

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

*O ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well- acquainted with all that ye do.*

The Quran surah 4 (The Women) verse 135

# **Do Shari'a Councils Meet the Needs of Muslim Women?**

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*And finally I thank Allah <sup>سبحانه</sup> و تعالی. He has blessed me in ways that I could not have imagined and I pray that what I have written is pleasing to Him.*

## Abstract

In the last 30 years English law has seen a small but steady proliferation of shari'a councils though exact numbers are not known. They have been set up to meet the religious needs of the British Muslim population primarily focussing on providing a forum for the resolution of marital disputes. Shari'a councils offer mediation and reconciliation services as well as issuing religious divorce certificates. In the academic research to date it is apparent that the primary applicants to shari'a councils are Muslim women. In order to understand why one must investigate Islamic law. Islamic law differentiates between the way in which men and women may divorce. Muslim men are free to pronounce a unilateral divorce without seeking the approval of any judicial body. Muslim women are not granted any equivalent rights to terminate a relationship and arguably must either secure their husband's consent or apply to an authority which can provide them with a religious determination. Shari'a councils have emerged to meet that need. My research demonstrates that whilst Muslim women are generally satisfied with the *outcome* of a shari'a council ruling they are critical of the *processes*. This becomes even more apparent to them when they compare their experiences of shari'a councils with the civil court system. Nonetheless, civil law alone is insufficient to meet the women's needs and access to a religious authority remains a vital resource for many Muslim women. There is, however, a dynamic and evolving relationship taking place between Muslim family law practices and English law, which is still only at the embryonic stage. Shari'a councils provide an important resource for Muslim women to fulfil their specific religious needs but there are significant improvements to be made to the provision of this service.

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**Legislation:**

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The European Convention of Human Rights

The Marriage Act 1949

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Trusts of Land and Appointment of Trustees Act 1996

Youth Justice and Criminal Evidence Act 1999

## Chapter 1: Introduction

When I began this thesis I had very broad aims. I wanted to consider whether English law was ready for a Shari'a court and wondered whether British Muslims should have access to their own court system. As I started working on this project it became very apparent that I needed a more focused approach. The vastness of Islamic law, of the Shari'a, and of English law is not an area of study that can be condensed into one thesis. My initial investigations into the possibility of a shari'a court began with shari'a councils, what I understood to be the nearest equivalent that we currently have in the UK. Shari'a councils are often, and much to their chagrin, referred to as shari'a courts so they seemed to be the obvious starting point.

The Islamic law historian, Noel Coulson, has stated that in classical Muslim tradition only one judicial organ was recognised: that is the court of a single qadi with no hierarchy and no system of appeal. He says that nowhere in modern Islam does this rudimentary organisation still prevail<sup>1</sup>. He explains how systems of appeal have been introduced, even in the most conservative areas. It strikes me that this classical approach to determining disputes, particularly in the area of family law, is to some extent reflected in the manner in which shari'a councils have begun to establish themselves within British society. Although their establishment and development has been an organic process which is still very much in the early stages, we can only trace shari'a councils back some 30 years in the UK<sup>2</sup>. This does in many ways reflect the classical traditions of dispute resolution, as explained by Coulson of no hierarchy, no system of appeal, just a local tribunal dealing with applications and queries from members of their local communities.

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<sup>1</sup> N.J.Coulson, *A History of Islamic Law* (Edinburgh University Press first printed 1964, 2007) 163

<sup>2</sup> Samia Bano, 'Islamic Family Arbitration, Justice and Human Rights in Britain', (2007) *Law Social Justice & Global Development Journal*, 10 and Samia Bano, 'Complexity, Difference and 'Muslim Personal Law': Rethinking the Relationship between Shariah Councils and South Asian Muslim Women in Britain' Doctoral thesis submitted to the University of Warwick 2004, 115

## Introduction to shari'a councils

Even the most cursory investigations into shari'a councils will reveal that overwhelmingly their applicants are Muslim women<sup>3</sup>. As primary users of their services, the focus of my research began to narrow into the women's experiences of using shari'a councils. From my work as a family law solicitor, I knew that the issue of a religious divorce is one of number of matters which Muslim women address when dealing with the consequences of a relationship breakdown. Very often in the background a religious divorce is taking place or at least being negotiated on, around the same time as parties are attempting to settle other disputes concerning children, finances and possibly a civil divorce. I knew that shari'a councils were most widely known for dealing with matters relating to divorce and the breakdown of a marriage. I wanted to ensure in my own study that, where possible, I compared the women's experiences of shari'a councils with their experiences of the English civil legal system<sup>4</sup>. Not only does this reflect the reality of Muslim women's experiences as they navigate their way through the consequences of relationship breakdowns, but more importantly, it is to provide balance. Much of the criticisms of shari'a councils assume that civil law can provide Muslim women with the outcomes which they desire and further that in order to access civil law Muslim women must choose to exit from their own religious norms and from shari'a council processes. This in turn assumes Muslim women's legal agency does not include any desire to obtain religious rulings. In allowing the women to discuss their experiences of both shari'a councils and civil law, my thesis will scrutinize these assumptions.

From the studies undertaken to date, we know that there are somewhere around 30<sup>5</sup> possibly up to 85<sup>6</sup> shari'a councils in England and Wales. They are primarily

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<sup>3</sup> See, for example, Samia Bano, 'Complexity, Difference and 'Muslim Personal Law': Rethinking the Relationship between Shariah Councils and South Asian Muslim Women in Britain' Doctoral thesis submitted to the University of Warwick 2004

<sup>4</sup> When I refer to 'civil' law I include both common law and statute. The expression 'civil law' as used in this thesis to denote English law.

<sup>5</sup> Samia Bano, 'An exploratory study of Shariah councils in England with respect to family law' (2012) University of Reading, 15, in which a mapping exercise was carried out to identify as accurately as possible the number, location and structures of shari'a councils. The study identified 30 councils, although it was noted that there may be some more smaller ones operating.

used to 'adjudicate' in matters arising from family breakdown, though there is evidence of shari'a councils providing advice and assistance on a wide range of day to day queries Muslims may have<sup>7</sup>. They have no jurisdictional power and each council appears to run independently. In July 2013 the UK Board of Shari'a Councils was established which appears to act as an umbrella organisation for shari'a councils. According to the written submission which it provided to the Parliamentary Home Affairs Select Committee, it lists twelve shari'a councils as its members<sup>8</sup>. Shari'a councils have been the subject of two independent enquiries<sup>9</sup>.

### My study

My study consists of one shari'a council based in Birmingham, the Islamic Judiciary Board ("IJB"). It is situated within the office space of one of the largest mosques in Birmingham namely, Green Lane Masjid and Community Centre ("GLM"). My research consisted of examinations of 100 closed files, observations of 16 meetings (some of which were joint meetings and some with one party alone) and an observation of one board meeting at which 11 cases were adjudicated upon. I also conducted interviews of 20 Muslim women, 14 of whom had approached the IJB. The remainder had approached other shari'a councils mainly in the Midlands area. Some of the women had approached multiple councils. In total I considered 127 cases of the IJB as well as interviewing the 20 women.

As a focus for my research I concentrate on Muslim women's use of shari'a councils in providing a religious ruling on the terminations of their marriages. The religious determination of a marriage is a key requirement when it comes to

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<sup>6</sup> Denis MacEoin and David G Green 'One Law for All' (2009) *Civitas*, 69, in which it was stated the number of shari'a councils is '85 at least' though exactly how the report came to that number is not fully explained.

<sup>7</sup> Oral Evidence of Khola Hassan to the Parliamentary Home Affairs Select Committee <http://www.parliamentlive.tv/Event/Index/76b3f1e0-29be-498f-9325-62d15033c20f> accessed 22 March 2017

<sup>8</sup> <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/sharia-councils/written/35231.html> accessed 22 March 2017

<sup>9</sup> Parliament Home Affairs Select Committee which heard oral evidence on 1<sup>st</sup> November 2016 and the Independent Review in 'Sharia Law' launched in May 2016 and chaired by Professor Mona Siddiqui.

addressing the needs of Muslim women. The central question of my study is to explore whether shari'a councils meet the needs of Muslim women and I have limited it to their need to be married and divorced. I accept that much of what I say is specific to the IJB but my suggestions will be applicable to shari'a councils more generally. Where possible I have included in my study a comparison of Muslim women's experiences of shari'a councils with their experiences of civil law. I took the view that this was not only an important comparator but would help to understand some of the complex choices Muslim women face in attempting to navigate through two jurisdictions. The relationship between English law and Islamic law is a theme that runs throughout my thesis. Specifically, I explore marriage and divorce in Islam and in English law. Muslim women continue to be bound by both English law and Islamic law and their experiences of each are not necessarily compartmentalised. As described by Fournier they form one highly complex battlefield<sup>10</sup>. In examining this relationship I seek to identify where there may be space for greater interaction between English and Islamic family laws. The aim of my research is to offer practical suggestions that will enhance Muslim women's abilities to marry and divorce in accordance with their faith without denying them the same access to English civil law that is enjoyed by all British citizens.

### **Methodology and approach**

In conducting my research, I began by contacting shari'a councils in the Birmingham area that would allow me access to their closed files, observe their process and understand better the interactions between shari'a councils and English law<sup>11</sup>. The best known shari'a council in Birmingham is situated within Birmingham Central Mosque. Since this council has already engaged with a number of academic researchers I decided to approach other shari'a council organizations. Although I am a Muslim I have never used the services of a shari'a council so I simply did an online search for shari'a councils. Apart from Birmingham Central Mosque the only one that I found online in Birmingham was

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<sup>10</sup> Pascale Fournier 'Please divorce me! Subversive agency, resistance and gendered religious scripts' in Elisa Guinchi (ed) *Muslim Family Law in Western Courts* (Routledge 2014) 32

<sup>11</sup> I obtained the appropriate ethics approval from the University of Birmingham for all of my empirical work.

The Fiqh Council of Birmingham (“The Fiqh Council”)<sup>12</sup>. GLM, however, is a mosque that I am familiar with as I have been a member of the congregation for many years. I have also helped on a voluntary basis with some of their activities. The IJB appeared much more enthusiastic and willing to engage with my project despite the fact that my request was being made at a time when shari’a councils were in the news due to covert investigations<sup>13</sup> and GLM itself had previously been subject to such scrutiny<sup>14</sup>, but I did not sense any reluctance or wariness on its part<sup>15</sup>.

GLM is one of the biggest masjids in Birmingham. It is part of a larger affiliation of masjids located throughout England under the banner of ‘Markaz Jamiat Ahle Hadith UK’ (‘MJA’H’). GLM is the head office for this affiliation. It is based in Small Heath, an area that has a large Muslim population. Indeed the mosque serves an increasingly diverse Muslim population. Although the majority of its congregation comes from a Pakistani background, there are also significant numbers of Muslims from other backgrounds such as Arab, Somali, Bangladeshi, Yemeni, Afghan, mainland Europe and English converts. Most masjids in the UK, especially some of the smaller ones tend to attract congregations from particular Muslim communities, sometimes from a specific region. For example, many of those from a Pakistani background are from the region of Mirpur and its surrounding areas in Azad Kashmir, Pakistan<sup>16</sup>.

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<sup>12</sup> I approached The Fiqh Council of Birmingham which appears to be a relatively new organisation unconnected to any mosque but providing a range of services including rulings pertaining to marriage and divorce. Its website sets out the full details of the organisation. <http://www.fiqhcouncilbirmingham.com/> last accessed 10<sup>th</sup> February 2017. The Fiqh Council’s rejection of my request to observe its processes was disappointing, especially as its panel of scholars appears to include those educated in both Islamic and Western institutions.

<sup>13</sup> BBC Panorama, ‘Secrets of Britain’s Sharia Councils’ first broadcast 22 April 2013

<sup>14</sup> Channel 4: Dispatches ‘Undercover Mosques’ first aired 15 January 2007.

<sup>15</sup> I was aware that IJB had been providing their services for a number of years and consisted of scholars mainly from a South Asian background. I was therefore expecting at least some resistance to my request. To my surprise they seemed perfectly willing to participate in my study and viewed it as an opportunity to have a dialogue with a wider audience. As time went on they became a little more reticent but this was due to the level of commitment required from them but they remained supportive throughout.

<sup>16</sup> A Communities and Local Government Report ‘The Pakistani Muslim Community in England Understanding Muslim Ethnic Communities’ (Department for Communities and Local Government 2009) 38 estimates around 60 to 70 per cent of British Pakistanis are from the Kashmir Mirpur region.

GLM's congregation appears to be more diverse in terms of ethnicity and it caters for both genders. It provides a range of services<sup>17</sup> and it delivers these services in multiple languages, though predominantly English. It also aligns itself with the 'Salafi'<sup>18</sup> form of Islam<sup>19</sup>, whose scholars are typically from Saudi Arabia and the Middle East. This type of Islam is generally regarded as a more conservative and 'pure' version of Islam, free from cultural baggage. Use of English as the main language, catering for the needs of women and attempting to follow Islam that is not linked to any particular culture is very attractive for young second and third generation British Muslims. It also helps to explain the diverse range of its congregation<sup>20</sup>. Younger Muslims may not have strong ties to their parents' cultural heritage, they may even wish to distance themselves from it and may therefore more readily identify themselves with the Muslim *ummah* as a whole<sup>21</sup>. At a time when Muslims feel threatened, turning to the guidance of what is perceived to be an 'authentic' version of Islam is particularly appealing to young Muslims<sup>22</sup>. The rise of young British Muslims who identify themselves as Salafi Muslims is a topic that is receiving increasing attention<sup>23</sup>.

It is important to understand this background to GLM in order to appreciate who the users of the shari'a council services are and the difficulties that diversity creates. Diversity of Muslims is a complex issue: it includes ethnicity, socio-

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<sup>17</sup> <http://www.greenlanemasjid.org/> accessed 11 February 2017. The website provides full details of the range of services offered by GLM. Aside from prayers, the masjid offers Islamic lectures and courses, social activities for men and women, children and youth club activities, scouts, sporting activities for men and women, Q & A sessions, new converts activities, after school Islamic classes, a food bank programme, burial provisions and other activities. It is a very active masjid.

<sup>18</sup> I use the term Salafi because on its website GLM self-identifies as Salafi and declare one of its values as '*Salafiyyah: Inspired by the guidance and example of the Salaf and our desire to emulate them*' <http://www.greenlanemasjid.org/about/values/> Last accessed 28 April 2018

<sup>19</sup> It has been noted that relatively few masjids identify themselves as Salafi and GLM is one of the most prominent amongst them.

<sup>20</sup> For further information see Rehana Parveen 'Do Sharia Councils Meet the Needs of Muslim Women?' in Samia Bano (ed) *Gender and Justice in Family Law Disputes Women, Mediation, and Religious Arbitration* (Brandeis University Press 2017) 142-165

<sup>21</sup> Arun Kundnani, *The Muslims are Coming! Islamophobia, Extremism and the Domestic War on Terror* (Verso Books 2014) 53

<sup>22</sup> Sophie Gillat-Ray, *Muslims in Britain: An Introduction* (Cambridge University Press 2010) 72-73

<sup>23</sup> Sadek Hamid 'The Attraction of Authentic Islam Salafism and British Muslim Youth' in Roel Meijer (ed) *Global Salafism Islam's New Religious Movement* (Columbia University Press 2009) 384-403

economic background, class and whether a person is British born or an 'immigrant'. Muslim faith diversity is particularly complex topic. Hirji examines the internal debates amongst Muslims that arise not just due to their different geographical locations, environments, modes of subsistence and cultural practices but the pluralism that is created by the different and often conflicting views about Islam<sup>24</sup>. Hijri notes the confusion created by the range of labels ascribed to Muslims that are intended to denote the type of Islam practiced by the individual and Muslims use of them as a way of 'othering' one another<sup>25</sup>. A label simply brings with it its own reductive and stereotypical notions and tells us very little about the individual or their practice of Islam<sup>26</sup>. Even where Muslims mark their identity primarily through religious terms they do not interpret foundational texts in the same way<sup>27</sup>. This level of pluralism not only makes it difficult for the state to identify who speaks on behalf of Muslims, it means Muslims themselves disagree on almost every aspect of how they practice their faith.

### **The Islamic Judiciary Board (IJB)**

The IJB offices are located within the GLM offices and until I began this research I was not aware of any distinction between the IJB and GLM. However, the IJB operates independently of GLM. It has a separate telephone line, separate staff and its own office space within the GLM building. On the GLM webpage<sup>28</sup> no mention is made of the IJB or the services it offers, although it is mentioned on the webpage of MJAH<sup>29</sup>. GLM itself is staffed mainly by what appear to be young British born men and more recently female staff, educated in the British educational system with internet and technology skills and whose first language

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<sup>24</sup> Zulfikar Hirji, 'Debating Islam from Within' in Zulfikar Hirji (ed) *Diversity and Pluralism in Islam Historical and Contemporary Discourses amongst Muslims* (I.B.Tauris & Co Ltd 2010) 1-30, 3

<sup>25</sup> Hirji n24, 4

<sup>26</sup> Even when considering one label such as 'Salafi' it is clear there are multiple views and understandings of the interpretations of foundational texts. In Ineke Roex 'Should we be Scared of all Salafists in Europe? A Dutch Case Study' (2014) *Perspectives on Terrorism* Volume 8:3 51-63, the author investigated the diversity amongst salafist beliefs within Dutch society and noted that categorising it as a 'sect' was problematic for failing to recognise this diversity. Though this study is undertaken in the context of examining Salafi movements as a security threat the point it addresses for the purposes of this thesis is that the approach to claims of uniformity within any group of Muslims should be treated with caution.

<sup>27</sup> Hirji, n24, 7

<sup>28</sup> <http://www.greenlanemasjid.org/social-welfare/> accessed 11 February 2017

<sup>29</sup> <http://mjah.org.uk/index.php/services> accessed 11 February 2017

is English. The GLM website is professionally managed and updated regularly. The IJB does not appear to have made any efforts to create an online presence and its somewhat old fashioned methods are also displayed in its case handling procedures.

The IJB was set up in the mid-1990s and consists of an administrator (who was my main point of contact), another employee and Maulana Abdul Hadi ("MHA") who is the chairman of its Board. The Board has another nine members, all of whom are from affiliated mosques from around England and Wales. All of those involved with the IJB are men; there are no women working in any capacity for the IJB. The Board members meet every six to eight weeks to make decisions on files. The day to day management is carried out by the administrator and other staff member. MHA and sometimes other Board members conduct the more detailed interviews which normally take place on Thursdays. Where parties themselves cannot or will not agree to a divorce, it is the full Board that makes the final decision in the absence of the parties. The administrator prepares a summary of each file to be presented to the Board, and the administrator is responsible for dealing with any paperwork associated with the Board decision.

Although MHA had initially agreed to my request for access to all files, on reflection other members of the IJB were concerned that they had not obtained authority from the parties and were reluctant to simply hand the files over to me. They seemed unsure in particular about their obligations towards the female applicants whose cases had ended. A compromise was agreed. I created a standardised file record sheet which listed out all the information that I felt I needed from each file. A copy of this sheet is reproduced at Appendix 1. I requested the last 100 closed files from the IJB to give me a sufficient sample size. The administrator sat with me as we went through each file. He did not give me confidential details of the parties but provided me with all information on the file that I requested. If I wanted to see documents from the file, such as a certificate, I was allowed to do so but the names and addresses were withheld.

My meetings with the administrator as we went through the closed files were recorded, and I transcribed the information on to each separate file record sheet<sup>30</sup>.

The drawback to this arrangement was that I was very dependent on the administrator, and weeks might go by before he was free to meet me. It was also very time-consuming for him. Some information was not recorded on every file, for example, the employment status of the parties or the dates of birth of any children, unless these details were of some relevance to substantive matters. Some files contained a lot of detail about the reasons for the application but less in other files where parties consented to the divorce early on in the process. The level of detail on many issues tended to depend on the issues that arose in the application itself rather than a systematic recording of information.

Some complications arose in trying to work out what amounted to a 'closed' file. In all of the files that I considered the applicant for the divorce was the wife<sup>31</sup>. If the application resulted in a termination of the marriage the IJB treated that file as closed and the file placed in storage. If, however the marriage is not terminated the file remains open since further steps may be taken. It is therefore difficult for me to judge how often the Board refuses an application. All of the files that this study is based upon are files in which the marriage was terminated because they are the only files which were treated as 'closed' files. It is entirely possible that applicants who were not granted a termination of their marriages either remained married or sought assistance from an alternative shari'a council<sup>32</sup>.

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<sup>30</sup> Although I recorded the IJB's file number for reference, I used my own numbering for my record sheets. I found it extremely useful to make use of the administrator in this way since he had a thorough knowledge of each file, could recollect circumstances about the case that were not recorded on the file and could translate some of the notes or information on the file itself.

<sup>31</sup> As will be explored later husbands are permitted to pronounce a unilateral *talaq* and in cases where the IJB is simply certifying for the husband that he has pronounced a *talaq* the IJB did not create separate a file for this. The IJB stated it intended to reconsider its processes on this issue.

<sup>32</sup>As will be noted in Chapter 7, it was apparent some women had been to more than one shari'a council to obtain a satisfactory ruling including some who had been to the IJB but then obtained their divorce from another shari'a council.

## **Method and approach for the interviews**

The twenty women whom I interviewed came from a range of backgrounds. They were all British Muslims although they were not all necessarily born in the UK. 17 of the women were Pakistani in their ethnicity, two were Indian and one was Yemeni. All had experienced a shari'a council process in the termination of their relationships but not all had experienced a civil process. This depended on whether they had entered into a civil marriage or had other matters such as disputes over children which a civil court was addressing.

The sample was drawn from a number of sources. A primary source was GLM and the IJB itself, either because I approached the women whom I had observed during the IJB sessions or through general announcements for volunteers that were made at some of GLM's activities for women. The rest of the sample were referrals through friends and acquaintances. I sent out general messages and requests for interviews of any Muslim woman who had been through a shari'a council process within the previous five years. 19 interviews were conducted face to face, the other by telephone. All the face to face interviews took place in coffee shops, in the women's own homes, places of work or in my home.

I readily acknowledge that I was not able to follow textbook procedures in selecting my sample; the women came from a hotchpotch of sources. I also acknowledge my sample size is relatively small and limited in other respects. The twenty women are not necessarily representative of Muslims as a whole nor do they represent any specific group. The only matters that they had in common were that they self-identified as Muslims and they had accessed a shari'a council in the previous 5 years.

## **Contextualising the debate – externally and personally**

At the same time as my thesis project began two other broad matters of significance were becoming more relevant. The first is an exponentially increasing worldwide interest in every aspect of the lives of Muslims and the second is my personal relationship with my faith.

Islam and Muslims have rapidly become the subject of worldwide scrutiny, not least because of issues around terrorism. In the years that have passed since 9/11, Islam and Muslims have become synonymous with terrorism and every aspect of Muslims' lives is now viewed through the lens of counter-terrorism and counter-extremism. Though the concepts of counter-terrorism and counter-extremism are two separate and independent notions, their convergence into one another has a direct impact on Muslims as they go about their daily lives. The implication being that in order to counter terrorism, one must counter religious extremism and in order to counter religious extremism one must limit or at least control the 'Islamic' or religious aspects of Muslim behaviour<sup>33</sup>.

There are multiple political debates taking place in this highly contested arena which have generated politicised and polarised opinions on the relationship between religious conservatism or religious extremism (depending on where one draws the line between conservative religious practices and extreme practices) and terrorism. It is unfortunate that discussions of Muslims and Islam are now framed around concerns for state security. Muslims themselves are perceived in a binary fashion of good and bad Muslims. Muslims are good where they conform to Western standards and therefore pose no threat to state security or Muslims are bad where they do not conform, and thereby threaten state security<sup>34</sup>. Whilst this narrative has been challenged at multiple levels it remains an influential basis of governmental policy<sup>35</sup>.

The consequence for Muslims is that any aspect of behaviour associated with being Muslim and which appears in any way contrary or just simply different to mainstream culture (whatever is deemed to be mainstream culture) is viewed with hostility and fear<sup>36</sup>. The ultimate concern is that such difference is detrimental to societal cohesion and may eventually lead to acts of terrorism.

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<sup>33</sup> See, Arun Kundnani, n21, 108-110, where he discusses the unstable practice of classifying Muslims into extremists and moderates.

<sup>34</sup> Similarly Ann Black and Kerry Sadiq 'Good and Bad Sharia: Australia's Mixed Response to Islamic Law' [2011] UNSW Law Journal 34(1), 383-412 examined 'good' and 'bad' shari'a and its accommodation in the Australian legal system.

<sup>35</sup> Chris Allen, *Islamophobia* (Ashgate Publishing Company 2010)

<sup>36</sup> Asma Mustafa *Identity and Political Participation Amongst Young British Muslims: Believing and Belonging* (Palgrave MacMillan 2015), 21 in her discussions of 'othering'.

This means that the manner in which Muslims order their day to day lives, even the seemingly mundane, such as whether members of the opposite gender are required to shake hands with one another can turn in flashpoint topics generating heated debate on a clash of civilizations between Muslims and Western societies. What Muslims eat, what they wear, how they dress, how they interact with the opposite gender, their desire to pray or fast during the month of Ramadan, have all been and continue to be scrutinised. A recurrent feature of the discourse around Muslims is their 'integration' and this is not topic which is limited to the UK but throughout Europe and other Western nations these concerns have been raised<sup>37</sup>. Often Muslim women are at the centre of these debates. In particular their clothing, whether this is the hijab, the niqaab or the wearing of a burkini on a beach, have become critical talking points of concern around female agency and authority<sup>38</sup>. Muslim women are presented as the subjects of Islamic male authority in need of saving by the West<sup>39</sup>.

There is no aspect of behaviour however tenuously linked to Muslims that has not been explored whether in the media or in academia, to interrogate what it says about Muslims as minorities and how compatible they are with mainstream society. This incompatibility is then linked to extremism, radicalisation and eventual terrorism<sup>40</sup>. Matters that on the face of it have no direct connection with or even indirect connection with extremism or terrorism, are viewed through this lens of countering terrorism and countering of extremism. It is within this politicised context that the topic of shari'a councils is addressed.

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<sup>37</sup> Allen n35, 109

<sup>38</sup> For a detailed analysis of the complexities these types of issues raise and the implications of using concepts such as 'oppressed Muslim woman' see Lila Abu-Lughod, *Do Muslim Women Need Saving?* (Printed in the United States 2013). Amongst other things Abu-Lughod explores how the insistence that Muslims women's rights should be defined by values of choice and freedom render Muslim women as deeply constrained.

<sup>39</sup> Sherene H. Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (University of Toronto Press 2011) where she compares the conceptualisation of 'dangerous' Muslim men with 'imperilled' Muslim women.

<sup>40</sup> This has been referred to as the 'conveyor belt theory' of terrorism. In Arun Kundnani, *A Decade Lost: Rethinking Radicalisation and Extremism* (Claystone 2015) he critiques the evidence on which the conveyor belt theory of terrorism is founded and religious ideology as a driver of terrorism.

## Personal journey and positionality

As a practising Muslim woman I have had to research topics and confront some of the most contentious matters in Islam, specifically how they affect Muslim women living in Western nations. I have had to consider questions around Muslim identity, gender equality and the role of women in public and private spaces. I have wanted to defend my own version of Islam whilst at the same time I have wanted to interrogate my own beliefs. I have also felt a deep sense of responsibility to the women that I have observed and interviewed. Each grappling with their own personal circumstances and their own understanding of Islam: each attempting to make choices that enable them to take their lives forward in a manner which is compatible with their religion but does not deny them their rights as British citizens. I have been mindful of my own temptation to 'correct' their Islam. I say 'correct' because one assumes that one's own interpretation of Islam is the only true and correct version and everybody else is misguided. As George Bernard Shaw put it '*no man ever believes that the Bible means what it says: He is always convinced that it says what he means*<sup>41</sup>'. This attitude is one which is certainly not limited to Christianity.

My aim has been to articulate the views of the women in a manner that captures the complexities and diversity of their opinions and experiences, whilst at the same time exploring some common themes and threads. The women that form the focus of the qualitative data of this study are all women who would class themselves as Muslims, as 'believing women'. They have all approached a shari'a council, at the very least, to obtain *religious* rulings regarding their marriages; some for more than this. Whilst they may have differing interpretations of Islam, by their own standards differing levels of 'religiosity', and differing views on their identities as British Muslim women, they all felt the need to obtain a *religious* ruling. For each of the women their Islam is important to them and influenced the choices that they made. This is the reason that I spend some time in this thesis addressing some core beliefs of Muslims. These core beliefs of faith have an impact on the decisions made by the women.

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<sup>41</sup> 'The Living Pictures', *The Saturday Review*, LXXIX (April 6, 1895), 443, reprinted in *Our Theatres in the Nineties* (1932). Vol. 1. London: Constable & Co. 79-86.

The shari'a council and the women I interviewed were fully aware that I am a practicing Muslim woman and this inevitably had implications, both in terms of how all the different parties interacted with me and in my analysis of the data<sup>42</sup>. A number of other Muslims academics have reflected on their experiences as Muslim researchers including Bano, Quraishi and Contractor. All expressed similar issues when, as practicing Muslims, they sought to conduct academic research into the lives of Muslims<sup>43</sup>. Quraishi points out the lack of research on the methodological implications of being Muslim and undertaking research on Muslims<sup>44</sup>.

I recognize that the fact that I am a practicing Muslim played a role in my access to a shari'a council, in my access to the women, in my interactions with all the participants involved in my fieldwork and in my analysis of the data. At the same time my status as an 'insider' provides me with no privileged position to speak on behalf of the shari'a council, on behalf of Islam, on behalf of Muslims or on behalf of the women I interviewed. Nor did I wish for my position to obscure the multiplicities of views, experiences and complexities that this area of research raises. As a researcher I sought to maintain a balance between providing an informed perspective that acknowledged my biography, but at the same time allowed the women to express their perceptions of their own lived experiences. I recognize the importance – and limitations of my own positioning within my research. The ethnographic approach to research has been well documented particularly amongst anthropologists. It has been used in a wide variety of disciplines and has the advantage of allowing me to use my biography as an 'insider'<sup>45</sup>. Walker noted how her own non-Muslim and obscure ethnic status

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<sup>42</sup> For a similar discussion in a different context, see for example, the work of Muzammil Quraishi, who discusses the significance of his own biography as a practising British Muslim man, in undertaking research on Muslim men in prisons: Muzammil Quraishi 'Researching Muslim Prisoners' [2008] *International Journal Social Research Methodology* 453-467.

<sup>43</sup> Sariya Contractor, *Muslim Women in Britain De-mystifying the Muslimah* (Routledge 2012) 37

<sup>44</sup> Quraishi n42, 459

<sup>45</sup> A good example of a study where an ethnographic approach was used that of Les Back *New Ethnicities and Urban Culture Racisms and Multiculture in Young Lives* (UCL Press 1999) which examined the experiences of young people 'coming of age in a multicultural urban environment'. Back immersed himself in his research environment by living and working amongst the participants of his study. I am already a member of the communities that I am researching.

opened up the field allowing some of her participants to discuss their personal lives or lack of commitment to their faith in a more open manner<sup>46</sup>. Conversely, my visible status as a Muslim allowed my participants to be more open about the influence of their faith as they assumed I understood their positionality. In either case, one must remain alert to the risk that participants may respond in a manner which they perceive to be the most agreeable to the interviewer.

This has been a very personal journey for me and has had a profound impact on my own Islam and in challenging my own views. Undertaking this work has allowed me the freedom to explore my own relationship with my religion, with God, and with the pluralism within Islam in an objective way that I had never previously considered. My research has never been as an outsider looking into a group of people but rather as someone who is part of the Muslim communities which I seek to explore. I conduct my research from an ethnographic perspective of looking around me at the women and the institutions that form part of the societies of which I am a member. I therefore write from the perspective of a believing and practising Muslim woman. But similar to the women that I came across, Muslim and Female are not my only identities<sup>47</sup>.

### **British Muslims: statistical information**

The 2011 census included a voluntary religious question with participants self-identifying their religion. Those identifying as Christian fell from 72 percent in the 2001 census to 59 percent in 2011. Those identifying as having no religion had an increase from 15 percent to 25 percent<sup>48</sup>. Davie makes some compelling points regarding religion and the changing nature of the way in which religion is understood in British society. She argues that post war, policy makers assumed religion would fade from the public discourse<sup>49</sup>. Whilst the statistics appear to support the contention that less people identify themselves as religious, her

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<sup>46</sup> Tanya Walker, *Shari'a Councils and Muslim Women in Britain: Rethinking the Role of Power and Authority* (2016 Brill) 62

<sup>47</sup> As noted by Asma Mustafa n36, 83 'Identity is a flexible, fluid and multifaceted aspect of life. It is not concrete and it is not always consistent.'

<sup>48</sup> <https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/religion/articles/religioninenglandandwales2011/2012-12-11> last accessed 28 June 2017

<sup>49</sup> Grace Davie, *Religion in Britain A Persistent Paradox* (Blackwell Publishers 2015) 16

argument is that although fewer people are religious, those that are take their religious lives more seriously. And this has important implications for public and private life<sup>50</sup>. This is notable when it comes to Muslims because as a religious minority their share increased from 2.7 percent to 4.9 percent. Davie also argues that the fact that Muslims were among those campaigning most vociferously for the religion question to be included in the census demonstrates that despite the undoubted diversity of Muslims in Britain, by concentrating on their diversity one can downplay the most significant factor in their lives: their faith<sup>51</sup>. She further states Muslims wish to be known as Muslims in public and in private life, in order that their needs may be met<sup>52</sup>. Davie does not provide any other empirical evidence for these assertions. My research from the interviews with the women supports her arguments up to a point. Mustafa argues that however little or much Islam is relevant to Muslims, it is an identity which they explore and reflect on<sup>53</sup>.

Birmingham, where the IJB is based, is home to a significant Muslim population<sup>54</sup> of around 234, 400. This figure translates into almost a quarter of Birmingham's population identifying as Muslim (around 21.8 percent). When compared nationally, Birmingham ranks ninth in its proportion of Muslims. GLM and the IJB are situated in the Small Heath area of Birmingham. Small Heath is not classified as a ward but instead split between the Bordesley Green, South Yardley and Sparkbrook wards. Bordesley Green and Sparkbrook are two of the three areas of Birmingham where more than 70 percent of the residents identify themselves as Muslim. It is clear, therefore, that GLM and the IJB are situated in an area where the proportion of Muslims is far higher than the national average and the average for Birmingham.

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<sup>50</sup> Davie n49, 16

<sup>51</sup> Davie n49, 42

<sup>52</sup> Davie n49, 42

<sup>53</sup> Asma Mustafa, n36,182

<sup>54</sup> All statistical information regarding Birmingham has come from Birmingham Local Authority (2013) 2011 Census: Population and Migration Topic Report'

## Multiple identities

An aspect of identity which has been receiving considerable public interest is the interrelationship of Muslim identity with British identity. The government has sought to make British identity and an allegiance to British values as hallmarks of what it means to be a British Muslim. The narrative that has been presented is that Muslims need to prioritise 'British values' over their faith and a failure to do so is at best viewed as religious extremism and at worst as on a path to radicalisation<sup>55</sup>. British Muslim women are both British and Muslim. Both of these identities matter and both of these identities are highly contested. How they converge is an even more difficult assessment to make. Whether a person's Britishness is filtered through their prism of Islam or if their Islam is filtered through the prism of Britishness is dependent on many different factors and not likely to be a static, fixed position.

Muslims living in the UK have all the same issues, legal and non-legal, as everyone else: they get married, divorce, purchase a house, take up a job, and so on. They undertake these actions within the framework of English law but one of the lenses through which they will view and manage their affairs is an Islamic one. There are further complications to this because, as is well documented now, Muslims are not homogenous and their application of Islam is far from homogenous. There have been numerous studies which have documented the diversity and pluralism within Muslim civilizations both historically and in contemporary societies<sup>56</sup>. Western countries have the added complexity that their Muslim population is made up from those that have emigrated from different parts of Muslim majority countries. So the Islamic lens through which

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<sup>55</sup> Extracts from speeches by David Cameron: *'We have encouraged different cultures to live separate lives, apart from each other and apart from the mainstream.....This hands off tolerance has only served to reinforce the sense that not enough is shared....now for sure they don't turn into terrorists overnight, but what we see and what we see in so many European countries, is a process of radicalisation'* (2011 at the Munich Security Conference) and *'I don't think we need to engage in some protracted exercise to define our shared values. We can do it in a single phrase: freedom under the rule of law.....But we can and should try to understand the nature of the force that we need to defeat. The driving force behind today's terrorist threat is Islamist fundamentalism. The struggle we are engaged in is, at root, ideological'* (2015 to the Foreign Policy thinktank)

<sup>56</sup> See for example, Sophie Gillat-Ray, *Muslims in Britain: An Introduction* (Cambridge University Press 2010) which attempts to capture the diversity amongst British Muslims without essentialising their behaviour or presenting Muslims as one monolithic community.

British Muslims view their affairs is neither clear nor necessarily consistently applied by Muslim themselves. Notwithstanding this, I would contend that there are some aspects of core belief of Muslims which are not always given sufficient weight in the attempt to present the very real pluralism that exists. In Chapter 3 I present some aspects of core beliefs.

Muslim women tend not to challenge shari'a councils authority or legitimacy to issue a decree terminating a marriage. This is unsurprising given that they are normally applicants who require such a decree. Muslim women's challenges to authority or legitimacy tend to revolve around a shari'a council's application of Islamic law and this is where contemporary debates on the roles of parties within marriage become important. There was little evidence from my research of Muslim women challenging a shari'a councils' right to exist. Where women are dissatisfied with an outcome or a failure to reach a conclusion by the shari'a council the answer for them does not seem to be to reject the legitimacy of all shari'a councils; rather it is to find either an alternative shari'a council or source that can provide the women with the ruling which they desire.

### Key arguments

The key arguments made in this thesis are that Muslim women have *religious* needs when it comes to the breakdown of their relationships. They have these religious needs precisely because they are Muslim. It may seem like an obvious point to make, but in all of the discussions regarding Muslim women, the multi-faceted nature of their identities, the unique experiences that impact on them, the familial and social pressures that they may be subject to, what is missing from these discussions, is their core beliefs as Muslims and the impact this has on their choices. Believing in God, in heaven and hell, in the temporality of this life, is in my view given insufficient weight. In their desire for a religious determination, Muslim women are demonstrating a religious need and as stated by Abu-Lughod '*freedom of choice is not the only litmus test of a worthy life*'.<sup>57</sup>. Shari'a councils are on the whole meeting certain specific needs of Muslim

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<sup>57</sup> Lila Abu-Lughod, *Do Muslim Women Need Saving?* (Harvard University Press 2013) 18

women. However, there are many ways in which shari'a councils could meet their needs better.

The manner in which I make these key arguments is firstly, in Chapter 2 I provide a literature review engaging with a full description and critique of the empirical research to date on shari'a councils. Additionally in this chapter I explore the concept of legal pluralism and the specific concerns that have been raised in safeguarding women when alternative, privatised methods of adjudication are promoted. In Chapter 3 I explore the sources of Islamic law and morality as well as key beliefs held by Muslims. I examine how these beliefs affect decision making for Muslims. I also include the development of the different legal personalities in Islam to provide a foundation for the way in which Muslims approach dispute resolution. Shari'a councils may be a unique peculiarity to secular states, but the functions that they fulfil and the manner in which Muslims use them can be historically traced to the different functions performed by Muslim jurists. Finally in this chapter I conclude by examining the extent to which women have been involved in determining God's Will from the Islamic sources. I argue it is relevant to explore women's legitimacy and authority as jurists in Islam because this has an impact on the role of women within shari'a councils.

In Chapter 4 I specifically consider Islamic laws of marriage and I explore the developing relationship with English laws of marriage. I scrutinise some of the complexities that have arisen, especially on the topic of *mahr* and *nikaah*-only marriages. I argue that in many respects Muslims are behaving as their non-Muslim British counterparts but that they 'Islamify' their behaviour and actions. Up until this point shari'a councils would have had very little involvement with Muslim women (or indeed Muslim men) but these earlier chapters provide the framework to understand the influence of Islam in the choices made by Muslims. It is not until Chapter 5 when we consider how Muslims divorce, that the need for shari'a councils arises. I explore the Islamic law of divorce, its relationship with English law and where shari'a councils fit into this dynamic. In both Chapters 4 and 5, I make use of recent feminist scholarship by Muslim scholars

to investigate some of the more controversial debates within Islam as these debates have an impact on how Muslims apply Islam into their everyday lives and the choices that they make. They also impact the manner in which shari'a councils interact with their female applicants. In Chapter 6 I begin my analysis of my fieldwork. Chapter 6 consists of my report from the IJB and in Chapter 7 I analyse the interviews bringing to life the voices of the women. In the last chapter I investigate women's role in shari'a councils beyond that of service users. I critically examine some of the objections that may be raised and conclude women's participation in shari'a councils is crucial to fully meet their needs. In this final chapter I consider some of the directions that the different debates on shari'a councils are taking and the possibilities for future interactions between the state and shari'a councils.

My aim in this thesis has not been to try to reform Islam and or find a version of Islam that is palatable to liberal society. It has been to present the women's views of what they understand normative Islam to be, to articulate the importance of their religious beliefs as a significant factor in their decision making and to identify ways in which the women can fulfil their objectives as subjects of the English legal system. Bowen states that the question of whether there could be a place in Britain for conservative Muslims is rarely raised<sup>58</sup>. I am not arguing that all the Muslim women who formed part of this study were 'conservative' but they all self-identified as Muslim and recognised their faith as a factor of some weight. As Bowen states there is a flourishing debate amongst Muslims themselves in their interpretations of every aspect of their lives, between liberal or progressive views to more hard line conservative opinions and everything in between<sup>59</sup>. Within those debates Muslims are living their lives and applying their Islam in a way which makes sense to them practically and which they believe is pleasing to God. But they do so as British citizens who also interact with the state.

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<sup>58</sup> John R. Bowen, *On British Islam, Religion, Law and Everyday Practice in Shari'a Councils* (Princeton University Press 2016) 209

<sup>59</sup> Bowen n58, 209-210

## Chapter 2: Placing my research and placing shari'a councils within the legal pluralism debate

The aim of this chapter is two-fold. First, it is to analyse the prior academic research which has been carried out on shari'a councils in order to articulate where my research fits it. Second, it is to explore the concept of legal pluralism in order to address the accommodation of shari'a councils.

### Research to date

There is now a significant and developing body of academic research into shari'a councils, most recently by Walker in 2016<sup>1</sup> but also other authoritative works include Bano in 2007 and 2012<sup>2</sup>, Douglas et al in 2011<sup>3</sup>, Keshavjee in 2014<sup>4</sup>, and Akhtar in 2015. Despite this growing body of work there are still gaps in the research and a general consensus that further work is needed. Earlier research published by Shah-Kazemi in 2001, remains a valuable and influential resource<sup>5</sup>. Shah-Kazemi's data has helped to establish the distinct needs of Muslim women in their desire to obtain a religious divorce and has provided a springboard for much of the later academic work. Another recent and thorough investigation into shari'a councils has been conducted by Bowen in 2016<sup>6</sup>.

Aside from Keshavjee and Akhtar, the other studies mentioned above have concentrated on observations of specific shari'a councils. They have, *inter alia*,

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<sup>1</sup> Tanya Walker, *Shari'a Councils and Muslim Women in Britain: Rethinking the Role of Power and Authority* (Brill 2016)

<sup>2</sup> Samia Bano, *Muslim Women and Shari'ah Councils: Transcending the Boundaries of Community and Law* (Palgrave MacMillan 2012)

<sup>3</sup> Gillian Douglas, Norman Doe, Sophie Gilliat-Ray, Russell Sandberg and Asma Khan, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* (Cardiff Law School 2011) <http://www.law.cf.ac.uk/cfr/Social%20Cohesion%20and%20Civil%20Law%20Full%20Report.pdf> last accessed 24 May 2017

<sup>4</sup> Mohammed M.Keshavjee, *Islam, Sharia & Alternate Dispute Resolution Mechanisms for Legal Redress in the Muslim Community* (I.B.Tauras & Co 2014)

<sup>5</sup> Sonia Nurin Shah-Kazemi, *Untying the Knot Muslim Women, Divorce and the Shariah* (The Signal Press 2001) <http://www.nuffieldfoundation.org/sites/default/files/files/Untying%20the%20Knot.pdf> accessed 24 May 2017

<sup>6</sup> John R. Bowen, *On British Islam, Religion, Law and Everyday Practice in Shari'a Councils* (Princeton University Press 2016)

included investigations of case files, observations of proceedings and interviews of those participating in the shari'a council processes both as users and staff members. Bano's study highlighted and explored the tensions that exist between Muslim women's demands to obtain religious rulings and their ambivalent relationships with shari'a councils, the unequal power relations and the multi-faceted concerns around adjudicating in a privatized space. She also noted the conservative approaches to cultural and religious norms that shari'a councils are imbued with and the complex implications this raises for gender equality and British identity.

Douglas et al adopted a broader approach in comparing three religious institutions namely, the Catholic National Tribunal for Wales, the Jewish London *Beth Din* and the Shariah Council of the Birmingham Central Mosque. As Douglas et al readily admit their findings are reported from the perspective of the tribunals rather than the users. Their study uncovered notable similarities between the different religious tribunals, for example, none has or is asking for a recognized legal status equivalent to a court; to the contrary all three of the tribunals investigated supported the overarching authority of civil law. For each of the three tribunals its primary concern was to determine whether a marriage may be religiously terminated thereby allowing its adherents the freedom to remarry and each tribunal played a limited role in ancillary matters. The Douglas et al study is useful in comparing the processes of each tribunal and in attempting to explore the tribunals' relationships with the state. My work aims to go further in examining not just a shari'a council's relationship with the state, but the specifics of Islamic law of marriage and divorce and its interface with English laws of marriage and divorce. By exploring a topic such as marriage in detail this has revealed some of the tensions that have arisen by Muslim marriage practices and is examined in Chapter 4. Similar to the Douglas et al study, Keshavjee's exploration of The Muslim Law (Shariah) Council (UK) describes its history and processes without hearing from the service users<sup>7</sup>. However, where his work is useful is in placing the shari'a council within a wider context of the variety of fora that Muslims in the Hounslow area may access

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<sup>7</sup> Keshavjee n4, 81-103

when facing family breakdowns. Some of the resources discussed by Keshavjee are specific to the Hounslow area, such as the Pakistan Welfare Association, others are more general such as use of elders and extended *biraderi* (kinship) networks<sup>8</sup>. Shari'a councils cannot be isolated from the wider context of the communities in which they operate and Keshavjee's work assists in demonstrating that shari'a councils are one of a number of avenues that may be pursued by Muslims in attempting to resolve family disputes. Both Bano and Walker allude to the wider power dynamics and the influences of 'communities' and extended families upon the autonomy of female applicants of shari'a councils but this is all considered only from the perspective of what the women say. Keshavjee, although investigates the multiple ways in which family disputes may be addressed, he does not explore the shifting power dynamics as between the differing methods of dispute resolution. His work is therefore limited and does not assist in trying to understand how choices are made, what factors influence those choices or the complex interrelationships between the different dispute resolution resources.

Akhtar's study drew on data from shari'a council users and potential-users. Her inclusion of Muslims who have never actually approached a shari'a council plus British Muslim men (as oppose to female only applicants of shari'a councils) provides a rich source of data, connecting her participants' nationality as British citizens, with their rights to access faith based dispute resolution mechanisms<sup>9</sup>. Her work recognizes the criticisms and shortcomings levelled against shari'a councils but nonetheless she concludes that British Muslims believe faith based dispute forums such as shari'a councils are essential to meet their religious needs<sup>10</sup>. My own study supports this contention.

Whilst the studies have adopted different approaches, they all examine the significance of shari'a councils to Muslims and in particular Muslim women. They all highlight the complex nature of the interactions between English law and the

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<sup>8</sup> Keshavjee n4, 104-129

<sup>9</sup> Rajnaara C Akhtar, 'Towards Conceptualising User-Friendly Shari'a Councils' (2013) *Journal of Islamic State Practices in International Law* 112-135, 126

<sup>10</sup> Akhtar n9, 132

application of different rulings of Islamic law within shari'a councils. For Bano there were three aspects of the process that emerged giving rise to serious concerns<sup>11</sup>. Bano's work lays much of the groundwork for later academic works, particularly Walker's<sup>12</sup>, in highlighting the ways in which a shari'a council's processes can become an increasingly marginalized space for women, particularly when she describes the workings of The Shariah Court of the UK (SCUK)<sup>13</sup>. Some of those concerns were countered in many respects in the approach taken by the shari'a council located within Birmingham Central Mosque (BSC). Its inclusion of female led counselling services as part of its procedures has meant that the service can be deemed to be more 'women-friendly'. Though still subject to criticism, the BSC processes demonstrate the important impact that women's involvement can have on an applicant's experience of a shari'a council. The BSC further demonstrated there are multiple ways in which shari'a councils can engage with English law in its application of Islamic law. This marks significant potential for organic development of Islamic law as applied by shari'a councils with English law, a topic to be explored in more detail in Chapters 4 and 5. This is a messy and at times very difficult process but one that is still in its very early embryonic stage.

Bowen's study is perhaps the most descriptive in the level of detail that he provides in his observations and analysis of the different shari'a councils with which he engaged. He asks at what point 'conservative' becomes 'extreme' in assessing how far a religious group can deviate from a supposed British way of life and suggests ways in which shared practices can emerge to enable a sense that one can be both fully British and fully Muslim<sup>14</sup>. Again this is a theme that I explore more fully when I consider the relationship between English and Islamic laws of marriage and divorce in Chapters 4 and 5. Interestingly, Akhtar notes

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<sup>11</sup> Bano n2, 126 identifies these three aspects as the nature of family intervention in the reconciliation process, the role of the husband in the counselling process and negotiations in unofficial spaces with little state protection.

<sup>12</sup> Walker n1

<sup>13</sup> Bano n2, 138-141, where the process was dominated by male scholars, witnesses, family members and judges and the failure to reconcile equated with female disobedience.

<sup>14</sup> Bowen n6, 226

that the existence of shari'a councils reflects the permanence of Muslims as British citizens rather than an indicator that they are creating a separatist agenda<sup>15</sup>. Arguably, establishing one's own institutions is a reflection of confidence in a British identity signaling a move away from a 'diaspora' to citizenship<sup>16</sup>.

All the studies mentioned above demonstrate that shari'a councils are products of a secular or at least non-Muslim legal environment and seek to operate within the English legal system in an attempt to address the specific needs of members of Muslim communities, especially the needs of women. However, Bowen argues that some of the salient features of shari'a councils hark back to early Islamic jurisprudence precisely because shari'a councils are not part of a Muslim majority state<sup>17</sup>. In Chapter 3 I build on this argument and explore how an investigation into the historical roles of the different experts and legal personnel who fall within the broad term of Muslim jurists influences the modern role of a shari'a council. I argue that the way in which a shari'a council has emerged is not simply a reflection of its geo-political and social environment but also a reflection of an amalgamation of historical Islamic juristic roles.

### **Power and Authority**

Walker who presents a nuanced and carefully researched study and one of her overall arguments is that the women in her study were caught up in games of power with limited control, and that their use of shari'a councils was part of tactic to gain greater control<sup>18</sup>. Walker builds on Bano's assertions concerning the complex relations of power through which cultural and religious practices are mediated<sup>19</sup>. There are a number of different ways in which power is explored by Walker relying on a Foucauldian theoretical framing of power. Walker asks

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<sup>15</sup> Akhtar n9, 126

<sup>16</sup> How a diaspora is defined and the transformation from a diaspora to an integrated identity is a topic that has received considerable academic debate. For example, see Christoph Schumann, 'A Muslim Diaspora in the United States?' (2007) 97 *The Muslim World*, or William Safran, 'Diasporas in Modern Societies: Myths of Homeland and Return' (1991) *Diaspora: A Journal of Transnational Studies* 83-89 and Gabriel Sheffer, *Diaspora Politics: At Home Abroad* (Cambridge University Press 2003).

<sup>17</sup> Bowen n6,

<sup>18</sup> N Walker n1, 60

<sup>19</sup> N Bano n2, 166

the question “*did the women consider the shari’a councils to be authoritative?*” and suggests this cannot be answered with a simple yes or no, as there was a complexity of responses<sup>20</sup>. But this question needs to be understood in a broader context of how Muslims interact with religious ‘authority’ more generally. Since the death of the Prophet, there is no singular or absolute source of authority for Muslims, a topic which I examine in more detail in Chapter 3. There is no hierarchy within Islam, and historically Islamic rulings have been highly pluralistic. Muslims are very often confronted by multiple and sometimes contradictory rulings on the same issue requiring them to make a ‘choice’. Muslims are likely to have similarly complex responses to questions of legitimacy or authority about any individual, body or organization claiming religious authority<sup>21</sup>. Shari’a councils are no different in this respect and one should not assume that questioning the legitimacy or authority of shari’a councils is somehow specific to the nature of shari’a councils. Rather, it is in line with the manner in which Muslims engage with claims for Islamic authority whether that claim is made by an institution, state or individual scholar.

It is interesting to note that Walker suggests shari’a councils would be deemed to be authoritative for the women if the women accepted them as “*an authority rooted in the practice of freedom of religion, having a right to command with a correlative duty on behalf of the women to obey, and being based on the rightness and legitimacy of the order*”<sup>22</sup>. But this definition of authority is one which any Islamic scholar or religious body will find difficult to fulfill as the right to command and duty to obey lies in the textual sources of Islam and the ability to use those sources; not necessarily in any individual or organization that is

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<sup>20</sup> Walker n1, 75

<sup>21</sup> In Frederic Volpi and Bryan S Turner, *Making Islamic Authority Matter* (2007) Theory Culture and Society Volume 24:2, 1-19 the authors argue that the multiplicity of voices claiming legitimacy and authority to interpret religious texts creates an inchoate ‘noise’ and even an institution such as the European Council of Fatwa relies on nothing more than individual Muslims recognising its judgments as binding. The authors explore the debate over authority in Islam in a contemporary context and state it is difficult to impose any transnational authority over this debate. As an advantage to Muslims in a Western context the lack of a central institution allows Muslims to explore the foundations of what their Islamic authority ought to be and the legal pluralism that this generates.

<sup>22</sup> Walker n1, 95

interpreting those sources<sup>23</sup>. It is possible for Muslims to question the authority of a body claiming religious authority whilst at the same time accepting the ruling given<sup>24</sup>. In describing a *fatwa* (a legal opinion) Keshavjee articulates the authority which comes from the ruling itself as *'[a fatwa...] posits a legal opinion on an issue....It does not call for execution, yet anyone who executes what is called for in it could legitimately feel a sense of justification at having acted in accordance with the Sharia'*<sup>25</sup>. One can follow a ruling and accept its legitimacy or authority without necessarily accepting the authority of the institution that provided the ruling. Akhtar makes a slightly different but equally pertinent point from her findings; that British Muslims can lack confidence in the authority of shari'a councils whilst simultaneously recognizing the expertise in Islamic law that is provided by them<sup>26</sup>. Keshavjee goes on to explain that the question of who is authorized to pronounce a legal opinion goes to the very heart of the legitimacy/authority debate that has existed for centuries within sunni Islam<sup>27</sup>. Walker does not explore this debate around authority within the context of its historical Islamic contestations.

Her arguments on authority and legitimacy are confined to the extent to which the women considered the shari'a council itself as an institute of legitimacy or authority. She argues that the women viewed shari'a councils as a means to an end and as part of *'pragmatic calculations of power'*<sup>28</sup>. This recognition of the performative functions of shari'a councils has been explored by other academics such as Bowen. He identifies a multiplicity of performative functions that a shari'a council engages with<sup>29</sup>. He also makes the point that many Muslims

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<sup>23</sup> Indeed, there are numerous evidences from some of the most renowned classical scholars of Islam, advising their students and followers to ignore them on any occasion where their rulings are determined to be contrary to the Quran or the sunnah. Certainly within Sunni Islam, it is generally accepted that there is no absolute authority after the death of the Prophet.

<sup>24</sup> Vopli & Turner n21, 8 argue that *one need not invoke essentialist arguments about the genuineness of authority emanating from the Islamic tradition in order to construct a narrative that highlights the contemporary social relevance of this type of communal affiliation, the relevance of these customs to the well-being of the community as a community and the well-being of individuals as members of that community.*

<sup>25</sup> Keshavjee n4,75

<sup>26</sup> N...Akhtar n9, 132

<sup>27</sup> Keshavjee n4, 75-76

<sup>28</sup> Walker n1, 95

<sup>29</sup> Bowen n6, 89, where he describes dissolution of the marriage by the shari'a councils as a judicial performative function, the encouragement of mediation to help secure a husband's

including those who use the services of shari'a councils are unsure of why shari'a councils have authority to grant a divorce<sup>30</sup>. This again illustrates the point made above; questioning the authority of a body does not necessarily equate with questioning the ruling given or even questioning the Islamic textual sources.

Walker herself notes, and this is supported by my own work, the dissatisfaction some of the women felt when they were informed by the BSC that their civil divorces were sufficient for a religious divorce. In my own work the dissatisfaction arose because greater *Islamic* guidance was expected of the BSC; an expectation that a religious framing would produce results other than that produced by a civil court. In these cases it is the interpretation of the textual sources that is being questioned.

Walker persuasively develops Bano's work on the notion of 'power' as a more useful tool to understand the interactions of the women. Walker recognizes that relations of power cannot be understood in simple binary terms, as between those deemed 'powerful' and those deemed 'powerless'; rather all of those involved (including the family members of the women) were, to varying degrees, subjected to the influences of power<sup>31</sup>. Of note, is that we have no documented research from parents, family members or husbands of the women who apply to shari'a councils, which would enable a more rounded understanding of the power dynamics taking place when shari'a councils mediate or adjudicate in family disputes. Most of the research has investigated shari'a councils primarily through the perceptions of the female applicants alone. An additional point to note is that Walker confines her discussions of power to the parties involved in the shari'a council process and does not explore the women's relationship with God as a distinct or influential factor in addressing the power dynamics. In Chapter 3 I explore the impact a relationship with God can have on questions of legitimacy, authority and who speaks for God.

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consent to a divorce as the husband's performativity and attesting to a divorce as recognition of a couple's performativity.

<sup>30</sup> N Bowen n6, 90

<sup>31</sup> N Walker n1,102

### Women's objectives

In most of the above studies women's objectives in obtaining a religious divorce appear to have been met and this is supported by my own work.

Notwithstanding this, as noted by Walker, Bano and others there were many respects in which the women were dissatisfied with the shari'a councils and it is interesting to note that some of the examples of dissatisfaction given by Walker indicate perhaps somewhat unrealistic expectations on the part of the women. These included expectations that the councils would be able to exert powers such that husbands would be forced to fulfil their spousal obligations or that the threat of divorce would result in a husband's re-engagement in a marriage. This seems to be a somewhat inconsistent position that is taken by some of the women; whilst they considered the shari'a council to hold no personal authority over them, it was expected (or hoped) that it would hold such an authority over their husbands<sup>32</sup>. However, Walker does not explore this contradiction with the women. One other point to note is that many of Walker's interviews they were taking place whilst the women's cases were ongoing. All of my interviews were conducted after the shari'a council processes had concluded and very often some months later. Reflecting on one's experiences after the event can bring a different perspective to the views one might hold, as oppose to the emotion and frustration that one might feel whilst in the midst of a dispute. This is not to generalize but simply to recognize that at times, in my own study, the women acknowledged how they felt at the time of going through the shari'a council process was not necessarily how they now felt some time later when reflecting on their experiences.

A very important feature of Walker's study is her identification of the women's desire for freedom, primarily from their husbands' control but also other specific types of freedom. However, this desire for freedom was pursued within the framework of their communities. It was not a desire to exit their communities, religion or cultures and this has important policy implications for any state intervention. Similarly Qureshi reports in her study of marital breakdowns

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<sup>32</sup> Walker n1,141

amongst British Pakistani Muslims that elements of individualizations are weaved in with traditional family cultures and may be important to people at different points in their lives<sup>33</sup>. A recognition of the women's connectedness to their social, family and communal environments to an extent echoes Herring's view of relational autonomy as a tool for conceptualizing the contextual nature of choices made within a familial environment<sup>34</sup>. Herring places relationships at the heart of understanding autonomy when decisions are made within a family context. Sandberg and Thompson identify a number of limitations with this approach and therefore adapt Herring's notion of relational autonomy in order to apply it to religious tribunals by combining relational *contract* theory (rather than autonomy) with some feminist perspectives that take account of the power dynamics of the parties, specifically gendered power dimensions<sup>35</sup>. As I will argue later adding feminist perspectives assists but has limitations in the experiences of Muslim women.

Walker states that religion as a motivating factor for the use of shari'a councils has been assumed and further assumptions have been made that shari'a councils are necessary in order to free Muslim women from their religious marriages<sup>36</sup>. She highlights the multiple motivations articulated by the women in her study that culminate in the overarching desire for 'freedom' which are not indicative of a religious need. Whilst it can be accepted there may be multiple motivations for approaching a shari'a council, Walker's work does not explore the women's relationship with God and the extent to which this is a motivating factor in obtaining a *religious* ruling or as stated above having an influence over power dynamics. Walker's analysis of the influence of Islam on the women is in many respects restricted to the extent to which the women considered themselves 'practicing' or otherwise and it seems that this is largely interpreted to indicate the extent to which the women were religious and therefore in need of a

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<sup>33</sup> Kaveri Qureshi, 'Marital Breakdown among British Asians, Conjugalities, Legal Pluralism and New Kinship' (Palgrave MacMillan 2016) 9

<sup>34</sup> Jonathan Herring *Relational Autonomy and Family Law* (Springer 2014) whose own work on relational autonomy builds on earlier academic works such as Mackenzie and Stoljar.

<sup>35</sup> Russell Sandberg and Sharon Thompson, 'Relational Autonomy and Religious Tribunals' [2017] *Oxford Journal of Law and Religion* 137, 147-150

<sup>36</sup> Walker n1,190

religious ruling. In Bano's work she explored with the women the manner in which they entered into their marriages. The overwhelming majority of the women in her study described the importance of their *nikaahs* in terms of a relationship with God<sup>37</sup> and this is reflected in my own work<sup>38</sup> and in the earlier work of Shah-Kazemi<sup>39</sup>. Indeed Bano went so far as to argue that '*the single-most important reason to emerge in this study was the women's need to obtain a religious divorce certificate rather than a desire to save their marriages*' a finding which is confirmed in Shah-Kazemi's work also<sup>40</sup>. It would seem incongruous that for these women entry into a marriage is, at the very least, imbued with some personal religious dynamic involving a connection to God, if exit out of it does not carry some religious significance also<sup>41</sup>. Here it is the relationship with God that is indicative of a religious need, not the extent to which the women considered themselves to be 'practicing'.

In my work I have sought to explore the women's relationship with God by investigating what impact believing in God and an afterlife has on issues such as marriage and divorce. Western societies are increasingly framing questions of marriage and divorce as matters of individual choice and autonomy, disconnected from religious belief or from having any impact on a spiritual connection with God. Believing in God and in an after-life inevitably places limitations on one's absolute autonomy. Who speaks for God in determining the ways in which autonomy should be limited is potentially in a very powerful position<sup>42</sup>. In the studies that have specifically included Muslim women's voices, sometimes the question of the extent to which the women consider themselves religious or 'practising' is asked, as mentioned above by Walker. And if the women answer in a negative or partially negative manner then there is little further analysis of religious belief as a factor influencing the women's motivations. For example, in Walker's study, once the women describe

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<sup>37</sup> Bano n2,166 where Bano describes how the women viewed the *nikaah* as recognition that they were married '*under the eyes of God*' and at 167, where she quotes a number of women articulating a personal religious significance of the *nikaah*.

<sup>38</sup> See Chapter 7

<sup>39</sup> Shah-Kazemi n5

<sup>40</sup> Bano n2,186

<sup>41</sup> A point made by one of my own participants – see, Chapter 7.

<sup>42</sup> See, Chapter 3

themselves as ‘not very practicing’ or something similar, little attention is paid to their own personal relationship with God and what this means to them in obtaining a *religious* divorce or whether religious belief forms part of their notion of ‘freedom’. Does the desire for ‘freedom’ include any religious aspects to it at all? Walker makes the point that the women were not necessarily seeking an exit from their communities or cultures and she explores some of the practical consequences for the women in gaining freedom<sup>43</sup>. But what did this freedom mean in terms of their relationship with God, if anything?

‘Practising’ as a descriptor for religiosity may have multiple meanings. It could simply refer to the acts of worship; a woman who describes herself as ‘not practicing’ or ‘not very practicing’ may mean that she does not wear a hijab or does not pray five times a day or does not fulfil any of the other obligatory acts of worship. She may even be referring to her engagement in those acts considered sinful in Islam such as a sexual relationship outside of marriage or drinking alcohol. Not fulfilling all of the acts of worship or engaging in sinful conduct does not equate with having no relationship with God. It does not mean a religious ruling on an issue such as divorce is unimportant. Indeed in Akhtar’s study she connects her participants’ self-identification of ‘practicing’ with personal acts of worships<sup>44</sup>.

An exploration of the women’s relationship with God, believing in heaven and hell, and the consequences of not obtaining a religious ruling would have provided Walker with a much richer understanding of the notion of ‘freedom’ as expressed by the women. In Akhtar’s study her participants consisted of 250 British Muslims, aged between 18-45, who self-identified as Muslims. Her only controls on this group were that they held a British passport and followed the Sunni legal traditions, and yet 94 per cent, described themselves as ‘practising’

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<sup>43</sup> Such as freedom to remarry, freedom from in-laws, freedom to pursue a life whereby family and friends concede the marriage has ended etc

<sup>44</sup> Akhtar n9, 123 Admittedly, Akhtar is distinguishing between the way in which the overwhelming majority of her participants felt that Islamic law played a significant role in their lives and the lack of religious knowledge of her participants when it came to the Islamic rules of marriage and divorce. The point remains that again the understanding of what it means to be religious is equated with acts of worship.

or 'understanding religious obligations'. More importantly '75 per cent stated that Islamic law either governed their lives or played a significant role'<sup>45</sup>.

I argue that the existence of shari'a councils is a matter of religious freedom for some Muslims, even if the women who approach a shari'a council have multiple motivations or have tactical strategies and even where the use of a shari'a council forms part of larger battlefield which the women are navigating. Despite this the ruling that a shari'a council is providing is a *religious* ruling. A shari'a council is expected to justify its ruling through the use of Islamic textual sources. Indeed Shah-Kazemi notes the efforts some of the women went to in arguing their positions using Islamic framing, texts and evidences<sup>46</sup>. Although it may only have been a minority of women in Walker's study, in other studies, including my own, the religious aspect of the ruling was of personal and spiritual significance to a far larger proportion of the women, thus enabling them to move on with their lives whilst maintaining their connection with God. What this may tell us is that Muslims cannot fit into one group or category of 'religious' people. For some, as in Walker's study, the religious aspect may be less important, for others it is extremely important.

I do not make the argument that shari'a councils in themselves are absolutely necessary to free women from a religious marriage. But access to a religious authority, scholar or body, whether in the form of a shari'a council or otherwise that can make a religious ruling to the satisfaction of Muslim women is a necessity. It so happens that shari'a councils fulfill this particular need for *some* Muslim women though we can safely assume that for many Muslims they are able to secure a satisfactory religious termination of their marriages without recourse to a shari'a council<sup>47</sup>. This does not mean that their divorces are not

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<sup>45</sup> Akhtar n9, 123

<sup>46</sup> Shah-Kazemi n5, 47 reproduces a letter in full in which the female applicant refers to Islam's teachings in general terms and at 63 where the female applicant writes a short letter and relies on a very specific *hadith* providing her with an Islamic basis for the granting of her divorce.

<sup>47</sup> On the limited information available, the highest number of shari'a councils is estimated at around 85 (and this is very much a contested figure). Walker mentions that it can be estimated there are perhaps hundreds of women each year approaching shari'a councils. According to the 2011 census the Muslim population of the UK is around 2.7million suggesting significant

conducted in accordance with Islamic methods of divorce as there are multiple ways in which the parties may divorce in accordance with Islam<sup>48</sup>. It is certainly arguable that there is a greater need for research to determine how Muslims have sought to end their relationships *without* accessing a shari'a council and although Qureshi's work touches on this, a great deal more research is needed<sup>49</sup>. Such research will provide a more complete picture of how Muslims are terminating their relationships and place shari'a councils within a wider context of Muslim practices. Otherwise there is a danger of failing to recognize the reality of many Muslims' lived experiences and instead entrenching shari'a councils as the only method by which Muslims can obtain a religious divorce. Indeed, a more troubling topic is that of Muslim women who remain in unhappy or abusive marriages precisely because they do not have access to, or they have not been permitted access to a religious authority enabling them to end their marriages. Muslim women are entitled to obtain a religious ruling from whichever religious source they choose and it is not a matter for the state to direct their choice or limit it to a specific designated authority.

#### **The IJB as a 'new' shari'a council**

In her research Walker<sup>50</sup> demonstrated that although she had observed four different councils as part of her study, the procedures were relatively similar and standardised. Similarly Bano is able to identify commonalities in the processes of the four shari'a councils that she studied. In my observations of one shari'a council, its processes are not dissimilar from the shari'a councils which have previously been studied and so the recommendations that I make in my conclusions can be applied and adapted to other shari'a councils. Walker makes the point that there is a compelling argument to be made that each shari'a

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proportions of Muslims do not approach shari'a councils. There is little research as to the extent to which Muslims may be achieving a religious divorce without recourse to shari'a councils.

<sup>48</sup> For a more detailed discussion of the differing Islamic methods of divorce, see Chapter 5.

<sup>49</sup> Qureshi n33, 164-170 demonstrates that some of the field work undertaken by her included women who were either satisfied with a civil divorce or had negotiated their release from their marriages outside of a shari'a council process. Qureshi also included case examples of husbands pronouncing *talaaq* where again there was no shari'a council involvement. Her *talaaq* cases in particular highlighted the ambiguous positions of the parties where the processes are undocumented and informalized and these are not always at the disadvantage of the women. Qureshi's study of those ending their marriages outside of shari'a councils is too small to draw any clear conclusions as there is such a wide range of possibilities addressed.

<sup>50</sup> Walker n1,56

councils should be considered on its own merits<sup>51</sup> but if we are to move forward with this debate then some general recommendations need to be identified without the need to examine every single shari'a council on its own merits.

Almost all of the studies that have observed specific shari'a councils have included the same two shari'a councils, the ISC in London and the shari'a council at Birmingham Central Mosque. Even in media programs it is these two shari'a councils that have been subjected to the greatest scrutiny. We therefore have a number of studies that are effectively exploring the same processes and some very similar or perhaps even the same data. My own study is of a shari'a council that has never previously been scrutinised, so it adds to the growing body of data in relation to the workings of different shari'a councils. It is the first piece of research since Shah-Kazemi that has concentrated on one shari'a council and by examining its processes in detail I aimed to provide *practical* advice to the shari'a council. Although some of the women that I interviewed had approached alternative shari'a councils (either in addition to or as an alternative to the one which I observed) I accept that the practical advice that I offer is primarily for the benefit of the shari'a council that I observed. However, in view of the commonalities identified from previous research it is clear there are pragmatic suggestions which can be made that may assist in standardising procedures and providing some quality assurance benchmarks which I explore in Chapter 6.

#### **The importance of a comparative approach**

Much of the women's criticisms of shari'a councils have revolved around the processes undertaken and the disappointments that the women felt when shari'a councils did not sufficiently safeguard their interests as they pursued their objectives. In my study I ask the women to compare their experiences of using shari'a councils with their experiences of the civil court system. None of the research to date has fully sought to explore the comparative approach. Further, in pursuance of this theme, in Chapters 4 and 5, my work investigates the developing relationship between English and Islamic laws of marriage and divorce by examining both the legal framework of each and how this relationship is organically developing. Criticisms of shari'a councils sometimes carry with

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<sup>51</sup> Walker n1

them the underlying assumption that civil law and civil courts would produce a 'better' result for Muslim women. In taking a comparative approach when critiquing shari'a councils one can identify how some of the concerns raised about shari'a councils are equally applicable in a civil court process. For example, Bano identifies that on occasions there may be an increased risk of abuse to a woman once her husband is notified of her application for a divorce by the shari'a council<sup>52</sup>. Presumably this increase in risk would also arise in civil proceedings given that a civil divorce would also require proof of service of the divorce petition upon the husband. How to tackle this is therefore not a matter specific to a shari'a council<sup>53</sup>.

Similarly, Walker highlighted the traditional and conservative manner of the women's appearances when attending the shari'a council as compared with their more 'Westernised' appearances when she met with them for their interviews. For some, she explains that the reason for this discrepancy was to present an image of a pious Muslim woman to the shari'a council<sup>54</sup>. One might ask whether parties attending before a civil court judge alter their dress to present a particular image or out of respect to the environment that they are in. Perhaps the reasons may be different (as it is not necessarily piety that is going to impress a civil judge) but this is not an unexpected or surprising strategy for the women to have undertaken<sup>55</sup>. Dressing in a manner that will convey a particular message to an adjudicator or in deference to the environment is not limited to shari'a councils and unless a comparative approach is taken Muslim behaviour is at risk of being exceptionalized and presented as unique to the experiences of Muslims or shari'a councils.

By providing a space for the women to discuss their comparative experiences my work highlights that the concerns, motivations and disappointments which the women may have in approaching shari'a councils are not necessarily eradicated

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<sup>52</sup> Bano n2 126

<sup>53</sup> Clearly English courts have greater resources, are more experienced and therefore have possibly more efficient methods for addressing this, but the issue itself is not specific to shari'a councils.

<sup>54</sup> Walker n1, 76

<sup>55</sup> I noted in my own study one of the women made a point to ensure she dressed in her work uniform when she appeared before a civil court. Her aim was to demonstrate her professional life so that she would be taken seriously by the civil judge.

by the civil court system. For many of the women that come before shari'a councils it is with the lived experiences of interacting with both English law and Islamic law. Understanding the complexity of that interaction is vital in providing context and a complete picture of the 'battlefield' within which the women are operating. A more thorough exploration of the interaction of laws, coupled with the women's voices of their experiences provides for a richer and more nuanced understanding of the family dispute as one large, messy arena in which many different decisions are being taken by the women, albeit with multiple motivations.

### **Banning of shari'a councils or reducing their need**

Research by Zee<sup>56</sup> and Manea<sup>57</sup> has focused on shari'a councils as manifestations of 'fundamentalism'<sup>58</sup> or 'Islamism'<sup>59</sup>. This inflammatory language feeds into the notion that shari'a councils ought to be viewed through a prism of state security and thereby justifying an outright ban on their existence. Zee and Manea appear not to even consider the possibility that Muslim women may wish to access shari'a councils because of their own religious beliefs or relationship with God. Shachar sums this up as a '*polarized dichotomy that allows either protecting women's rights or promoting religious extremism*'<sup>60</sup>.

Shari'a councils have generally been subjected to an intensely hostile environment<sup>61</sup>, not just in terms of critiquing their procedures but in the calls for their outright bans. They have been the targets of a number of covert

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<sup>56</sup> Machteld Zee, *Choosing Sharia? Multiculturalism, Islamic Fundamentalism & Sharia Councils* (Eleven International Publishing 2016)

<sup>57</sup> Elham Manea, *Women and Shari'a Law* (I.B.Tauras 2016)

<sup>58</sup> See Zee n56, 95-159,

<sup>59</sup> See Manea n57, the term Islamist is used throughout her book to describe either those with 'conservative' religious background or those with a 'political' agenda (48). Manea suggests there are three types of women who turn to shari'a councils: first, a woman who seeks a religious divorce because 'people have told her that under Muslim law she is not divorced', secondly, women married outside the UK and thirdly, women who had a religious marriage but no civil marriage (200-201). Her research did not consider the option of Muslim women who practice their faith and apply to shari'a councils because they themselves believe that God's law differentiates between men and women in the manner in which they are entitled to a divorce.

<sup>60</sup> Ayelet Shachar, 'Privatising Diversity: A Cautionary Tale from Religious Arbitration in Family Law' in Marie A. Fallinger, Elizabeth R.Schiltz and Susan J.Stable (eds), *Feminism, Law, and Religion* (Ashgate Publishing Limited 2013) 117

<sup>61</sup> An example is the extremely hostile response to the 2008 speech of Rowan Williams, 'Religious and Civil Law in England (2008) 10 Ecclesiastical Law Journal 262

investigations conducted by programs such as Panorama<sup>62</sup>, which, although raising legitimate concerns, tend to sensationalize those concerns and heighten Muslim fears of persecution. Both Baroness Cox's Bill<sup>63</sup> and the Independent Review ("The Review")<sup>64</sup> chaired by Mona Siddiqui stopped short of calling for a ban but both are clearly aimed at reducing the use and need for shari'a councils<sup>65</sup> with perhaps a thinly veiled long term aim of their disappearance altogether. It is disconcerting to note that The Review has come from the Counter Extremism Unit of the Home Office, again implying that the behaviour of Muslims in managing their family lives is a matter of state security<sup>66</sup>.

For the meantime The Review supports some form of state regulation<sup>67</sup> together with a code of practice to be implemented, whilst Baroness Cox's Bill attempts to create a number of criminal penalties for the assumed transgressions of shari'a councils. The Review's reasons for not favouring an outright ban of shari'a councils are not due to any positive desires to accommodate shari'a councils; rather it is an acknowledgment of the impossibility of attempting to ban a voluntary organisation whose legitimacy only arises from the communities that it serves<sup>68</sup>. In its report, The Review chose to annex two letters, each signed by multiple signatories, expressing views, concerns and some support<sup>69</sup>. A key

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<sup>62</sup> BBC Panorama, 'Secrets of Britain's Sharia Councils' first broadcast 22 April 2013

<sup>63</sup> Arbitration and Mediation Services (Equality) Bill 2017

<sup>64</sup> 'The independent review into the application of sharia law in England and Wales' published February 2018

<sup>65</sup> The Review n64,19

<sup>66</sup> Equally problematic is the title of The Review, namely "The independent review into the application of sharia law in England and Wales". The term 'sharia law' is very problematic. I examine what is meant by 'sharia' in Chapter 3. To use a term such as 'sharia law' which has no identifiable meaning but rather carries highly inflammatory ramifications is at best demonstrative of an indifference towards the precision of language that is needed when analysing the actions of minority communities and the consequent implications of that language.

<sup>67</sup> This recommendation has immediately been rejected by the government as it would provide shari'a councils with a level of state legitimacy which the government is not prepared to grant.

See, <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-02-01/HCWS442/> last accessed 18 April 2018

<sup>68</sup> The Review n64, 23 where for pragmatic reasons it is concluded that the closure of shari'a councils is not a viable option.

<sup>69</sup> The Review n64, the first letter at annex C was highly critical of the terms of the entire review process, its terms of reference and some of the panel members. It is signed by some of the most prolific and vehement critics of shari'a councils many of whom advocate for an outright ban on shari'a councils. Signatories to this letter were particularly incensed by the inclusion of Muslim imams or scholars on the panel as advisers and felt that a 'theological approach' was inappropriate.

concern in both letters was the lack of Muslim female voices<sup>70</sup>. Aside from these two letters it is very difficult to tell from The Review exactly what evidence was taken into account by the panel and it is unfortunate that The Review took the simplistic approach that Muslims' conformity with the state's marital laws would provide them with sufficient protections without actually exploring the effectiveness of this.

Those opposing the existence of shari'a councils effectively argue that the entire debate should be driven only by the experiences of 'victims' of shari'a councils. Similar to Zee and Manea, Patel claims that in this context the demand for legal pluralism mainly arises from 'conservative and fundamentalist forces' and that these should be treated with a great deal of caution for failing to recognise the power dynamics within minority communities especially as they effect women<sup>71</sup>. It is difficult to ascertain exactly what types of Muslims Patel includes in her 'conservative and fundamentalist forces' as this is never defined by her. Would this include any Muslim woman who personally desired a religious ruling as an alternative or in addition to a civil decision? Patel states that in any considerations of providing legitimacy to non-state laws the critical starting point must be the impact on the most marginalized, such as women and children<sup>72</sup>. Whilst this may be correct it is only the starting point and the debate does not end there and nor should it. It is also oppressive to Muslim women not to allow them to exercise their religious freedoms and as framed by Al-Hibri Muslim women are entitled to their religious beliefs whether secular feminists approve them or not<sup>73</sup>. Al-Hibri also makes the point that Muslim women who are attached to their religion will not be liberated through the use of secular approaches imposed upon them<sup>74</sup>. Rather than banning shari'a councils the aim

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<sup>70</sup> The open letter from the Muslim Women's Network UK, at annex D is more circumspect but again makes the point that the voices of Muslim women ought to be prioritised and further welcomed the inclusion of religious scholars as the issues do concern matters of Islamic faith

<sup>71</sup> Pragna Patel, 'The Growing Alignment of Religion and the Law' in Samia Bano (ed) *Gender and Justice in Family Law Disputes Women, Mediation and Religious Arbitration* (Brandeis University Press 2017)

<sup>72</sup> Patel n71, 84

<sup>73</sup> Azizah Y. al-Hibri, 'Is Western Patriarchal Feminism Good for Third World/Minority Women?' in Joshua Cohen, Mathew Howard and Martha Nussbaum (eds), *Is Multiculturalism Bad for Women? Susan Moller Okin with Respondents* (Princeton University Press 1999) 44

<sup>74</sup> Azizah Y. al-Hibri, 'Islam, Law and Custom: Redefining Muslim Women's Rights' [1997] *American University International Law Review* 12:1, 3

ought to be to find ways to improve them so that Muslim women are able to secure the religious rulings that they desire, even if those rulings rely upon religious norms that feminists and secularists would object to. The banning of shari'a councils will not remove the need for a religious ruling from those who perceive themselves to be bound by religious norms that do not permit them to divorce without such a ruling. One might ask would the abolition of the Beth Din free Jewish women from their limping marriages?

Patel argues that by the time ethnic minority women engage with civil law they have already been placed under immense pressure to engage with informal mediation to their detriment<sup>75</sup>. As stated previously the real concern ought to be with the Muslim women who are unable to access religious authorities, such as shari'a councils, because they will be ones that are remaining in unhappy marriages. The focus on shari'a councils in many respects conceals all of the other ways in which Muslims terminate their relationships or more worryingly the ways Muslim women have been unable to terminate their relationships.

The Muslim Women's Network ("MWN") has published its own guidance and report into Muslim marriages and divorce and as part of that report it has commented on shari'a councils<sup>76</sup>. MWN's report is not an empirical study grounded in a clear methodology and it is more a reflection of their activism in this area. MWN's long term aim is to reduce the need for shari'a councils by encouraging greater reliance on civil law. In its section on shari'a councils some quite generalised statements and assumptions are made<sup>77</sup>. The long term aim of pushing women towards civil law is problematic for multiple reasons which I

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<sup>75</sup> Patel n71, 83

<sup>76</sup> Shaista Gohir (on behalf of the Muslim Women's Network UK), *Information and Guidance on Muslim Marriage and Divorce in Britain* (Muslim Women's Network UK 2016). The report appears to be a mixture of providing guidance on Islamic matters of *fiqh*, guidance with regard to English law, some case studies, some question and answer style information and some general information.

<sup>77</sup> Gohir 76, 36, as an example a comment is made that most shari'a councils follow the juristic traditions of the Hanafi school but there is no evidence provided to support this contention. The claim is made because the report states the overwhelming majority of Muslims in Britain are of a South Asian background. But the academic literature does not support this claim. Many of the shari'a councils that have actually been subjected to academic scrutiny have not displayed an over reliance on Hanafi *fiqh*. In fact, if most were following Hanafi *fiqh* then there would be a great deal more consistency between the different shari'a councils. Similarly, a statement is made that most scholars have received their training from abroad and yet there is no evidence to support this.

explore in Chapters 4 and 5. In a survey commissioned by Channel 4<sup>78</sup>, of note is the reluctance of Muslim women to engage with civil law *after* having experienced a civil process<sup>79</sup>. The Channel 4 survey demonstrated that women who have previously undergone a civil divorce process are more likely to opt for a *nikaah* only marriage the next time around<sup>80</sup>. In Chapter 7 I explore some of the reasons why this may be the case. The point that I make here is that in all the calls for the banning or reduction of shari'a councils it is presumed civil law will not only serve Muslim women better but that an informed Muslim woman would choose civil law. This is not necessarily what the research is demonstrating. Women who have undergone a civil divorce process are arguably more informed about it than those who have not, and their eschewing of civil law is based on their experiences of it. My research investigates some of the issues around this.

#### Further research is needed

Despite the growing body of academic literature there are aspects of shari'a council's work that have not been subjected to the same rigorous manner of question and analysis as the female participants have. Many of the academics investigating this area have spoken with some members of shari'a councils as and when opportunities arose in the course of their observations of proceedings. Such research is not specifically aimed at addressing, for example, the management of the dynamics of power from the perspective of the adjudicators<sup>81</sup>. This work would assist in examining how internal debates are taking place as this is an under-researched area and it is the internal debates that will eventually lead the way forward in the development of Islamic jurisprudence in a British context. Similarly, very little if any research has specifically been undertaken of husbands; whether they engage with the process

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<sup>78</sup> Survey Commissioned by Channel 4 and True Vision Aire Production Company, some of the results of which were broadcast in a Channel 4 documentary called 'The Truth About Muslim Marriage' first shown on 21 November 2017.

<sup>79</sup> Whilst there are many concerns and reservations raised regarding the methodology, the framing of the questions, the qualifications and training of the interviewers, and some of the contradictory data that is obtained, I do not propose to explore all of these arguments. Despite this, there is some value in the data as a springboard for discussions and future research.

<sup>80</sup> The survey results as presented by Rajnaara Akhtar to the Migrant Marriage Conference held at the University of Birmingham on 16 April 2018.

<sup>81</sup> Bowen n6, perhaps came the closest to examining the tensions and multiplicity of views held by Islamic scholars in one shari'a council when he described the conversations and debates taking place.

and if not, why not? How they view the authority of the councils? What would encourage them to engage? In examining the power dynamics only from the perspective of the women we are relying on an incomplete picture from which to draw conclusions. One of Bano's key concerns was the nature of family intervention during the breakdown of a relationship but her analysis, as with others, has been formed almost exclusively from the perspective of the women. Whilst my own work also pursues the needs of Muslim women it examines those needs within the context of an interrelationship between Islamic and English law. I recognise that significant gaps remain, and for future projects, I would like to see research emerge that explores the gaps from the perspectives of those other than the women.

## Legal Pluralism

Having placed my research within the larger body of academic literature I now turn to consider both the theoretical and practical positioning of shari'a councils within English law. In this section I argue that for Muslims living as minorities in secular states the appropriate framework to adopt is one of legal pluralism. I examine the history of legal pluralism and concentrate on the relationship between legal pluralism and Muslim women as legal subjects. I argue that Muslim women participate in creating their own legal subjectivity and the accommodation of religious minorities must come from an acceptance of legal pluralism, even if there are concerns about individual rights becoming obscured by group rights.

If British Muslims consider themselves to be bound by more than one legal system questions arise as to whether this is something which should be accommodated, encouraged, discouraged, ignored or actively denied. And thereafter if legal pluralism is something to be accommodated or encouraged, what type of model should be followed and what are the limits of any such accommodation? Even if it is to be discouraged or denied, I question whether it is even possible for English law to prevent Muslims from obtaining a religious ruling regarding the ordering of their lives. The English legal system has to decide as a matter of policy which direction it wishes to take. Much has been said in recent years regarding social cohesion and integration by minorities, most notably the integration of Muslims into Western societies including the UK<sup>82</sup>. The approach that is taken to legal pluralism has a direct impact on the model and methods by which policies are adopted to protect or enhance minority group rights or to suppress those rights and has a direct impact on the so called 'integration' of minorities.

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<sup>82</sup> For example, Dame Louise Casey, *The Casey Review: a review into opportunity and integration* (Department for Communities and Local Government, 2016). This review was commissioned by the then Prime Minister and Home Secretary to investigate issues of integration and social cohesion. Whilst this report was intended to cover deprived communities generally, much of its concerns around integration centred on Muslim communities.

Legal pluralism is not in itself a new issue and the matters it raises are not specific to Muslims only. It *'has become, like multiculturalism, a symbol of the modern age'*<sup>83</sup>. Due to the effects of globalisation, migration and immigration, most Western nations now include minority diasporas who have their own cultural norms and may even make use of their own culturally based mechanisms for the resolution of their disputes. This has led to individuals from those minorities making use of more than one 'legal' system in order to resolve their disputes. As has been pointed out the definition of legal pluralism often depends on the background and ideological orientation of the author<sup>84</sup>. Essentially any definition of legal pluralism is dependent upon the author's definition of 'law'. The wider the definition of 'law', the more possibilities we have for defining and applying models of legal pluralism. The ideology of what is meant by 'law' generally plays an important role in not only in the definition of legal pluralism but also in considering the extent to which English law should accommodate it. In any case normative pluralism exists as a fact and whether we call it *legal* pluralism may make little difference to the policy approach taken in managing the pluralism which exists. Twining makes the point that if law is conceived as social practices, we are concerned with the actual behaviour that is taking place and he gives Islamic law as an example of an *'institutionalised social practice wherever there is a significant population of practising Muslims'*<sup>85</sup>. In effect, in the UK there is a significant population of practising Muslims therefore Islamic law exists.

On the matter of accommodation, it has been suggested that liberalism is the most suitable doctrine for accommodating and even advancing differences in contemporary societies<sup>86</sup>. But as Ercan argues, the liberal formula is based on a *'separation of public and private spheres and locating culture within the latter*

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<sup>83</sup> Ian Edge, 'Islamic finance, alternative dispute resolution and family law: developments towards legal pluralism?' in Robin-Griffith Jones (ed) *Islam and English Law* (Cambridge University Press 2013) 137

<sup>84</sup> Edge n83, 137

<sup>85</sup> William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009) 75

<sup>86</sup> Selen A. Ercan, 'Democratising Identity Politics: A Deliberate Approach to the Politics of Recognition' in Dorota Gozdecka and Magdalena Kmak (eds) *Europe at the Edge of Pluralism* (Intersentia Publishing Ltd 2015) 13

*seems to reach its boundaries*<sup>87</sup>. Liberalism protects the supposed neutrality of the state and Ercan explains that liberalism assumes permitting or encouraging *'the practice of culture within the private sphere is the most appropriate way to deal with it'*<sup>88</sup>. The effect of this is that if cultural demands are made in the public sphere, liberalism's priority is the protection of state neutrality rather than accommodation of cultural practices<sup>89</sup>. The location of religion in the private sphere is particularly problematic for Muslims because of the different nature in which 'law' is understood and the manner in which concepts of public and private are differentiated in Islam<sup>90</sup>. This issue will be explored in more detail later in this chapter and in Chapter 3. Here it is important to note that Western jurisprudence approaches law from a very different perspective to Muslim jurisprudence. Coulson states that western jurisprudence approaches the study of law as an enquiry into what law is or what it ought to be<sup>91</sup>. Muslim jurisprudence, he argues, is an extreme example of divorcing law from its historical conditions precisely because it claims to be the revealed will of God and so there is no notion of it being an historical phenomenon closely connected to the progress of society<sup>92</sup>. Muslim jurists are always attempting to locate the Divine Will in every matter. This difference in approach not only has a direct influence on Muslim jurisprudence in determining what is considered to be

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<sup>87</sup> Ercan n86, 13

<sup>88</sup> Ercan n86, 16

<sup>89</sup> A practical example of this argument is the recent furore created by an ECHR decision allowing employers to ban their employees from wearing visible religious and political symbols. The alleged aim is to protect an assumed neutrality in the public sphere of employment practices, by ensuring any manifestations of dress arising from religious or political belief are reserved to the private sphere. It is notable that the cases which the ECHR was addressing all concerned women wearing the hijab in their respective workplaces. See:

<https://www.theguardian.com/law/2017/mar/14/employers-can-ban-staff-from-wearing-headscarves-european-court-rules> last accessed 12 April 2017

<sup>90</sup> In his article *The Contemporary Relevance of Legal Positivism* 32 *Austl. J. Leg. Phil.* 1 2007 Tamanaha argues that the shari'a is different in crucial respects from Western law. He argues that neither a positivist theory of law nor a natural law theory as understood by Western academics of law can successfully incorporate an Islamic understanding of law. He argues that the characteristics of Islamic law present challenges for both positivists and natural lawyers. Although his point is that it is positivism which, with refinement, can respond to Islamic law, his positing of Islamic law as challenging to both natural law theorists and positivists demonstrates the enigmatic position occupied by Islamic law within Western theories of law. This point is to be explored in more detail later in this chapter.

<sup>91</sup> In crude terms this would amount to law as understood either from a positivist perspective or from the perspective of a natural law theorist.

<sup>92</sup> N.J.Coulson, *A History of Islamic Law* (Edinburgh University Press first printed 1964, reprinted 2007) 1-2

'law', but it is argued that it makes Islamic law less susceptible to adapting to societal changes. This has become an increasingly contested position most recently by those who assert that patriarchal interpretations of the Quran are precisely due to the societal norms in which the scholars interpreted the text and will be explored in Chapters 4 and 5.

#### Defining 'Law' and 'Legal Pluralism' from a Western perspective.

Before exploring the issue of legal pluralism, one must take a step back in order to determine what is meant by law and what is implicit in our understanding of law that enables one to identify a particular rule as law. This seemingly simple question has resulted in a mass of contrasting and contradictory theories, all of which attempt to explain what we understand law to be<sup>93</sup>. It is, however, important to appreciate the context within which different theories have developed. This may be an historical or cultural context and further the context of the specific issues which the theorist was considering<sup>94</sup>. All of these factors have a strong impact on how the term 'law' is defined, most notably when understanding 'law' from the perspective of Western jurisprudence. In the contemporary climate of globalisation and the consequent pluralism this generates, this features as a forceful challenge to any attempt at articulating a broad framework for defining law which can also accommodate the complex diversities within it.

For Muslims it is the theories of natural law which most closely align with the Islamic understanding of law<sup>95</sup> even if Islamic law addresses issues of justice, human rights, social and state contracts in a different manner. Coulson states law in classical Islamic theory is *'the revealed will of God, preceding (and not succeeding) any Muslim state and controlling (and not controlled by) any Muslim*

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<sup>93</sup> Twining n85, 65, makes the point that the question 'what is law?' is in itself ambiguous and misleading and the response depends upon the enquiry that is being made. In the context of my thesis the enquiry into the question of 'what is law?' is made to examine the essential nature of the norms and rules applied by Muslim women in the breakdown of their relationships.

<sup>94</sup> For a short discussion on the importance of context see Ian Mcleod, *'Legal Theory'* (Palgrave Macmillan Sixth Edition 2012) 4-6

<sup>95</sup> See, for example, Thomas Aquinas *Summa Theologica* (trans Fathers of the English Dominican Province) (Leopold Classic Library), Aristotle *Nicomachean Ethics* and *Politics*, Plato *The Republic*

society<sup>96</sup>. Coulson asserts that the modernist approach to law is shaped by the *'needs of society as its function is to answer social problems'*<sup>97</sup>. But he goes on to explain that the needs and aspirations of society cannot, in Islam, be the exclusive determinant of the law. In Islam, law must operate within the bounds of the divine command. Any reformation of Islamic law which may be required in order to address modern needs must still operate within the divine Will<sup>98</sup>.

For now, it is noteworthy that for Muslims, legitimacy from God is an important factor when identifying the subjective view of how an individual determines what 'laws' they are bound by and what decisions they make. And given that the shari'a council makes religious rulings, it is a central aspect of its ruling that its decisions also have legitimacy from God. This requirement of legitimacy from God goes some way to explaining why Muslim women engage with shari'a councils, why they want a religious ruling regarding the status of their marriages and why civil courts are insufficient for them in this context. Muslims do not consider legitimacy from God to be an absolute right held by any particular individual. For Muslims, the last human being to receive Prophet-hood and direct guidance from God was the Prophet Mohammed صلى الله عليه وسلم<sup>99</sup>. As Muslims do not believe any new Prophet will come after Prophet Mohammed no further guidance based on revelation will occur.

By the Quranic command to *'Obey God and His Prophet'*, Coulson argues this *'supreme innovation introduced the establishment of a novel political authority possessing legislative power'*<sup>100</sup>. Yet, it is arguable that Coulson presents a very simplistic notion of Islamic law by claiming such an overt separation between law and society. He is correct in asserting that for Muslims one must locate the divine Will but Muslim societies have thrived in very different social and

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<sup>96</sup> N.J.Coulson, n92, 1-2

<sup>97</sup> N.J.Coulson, n92, 6

<sup>98</sup> N.J.Coulson, n92, 6-7

<sup>99</sup> As a Muslim, it is expected that I will send peace and blessings upon the Prophet every time his name is mentioned. For the sake of brevity and due to the limited word count I will restrict myself to setting out the Arabic phrase for peace and blessings once but my intention is to send peace and blessings every time the Prophet's name is mentioned in this thesis.

<sup>100</sup> N.J.Coulson, n92, 9

historical contexts. Ramadan has identified the intellectual endeavours and human reasoning which are involved in locating the divine Will<sup>101</sup>. As will be explored in Chapter 3 contemporary scholarship in Islam, especially by those wishing to re-interpret scriptural texts have argued that it is the failure to acknowledge the highly contextualised interpretations by classical jurists which have stifled the development of Islam.

### **The impact of Legal Positivism**

Legal positivists have sought to make a distinction between what law *is* as opposed to what law *ought* to be. They would argue that whilst law and morality may be connected, there is no necessity to this connection and the two should be kept apart in trying to identify what law *is*<sup>102</sup>. The basic methodology of legal positivism is descriptive and analytical, in that the overriding objective is to identify and analyse the clearly observable world and its actual existence. Finnis highlights the complex interactions that take place when any attempt is made to provide a value-free description or analysis of the law. He takes the view that it is not possible to describe or analyse a theory of law without undertaking an evaluation of the law also<sup>103</sup>. Theories of legal positivism take it to be their central case that there is one single coherent legal system for each population whose source is the sovereign or state. This may be because legal positivism is seeking to generalise the common features of all centralised rule-based systems that are stable rather than asking whether those rules are legitimate. By concentrating on this centralised aspect of rule-making, legal positivists do not really consider any sources of law other than those that emanate from the centralised system.

The complete separation of law and morality would not find favour in Islamic law. In Chapter 3 I argue that Muslims turn to the same Islamic sources in order to derive their legal rulings and their moral guidance. There is an intimate connection between law and morality in Islam and Peters and Bearman

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<sup>101</sup> Tariq Ramadan, *Western Muslims and The Future of Islam* (2004 Oxford University Press) 22

<sup>102</sup> Though there are a number of different theories and criteria for legal positivism as Hart put it "*Legal Positivism, like most terms which are used as missiles in intellectual battles, has come to stand for a baffling multitude of different sins.*" H.L.A.Hart, 'Positivism and the Separation of Law and Morals' [1958] HLR 71(4) 593-629, 595

<sup>103</sup> John Finnis, *Natural Law and Natural Rights* (Oxford University Press 2011), 3

demonstrate the benefits of this connection in encouraging obedience to the law<sup>104</sup>.

The theory of English legal positivism has dominated the discourse of English law. Its separation of law from morality and also specifically religious-based morality resonated with English lawyers and academics who were fundamentally sympathetic to the methodology of positivism. They therefore consolidated the theories of positivism rather than challenging them. In addition, as Western societies have become more secular, the state itself has attempted to separate religion from law and in the case of English law, separated Christianity from law<sup>105</sup>.

Attempting to make the law more secular, separating it from issues of morality and religion, gives a perception of equality before the law to all individuals, irrespective of their moral or religious beliefs. It is arguable for natural lawyers positive law was always secular. But this attempt at separation can mask differences including power imbalances, for example, by claiming that the positive, secular law is neutral. Davies makes the point that one of the outcomes of the supposed neutrality of the law is that whilst it will regulate, it will not intervene in the social distributions of power<sup>106</sup>. Secularisation of the law can also fail to accommodate or recognise difference. Davies also points out the argument made by liberalism is that the law can eliminate prejudice by adhering to standards of equality by which everyone is treated the same<sup>107</sup>.

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<sup>104</sup> Rudolph Peters and Peri Bearman 'Introduction: The Nature of the Sharia' in Rudolph Peters and Peri Bearman (eds), *The Ashgate Research Companion to Islamic Law* (Routledge 2016) 3 in which they give the example of the same normative system which would incline a Muslim to fast during the month of Ramadan would also incline that person to pay a worker's wages as contracted.

<sup>105</sup> This has been the subject of recent discussions by Munby LJ [https://owa04.bham.ac.uk/owa/redir.aspx?C=nAiValiDtECunUnqX9gPynbnrzYxsNAIsN-tejY0KgA9o\\_FtqoyK0IXZmlK7bh4ySfVIFB8PZ\\_A.&URL=http%3a%2f%2fwww.judiciary.gov.uk%2fResources%2fCO%2fDocuments%2fSpeeches%2flaw-morality-religion-munby-2013.pdf](https://owa04.bham.ac.uk/owa/redir.aspx?C=nAiValiDtECunUnqX9gPynbnrzYxsNAIsN-tejY0KgA9o_FtqoyK0IXZmlK7bh4ySfVIFB8PZ_A.&URL=http%3a%2f%2fwww.judiciary.gov.uk%2fResources%2fCO%2fDocuments%2fSpeeches%2flaw-morality-religion-munby-2013.pdf) last accessed 26 June 2017

<sup>106</sup> Margaret Davies, 'Legal theory and law reform: Some mainstream and critical approaches' (2003) 3 <http://www.austlii.edu.au/au/journals/AltLawJl/2003/51.html> accessed 11 May 2017

<sup>107</sup> Davies n106

Moreover it becomes an increasingly arduous task for the law to address clashes between the law and religious beliefs. In a multi-cultural, multi-religious society, it may appear that the absolute separation of state, religion and law is the most appropriate way to achieve fairness between its citizens. But this is a very messy process and English law is far from having achieved this separation. When we go on to examine English Family Law, we see that one of the reasons why the laws relating to marriage are so confusing, is precisely because of the state's involvement in what is essentially a moral and religious arrangement. The state's involvement in marriage has its foundations in a Christian concept of marriage and this is one of the reasons why the state finds it so difficult to accommodate forms of marriage which do not have the hallmarks of a Christian marriage ceremony.

#### **From Legal Positivism to Legal Pluralism**

One can argue that it is in the interests of members of the legal fraternity to accept and promote the idea that the definition of law includes only that which emanates from the state and its institutions. Judges, lawyers and legal academics are trained to consider and apply the law they define as law. Anything else may be coercive, may affect individual choices, may be determinative of particular courses of action but does not amount to law. This is not to suggest that there is any particular agenda to this end but the challenge against positivism and monism has come largely from those who have accepted the evidence from anthropologists and the groups within society who may be marginalised such as women or minorities. Legal positivists would say that they are simply describing the law as it is posited within society. But one can argue that they are only describing one type of law posited in one type of society with only one type of subject in mind (white and male). The positivists are not describing the lived reality of what is considered to be law by all of the citizens within a society. And the Western conceptual frameworks under which the debates about the definition of law have taken place have not addressed Islamic law.

What is interesting from the perspective of Muslims, is that much of the discourse by traditional Muslim scholars on the understanding of law has been dedicated to addressing the needs of Muslims living in Muslim majority lands, so

a type of legal monism, not dissimilar from Aquinas' theory of natural law is the preferred legal framework. But this framework only works for Muslims where they are living in Muslim majority lands. The status of Muslims living as minorities was barely mentioned or addressed by the traditional scholars. For Muslims to live as a minority within a non-Muslim environment, they along with other minorities require the state to adopt legally pluralistic measures giving recognition to alternative legal norms, in order that their religious beliefs and way of life is accommodated. Muslims in Western nations are in a somewhat paradoxical position: it may be that they require the state to adopt a form of secularised system of law in order that they are allowed the freedom to apply Islamic law to themselves. Muslims in Western countries may also have to support other minorities, even on matters with which they may disagree, in order to be able to argue that they can apply Islamic law to themselves.

#### **The history of legal pluralism**

Griffiths attempted to explain why the ideology of legal centralism which requires law to be defined as state law, uniform for all persons and administered by a single set of institutions, has frustrated the recognition of legal pluralism<sup>108</sup>. Griffiths asserts that legal pluralism is a fact and that legal centralism is a myth. The concept of a plural legal system is not new and the shift away from the understanding of society within a monist tradition to a pluralist view can be traced to the seventeenth century when political philosophers began to challenge monism and to demonstrate cultural sensitivity, albeit in what would be considered today a fairly simplistic manner<sup>109</sup>. Modern liberal views of plurality do not simply demonstrate sensitivity to cultural diversity but go further in promoting its desirability<sup>110</sup>.

However, Griffiths argues that the modern history of pluralism is based on the colonial experiences of Western nations where their ultimate goal was that of

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<sup>108</sup> John Griffiths, 'What is Legal Pluralism?' (1986) 24 JLP 1.

<sup>109</sup> See Bhikhu C Parekh, 'Rethinking Multiculturalism: Cultural Diversity and Political Theory' (2<sup>nd</sup> ed, Palgrave Macmillan 2006) for a more detailed historical account.

<sup>110</sup> See Bhikhu C Parekh, n109 in which he discusses the theories of John Rawls, Joseph Raz and Will Kymlicka as being some of the most influential liberals on the issue of plurality.

unification into one system<sup>111</sup>. Allowing sub groups to apply their own norms was a short-term measure until unification could be achieved<sup>112</sup>.

Griffiths distinguishes between pluralism in the weak sense and pluralism in the strong sense<sup>113</sup>. In its weak sense, a legally pluralist society may be accommodating some alternative legal systems but those alternative systems remain hierarchically subordinate to state law and they are seen as problematic with the aim being to ensure that all law ultimately comes from a single validating source and is administered by state institutions. This type of pluralism, Griffiths argues, has only a resemblance to legal pluralism as the objective is still one of a centralist or positivist view of law<sup>114</sup>. Tamanaha is very critical of this approach, arguing that legal pluralists have created a fearsome opponent in legal centralism in order to inflate the significance of their concept of legal pluralism<sup>115</sup>.

Legal pluralists have struggled to define legal pluralism and one of the key reasons for this difficulty is the debate around what amounts to law. Another factor which affects how legal pluralism is defined is the perspective from which this issue is being examined, whether legal or anthropological. As Griffiths points out, the anthropologist's definitions of law are not in terms of the state but in terms of authority or institutions as a feature of the social groups with which they are concerned. So, anthropologists have no difficulty in recognising legal pluralism in the strong empirical sense that Griffiths favours.

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<sup>111</sup> Sally Merry Engle refers to the research into colonial pluralism as 'classical legal pluralism' and the examination from the 1970s onwards of pluralism in non-colonised societies as 'new legal pluralism'.

<sup>112</sup> John Griffiths, n108

<sup>113</sup> Woodman makes a similar argument in distinguishing types of pluralism when he refers to 'deep legal pluralism' and 'state law pluralism'.

<sup>114</sup> John Griffiths, n108

<sup>115</sup> Brian Z Tamanaha, 'The Folly of the Social Scientific Concept of Legal Pluralism' (1993) *Journal of Law and Society* Volume 20, No2

Griffiths discusses a range of definitions of legal pluralism from Hooker's '*multiple systems of legal obligation.....within the confines of the state*'<sup>116</sup> to Pospisil's explanation of society being made of many subgroups with each subgroup regulating behaviour of its group thereby creating a multiplicity of legal systems at different legal levels and therefore suggesting a hierarchy<sup>117</sup>. Similarly Smith refers to individuals being members of social corporations who provide the individual with their rights and obligations. However, because Smith accepts that individuals may be members of different corporations at the same time, his definition does not require a hierarchical structure<sup>118</sup>.

Ehrlich's theory of 'living law' considers the importance of the law which dominates life itself and is also a reaction to legal positivism. Ehrlich considers law to be a chaotic mess of competing, overlapping, constantly fluid groups in a baffling variety of structures to each other and to the state<sup>119</sup>. Whilst this may be correct this definition of law seems to be so wide that it provides little assistance as an analytical tool. Indeed all of the definitions mentioned thus far have elements which help to either define law or to deal with a model of social structure. But they still do not adequately consider how an individual decides which norms are applicable to them and how members of different groups interact with one another. This is why the anthropological approach is so important in this area. As Benda-Beckman points out we do not have to prove to anyone 'that' it is there, the question is how do we get to grips with this complexity?<sup>120</sup> Woodman also states that the discussion of legal pluralism is

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<sup>116</sup> M.B.Hooker, *Legal Pluralism": An Introduction to Colonial and Neo-Colonial Laws* (Oxford University Press 1975) as cited by John Griffiths 'What is Legal Pluralism' (1986) 24 *Journal of Legal Pluralism and Unofficial Law*

<sup>117</sup> Leopold Pospisil, *The Anthropology of Law: A Comparative Theory of Law* (Harper Row 1971) as cited by John Griffiths 'What is Legal Pluralism' (1986) 24 *Journal of Legal Pluralism and Unofficial Law*

<sup>118</sup> M.G. Smith, *Corporations and Society: The Social Anthropology of Collective Action* (Duckworth 1975) as cited by John Griffiths 'What is Legal Pluralism' (1986) 24 *Journal of Legal Pluralism and Unofficial Law*

<sup>119</sup> Eugene Ehrlich, *Fundamental Principles of the Sociology of Law* (Cambridge Harvard University Press 1936) (translated by W.Moll) as cited by John Griffiths 'What is Legal Pluralism' (1986) 24 *Journal of Legal Pluralism and Unofficial Law*

<sup>120</sup> Franz von Benda-Beckman 'Who's afraid of Legal Pluralism' (2002) 47 *JLP & UL* 37

largely by lawyers whereas the analysis of the empirical investigations is largely by anthropologists<sup>121</sup>.

A recent and widely definition is Moore's concept of '*the semi-autonomous or self-regulating social field*' where she begins with the question of an '*appropriate field of observation*' for the study of law and change in a socially complex environment<sup>122</sup>. Like other pluralists, Moore rejects the notion that only the state can be the source of 'legal' rules. Griffiths agrees with Moore that legal pluralism is an attribute of a social field and not of law itself. He argues that law is the self-regulation of the semi-autonomous field. Within this field there is not one system in which law and legal institutions are subsumed. Rather they have their sources in self-regulatory activities which may support, complement, ignore or frustrate one another so that the law which is effective on the ground floor of society is the result of extremely complex, unpredictable patterns of competition, interaction, negotiation and the like.

Merry points out the advantage of using Moore's definition of a semi-autonomous field is that is not attached to a single social group and although rules and customs are generally internal, the social field is also vulnerable to rules and forces emanating from the larger world around it<sup>123</sup>. Merry's own definition of legal pluralism is very similar to Moore's in that she states it is a situation in which two or more legal systems co-exist in the same social field<sup>124</sup>.

Both Moore's and Merry's concepts allow for the interaction of different systems of legal norms and fit in well with the experiences of Muslims living in the UK. Specifically when considering the experience of British Muslim women who are navigating the breakdown of a relationship, that experience does not take place in a purely 'Islamic' or religious context. The multiple social fields cannot be

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<sup>121</sup> Gordon R Woodman, 'Ideological Combat and Social Observation Recent Debate About Legal Pluralism' (1998) 42 Journal Legal Pluralism and Unofficial Law 21

<sup>122</sup> Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) Law and Society Review 7:4

<sup>123</sup> Sally Engle Merry, 'Legal Pluralism' (1988) Law and Society Review 22:5

<sup>124</sup> Sally Engle Merry, n123

isolated from one another. Sometimes they operate in harmony, sometimes they clash and many times they are simply independent of one another.

This leads us to an important issue raised by Merry which is the difficulty of demarcation between normative orders that can or cannot be referred to as law. Tamanaha states that by having no agreed definition of law, we are on '*a slippery slope where all forms of social control amount to law so law loses any distinctive meaning*'<sup>125</sup>. He argues legal pluralists are left with the assertion that legal includes non-legal but not being able to come up with a definition of what that non-legal is. He goes as far as to question why refer to it as 'legal' pluralism when pluralists find it difficult to identify all the 'non-law' bits as law. This is a point of contention between Woodman and Tamanaha. Woodman takes the view that a strict demarcation in defining state and non-state law is not a necessary requirement for analysing social control, as all social control forms part of the analysis of legal pluralism<sup>126</sup>. He would assert that a precise, universal definition of law is not a prerequisite to social scientific research in this area. State law may contain features that are not so readily identifiable in non-state law, such as powers of enforceability, but as Woodman suggests, it is not a valid argument to insist that state law must be distinguished from non-state law, simply in order to differentiate state law<sup>127</sup>. Woodman argues that law covers a continuum which runs from the clearest form of state law through to the vaguest forms of social control and essentially he would use the term 'law' wherever it was convenient to do so and without privileging any particular type of law<sup>128</sup>.

Whilst I agree with this view I would add that this continuum is by no means straight or indeed indicative of any hierarchical structure placing state law always at the top. Although state law may have a special place because of its mechanisms to enforce itself, it does not necessarily have the same importance to each member of a society. Notwithstanding this, Woodman points out that

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<sup>125</sup> Brian Z Tamanaha, n115, 193

<sup>126</sup> Gordon R Woodman, 'Ideological Combat and Social Observation Recent Debate About Legal Pluralism' (1998) 42 *Journal Legal Pluralism and Unofficial Law* 21-59, 45

<sup>127</sup> Woodman n126, 45

<sup>128</sup> Woodman n126, 45

state law is given special status even by legal pluralists, particularly as studies of legal pluralism have invariably focused on the interaction of state law with one or more non-state laws. Little research has taken place on the interaction between two or more non-state laws. It may be that as there are different versions of Islamic law observed by different, but often interacting communities in the UK that there is room for research into the pluralism between non-state laws in this context. The difficulty here is that it is virtually impossible to study any group within society without considering the impact of state law, even if one wishes to focus the study on other aspects of non-state law. Inevitably the application of state law will have to be included. By its very nature, state law is applicable to every member of society and therefore the non-state law will either, conform, contradict or become inconsequential to the state law. Non-state law, to a lesser or greater extent, is moulded by state law and this is the experience of shari'a councils in the UK. They are affected by state law. I would, however, argue that this is a two way relationship where state law too is impacted by the non-state law interactions that take place and is capable of adapting to take account of non-state law<sup>129</sup>.

In addition, often state law can provide important mechanisms for checks and balances within non-state law. Members of a particular group may not wish to be bound by the non-state law of their group and the state can provide alternative methods of dispute resolution as well as ensuring non-state law maintains particular minimum values. Woodman points out whilst it may be arguable that there are no absolute rights, universal values may still exist and be maintained amid cultural diversity<sup>130</sup>. State law can provide those minimum universal values.

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<sup>129</sup> In Chapter 4, for example, I examine the doctrine of *mahr* and the manner in which English law has evaluated it. Another example also considered in Chapter 4 is the *nikaah* marriage ceremony.

<sup>130</sup> Gordon R Woodman, 'The Possibilities of Co-existence of Religious Laws with Other Laws' in Rubya Mehdi, Hanne Petersen, Erik Reenberg Sand, Gordon R Woodman (eds) in *Law and Religion in Multicultural Societies* (DJOF Publishing Copenhagen 2008)

Particular tensions do, however, arise where the non-state law contradicts state law but this is an issue to be explored in more detail later when examining the specifics of laws relating to marriage and divorce. For now, I make the argument that any study of non-state law has to consider the impact of state law because state law directly impacts on the ability of non-state law to operate at all. This supports my reasoning for my examination of Islamic laws of marriage and divorce together with English laws of marriage and divorce and further why the women interviewed were asked to compare their experiences. One can accept that state law does have a special status and still call oneself a legal pluralist wishing to promote a legally pluralistic society.

### **The relationship between legal pluralism and Muslim women as legal subjects**

In focussing my research on Muslim women, I recognise that the issue of autonomy has become a particularly sensitive topic. To what extent Muslim women make 'free choices' is an issue which has preoccupied many different factions within society, all of whom claim to speak on behalf of Muslim women. In order to understand why Muslim women make the choices that they do and to investigate the freedom with which those choices are made, we need to consider what 'laws' the women themselves feel bound by. Kleinhans and McDonald argue that, in an attempt to address the myriad of normative orders in which law's subjects participate, traditional discussions of legal pluralism avoid interrogating how individuals view themselves and the law<sup>131</sup>. They state that legal subjects are '*law inventing and not simply law abiding*', in that the subjects control the law as much as law controls subjects which ultimately requires a '*more intense scrutiny of the legal subject conceived as carrying a multiplicity of identities*'<sup>132</sup>. As pointed out by Manji articulating a feminine view of the legal world requires an engagement with legal pluralism and I would argue specifically an engagement with critical legal pluralism<sup>133</sup>. Both Manji<sup>134</sup> and Davies<sup>135</sup> agree that legal centralism relies upon a heteronormative and masculine conception of law.

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<sup>131</sup> Martha-Marie Kleinhans and Roderick A McDonald, 'What is *Critical* Legal Pluralism?' 12 Can. J.L. & Soc. 25 1997

<sup>132</sup> Marie-Kleinhans n131

<sup>133</sup> Ambreena S Manji, 'Imagining Women's 'Legal World': Towards a Feminist Theory of Legal Pluralism in Africa', *Social and Legal Studies* 1999 8:435

<sup>134</sup> Manji, n133

<sup>135</sup> Margaret Davies, 'The Ethos of Pluralism', 27 *Sydney Law Review* 87 2005

Indeed Manji argues that feminist legal theory, which is located within a '*dominant and phallogentric legal centralist paradigm, has hindered feminists' engagement with legal pluralism*'<sup>136</sup>. This theory of critical legal pluralism is very important when undertaking research which is trying to establish why Muslim women make the choices they do and the extent of the freedom they exercise in making those choices. Why would a Muslim woman agree to wear a face veil, or enter into a polygamous relationship or accept any restriction not imposed by state law?

In carrying out this investigation for Muslim women it is not simply a question of asking why. As Razack points out, whilst Muslim men have been the target of intense policing, Muslim women have been singled out as needing protection from their violent and hyper-patriarchal men<sup>137</sup>. So the extent to which women make a 'free' choice forms part of this investigation. Research into this question in any context requires an exploration of the complex relationship between law and gender, a topic scrutinised to a greater extent in the Western world than in the Islamic world. The argument I make here is that in the case of Muslim women insufficient weight has been given to the importance of religion or a relationship with God as a normative factor. Part of their legal agency as Muslim women is to access authorities that can provide them with religious guidance and rulings.

### **Gender Equality and Sameness/Difference Debate**

We now have a substantial body of literature in the West exploring the relationship of law, its legal institutions and gender, specifically of females. As summarised by Tucker, Western liberal thinkers base their arguments on concepts of equality, justice and fairness between men and women<sup>138</sup>. Decades of legislation have attempted not only to remove the outright discrimination between men and women but to root out the hidden inequalities that arise due to the evolution of law in a patriarchal society. Tucker states the task for liberals

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<sup>136</sup> Manji, n133

<sup>137</sup> Sherene Razack, 'Between a Rock and Hard Place: Canadian Muslim Women's Responses to Faith-Based Arbitration' in Rubya Mehdi, Hanne Petersen, Erik Reenberg Sand, Gordon R Woodman (eds) in *Law and Religion in Multicultural Societies* (DJOF Publishing Copenhagen 2008)

<sup>138</sup> Judith. E Tucker, 'Women, Family, and Gender in Islamic Law' (Cambridge University Press 2008)

and in particular feminists is 'to correct those aspects of law that belie the liberal promise of equality and freedom of choice by discriminating against women'<sup>139</sup>.

This has been identified as a debate between gender equality as an objective, as against the recognition of difference between the genders<sup>140</sup>. This is a debate of significance to Muslim women as it seeks to analyse their agency when confronted with the application of religious laws that appear to contradict gender equality. On the one hand Muslim women have endeavoured to assert their equality as human beings in what is perceived to be the same struggle that all women are engaged with. On the other, Muslim women have attempted to interpret God's commands in a manner which can provide them with meaning to their contemporary lived experiences even if those interpretations do not conform to claims for gender equality. The achievement of gender equality as an overall aim has been an overarching concept of most feminists' works, certainly that of Western feminism. It has been the bedrock for the interrogation of legal and societal norms especially in the area of family life<sup>141</sup>. It has formed the basis for introducing extensive legislative reforms and a failure to achieve gender equality in every aspect of women's lives is seen as a cause for the continued oppression of women. It is a key objective associated with secular, liberal, Western ideologies.

If the vision of equality is gender-neutral then it raises a number of concerns. Tucker gives the example how some feminist thinkers would shy away from treating pregnancy as different from any other disability in an effort to avoid what she terms as the opening of *Pandora's box of special treatment for women as women*<sup>142</sup>. Another difficulty is that the standard of gender neutral equality is very often based on male values, male experiences and male needs. As pointed

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<sup>139</sup> Tucker, n138

<sup>140</sup> In Prakash Shah *Legal Pluralism in Conflict Coping with Cultural Diversity in Law* (2005) Glass House Press, the author explores more generally the balance which the law seeks to achieve between equality and difference. Although Shah is not specifically referring to Muslim women as a category, his exploration demonstrates the multiple ways in which equality is challenged by minorities.

<sup>141</sup> See, for example, Carol Smart 'The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations' (first published 1984, Routledge, 2013)

<sup>142</sup> Tucker, n138

out by West the experience of being human differs for women and for men<sup>143</sup>. To simply ignore that difference and insist on a form of equality which is male gendered and represents male values is a form of injustice to women and marginalisation of their experiences.

As a result, Tucker explains, there has been an emergence of a 'woman centred' or 'essentialist' approach<sup>144</sup>. This approach fits in with the critical legal pluralist's view of legal pluralism that the female difference in both biology and in her experience of the world around her is given priority in understanding how a woman as a legal subject and in particular how a Muslim woman engages with the normative orders. This argument taken to its ultimate conclusion would advocate for laws for women to be based upon immutable characteristics possessed by women. Perhaps more importantly, a woman centred approach can also address why Muslim women engage with the multiple normative orders in the manner which they do<sup>145</sup>. Tucker states the implications for this are far reaching for both the law and its legal institutions but then adds some notes of caution<sup>146</sup>. The experiences of women are not homogenous, even within Muslim culture. They are affected by race, culture, class, knowledge of Islam and 'religiosity', family and societal pressures, education – a whole range of factors making the lived-in reality of one Muslim woman very different from that of another. In addition other critics have suggested a woman centred approach itself requires an acceptance that there is a known and agreed 'nature' of women (and by implication of men also).

In tracing the history of feminism by Muslims in the non-Western world Badran demonstrates the positive impact that notions of gender equality (and feminism

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<sup>143</sup> Robin West, 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory', *Wisconsin Women's Law Journal* 3, no.81 (1987):82 an example given is of a range of women's gender specific injuries which are not compensated or recognised as injuries by the legal culture.

<sup>144</sup> Tucker, n138

<sup>145</sup> In Debra Majeed, *Polygyny What it Means When African American Muslim Women Share Their Husbands* (University Press of Florida 2015) the author the agency of Black African American women engaged in polygynous marriages through the lens of 'womanism' (as coined by Alice Walker). This allowed Majeed to explore the women's choices as experienced by them in their own conditions of black womanhood whilst at the same time demonstrating a concern and commitment male members of a household as well as the females.

<sup>146</sup> Tucker, n138

more generally) have had on the lives of Muslim women<sup>147</sup>. Specific strands of 'Islamic feminism' have enabled Muslims to re-construe some Quranic verses and other religious texts so that they can be reconciled with claims for gender equality<sup>148</sup>. I will explore some of these in more detail in Chapters 4 and 5 when analysing specific verses on marriage and divorce. As Badran states there has been a plethora of Muslim women who have located their discourse on women within an egalitarian reading of Islamic texts<sup>149</sup>. Whilst the aim of achieving gender equality has become a mainstream and established ambition within Western nations it has been subjected to acute criticism from some Muslims.

There are those who reject the label of feminism and reject gender equality as the ultimate standard against which God's commands as they pertain to men and women should be measured. This does not mean that there is no desire for a liberatory reading of religious texts in order to understand a woman's relationship with God or her interactions within society and with men. But achieving gender equality should not be the only measure by which we calculate the success of Muslim women. Abu-Lughod, for example, demonstrates the limits of the human rights discourse when addressing the needs of Muslim women and the consequent limitations that this creates for Muslim women's agency<sup>150</sup>.

Similarly, Mahmood conceptualised pious Muslim women as creating '*modalities of agency*' through which they were able to create a transformative effect in social and political fields<sup>151</sup>. The women in Mahmood's study were concerned with *dawa'h* (proselytising) and their main concern was to submit to what they understood to be the Divine Will with little interest in achieving gender parity as an ultimate outcome. Mahmood argues for the uncoupling of the notion of agency from the political project of feminism in order to analyse the multiple

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<sup>147</sup> Margot Badran, 'Engaging Islamic Feminism' in Anitta Kynsilehto (ed), *Islamic Feminism: Current Perspectives* (Juvenes Print 2008)

<sup>148</sup> Badran n147, 28

<sup>149</sup> Badran n147, 30

<sup>150</sup> Lila Abu-Lughod, *Do Muslim Women Need Saving?* Harvard University Press (2013)

<sup>151</sup> Saba Mahmood, 'Politics of Piety The Islamic Revival and The Feminist Subject' (Princeton University Press 2012)

forms of agency that takes place in other modalities<sup>152</sup>. Her detailed exploration of the debates and exchanges between the women testify to forms of female empowerment and agency which lie outside of the liberal standards of gender equality<sup>153</sup>. An over reliance on gender equality fails to address the multiple narrations of Muslim women's experiences or objectives.

Another variance of approach which posits a challenge to the claim for absolute gender equality is to view differences between men and women as expressions of a complimentary relationship between the genders where aspects of the different roles, functions and biology of men and women can be accommodated. This has generated a significant body of work within general feminist discourse and as mentioned above by Tucker critics have argued can lead to essentialist notions of men and women. The sameness and difference debate is one which has split Western feminists and remains a challenge<sup>154</sup>. From an Islamic perspective contemporary Muslim scholars have used the sameness and difference debate as a prism through which to re-engage with Islamic texts in order demonstrate when and how Allah speaks to the believing men and women as equals and when, how and more importantly why He differentiates between genders. Muslims scholars have noted that for the most part the Quran speaks to men and women in egalitarian terms. Barlas in particular has been influential in her exposition of the general egalitarian manner in which men and women are addressed by God in the Quran but she refuses to be bound by a strictly feminist

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<sup>152</sup> Mahmood n151, 153-154

<sup>153</sup> Mahmood n151, there are many different debates, arguments and exchanges amongst the women of Mahmood's study which she sets out in detail in order to explore the different ways in which agency can emerge. For example, at 176-180 Mahmood narrates the struggles of Abir to transform herself from a non-religious Muslim to a diligent Muslim who performed the obligatory acts of worship and underwent training to proselytise Islam. Mahmood argues that Abir's strategies in her battles against her husband cannot be fully accommodated within the language of feminist discourse but rather must be analysed in terms of her aims which included the objective of achieving a greater level of piety.

<sup>154</sup> See, Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path beyond Essentialism in Feminist and Critical Race Theory* Duke Law Journal (1991) 296-323. Although this article is written in an American context and concerns the work of specific academics, at its heart the paper explores the challenges posed by the sameness/difference debate for women and minorities. Williams argues that the reformulation of this debate allows for distinguishing which differences matter in which contexts.

discourse when theorising alternative paradigms<sup>155</sup>. In Chapters 4 and 5 I will address some of the specific verses in the Quran that have caused tensions in this debate around gender equality as they overwhelmingly occur when addressing the rights and obligations within a marital setting. In Chapter 8 I will explore some of the limits of the gender equality debate and by extension the limits of the feminist discourse for Muslim women.

### Post-identity and Vulnerability

As an alternative to the equal protection analysis and discrimination-based models, a significant body of work is now emerging by Fineman who has proposed a theory of a vulnerable subject<sup>156</sup>. This is set out on a 'post identity' basis, to evaluate the entrenched privileges conferred on limited segments of the population, by the state through its institutions<sup>157</sup>. Fineman's theory concerns the interaction between the state and its subjects, and as shari'a councils currently operate in effect outside of the state, her theory does not fully apply. Fineman's definition of the state includes organised and official linked institutions that hold coercive power and the ability to make and enforce mandatory legal rules. Shari'a councils would *not* fall into that definition either although Fineman goes further in analysing how the state could be re-conceptualised to include within it any entity whose identity is legitimated by the state<sup>158</sup>. Her argument is that the state has a role in ensuring organisations operate equitably.

Notwithstanding any difficulties that there may be in identifying the state there are other aspects of her theory that may assist. Fineman supports the earlier comments of Tucker and others in identifying the inadequacies of adopting a

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<sup>155</sup> Asma Barlas, 'Believing Women in Islam Unreading Patriarchal Interpretations of the Qur'an' (University of Texas Press 2002). Further, Asma Barlas, Engaging Islamic Feminism: Provincializing Feminism as a Master Narrative in Anitta Kynsilehto (ed) *Islamic Feminism: Current Perspectives* (Tampere Peace Research Institute 2008) 15-24 in which she documents her own fractious relationship with feminism concluding that she resists the label of a feminist.

<sup>156</sup> Martha Albertson Fineman 'The Vulnerable Subject Anchoring Equality in the Human' Condition in Martha Albertson Fineman (ed) *Transcending the Boundaries of Law* (Routledge 2011)161-175

<sup>157</sup> Fineman n156, 161

<sup>158</sup> Fineman n156, 164 In the current climate it would seem that this is not a possibility as the government has made it clear it has no intentions of legitimating shari'a councils.

‘sameness of treatment’ approach<sup>159</sup>. Her thesis of vulnerability states that exploring the concept of vulnerability would encourage an examination of its hidden assumptions and biases that shaped its original social and cultural meaning<sup>160</sup>. Her concept of vulnerability identifies every human being as being vulnerable and dependant. Interestingly her concept of human frailty would find sympathy with Islamic notions of human dependency upon God as all human beings are vulnerable and in need of God. God is the only One without needs.

She goes on to explain that whilst all humans are vulnerable to the vicissitudes of life, on an individual level vulnerabilities are also specific and particular, creating unique experiences for each individual. As no human being can avoid vulnerability, it is societal institutions that provide assistance. In this way law is fashioned around a comprehensive vision of the human experience to meet the needs of real-life subjects<sup>161</sup>. Fineman’s answer to a vulnerable subject is for the state to assume a more active role in a non-authoritarian way which would empower vulnerable subjects.<sup>162</sup> This in my view is a very troubling conclusion as the state does not provide neutral intervention even where it is expanding its social welfare remit and I refer back to my discussions in Chapter 1 regarding the state-security prism through which Muslims are now often viewed by the state. Kohn argues Fineman’s theory adopts an unduly paternalistic position and has limitations<sup>163</sup>.

### **Muslim Women and Creating Legal Subjectivity**

Critical legal theorists would argue that legal subjects possess a transformative capacity so they have a responsibility to participate in the multiple normative communities by which they recognise and create their own legal subjectivity<sup>164</sup>. Muslim women are undoubtedly participating in multiple social fields. One can see from the range of Muslim women’s activism throughout Muslim majority countries and Western nations Muslim women do not behave as static receptors

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<sup>159</sup> Fineman n156, 162

<sup>160</sup> Fineman n156,166

<sup>161</sup> Fineman n156,167

<sup>162</sup> Fineman n156, 173

<sup>163</sup> Nina A.Kohn, ‘Vulnerability Theory and the Role of Government’ (2014) *Yale Journal of Law & Feminism* V26:1

<sup>164</sup> Martha-Marie Kleinhans and Roderick A McDonald, ‘What is *Critical* Legal Pluralism?’ 12 *Can. J.L. & Soc.* 25 1997

of law, they participate in shaping, negotiating and interacting with the law across multiple terrains<sup>165</sup>. Also they do not compartmentalise their experiences to each separate social field. For example, their religious beliefs will impact on their participation in public life and engagement with civil law. In this way they will be responsible for creating their own, and very often unique, legal subjectivity. Moreover, I would argue that in creating their own legal subjectivity, the normative legal orders applied by the women do not always carry the same weight in the multiple social fields in which they engage. For example, a Muslim woman may well give priority to Islamic law when it comes to decisions regarding the status of her marriage, so religious laws take priority in this context. But when it comes to disputes around finances, she may be more willing to prioritise civil law. That is not to say religion has no impact at all but the hierarchical order in which different normative orders are applied does not always stay the same in every context. Each individual thereby interacts with the normative orders from the different social fields in which they participate to create their own unique legal subjectivity.

### **The challenges for legal pluralism**

There are two extreme viewpoints about the desirability of recognising legal pluralism. On the one hand there is the view that everyone must abide by a single legal system. There is no room for plurality of laws whether in matters of a private or public law nature. One legal system must be applied in exactly the same manner, thus giving the impression of equality before the law. The opposing position is that legal and religious pluralism should be encouraged to enable genuine equality so that laws which allow a minority religious group to adopt their own personal codes and systems are given the same level of recognition as the laws of the majority.

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<sup>165</sup> See, for example, Dunya Mamoon, *Islamism and gender activism: Muslim women's quest for autonomy* (1999) *Journal of Muslim Minority Affairs* 19:2, 269-283 and more recently Lila Abu-Lughod, *The Active Social Life of "Muslim Women's Rights": A Plea for Ethnography, Not Polemic, With Cases from Egypt and Palestine* (2010) *Journal of Middle East Women's Studies* Volume 6:1, 1-45

Both arguments are said to promote concepts of justice, fairness and equality before the law<sup>166</sup>. A legal pluralist would argue that individuals benefit from being part of a group and as such the practices and norms of that group should be given legal recognition. This is how a civilised society achieves justice and equality for its subjects. As against legal pluralism is the assumption that one set of laws must have supremacy over all other legal systems and it is unjust to allow an individual access to an inferior set of laws. All members of a society must have equal access to the same set of 'supreme' laws<sup>167</sup>. Additionally it may be argued that state law is the best way of achieving justice because it is based on democratic processes and is the best guarantor of social stability.

Once we begin to define and understand what is meant by legal pluralism we can begin the task of considering the practical reality of appropriate models of accommodation. Malik has used the term minority legal order ('MLO') to define a recognisable set of cultural or religious norms which contain some systematic features enabling a distinct institutional system to be defined, even if there is internal plurality within those norms<sup>168</sup>. Malik presents a number of possible state responses to a MLO ranging from prohibition, to non-interference and in between various levels of recognition up to what she refers to as 'mainstreaming' whereby the state actively endorses or adopts the norms of the MLO. In all cases the state retains its sovereignty as a final arbiter and holder of political power. Malik includes in her models Shacher's joint and transformative accommodation approaches.

Douglas et al suggest there are three models of legal approaches to religious diversity.<sup>169</sup> A 'personal law' system which is described as 'classic legal pluralist system' in which each of the recognised religious groups has equal standing and

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<sup>166</sup> See Gordon R Woodman, 'Legal Pluralism and the Search for Justice, Studying People's Search for Justice' (1996) JAL Vol 40, 2. 152-167

<sup>167</sup> See Woodman n166, Although Woodman is discussing legal pluralism in the context of African societies the arguments for and against legal plurality are equally applicable.

<sup>168</sup> Maleiha Malik, 'Minority Legal Orders in the UK Minorities, Pluralism and the Law' (The British Academy 2012) 23-24. Her definition would include Muslims as a minority diaspora.

<sup>169</sup> Gillian Douglas with Norman Doe, Russell Sandberg, Sophie Gillat-Ray and Asma Khan 'Accommodating Religious Divorce in the Secular State: A Case Analysis' in Mavis Maclean and John Eeklaar (eds) 'Managing Family Justice in Diverse Societies' (Hart Publishing 2013) 187-190.

people are governed in accordance with the religion they profess to hold. A 'cohabitation model' whereby state law ignores the religious meaning of an activity and instead applies the civil law equivalent. The religious system runs in parallel to state law thereby creating a sense of cohabitation and state law simply tolerates the religious practices of a group. The third model is the 'integration model' as distinct from assimilation (as assimilation requires loss of minority identity in order to conform) requiring amalgamation of minority practices into the existing community<sup>170</sup>. The three models share similarities with some of Malik's methods of accommodation.

Both Malik and Douglas et al identify examples whereby the state has adopted a mixture of the different models. Douglas et al suggest that at present English law follows both the cohabitation model and the integration model depending upon the specific act which is being considered<sup>171</sup>. The same act can give rise to differing models depending on the exact nature of the way in the act has been performed and marriage is a good example of this<sup>172</sup>. This indicates that English law has a very ad hoc approach to legal pluralism. There is no holistic policy to decide how minorities are to be legally accommodated and instead laws are enacted as and when an issue arises<sup>173</sup>. Menski states that Muslims have been demanding Shari'a law in their personal matters since the 1970s. As governments have refused to take up the challenge English judges have increasingly had to make decisions for which they do not have the skill or expertise. The state's approach in attempting to address issues as and when they arise, rather than engaging in a holistic manner on the issue of legal pluralism,

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<sup>170</sup> For a range of other pluralistic legal models see the literature of Werner Menski and Gordon R Woodman.

<sup>171</sup> Gillian Douglas et al, n169

<sup>172</sup> Douglas et al use of marriage demonstrates the different models that are currently adopted by English law. *Nikah* can be seen as an example of the cohabitation model. In most cases a *nikah* alone will not be recognised as a valid marriage by English law but neither is a Muslim prevented from entering into such an arrangement. It is a similar case for a religious divorce. A religious marriage which also fulfils the requirements of English law would fall within an integrations model as the religious rites have been absorbed into the English legal system.

<sup>173</sup> An example of an issue that has received wide media and academic examination is the wearing of the *niqaab* by Muslim women. This single issue has prompted wide-ranging discussions about the cultural and legal accommodation of Muslims. For a detailed analysis of the *niqaab* debates throughout Europe see Anastasia Vakulenko, 'Islamic Veiling in Legal Discourse' (Routledge 2012)

gives rise to greater tensions and potential for conflict. Indeed it requires individuals to make choices as to which laws they are going to follow when they perceive contradictions between state law and their religious norms.

Some of the key concerns around any type of accommodation of a MLO have hinged on the debates around women as minorities within minorities and their consequent lack of power to effect change or to exit oppressive practices. Additionally, the pressure to conform to religious or cultural practices rather than access state mechanisms<sup>174</sup>, the increased privatisation of family law without the necessary safeguards for women's vulnerabilities<sup>175</sup> and the lack of appetite within Muslim minorities to promote gender equality all lead to the conclusion that rather than accommodating a MLO the state should be actively prohibiting them. Some of these concerns have been addressed earlier in this chapter.

Despite raising many of these concerns herself it is interesting to note that Okin concludes by stating that '*Unless women....are fully represented in negotiations about group rights, their interests may be harmed rather than promoted by the granting of such rights*'<sup>176</sup>. Her conclusion does not rule out accommodation but rather requires the fully supported participation of women. For Muslim women I would suggest this includes engagement at every level of the debate, in negotiations with the state, participation in the shari'a councils themselves and in the Islamic scholarly debates on matters of internal plurality. As explored in the first part of this chapter we now have a significant body of work representing the voices of Muslim women that attests to a continued demand for religious rulings<sup>177</sup>. Similarly, when considering Diduck's concerns around the promotion of autonomy in ADR processes and whilst acknowledging that risks and vulnerabilities must be taken seriously, the question to ask is whether the

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<sup>174</sup> Patel n71

<sup>175</sup> See, Alison Diduck, 'Autonomy and Family Justice' 28 *Children & Fam. Law Quarterly* 133 (2016)

<sup>176</sup> Susan Moller Okin *Is Multiculturalism Bad for Women?* (Princeton University Press 1999) 24

<sup>177</sup> Although I fully accept that there are multiple voices of Muslim women and that not all Muslim women desire religious rulings, the point made is that a significant body of Muslim women do wish to have access to an authority that can provide a religious ruling and/or religious arbitration in a family dispute.

removal or reduction of autonomy is the appropriate response? The implication is that autonomy ought to be replaced with state solutions in every dispute. Is it not more appropriate that women are sufficiently informed and empowered to exercise their agency? Mahmood's work has been very important in this regard in examining how the agency of religious women can take forms that feminist discourses are simply not equipped to address<sup>178</sup>. An informed and empowered position for a Muslim woman includes her desire to live in accordance with her faith even if that does not conform to ideals of gender equality. At the same time internal pluralism needs to be supported to ensure that where difference between genders is promoted as a religious interpretation of the textual sources that this comes from a desire to seek the truth of what God wants from Muslim men and women living in Britain today. Malik suggests a threshold test of 'significant harm' to provide a guide for when state intervention is appropriate in a MLO as this test can incorporate a wide range of cultural and religious practices<sup>179</sup>.

Shachar suggests an approach of joint governance<sup>180</sup>. Although she presents variant models of joint governance the one that is the most appropriate to explore in this context is transformative accommodation<sup>181</sup>. Shachar suggests a regulated interaction between religious and secular sources of law with a baseline of citizenship-guaranteed rights<sup>182</sup>. She views the negotiation between the state and a 'group' as an opportunity for all interested actors to become more responsive to one another's needs rather than a cause for conflict. Such an approach recognises the multiple affiliations of individuals and coheres with the types of legal pluralism discussed earlier in this chapter. The key aim of

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<sup>178</sup> Mahmood n151

<sup>179</sup> Malik n168, 30 To help determine what is meant by significant harm in different circumstances requires the input of Muslim men and women so that the threshold does not end up becoming a blunt instrument requiring Muslims exit religious norms in order to secure state protection.

<sup>180</sup> Ayelet Shachar, *Multicultural Jurisdictions Cultural Differences and Women's Rights* (Cambridge University Press) 2001

<sup>181</sup> Shachar herself critiques the disadvantages of the other models suggested by her.

<sup>182</sup> Ayelet Shachar, 'Privatising Diversity: A Cautionary Tale from Religious Arbitration in Family Law' in Marie A. Failinger, Elizabeth R. Schiltz & Susan J. Stabile (eds) *Feminism, Law, and Religion* (Ashgate Publishing Limited 2013)

transformative accommodation is the continued dissemination of power<sup>183</sup>. Through negotiations with the state agreed areas can be delineated to provide a choice of options and the creation of a healthy type of competition between those options. Healthy competition also leads to internal dialogues, transformations and accountability. This type of holistic approach has not been undertaken by the state or Muslims. Indeed it has been in the interests of both shari'a councils and the state to keep an accepted distance from one another. Shari'a councils have repeatedly made it clear they are not seeking state accommodation and the state has made it clear it is not taking any steps which may be perceived to legitimise 'sharia' in any way. By undertaking a process of negotiation this will require public recognition of another. If we take the example of marriage; here there is an opportunity for the state to relieve itself of the burden of determining when a valid marriage has been entered into. Instead the state need only concern itself with those issues that impact on safeguarding or causing significant harm. Muslims themselves are given the legal power to determine when they are married. The exact terms and extent of authority for each party is a matter of continued negotiation and refinement but approaching the relationship between the state and its subjects in this way allows for Muslims to interact as both citizens and Muslims.

The accommodation of religious minorities has to come from an acceptance of legal pluralism. There has to be a recognition that people who follow a particular religion are going to feel themselves bound by 'laws' that are not emanating from the state and as a result may want some, if not all, of their disputes resolved in a manner which conforms with their religious beliefs. There is therefore a huge potential for shari'a councils to provide an important place to address certain issues that require a religious ruling. For Muslims this also means that they are cognisant of the fact that they are not the only minority group to occupy this space. Building on the works of academics such as Kymlicka<sup>184</sup> and Modood<sup>185</sup> it is essential for Muslims to support the common political interest of other

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<sup>183</sup> Shachar n180, 119

<sup>184</sup> Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford Scholarship Online 2003)

<sup>185</sup> Tariq Modood, *Multiculturalism* (second edition Polity Press 2013)

minorities in engaging with the state. At the same time one can appreciate that there is no single formula that can work for all group interests or indeed for all types of issues.

In the next Chapters I explore the specifics of Islamic law as it applies to Muslims, especially how British Muslims apply it to themselves. English law can only consider the accommodation of a religious minority if it can understand how that religious minority applies laws to itself.

## Chapter 3 – Islamic Law, Morality and its Sources

### Introduction

In this chapter I consider a number of aspects of Islamic law and its sources. Islamic jurisprudence identifies the sources of law, how law is derived from them, and how it is then applied. The word 'shari'a' has meanings and connotations ascribed to it which I will consider before making use of it later in this chapter. In the first part of this chapter I will explore some aspects of Muslim belief: the relationship between a believer and God and the belief in an afterlife. These are important because they have an impact on choices made by Muslims and, more specifically, Muslim women.

I will also explore some of the institutions and personnel in their application of Islamic law. Historically the method of adjudication and the manner in which Muslims obtain rulings is through the use *fatawa*, (opinion of a scholar) and where there is a dispute going to a *qadi* (a judge). This method still has a strong influence on the way in which Muslims in contemporary societies make decisions in their day to day matters even when they use modern means to do so. Such an investigation will help to understand the institutions shari'a councils are effectively attempting to replicate in a British context. I argue that shari'a councils offer a type of amalgamation of these historical institutions, method of dispute resolution and personnel. Whether they are successful in so doing or an appropriate response to the needs of Muslim women are separate issues.

I then examine some of the sources of Islamic law, the most obvious and important of which are the Quran and Sunnah. I examine the manner in which these sources are used to interpret how Islamic law is applied to Muslims and some of the controversies regarding the sources. In a final section to this chapter I briefly examine the historical role of Muslim women as scholars of Islam. This is important to my thesis because I argue that Muslim women need to play a much greater role in shari'a councils. Historically Muslim women have played a

significant role in Islamic scholarship which has not always been adequately recognised.

### **The relationship between human beings and God**

In this thesis I use the word God and Allah interchangeably to refer to the same one Supreme Being. Muslims believe God is the Creator of the universe and everything it contains. God is not only the Creator, but also the Sustainer, Ruler and Judge of the entire universe<sup>1</sup>. God has many attributes including that He is All-Knowing and All-Wise<sup>2</sup>. Human beings are the most noble of His creations and He has gifted humans with intellect and reasoning. However, as with everything that God has blessed us with, we must use our intellect and reasoning in order to fulfil God's commands and to understand what our purpose in this life is. One of the most quoted verses in the Quran identifies the purpose of human creation:

*'And I did not create the jinn and mankind except to worship Me' <sup>3</sup>.*

Included in the worship of God are not only the acts of worship such as prayer, fasting, making the hajj pilgrimage and paying of zakat<sup>4</sup> but also leading a life of justice, piety and fairness. Worship of God is therefore a much wider concept than the ritual acts of Islam and includes doing all of those things God commands and staying away from all those things that He forbids. Thus it includes every aspect of a Muslim's life.

Worshipping God includes paying attention to the spiritual nature of the human being, as great emphasis is placed on the purification of the heart and ridding it of the evil natural desires that lead mankind to commit sins against themselves,

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<sup>1</sup> John.L.Esposito, *What Everyone Needs to Know About Islam* (Oxford University Press 2011) 5

<sup>2</sup> The Quran 2:32 is an example of a verse where Allah describes Himself as All-Knowing and All-Wise.

<sup>3</sup> The Quran 51:56. Also note the word jinn refers to the creation of God that are mentioned in numerous parts of the Quran. They are an intelligent life form made of smokeless fire and of lower rank than human beings and angels. They inhabit the earth but are not generally visible to human beings. However they do have powers and there are some who will try to lead mankind astray. These are evil jinn and their leader is Satan, who himself is also a jinn.

<sup>4</sup> Zakat is the obligatory charitable tax payable by every Muslim on their wealth which is above a minimum amount. The minimum amount is set according to the type of wealth which is being considered. The amount to be paid can also vary but generally is said to be 2.5% for most types of wealth.

one another and God. The concept of purification<sup>5</sup> of the heart is a central theme of Islam and many entire classical scholarly works have been dedicated to its importance and to the identification of practical steps on how to achieve it<sup>6</sup>. The principle of the oneness of God is known as *tawheed* in Arabic. Ali states this is the single most important concept associated within Islam and its opposite, associating partners with God and known as *shirk*, is the gravest of all sins<sup>7</sup>. To associate partners with God is to give another entity, human or otherwise, the attributes that singularly belong to God alone. All acts of worship must be carried out with the intention that they are undertaken for the one true God and not for any worldly gain. It is a matter for God to accept or reject the sincerity with which an act of worship is performed as He alone is able to judge the hearts of human beings<sup>8</sup>.

### The aim of a Muslim – to enter paradise and avoid the hellfire

The ultimate aim of a Muslim is to attain God's pleasure, to have good deeds accepted by God, such that on the Day of Judgment God in His infinite Mercy will forgive that Muslim for his sins and enter that person into paradise. God says that He has sent Messengers and books of revelation to all nations in order to

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<sup>5</sup> Purification simply means cleansing the heart from all impurities that tempt one to sin. It is the heart which determines one's true belief in God and His right alone to be worshipped.

<sup>6</sup> As an example of a popular contemporary text on the topic of purification of the heart is Hamza Yusuf, *Purification of the Heart Signs, Symptoms and Cures of the Spiritual Diseases of the Heart. Translation & Commentary of Imam Al-Mawlid's Matharat Al-Qulub* (Starlatch Press, US 2004). Also in The Quran at 26: 88 & 89 Allah says that on the Day of Judgement that nothing will be of benefit to human beings except those that come to Allah with a sound heart.

<sup>7</sup> Kecia Ali and Oliver Leaman, *Islam The Key Concepts* (2008, Routledge) 143

<sup>8</sup> A well-known hadith which is often cited as one of the proofs for the importance of having a sincere intention is narrated by Umar bin Al Khattab in which he says *'I heard the Messenger of Allah say: All actions are by their intentions and every man will have that which he intended. Whoever migrates for Allah and His Messenger, the migration will be for the sake of Allah and His Messenger. And whoever migrates for a worldly gain or to marry a woman, then his migration will be for the sake of whatever he migrated.* This hadith is contained in Bukhari at no 54 and in Sahih Muslim at no 1907. Bukhari and Sahih Muslim are the two most well-known and established collections of *hadith*. They are relied upon by Muslims as providing authentic *ahadith* regarding the sayings and actions of the Prophet. This *hadith* alone has had extensive commentary on the importance of having sincere and pure intentions in ones actions. The meaning of this *hadith* is that whatever act an individual undertakes, the reward for it will depend on that individual's intention and only God knows what is the true intention.

guide mankind to their correct purpose in life and the final Messenger is the Prophet Mohammed and the final book of revelation is the Quran<sup>9</sup>.

The striving for completeness of faith is an important concept in Islam. Muslims understand their entire lives to be a struggle to live within the bounds that God has ordained and to stay away from the temptations of Satan. Belief in a Day of Judgment and believing in paradise and hellfire have great significance for the Muslim mind-set. Haleem discusses the themes of life and beyond and paradise as two separate but connected themes that life in this world is an inseparable part of the continuum of life, death and life again, giving our lives context and relevance<sup>10</sup>. True success in this life is only realised upon death when an individual finds out where their final abode is<sup>11</sup>. Haleem notes that on almost every single page of the Quran, there is reference to one aspect or another of the afterlife, whether direct or indirect<sup>12</sup>. Belief in the afterlife is very often connected directly with one's belief in God as the expression 'If you believe in God and the Last Day' is used by God in the Quran as a method to distinguish between those who truly believe and those who do not<sup>13</sup>. Belief in God requires a belief in a Day of Judgment<sup>14</sup>.

In considering Muslim women's choices and agency this religious dimension should not be underestimated. They may appear alien not only to an increasingly secular society at large<sup>15</sup> but to the legal system itself that which continues its attempts to separate law from religion. Haleem explains '*life in this world*,

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<sup>9</sup> The Quran, 10:47 '*And for every nation is a messenger. So when the messenger comes, it will be judged between them in justice and they will not be wronged*'. There are other verses in the Quran which similarly identify previous messengers.

<sup>10</sup> Muahmmad Abdel Haleem, *Understanding the Quran Themes and Styles* (first printed 2011, I.B.Tauras 2014) 84-109

<sup>11</sup> The Quran 3:185

<sup>12</sup> Haleem, n10, 84

<sup>13</sup> The Quran 4:59 is an example where this expression is used to identify how the believers should behave when they have a disagreement.

<sup>14</sup> Belief in the Day of Judgment is one of the 6 pillars of faith, see, Vincent J. Cornell, 'Fruit of the Tree of Knowledge The Relationship Between Faith and Practice in Islam' John L. Esposito (ed), *The Oxford History of Islam* (Oxford University Press 1999) 63-105, 88

<sup>15</sup> From the 2011 census we know that there has been an increase in those who identify themselves as having no religion, from 14.8 per cent of the population to 25.1 per cent.

*through its connection to the afterlife has much more significance [for Muslims] than it would otherwise have*<sup>16</sup>.

Shah-Kazemi's research highlights how the women ranked the religious determination of a marriage above any civil adjudication<sup>17</sup>. She states that religious *divorce assumed a logical concomitant of the strength of the women's religious identity and practice*<sup>18</sup>. This was evident in the many cases of strongly motivated religious women who appealed in emotional [and religious] terms to the shari'a council in '*contrast to the perfunctory manner of their civil divorce petitions*<sup>19</sup>. Thus women applying to a religious tribunal are more likely to frame their application in religious terms. That is not to say that it is only the religious dimension which determines Muslims' behaviour or that it has the same impact for all Muslims, or even that these beliefs are not influenced by other factors. But it may be said that it is a core aspect of the Muslim belief system that actions in this life have consequences in the next life.

Belief in an eternal existence after death, the abode of which is to be determined by God, based on their actions has two key implications for Muslims. First, Muslims may make what appear to make 'sacrifices' in the belief that they will be rewarded<sup>20</sup>. Belief in the Day of Judgment provides Muslims with an incentive to stay within the bounds of Islam. Going outside of God's laws is seen as a temporary enjoyment in this life for which there is the possibility of punishment in the next<sup>21</sup>.

More importantly, the second implication is that one who is able to determine and articulate what God actually means on any specific issue is in a very

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<sup>16</sup> Haleem, n10, 93

<sup>17</sup> Sonia Nurin Shah-Kazemi *Untying the Knot Muslim Women, Divorce and the Shariah* (The Signal Press 2001)

<http://www.nuffieldfoundation.org/sites/default/files/files/Untying%20the%20Knot.pdf>  
accessed 24 May 2017

<sup>18</sup> Shah-Kazemi n17, 48

<sup>19</sup> Shah-Kazemi n17, 48

<sup>20</sup> For example, the prohibition of drinking of alcohol. The Quran 2:219 forbids alcohol even though there may be some benefit in it. Muslims abstention from drinking alcohol is in the belief that God will reward them for this sacrifice.

<sup>21</sup> The Quran 57:20, in which God tells mankind that the life of this world is a temporary enjoyment. This is a recurrent theme within the Quran.

powerful position. Such issues include: what are the boundaries within which Muslims must abide in relation to a particular issue? What is the correct Islamic ruling and how is it derived? Where there is a dispute, who is adjudged to be 'wrong' or 'right' from an Islamic perspective, and what are the implications for the eternal salvation of the 'wrongdoer'? One cannot underestimate the power of someone in a position of authority who can declare that a particular course of action is something to accept in this life in order to attain eventual paradise in the next. It may appear that historically legitimacy and authority to extrapolate what God means on any matter is a function of male jurists. Women, it seems, have either been excluded or their inclusion has not been documented. Later in this chapter I will criticise these assertions and I will argue that not only is the extrapolation of the Divine Will a gender neutral act but there is an emerging body of evidence pointing to the involvement of females in Islamic scholarship from the very outset.

### Categorisation of all acts

All acts and deeds have been divided by jurists into five well known categories of obligatory (*wajib* or *fard*), preferred (*mandoub*), permissible (*mubah*), disliked (*makrouh*) and forbidden (*haraam*)<sup>22</sup>. This categorisation is used in the everyday acts of an individual as well as in legal rulings. When a Muslim enquires whether a particular action is permissible such as, eating a particular food, travelling to a particular destination, marrying a particular woman or divorcing in a specific way, the response of the decision maker will involve the categorisation of the act into one of those five categories. So, for example, if I were to ask if it is permissible for me to eat oysters; the response that I receive may well provide me with a wealth of evidence and opinions of different schools of thought, of differing opinions of classical jurists, or of analogies with other types of similar seafood. But ultimately the decision maker will need to tell me if my eating of oysters is an obligatory act, a preferred act, a permissible act, a disliked act or a completely forbidden act. As well as the above, the decision

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<sup>22</sup> Although this categorisation comes from an *hadith* that is known to have some weaknesses, nevertheless the categorisations have been well established by classical and modern jurists.

maker may also take into account my personal circumstances and customary behaviour in order to give a response that is specific to my circumstances.

The categorisation of the act is important. If an act is obligatory failure to perform it is punishable either in this life or in the next, or both. For example, it is obligatory for a sane, adult Muslim to pray five times a day with very few exceptions. So a failure to pray the obligatory prayers may be a cause for a person to be entered into the hellfire in the next life<sup>23</sup>. Similarly, carrying out a forbidden act, such as drinking of alcohol may be punishable in this life and the next unless repentance is sought<sup>24</sup>.

The categories of preferred and disliked are similarly reciprocal. To undertake a preferred act and to abstain from a disliked act are both rewardable actions. So, for example, drinking water from the zamzam well when a Muslim is on the hajj pilgrimage is a preferred act for which God will reward that Muslim, provided of course it is done with the correct intention<sup>25</sup>. Also, because the wasting of water is a disliked act, a Muslim who performs a ritual ablution without wasting water will be rewarded by God<sup>26</sup>.

The middle category of permissible acts carries neither a reward for doing the act nor a punishment for not doing it<sup>27</sup>. Going on a journey, driving a car, eating food are examples of acts which are permissible but carry no reward for doing them, nor any sanction for refraining from them. Two points need to be made,

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<sup>23</sup> The Quran, 74:42-43, where the people of paradise will ask the people of the hellfire what led them to enter the hellfire and the first reason that they will give is because they were not of those who prayed.

<sup>24</sup> The punishment for drinking alcohol as identified by various ahadeeth, ranges from forty to eighty lashes. There are certain forbidden acts which have no punishment prescribed in this life and the only punishment is in the next life such as '*riba*' which is normally translated as 'interest' or 'usury'. *Riba* is forbidden in very harsh terms in the Quran but no punishment is set out for it in this life and the punishments for it are entirely in the next life. The Quran 2:278-279, where God declares war against the one who refuses to give up *riba*.

<sup>25</sup> The zamzam well is located in Makkah and water from the well is considered by Muslims to be holy water.

<sup>26</sup> Not doing the preferred act or the doing of a disliked act is not in of itself sinful and punishable by God. However, some scholars take the view that repeatedly doing a disliked act may amount to a minor sin, as it demonstrates a reckless disregard for God's commandments.

<sup>27</sup> Vincent J. Cornell, 'Fruit of the Tree of Knowledge The Relationship Between Faith and Practice in Islam' John L. Esposito (ed), *The Oxford History of Islam* (Oxford University Press 1999) 63-105, 93

however. First a permissible act can become rewardable if the conscious intention of the doer is to please God. So going on a journey in order to educate oneself about Islam can turn a permissible act into a rewardable one as it brings about God consciousness in everyday life, referred to as *tawwakul*. So a Muslim's entire life and all actions within it become a form of worship of God. All Muslims are encouraged to strive for this *tawwakul* so that at all times there is an awareness of God's presence in every act and thought. Since God has said that life is for no other purpose than to worship Him, the more an individual can incorporate God into everyday life, the more it will be a fulfilment of that purpose. However, often *tawwakul* does not require a Muslim to *act* in any way different from that individual's normal day to day activities. What is required is an acknowledgement of God's presence and watchfulness over all acts and thoughts.

The second point is that the majority of actions a Muslim will perform fall into the category of permissibility. Most actions that are not specified as obligatory acts of worship<sup>28</sup> are permissible unless there is evidence to the contrary<sup>29</sup>. This presumption of permissibility is given by God in the Quran as He states He has created this earth and everything in it for human beings<sup>30</sup>. This presumption is accepted by classical and modern scholars of Islam and there is little dispute regarding it. The disputes and differences between scholars occur when considering specific acts and deciding upon the category into which a particular act fits<sup>31</sup>. Kamali makes the point that acts which fall within the middle categories are non-justiciable and it is only the two extremes of forbidden and obligatory which are legal categories<sup>32</sup>. Even within the extremes, acts

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<sup>28</sup> Specified obligatory acts of worship are matters such as prayers, fasting, pilgrimage etc. Specific acts of worship are subject to their own rules.

<sup>29</sup> Whilst this is the starting point for most actions there are three exceptions, that is, there are three areas where the reverse is applied. In those cases it is presumed that the action is not permissible unless evidence to the contrary is brought forward. The three exceptions are in the eating of meat where it is presumed all animals are unlawful to eat unless you find evidence that they are permissible, the intimacy of a relationship between a man and a woman unless they have an Islamic marriage ceremony and the taking of another's wealth unless permission has been granted.

<sup>30</sup> The Quran, 2:29

<sup>31</sup> For a more detailed discussions regard the categorisation of acts see Cornell n27, 92-94

<sup>32</sup> Mohammad Hashim Kamali, 'Law and Society The Interplay of Revelation and Reason in the Shariah', John L Esposito (ed) in *The Oxford History of Islam* (Oxford University Press 1999) 134

considered to be rights of God (such as prayer, fasting etc) are not normally justiciable in themselves whereas rights that human beings may have towards another can be made subjects of judicial orders<sup>33</sup>.

If the purpose of life for a Muslim is to worship God and that worship entails leading a life which pleases God, then a Muslim needs to know how to please God. Where are the sources for determining this, and who has the authority to decide in which category an act falls? For example, a Muslim woman may want to know can she marry without her father's permission. Can she divorce her husband? Can she keep the children living with her after a divorce? Can she keep the jewellery that is in her possession? These are not just matters of law or morality for her. When she asks these questions, what she is really asking is: what does God says about these things? No doubt culture, customs, societal and family expectations and pressures all have a large part to play in this but the questions themselves and the responses to them are framed in terms of trying to understand what is in reality God's response.

For a Muslim, it *may* be less important whether the classification of an act into one of the categories seems 'fair', 'reasonable' or even 'logical'; rather it is whether the response is genuinely God's judgement on the matter. A Muslim woman who asks these questions, or indeed any Muslim who is asking about the permissibility or otherwise of an act, is more likely to accept the response if it is believed to be the genuine response of God. But as Abou El Fadl states this leads us on to the question of who speaks for God<sup>34</sup>. Who has the authority and legitimacy to respond to these questions and what sources do they turn to in order to obtain the answers?

It is relevant to the present work that, as explained by Coulson, family law is regarded as a particularly integral and vital part of religious duties<sup>35</sup>. In tracing

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<sup>33</sup> Kamali, n32 134-135

<sup>34</sup> Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oneworld Publications 2010)

<sup>35</sup> N.J.Coulson *A History of Islamic Law* (Edinburgh University Print first printed 1964, reprinted 2007) 147

the early history of Islamic law, Coulson states that other spheres of law such as criminal or contract law have been adapted to take into account political interests or commercial realities, whereas deviations in family law are not recognised as legitimate expressions of Islam. Indeed he states that family law is the stronghold of the shari'a since allowing Western laws to influence other aspects such as criminal or contract law has resulted in a stronger emphasis on Islamic law and religious obligations in family law<sup>36</sup>. In effect, this counters the secularisation of the other areas of law. Similarly Poulter argues that Islamic family law is seen as especially worthy of being preserved when other aspects of the shari'a have been discarded for Western models<sup>37</sup>. Black and Sadiq also argue that family law remains central to identity and belonging<sup>38</sup>. Furthermore, the family is the area where we see the clearest demarcation drawn between men and women and the gendering of roles. This will be seen in more detail when marriage and divorce laws are considered in Chapters 4 and 5.

### Islamic morality and Islamic law

In Islam there is no clear distinction drawn between Islamic morality and law. Neither the Quran nor the *sunnah* of the Prophet make this distinction. Indeed Kamali says it is questionable whether Islam was meant to be as much of a law-based religion as it has often been made out to be and argues that there is a tendency to over-legalise Islam in the writings of both Muslims and Orientalists<sup>39</sup>. He explains that Islam is a faith and a moral code first and foremost and the following of a legal code is subsidiary to the original message of Islam. Supporting Kamali's view Coulson notes that the Quran contains no more than approximately eighty verses that deal with legal topics in the strict sense<sup>40</sup>.

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<sup>36</sup> N.J.Coulson, n35, 161

<sup>37</sup> Sebastian M Poulter, 'The Claim to a Separate Islamic System of Personal Law for British Muslims' in Chibli Mallat and Jane Connors (eds), *Islamic Family Law* (Graham & Trotman 1990) 147.

<sup>38</sup> Ann Black and Kerrie Sadiq, 'Good and Bad Sharia: Australia's Mixed Response to Islamic Law' [2011] UNSW Law Journal 34(1), 383-412, 396. In this paper Black and Sadiq contrast the acceptance of Islamic banking and matters of a fiscal nature into Western models with the resistance and fear associated with Islamic family law. Although their discussions are primarily concerned with an Australian context, their analysis is equally applicable to a British context.

<sup>39</sup> Mohammad Hashim Kamali, *Shari'a Law An Introduction* (Oneworld Publications 2008) 1

<sup>40</sup> Coulson n35, 12

At a practical level for Muslims and especially for those living in a non-Muslim jurisdiction the distinction between what is termed law and what is considered rules of private behaviour may not be of any great significance since the vital issue regarding any act is whether God permits it. The sources determining the validity of the act and its categorisation (whether obligatory, permissible etc) are the same whether it is an issue of general behaviour or of 'law'<sup>41</sup>.

For Muslims it can become very difficult to distinguish between the legal and non-legal supporting Kamali's earlier contention to over-legalise. In Western models the sources used to determine the application of law are only used for that which is understood to be 'law'. Legal commentators, judges and decision makers are not expected to provide rulings on behaviour which does not contravene positivist law. Whilst there have been concerns about Western societies becoming subject to increasing levels of positive law, that is, law emanating from the state and its institutions, there remains a clear understanding and commitment to the principle that individuals have the right to a private life, free from legal intervention<sup>42</sup>. There is no such separation in Islam when considering God's authority over human beings. There is recognition of public and private spaces and individuals have rights of privacy as against one another, but the Quran tells mankind that God watches over everything you do<sup>43</sup>. This does not translate into human beings watching over each other but it does mean that Muslims will seek Islamic 'rulings' on the minutiae of their lives.

This overlap between Islamic law and rules of general behaviour or morality can affect legal decisions made in a tribunal setting. A Muslim decision maker, in deciding upon an Islamic divorce, may well not limit himself to those matters which an English civil court would see as matters of law relevant to the issue of the divorce. The Muslim decision maker may appear to the observer to be delving into matters that are not 'legal' in their nature precisely because of this

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<sup>41</sup> Thus, if I want to know how I should treat my parents (general behaviour), or if I want to know what share of my father's estate I am entitled to (law), I go to the same sources

<sup>42</sup> Article 8 of the European Convention of Human Rights is a commitment to respect for private family life without undue state intervention.

<sup>43</sup> The Quran 4:1

overlap. Admittedly the decision maker's interest may come from cultural norms or patriarchal interpretations or a whole range of reasons unconnected with Islamic morality. Islamic morality is not itself a fixed set of notions. Later in this Chapter I explore the objectives of the shari'a and argue that the flexibility of the objectives has been underused as a way of framing and resolving disputes for Muslims. Use of the objectives of the shari'a would allow for greater levels of dynamism and adaptability and yet the tendency to over-legalise has meant that where 'non-legal' matters are taken into account, we have not seen any direct references or engagement with broader objectives such as justice, equality, public interest, enjoining good or forbidding evil.

In the Islamic model of society all behaviour comes under God's regulation. It is therefore a difficult model for Western societies to comprehend, particularly as they themselves are increasingly secular societies which aim to separate law and religion. By the same token it is virtually impossible for a Western or secular state to effectively instruct Muslims that they cannot apply Islamic law to themselves. Muslims have already, to a lesser or greater extent, submitted to regulation by God. The issue then becomes the extent to which Muslims are allowed to apply Islamic religious laws and norms to themselves and how this is accommodated or regulated. Black and Sadiq's contrast between the way in which the Australian government has embraced Islamic law for matters relating to banking and finance, compared to the hostility and suspicion with which it treats Islamic family law demonstrates the inconsistent approaches that are taken<sup>44</sup>.

Paradoxically Muslims need Western governments to become more secular, to increase the space for private autonomy and to encourage regulation by private means, so that they have greater opportunities to apply Islamic law to themselves<sup>45</sup>. However this secularisation must not be one which attempts to

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<sup>44</sup> Black and Sadiq, n38

<sup>45</sup> A good example of this in a family law context arises as follows: Policy makers may decide it is in the interests of couples that, following the breakdown of their relationship, they ought to be encouraged to mediate on arrangements for their children and on the division of finances. It becomes very difficult for the state to prevent or regulate Muslim couples who decide to mediate within an Islamic framework.

ignore the 'Muslimness' of its citizens. Much of the 'accommodation' of Islamic law occurs quietly, particularly in the sphere of the private space which is a matter that has increasingly concerned feminists<sup>46</sup>. Notwithstanding any tensions this may create, An-Na'im strongly favours the separation of the state from the religious obligations of its Muslim subjects<sup>47</sup>. He argues that to be a Muslim one needs a secular state, even in a Muslim majority nation<sup>48</sup>. He goes on to advocate that it is for communities to organise themselves in a civil society, subject to the law of the land<sup>49</sup>. This allows Muslims to debate what shari'a means, apply it to themselves, and interact with the state as citizens<sup>50</sup>. This is an important way forward for Muslims living in secular states. An-Naim argues that interactions between states and citizens should be framed by reference to human rights<sup>51</sup>.

The role of the state include matters such as the provision of economic, social and welfare rights, access to education and health resources and matters of governance. An-Naim further points out that Muslims have always had the individual ability to seek and act upon a *fatwa* to address their own personal religious needs as believers<sup>52</sup>. In secular states this is precisely how Muslims behave; they do not look to the state to guide them as to their religious beliefs and nor should they. Instead they obtain rulings from a multiplicity of religious sources. Even where the function of providing a religious ruling is institutionalised to an extent by shari'a councils, Muslims are still free to access alternative sources for their religious guidance and rulings. What is needed from

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<sup>46</sup> As discussed in Chapter 2. Some of the concerns are summarised by Ayelet Shachar in 'Privatising Diversity: A Cautionary Tale from Religious Arbitration in Family Law' in Marie A. Fallinger, Elizabeth R. Schiltz and Susan J. Stable (eds), *Feminism, Law, and Religion* (Ashgate Publishing Limited 2013) 119-122, where she identifies issues around consent, gendering, loyalty and inter-communal tensions as potential dangers of privatised diversity.

<sup>47</sup> Abdullahi An-Na'im, 'Towards an Islamic Society, not an Islamic State' in Robin Griffith-Jones (ed) *Islam and English Law Rights, Responsibilities and the Place of Shari'a* (Cambridge University Press 2013) 238

<sup>48</sup> An-Na'im n47, 241

<sup>49</sup> An-Na'im n47, 243

<sup>50</sup> An-Na'im n47, 241-243

<sup>51</sup> Abdullahi An-Naim, 'Promises We Should All Keep', in Joshua Cohen, Matthew Howard and Martha C. Nussbaum (eds), *Is Multiculturalism Bad for Women Susan Moller Ok with Respondents* (Princeton University Press 1999)

<sup>52</sup> Abdullah An-Naim 'Islamic Family Law in a Changing World A Global Resource Book' (Zed Books Ltd 2002) 16

the state is the commitment to a space for Muslims to enable them as religious communities to debate and shape how the shari'a applies to them as Muslims. Furthermore the state needs to recognise that when Muslims engage with the state they do so as Muslims and should not be expected to leave their religion at the door in order to access state institutions. The exact boundaries of this relationship can be negotiated using Shachar's concept of transformative joint governance<sup>53</sup>. Shachar points out the absurdity of the expectation that individuals act as undifferentiated citizens in the public sphere but are free to express religious or other identities in the private domain<sup>54</sup>.

### Shari'a

So far this discussion has used the more neutral term 'Islamic law' and has differentiated between rules of 'law' and of 'behaviour' or morality in general. The term 'shari'a' brings its own set of meanings and misunderstandings<sup>55</sup>. The word existed before Islam and its original Arabic lexical meaning is 'a way to the watering place'<sup>56</sup>. Ali uses the imagery that this evokes to discuss how shari'a is not a static entity but a stream, which flows onwards, intertwining, giving rise to new rules and principles leading to social justice<sup>57</sup>. In a religious context the meaning refers to a path towards salvation, the path a believer must tread in order to obtain guidance in this world and deliverance in the next<sup>58</sup>.

Kamali notes that the word shari'a is used only once in the Quran<sup>59</sup>, where it is used to distinguish between those who follow the right path (the shari'a) and those who have no knowledge and follow their desires<sup>60</sup>. An-Na'im expands this

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<sup>53</sup> Ayelet Shachar, *'Multicultural Jurisdictions Cultural Differences and Women's Rights'* (Cambridge University Press 2001), as discussed in the previous chapter.

<sup>54</sup> Ayelet Shachar, 'Privatising Diversity: A Cautionary Tale from Religious Arbitration in Family Law' in Marie A. Fallinger, Elizabeth R. Schiltz and Susan J. Stable (eds), *Feminism, Law, and Religion* (Ashgate Publishing Limited 2013) 109-139, 109

<sup>55</sup> In any academic paper where the term 'shari'a' is to be used, the author inevitably begins by exploring the meanings of this term with a view to trying to avoid a simplistic or reductive understanding of the word and further to understand the development of shari'a historically.

<sup>56</sup> Mohammad Hashim Kamali, n32, 2

<sup>57</sup> In Shaheen Sardar Ali, *Modern Challenges to Islamic Law* (Cambridge University Press 2016) 20-22 she discusses the concept of the shari'a as a flowing stream and the implications this has on our understanding of what is meant by shari'a.

<sup>58</sup> Kamali n39, 2

<sup>59</sup> Kamali n39, 2

<sup>60</sup> The Quran, 45:18

definition to include the general normative system of Islam as understood and developed by Muslim jurists, especially in the first three centuries of Islam, and supports the view that it is a broader set of principles and norms than law as commonly understood<sup>61</sup>. So his definition includes the shaping of the shari'a by jurists. He highlights the critical point at which a shari'a norm is transformed into a legally binding rule, namely when it is given state force to the exclusion of other juristic opinions on the matter<sup>62</sup>. Under this definition, Muslims' application of the shari'a in a secular state will never be transformed into law unless and until the state specifically endorses it.

Kamali explains that '*since shari'a is a path to religion, it is primarily concerned with a set of values that are essential to Islam and the best manner of their protection*'<sup>63</sup>. These are also known as *maqasid al-shari'a*, the objectives or purposes of the shari'a<sup>64</sup>. Exactly what these objectives are and how they are identified is contested but there is consensus that the shari'a as a whole is concerned with measures that are beneficial to the people and prevent their corruption. The most essential benefits include the protection and advancement of faith, of life, of property, of intellect and of family and the shari'a in all of its parts is concerned with the manner of best protecting these values<sup>65</sup>. In his short introduction to the *maqasid al-shari'a* Auda discusses the different ways in which the *maqasid* are classified and the different views jurists and scholars have held about objectives of the shari'a<sup>66</sup>. The *maqasid* have become particularly relevant in modern times as contemporary scholars, especially Muslim Feminist scholars, revisit the *maqasid* as a basis for re-reading Quranic texts and re-contextualising *ahadith*. Auda gives the example of Rashid Rida (died 1935) who, included as objectives of the shari'a, 'reform' and 'women's rights'. Al-Ghazaly (died 1996) included 'justice and freedom' in his theory and more recently Yusuf Al-

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<sup>61</sup> Abdullahi An-Na'im *Islamic Family Law in a Changing World A Global Resource Book* (Zed Books Ltd 2002) 1

<sup>62</sup> An-Na'im n61, 2

<sup>63</sup> Kamali, n39, 2

<sup>64</sup> Kamali n39,123-140 devotes a chapter to the discussion of the history and methodology of identifying the *maqasid as-shari'a* and the particular contribution made by the Muslim jurist As-Shatibi to this body of knowledge.

<sup>65</sup> Kamali n39, 33-35

<sup>66</sup> Jasser Auda, *Maqasid Al-Shari'ah A Beginner's Guide* (Cromwell Press 2008)

Qaradawi has included 'human dignity and rights'<sup>67</sup> thereby enabling scholars to respond to global or contemporary issues in a more current and contextualised manner. This widening and varying of the values that the shari'a is said to protect has an impact on the notion of legal pluralism, in that it allows for an even greater degree of pluralism to flourish. Thus it can be argued that the values which the shari'a aims to protect are not fixed. Rather, by making use of contemporary values as part of the objectives of the shari'a, Islamic law can adapt and change. Over-legalisation can, however, lead to the stagnation of these objectives. There has been very little work undertaken that has attempted to connect shari'a councils rulings with the *maqasid*. In Muslim majority countries the codification of family laws leaves limited space to develop this relationship. But in secular nations there is greater potential.

Kamali makes the point that as a path shari'a is part of the religion but not the entire sum of it. Religion is a larger entity and shari'a is only part of it, albeit an inseparable part. Kamali states '*in its common usage shari'a refers to the commands, prohibitions, guidance and principles that God has addressed to mankind pertaining to their conduct in this world and salvation in the next*'<sup>68</sup>. This should lead mankind to righteousness and truth, to the establishment of justice and good governance and to being worthy of assuming the divine trust as God's vicegerency on earth<sup>69</sup>. Shari'a is thus closely identified with divine revelation and its revealed sources are the Quran and the *sunnah* of the Prophet.

### Shari'a and Fiqh

The term *fiqh* broadly refers to legal science or jurisprudence. *Fiqh* has largely been developed by jurists and consists of rules founded mainly on human reasoning and efforts. Shari'a is the wider circle embracing all human actions whereas *fiqh* is narrower in scope and generally addresses issues of practical legal rules. The term legal here is slightly ambiguous because in this context it includes matters such as how to perform an ablution or how to perform pilgrimage as well as rules regarding marriage, divorce and criminal behaviour.

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<sup>67</sup> Auda n66, 8

<sup>68</sup> Kamali, n39, 14

<sup>69</sup> Kamali, n39, 14

Black et al define *fiqh* as understanding of the shari'a without entering into the philosophy of the law<sup>70</sup>. To describe *fiqh* as simply Islamic jurisprudence may be misleading, as the Western concept of jurisprudence includes the philosophy of law. The determination of a *fiqh* ruling also relies on *usul-ul-fiqh*, namely the principles of jurisprudence. Muslim jurists have developed a body of principles which are used to derive the eventual *fiqh* ruling. The use of *usul-ul-fiqh* ought to provide a jurist, not only with a method for deriving a ruling but, more importantly, flexibility in the practical legal rule that is adopted<sup>71</sup>.

Differences of opinion among jurists on issues of marriage and divorce often arise through *fiqh* rulings. These differences are not referred to as differences in shari'a. Kamali explains this by stating that '*the underlying message is one of unity in reference to the shari'a but diversity with regard to fiqh*'<sup>72</sup>. Kamali himself notes that there are many twentieth century writers who have identified this distinction between the shari'a and *fiqh*<sup>73</sup>. However, Kamali also notes, as do many other academics, the difficulties inherent in attempting to define the precise scope of shari'a.

The development of the methodological approaches for deriving *fiqh* rulings only began after the death of the Prophet. Two distinctive approaches emerged which subsequently laid the foundations for the major *madaahibs* (legal schools) that have survived today<sup>74</sup>. The traditionalists relied on textual authority and hostile to the use of personal opinion whereas the Rationalists, in the absence of clear text in favour of a more liberal approach to the use of reasoning. These approaches eventually led to the establishment of the four main surviving

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<sup>70</sup> Ann Black, Hossein Esmaeili and Nadirsyah Hosen, *Modern Perspectives on Islamic Law* (Edward Elgar Publications 2013) 1-3

<sup>71</sup> An example of a principle of *usul-ul-fiqh* is 'hardship necessitates ease'. This is a general principle, but a jurist could use this general principle to provide a specific ruling for a situation that is causing harm to an individual. Black et al n63, 16-17 also comment on the underdevelopment of some of the principles of *usul-ul-fiqh*, demonstrating that there is potential for continued refinement even within the principles of jurisprudence.

<sup>72</sup> Kamali n39, 16

<sup>73</sup> Kamali gives examples of Muhammad Musa, Asaf Ali Fyzee and Muhammad Asad.

<sup>74</sup> Mohammad Hashim Kamali, 'Law and Society The Interplay of Revelation and Reason in the Shariah' in John L Esposito (ed) *The Oxford History of Islam* (Oxford University Press) 112-117 where Kamali traces the historical development of *fiqh* and the different legal schools.

schools of thought, namely Hanafi, Maliki, Shaifi and Hanbali<sup>75</sup>. Even within the schools scholarly differences of opinion would emerge and more recently Salafism has encouraged a rejection of the *madaahib* approach<sup>76</sup>.

As Kamali states Muslim jurists have made distinctions between religious and juridical obligations with only the latter being enforceable in court. An important distinction is that between devotional matters and civil transactions<sup>77</sup>. It is arguable that these theoretical discussions around the application of *fiqh* do not encompass the lived reality and experiences of those attending before shari'a councils. For example, although Kamali points out devotional matters are not subject to juridical intervention they can still have an impact on the decisions being made. In determining questions about divorce, shari'a councils may well take into account evidence about whether parties have fulfilled their obligations to God<sup>78</sup>. As examined in Chapter 2 there are concerns around shari'a councils and the privatising of family law more generally that the theoretical explanations of how rulings are derived in Islam do not account for. These include unequal distributions of power, gendered environments and gendered interpretations of the textual sources. This is why the supporting of Muslim women in obtaining religious rulings must include multiple ways in which these concerns are addressed but the aim must be to assist women in obtaining a religious ruling, not in taking this option away. There is no one fail safe solution but the internal debates around the objectives of the shari'a, the inclusion of women as adjudicators, the renewed efforts by both men and women to interpret the textual sources in a contemporary climate, coupled with the state's recognition and interaction with Muslims as citizens who are part of complex and pluralistic religious communities will provide a starting point for tackling these concerns.

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<sup>75</sup> For a more detailed discussion of each see Kamali n74 and

<sup>76</sup> See, Emad Hamdeh, 'Qur'an and Sunna or the Madhhabs?: A Salafi Polemic Against Islamic Legal Tradition' [2017] *Islamic Law and Society* Volume 24:3 211-253. Hamdeh examines the ways in which the religious and social climate has enabled a unique type of Salafi movement that rejects and discredits the *madaahib* approach to *fiqh*.

<sup>77</sup> Kamali n32, 17-18

<sup>78</sup> As another example, a shari'a council may decide to grant a divorce to a woman who alleges that her husband drinks alcohol, does not fast in Ramadan, nor pray his obligatory prayers and is therefore a 'poor' Muslim. These are all devotional matters and yet may form part of the reasons for the determination that is made.

## Authority and Legitimacy of the Jurists.

The term jurist includes a broad range of experts within Islam. Before addressing the sources of the shari'a or of *fiqh*, it may be pertinent to consider the legal personnel within the shari'a and within traditional Islamic societies, as does Hallaq in his short book introducing and explaining Islamic law<sup>79</sup>. The impact that the roles of the legal personnel have in shaping laws and in shaping the manner in which decisions are made can be underestimated. Its effect remains within modern Muslim communities today, both those which are minority diasporas in the West and those which are the majority in Muslim countries.

Hallaq states that the most striking feature of traditional Islamic legal personnel is that they were not subject to the authority of the state, simply because the state did not exist at that time. Regulation was primarily by self-rule<sup>80</sup>. Any requirements of a ruler were for the purposes of protection from external enemies. He argues that the shari'a was not the product of Islamic governments unlike modern law which, if we take the positivist view, is significantly the product of the state<sup>81</sup>. There are four main roles that Hallaq identifies in the pre-modern Islamic period: the Judge, the Mufti, the Author-Jurist and the Law Professor<sup>82</sup>. Each of these has a distinct but sometimes overlapping role.

While other roles also existed, Hallaq sees these four participants as fundamentally contributing to the unique features which the shari'a developed and I would argue continue to have an impact today. Of the four roles that of the Judge required the least in terms of Islamic knowledge. The Mufti was responsible for the issuing of a *fatwa*: a legal opinion to a specific question that had been raised by a judge or by individual members of society. The Mufti was not appointed by anyone and received no payment for this role. This is a role that Hallaq argues '*is central to the early evolution of Islamic law*' and led to the role of the Law Professor, who was normally a student of a Mufti. Author-Jurists

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<sup>79</sup> Wael B.Hallaq, *An Introduction to Islamic Law* (Cambridge University Press 2009)

<sup>80</sup> Hallaq n79, 8

<sup>81</sup> Hallaq n79, 8

<sup>82</sup> Hallaq n79, 8-11, where all four roles are explained in detail.

were responsible for the majority of Islamic works. They largely depended on the rulings of Muftis and would compose specialized treatises, multi-volume compilations or commentaries on other works. In their writings Author-Jurists were able to reflect evolving social conditions. The attempt of jurists to understand and apply God's law is referred to as *ijtihad* and the one who undertakes that job is referred to as a *mujtahid*<sup>83</sup>.

A judge could make use of the ruling of a Mufti or the work of an Author-Jurist when making a determination. It is notable that unlike a modern Western judge who is very careful not to stray from the specific facts and evidence before the court, a Muslim judge historically carried out many other functions and adjudicated in matters which a positivist would not consider to be strictly legal in nature<sup>84</sup>. The Muslim court itself was used not just as a venue for the adjudication of disputes but to record significant transactions or events, thereby providing Judges with intimate knowledge of the community in which they lived, a stark difference to the objectivity expected of a judge in a secular model<sup>85</sup>.

The impact of the different types of jurists permeates the manner in which Muslims search for answers and expect adjudications on matters in dispute in contemporary society. One who adjudicates in shari'a councils appears to be carrying out a mixture of the roles identified by Hallaq, combining the roles of Mufti and Judge. This affects the manner in which Muslims approach disputed issues, whom they turn to for a determination and what functions they consider a shari'a council ought to serve. It can also lead to confusion for shari'a council users if they have differing expectations of the outcomes they hope to achieve.

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<sup>83</sup> Both words come from the same root word *jihad* and thereby include within their meaning the notions of striving and struggling for the sake of Allah. In this context, this is an intellectual struggle to understand God's law.

<sup>84</sup> Hallaq gives examples of inspecting newly constructed buildings, the operation of hospitals and soup kitchens, auditing of charitable endowments, acting as a guardian including a guardian in marriage for a woman who had no male relatives and of mediating in disputes. Again this reflects the very wide notions of law in Islam and the lack of clear boundaries between the private and public spaces.

<sup>85</sup> Hallaq n79, 12

Other than the Judge who was appointed by a central authority, none of the other roles had a method for establishing suitability for the position, nor was there a hierarchal structure to determine who was more qualified. As Hallaq says the level of a scholar's knowledge was determined through practice, not qualifications<sup>86</sup>. Abou El Fadl notes there was and is no church in Islam<sup>87</sup>. He argues the picture is '*one of egalitarianism and accessibility of God's truth to all*', irrespective of class, race or gender<sup>88</sup>. Whilst all Muslims strive to discover the Divine Will no-one has authority to lay exclusive claim to it and it seems the views of one's peers provided the only mechanism by which the scholars were appraised. During the time of the Prophet he was undoubtedly recognised as the authoritative voice representing God's Will, since he was considered the direct recipient of God's revelation. Immediately after the death of the Prophet, Muslims faced a number of crises regarding legitimacy and authority. Abou El Fadl highlights some of the political struggles that took place and, more importantly for our purposes, the disputes as to how the sovereignty of God was to be understood, without the Prophet as a living authority<sup>89</sup>. It was not until in or around the eighth century that the roles identified by Hallaq were sufficiently developed for those holding them to become a specialised body of professionals<sup>90</sup>.

Abou El Fadl distinguishes jurists from the judges because many jurists refused to serve in the judiciary believing that this compromised their scholarly independence. In shari'a councils we see no clear demarcation between the Judge and other legal experts or jurists but rather an amalgamation of roles. The shari'a council adjudicator is not only part of the panel deciding the outcome of the application before it, but is also an advisor to the parties on their Islamic rights and responsibilities in the marriage, and gives rulings which would have been historically provided by a mufti or jurist. This somewhat jumbled combination of roles within one organisation is an organic response to a

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<sup>86</sup> Hallaq n79, 9

<sup>87</sup> Abou El Fadl, n34, 9

<sup>88</sup> Abou El Fadl n34, 9

<sup>89</sup> Abou El Fadl n34, 23

<sup>90</sup> As a whole those who have a sufficient level of knowledge of Islam are referred to the *fuqaha* (jurists) or *ulama* (scholars).

perceived need of Muslim communities living in a modern, non-Muslim environment. However it is interesting to note that, like jurists, shari'a councils may also be concerned about their scholarly independence when they act within the formal civil legal system.

Abou El Fadl explains that every adult Muslim, man or woman is obligated to understand and implement the shari'a and this accountability is personal and individual<sup>91</sup>. The importance of seeking knowledge has been emphasised by all jurists in Islam and many have stated that it is an obligation. The Quran itself encourages Muslims in general to think about the world around them and often refers to '*people of understanding*' in virtuous terms<sup>92</sup>. More specifically both the Quran and the Prophet spoke of the importance of people of knowledge and the importance of protecting scholarship so that it could be transmitted and taught to future generations<sup>93</sup>. In addition to the verses in the Quran there are sound *ahadith* in which the Prophet himself emphasised the status of those who are learned in the religion<sup>94</sup>.

However, none of this evidence gives any indication of how scholarship is attained. Nor is there any suggestion that the demand to seek knowledge is aimed only at men, the implications of which I address later in this chapter. As Abou El Fadl states, '*the Quran does not clearly resolve the issue of authority*'. He argues that whilst there is *no doubt that the Quran regards itself and God authoritative on most matters, it does not clearly explicate the dynamics of the interrelationship and appropriate balance between God, the text, collective and individual responsibility*<sup>95</sup> Black et al also point out that the sovereignty of God has to be reconciled with human experience<sup>96</sup>. The shari'a therefore remains the

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<sup>91</sup> Abou El Fadl, n34, 37

<sup>92</sup> The Quran, 38:29 is one example of a verse where reference is made to '*those of understanding*'.

<sup>93</sup> The Quran, 9:122 and 4:59

<sup>94</sup> An example is the hadith narrated by Abu Umama al Bahhili in four different sources of Ahmad, Ibn Majah, Abu Dawud and Tirmidhi in which the Prophet said: '*The superiority of a scholar (alim) over the devout (abid) is like my superiority over a worshipper or like that of the moon in the night when it is full over the rest of the stars, and truly the scholars are the heirs of the Prophets, and truly the Prophets do not leave behind them gold or silver, they only leave knowledge as their heritage. So whosoever acquires knowledge acquires a huge fortune*'.

<sup>95</sup> Abou El Fadl n34, 32

<sup>96</sup> Black et al n74, 9

immutable, fair and just Divine Will with and the *fiqh* is merely the attempt by human beings (the jurists) to understand and apply God's law. So extensive has been the work of jurists that Schacht has described Islamic law as an extreme case of 'jurist's law'<sup>97</sup>. As an aside this is one of the key reasons why juristic differences in opinion are acceptable within Islam<sup>98</sup>. Human beings are inevitably liable to failings, errors, mistakes and misunderstandings and Muslims accept that perfection belongs only to Allah.

## The sources of the shari'a

### The Quran

The Quran is considered to be the direct words of God. During the period of revelation 23 years up to his death 632 CE the Prophet received *wahy* (revelation) from the Angel Gabriel. It is undoubtedly the single most important source of guidance for Muslims. The recitation of the Quran is, in of itself, an act of worship. The Quran describes itself in many ways including 'A Book'<sup>99</sup>, 'A Guidance'<sup>100</sup>, 'A Clarification'<sup>101</sup>, 'An Admonition and a Reminder'<sup>102</sup>, 'The Truth', 'A Guidance, a Mercy and Glad Tidings'<sup>103</sup>, 'The Criterion'<sup>104</sup> 'A Reminder'<sup>105</sup>, but the overriding one is that of Book of Guidance<sup>106</sup> enabling human beings to discern truth from falsehood and live a life that is pleasing to God. It is not a book of rules or a codified document and none of the definitions that it gives itself suggest it should be treated as a book of rules. It consists of 114 chapters (*surahs*) each of which has a title that relates to a topic or theme covered at some

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<sup>97</sup> Joseph Schacht, *An Introduction to Islamic Law* (Oxford University Press, 1964) 5

<sup>98</sup> Whilst there is some debate as to its authenticity, there is evidence for the *hadith* in which the Prophet is alleged to have stated '*Difference of opinion in my community is a mercy from Allah*'. What is more readily accepted is the *hadith* in which the Prophet said that when a jurist exercises effort to reach a conclusion that jurist will receive a double reward but if the conclusion is incorrect the jurist will receive a single reward (Sunan of Abu Dawud Hadith no3585). Thus alludes to the infallibility of human beings but also implies that more than one opinion may arise on a specific topic.

<sup>99</sup> The Quran 14:1 as an example verse

<sup>100</sup> The Quran 2:2

<sup>101</sup> The Quran 16:89

<sup>102</sup> The Quran 11.120

<sup>103</sup> The Quran 16:89

<sup>104</sup> The Quran 25:1

<sup>105</sup> The Quran 15:9

<sup>106</sup> The word 'guidance' appears in the Quran over 70 times.

point in the *sura*<sup>107</sup>. The Quran's format and style is not linear and there is no one narrative flow<sup>108</sup>. This again indicates that it is not to be read as a rule book.

During the lifetime of the Prophet, the Quran was preserved mainly as a memorised text, a legacy that remains very much alive today<sup>109</sup>. The preservation of the entire Quran in a written form occurred shortly after the death of the Prophet by his companions and was completed around 20 years after his death. Coulson states that no more than around 80 verses (from a total of over 6000) deal with what we would understand to be strictly legal topics<sup>110</sup>. He notes that, even then, the verses tend to deal with topics in a general sense rather than as a comprehensive code<sup>111</sup>. Ramadan suggests that there are around 228 verses which deal with legislative type matters and notes that jurists have differed about which verses come within the definition of law or legislation<sup>112</sup>. Kamali puts the figure at around 350<sup>113</sup>. In any case, it is evident that legal verses form only a minority of the Quran.

Coulson argues that the position of women occupies pride of place in Quranic laws<sup>114</sup>. The aim of the Quran regarding women was to radically improve their position from the customs of the arguably patriarchal and misogynistic *jahilliya* (pre-Islamic) period. In Arab society female babies were buried alive, wives were sold to husbands and men had multiple wives without restrictions or obligations. The Quran was therefore seen as a radical reformation of the rights of women and their dignity as human beings and by corollary a restriction of

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<sup>107</sup> The shorter chapters were revealed to the Prophet during the early part of his mission-hood in Mecca, covering themes relating to beliefs, such as oneness of God, heaven and hell, the Day of Judgment and the prophet-hood of the Messenger. The longer chapters were revealed in Medina and address more complex matters beyond belief and address Muslims as a community of believers and their interaction with other groups within Arab society. Most of the verses addressing legal and political matters are revealed during the Medina phase of revelation.

<sup>108</sup> Jonathan A.C. Brown, *Misquoting Muhammad The Challenges and Choices of Interpreting the Prophet's Legacy* (Oneworld Publications 2016) 8

<sup>109</sup> There are some occasions where verses of the Quran were written on parchment during the life of the Prophet but on the whole it was conveyed orally.

<sup>110</sup> Coulson n30, 12

<sup>111</sup> Coulson n30, 14

<sup>112</sup> Tariq Ramadan, *Islam, the West and the Challenges of Modernity* (The Islamic Foundation 2009) 14

<sup>113</sup> Kamali n38, 19

<sup>114</sup> Coulson n35,14

some of the licence given to men. It should be noted that this is a contested claim. Mernissi<sup>115</sup>, Ahmed<sup>116</sup> and Al-Fassi<sup>117</sup> have all argued that constructing pre-Islamic Arabia as a wholly patriarchal and misogynistic society has enabled Muslims to claim Islam as the sole source of women's liberation. Indeed Al-Fassi argues that the position of women in Nabataea (a region of Arabia) was better pre Islam than the situation for women in Saudi Arabia today. This speaks to a far more complex picture emerging of how women's fortunes were dependant on cultural, social and economic norms outside of religion and indicates that religion alone cannot free women from oppression if it is not supported by social, cultural and economic measures. The task for Muslim women is to separate those 'sacrifices' that are made because they are a true interpretation of what God requires from them as Muslims, as against the oppression that is due to poverty, misogyny, tyranny and patriarchy.

In the last twenty years or so a significant body of work has emerged which has sought to re-read the Quran from the perspective of women<sup>118</sup>. This attempt to provide an alternative understanding has largely been led by Muslim female academics, many of whom would describe themselves as feminists<sup>119</sup>. Their specific aims have been varied, but essentially, as Ali states, they take women's

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<sup>115</sup> Fatima Mernissi, 'Beyond the Veil Male Female Dynamics in Muslim Society (Saqi Books 2011) 71, Mernissi discusses the period before and after Islam in terms of the sexuality of both men and women. She argues that it was women's sexuality that was controlled or 'civilised' after Islam.

<sup>116</sup> Leila Ahmed, 'Women and Gender in Islam' (Yale University Press 1992), 36-37 where she also points out that in some cultures of the Middle East women were considerably better off before the introduction of Islam.

<sup>117</sup> Hatoon Ajwad Al Fassi, 'Women in Pre-Islamic Arabia: Nabataea' (British Archaeological Reports Oxford Ltd 2007)

<sup>118</sup> There has been since around the 1500's the view that the 'doors of *ijtihad*' have been closed, preventing Muslims from any re-interpretation of any verses. Kamali, n34, at 169-170 discusses some of the reason for this including the general weakening of Muslim civilizations and the advance of Western forces through colonisation. As a result, innovation by Muslims jurists was viewed negatively and juristic advances were effectively stifled and limited to imitation known as *taqlid*. In the early part of the 20<sup>th</sup> century a concerted effort began the process of re-invigorating *ijtihad* and though it is still contested, Muslim scholarship is working towards a greater intellectual struggle in addressing contemporary issues.

<sup>119</sup> In David Solomon Jalajel *Women and Leadership in Islamic Law: A Critical Analysis of Classical Legal Texts* (Routledge 2017) 2-7 provides a summary of the leading voices who have contributed to the debate regarding women in Islam and especially in the context of women holding public office.

rights and needs as their main concern<sup>120</sup>. Ali makes an important point that there has never been a single unitary Islamic law. God's law, though infallible, cannot be known without human interpretation<sup>121</sup>, and humans are fallible<sup>122</sup>. In this re-interpretation of what has been understood to be God's commands, the topic of the marital relationship has received most scrutiny. I will examine particular verses that relate to marriage and divorce in Chapters 4 and 5 respectively.

In the early 1990s Stowasser summarised the debate around the Quran and Islam generally: that the Muslim *ummah* is faced with the united vision of the importance of faith and Islam in their lives, but that the adaption of that vision to modernity is hugely disputed<sup>123</sup>. The disputes as to how faith applies in a modern context are readily seen in the multiple interpretations of the Quran. Stowasser categorises Muslims into three broad groups: modernists, conservatives and fundamentalists<sup>124</sup>. She argues that these categories take their understanding of the Quran in accordance with their own worldview and socio-political agenda, including their understanding of the female<sup>125</sup>.

Lamrabet, rather than categorising Muslims, categorises the verses of the Quran into three main groups<sup>126</sup>. She distinguishes between verses which have universal aims<sup>127</sup>, which concern the specific context of revelation<sup>128</sup>, and those which require re-interpretation in light of prevailing conditions. The last category includes verses relevant to issues pertaining to women. There are a

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<sup>120</sup> Kecia Ali, 'Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Law' in Omid Safi (ed) *Progressive Muslims on Justice, Gender, and Pluralism* (Oneworld Publications 2011) 165

<sup>121</sup> Kecia Ali n120, 167

<sup>122</sup> Kecia Ali n120, points out there can be no clearer recognition of human fallibility than the fact that jurists add a disclaimer to their rulings of 'And God knows best' recognising the inability of any human being to fully know God's revealed law.

<sup>123</sup> Barbara Freyer Stowasser, *Women in the Qur'an, Traditions, and Interpretation* (Oxford University Press 1993) 5

<sup>124</sup> Stowasser n123, 6-7

<sup>125</sup> Stowasser n123, 7

<sup>126</sup> Asma Lamrabet, 'An Egalitarian Reading of the Concepts of Khilafa, Wilayah and Qiwwamah' in Ziba Mir-Hosseini, Mulki Al-Sharmani and Jana Rumminger (eds), *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (Oneworld 2015) 68

<sup>127</sup> Such as those advocating justice, piety, human dignity and equality for all. Lamrabet states these form the majority of the Quran.

<sup>128</sup> Such as the spoils of war, rules pertaining to slavery or corporal punishment.

number of difficulties posed by this categorisation. First, it raises the age old tension between the doctrine that the Quran is the immutable word of God for all times and for all places and the suggestion that parts of it are obsolete or require re-interpretation, a tension which all contemporary exegetes grapple with. Secondly if Lambrabet's categorisation is accepted, the methodology of how one decides which category a particular verse fits into is highly contested.

Lambrabet recognises the tension between traditional conformism and modernity devoid of spirituality<sup>129</sup>. She emphasises the need for caution when isolating particular verses of the Quran such as those that are specifically for women. As she rightly argues this fragmentary approach consolidates the masculine norm in Islam, implying that only certain verses are relevant to women and removing the interpretation of those verses from the overall context of values in the Quran such as justice<sup>130</sup>.

As Wadud points out '*no method of Quranic exegesis is fully objective. Each exegete makes some subjective choices*<sup>131</sup>'. She suggests the appropriate method of Quranic interpretation is essentially one of contextualisation, in that both the revelation and interpretation of the verses need to be understood in the context in which they occurred. This, she argues, allows for an understanding of the proper meaning of the message in a different context<sup>132</sup>.

What is clear is that interpreting verses from the Quran is not a simple exercise of reading the verses. Muslim jurists themselves developed detailed criteria to determine whether verses were specific, general, clear, ambiguous, conflicting, abrogating or abrogated, in order to derive rulings. Hidayatullah sums up the modernist approach to the Quran, which *inter alia* includes a stronger emphasis on historical context<sup>133</sup>. For Muslims living in a secular environment, there is

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<sup>129</sup> Lambrabet n126, 65

<sup>130</sup> Lambrabet n126, 66-67

<sup>131</sup> Amina Wadud *Quran and Woman: Rereading Sacred Text from a Woman's Perspective* (Oxford University Press 1999) 1

<sup>132</sup> Wadud n131, 4

<sup>133</sup> Aysha A. Hidayatullah *Feminist Edges of the Quran* (Oxford University Press 2014) 31

even more reason for contextualisation to play a significant role in interpretation.

### The Prophet, his *sunnah* and the *ahadith* collections

Aisha, one of the wives of the Prophet and an important scholar in her own right, was once asked about the character of the Prophet. She replied that he was a walking Quran. In other narrations she asked the questioner 'do you read the Quran? His [the Prophet's] manners are the Quran'. It is understood from Aisha's comment that the Prophet was the embodiment of the Quran. Revelation came to him alone, through the Angel Gabriel, and the obligation was upon him to deliver God's message.

The Quran itself commands believers to obey the Messenger<sup>134</sup> and it is made clear that obedience to the Prophet is obedience to Allah<sup>135</sup>. The Prophet himself informed the *sahaba* (the companions), who loved him and were willing to sacrifice their lives for him, that even they did not truly believe in God unless they loved the Prophet more than they loved themselves<sup>136</sup>. There are aspects of faith that Muslims would not be able to put into practice without the Prophet<sup>137</sup>. Consequently amongst the vast majority of Muslims the Prophet remains indispensable and irrespective of the sectarian groups, almost all Muslims portray themselves as bearing the mantle of the Prophet<sup>138</sup>. All actions, sayings and rulings of the Prophet form his *Sunnah*, to be followed by all Muslims after him.

As with Quran, the preservation of the *sunnah* in a written form did not occur until after the death of the Prophet. However, unlike the Quran, the earliest compilation of the *ahadith* occurred around two hundred years after the death of

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<sup>134</sup> The Quran 4:59 is an example of a verse where this command occurs although there are many other occasions in the Quran when believers are commanded to obey the Messenger including 5:92, 4:59, 24:54, 33:71, 4:64

<sup>135</sup> The Quran 4:80

<sup>136</sup> *Hadith* in Bukhari (Vol 8 78:628) is one of a number of *ahadith* that make this point.

<sup>137</sup> The example usually given is the command to pray is in the Quran. The details of precisely how Muslims pray can only be determined from the Prophet.

<sup>138</sup> Jonathan A.C Brown, n108, X111

the Prophet<sup>139</sup>. In order to ensure that the preserved *hadith* was in fact genuine, the compilers of *ahadith* developed conditions that would need to be met by each *hadith* before the *hadith* was accepted as genuine. The conditions generally addressed two checking processes: first, of every narrator in the chain of narration (*sanad*)<sup>140</sup> and secondly of the text itself (*matan*)<sup>141</sup>. Each *hadith* was then graded as to its strength<sup>142</sup>. Zaman points out that scholars of *hadith* were ‘deeply conscious of the need to preserve the integrity of the methods they had developed’<sup>143</sup>. Muslims have for generations relied upon the meticulousness of these early *hadith* jurists, in using *ahadith* as grounds for claims. But this has also been a source of criticism by Muslims themselves and especially by orientalist scholarship. Often disputes over the *ahadith* result in the different *fiqh* opinions.

Muslim Feminist Scholars have attempted to re-read the Quran through the prism of contemporary values rather than criticise the Quranic text itself. This is because as a Muslim one accepts the Quran as the word of God. Also as stated earlier the Quran often deals with themes rather than specifics, whereas the *hadith* literature generally concerns a specific event or incident and the Prophet’s reaction in relation to it<sup>144</sup>. For these reasons the corpus of *hadith* literature has been subjected to more open criticism. Abou El Fadl, for example, casts doubt on specific narrators of *ahadith* as well as criticising the application

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<sup>139</sup> The most well-known compilers of *ahadith* are Bukhari and Sahih Muslim. Other recognised compilers are At-Tirmidi, Bayhaqqi, Ibn Majah, Abu Dawood, Imaam An-Nawwawi, Ibn Hajjar Al-Asqalani and Imaam Malik

<sup>140</sup> This scrutinising of the chain of narration included an assessment of the reliability or truthfulness of the narrator and ensuring that the chain of transmission extended back to the Prophet without any interruption. Every narrator in the chain was meticulously investigated. With this inquiry, scholars of *hadith* would consider the number of narrators at each level of transmission. The more narrators at each level, the more likely the *hadith* is classed as *muttawatar* making the *hadith* more reliable. If there is only one narrator or few narrators at each level the *hadith* is *ahad* and in some circumstances this is perceived to be less reliable.

<sup>141</sup> This involved investigating the words used, the style of speech, it’s consistency with other *ahadith* and with the Quran.

<sup>142</sup> As different compilers of *hadith* used differing pre-conditions to determine grading, even within this area there are contestations as to whether an individual *hadith* is described as sound, weak, fabricated etc.

<sup>143</sup> Muhammad Qasim Zaman, ‘The Ulama and Contestations on Religious Authority’ in Muahammad Khalid Masud, Armando Salvatore and Martin van Bruinessen (eds), *Islam and Modernity Key Issues and Debates* (Edinburgh University Press 2009) 206-236, 209

<sup>144</sup> Although there are specifics of marriage and divorce referred to in the Quran which are to be addressed in later chapters.

and interpretation of certain *ahadith* where they have been demeaning to women<sup>145</sup>.

Muslims today face the sometimes hugely demanding task of applying *ahadith*, that arose in specific circumstances and which document particular reactions of the Prophet, to their own circumstances. After the death of the Prophet and as Islam went through turbulent times, civil unrest and internal wars, as Brown states the uncontested authority of the Prophet's voice remained dangerously inchoate<sup>146</sup> and '*hadith forgery would be a consistent problem in Islamic civilisation*'<sup>147</sup>.

Brown argues that for most Muslims<sup>148</sup> the lens through which the Quran is understood and controlled is the life of the Prophet<sup>149</sup> although Muslims and non-Muslim scholars have not always approached the critiquing of *hadith* in the same way. Brown discusses this difference in approach in some detail and states Muslims are generally looking for authenticity but they do not start from a position of scepticism. Western critique is the converse<sup>150</sup>. Muslims living in Western societies are subjected to influences from both Muslim and Western traditions. Perhaps the most obvious manifestation of the fusion of both approaches is the critical styles adopted by Muslim academics trained in Western institutions.

### Other sources

I have concentrated on the sources that are most readily used and understood by Muslims. There are a range of other sources including *qiyas* (analogy), *ijma*

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<sup>145</sup> Abou El Fadl n34, at 111 where he criticises Abu Bakrah al-Thaqafi and 209-49 where much of his criticisms of determinations which are demeaning to women comprise of critically analysing *ahadith*.

<sup>146</sup> Brown n108, 22

<sup>147</sup> Brown n108, 71

<sup>148</sup> I say most Muslims although I do accept that there has always been a minority of Muslims that have rejected the hadith as a source of law entirely. Such a minority view point is not examined in this thesis.

<sup>149</sup> Brown n108, 150

<sup>150</sup> Brown n108, 199-236 traces the history of Western hadith criticism as compared with the approach of Muslim scholars.

(consensus), *maslahah mursala* (public interest)<sup>151</sup>, *urf* (customs), the opinions of companions and *sadd al-darai* (blocking the means<sup>152</sup>) and as pointed out by Black et al, Islamic scholars have cited over 12 other sources<sup>153</sup>. Some commentators have argued that Muslims, especially those living in Western lands, should be engaging with these secondary sources to a much greater extent and that they have either been neglected or underdeveloped. I do not propose to examine these sources in any detail in this thesis but would make a few general points. Hamid points out that in the last 30 years the appeal of Salafism has expanded amongst second generation British Muslims who are searching for a 'pure' form of Islam<sup>154</sup>. This implies that the sources of most relevance are the Quran and *Sunnah* rather than relying on secondary sources and the result can be to stifle the development of secondary sources. However a lay Muslim would not find it easy to navigate secondary sources. Their developments pose challenges that need to be addressed by contemporary scholars in conjunction with development of the *maqasid*.

### The role of women as scholars of Islam

This issue was mentioned earlier in this chapter. It has two aspects: whether determination of the Divine Will is a function that can be carried out only by men; and if not, whether women have been prevented from participating as members of the *ulama*. This is relevant to shari'a councils for a number of reasons. A recurring theme which has emerged from my own research and from the wider debate on this topic is the lack of women involved in the work of shari'a councils especially as decision makers<sup>155</sup>. Apart from using their services, women seem to have little involvement with or impact on shari'a councils. There

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<sup>151</sup> In Mohammed Hashim Kamali, *Principles of Islamic Jurisprudence* (The Islamic Texts Society 2003) 351-367 he discusses the secondary sources, in particular he gives many examples where the doctrine of public interest was used throughout Islamic history as a basis for enactment of laws and regulations despite a lack of textual authority for the doctrine.

<sup>152</sup> This is in reference to, for example, putting in place rules which prevent a greater harm: it is accepted *zina* (sexual relationship outside of marriage) is a major sin so one way of blocking the means to it would be not to allow men and women to associate freely with another.

<sup>153</sup> Black et al n74, 11

<sup>154</sup> Sadek Hamid 'The Attraction of "Authentic" Islam, Salafism and British Muslim Youth' in Roel Meijer (ed), *Global Salafism Islam's New Religious Movement* (C.Husrt & Co 2009) 384-403, 384. Hamid is not the only commentator to have noted this and it has been widely noted across Western nations generally.

<sup>155</sup> This theme is to be addressed in more detail in Chapters 6 and 7.

are only a handful of shari'a councils where women are employed or sit on the Boards<sup>156</sup>. Is women's marginalisation from shari'a councils specific to them or is part of a broader process excluding women from jurisprudential roles in the public space?

None of what has been said in this chapter with reference to legitimacy, authority to determine God's will or the traditional roles of the different types of scholars has indicated that these are matters reserved for the male gender. On the contrary, gender is rarely addressed when examining how the Divine Will is to be determined. The starting position for Muslims is that '*truth is equally accessible to all Muslims regardless of race, class or gender*'<sup>157</sup>. In a blog article Abou El Fadl addresses the current absence of women from Islamic public and intellectual life and compares this with the history of Islam which he says '*abounds with famous women narrators of jurisprudence*'. As he points out there are many female activists and professionals, but they are rarely found on Boards of Islamic centres<sup>158</sup>.

The history of female scholarship in Islam has received renewed interest in the last 10 years. Both Nadwi<sup>159</sup> and Sayeed<sup>160</sup> have carried out meticulous work in tracing the role of women as scholars of Islam. Both authors concentrate most of their commentary on scholarship within *hadith* literature because this is where we find much of the documented activities of women. Nadwi argues that '*women scholars exercised the same authority as men scholars*'<sup>161</sup> and states that access to understanding God's will is not a function of any particular group, but of knowledge and adherence to the primary sources<sup>162</sup>. Between them Nadwi and Sayeed are able to cite copious examples of females who narrated *hadith*, gave

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<sup>156</sup> Prominent females in shari'a councils include Khola Hassan from London and Amra Bone from Birmingham.

<sup>157</sup> Abou El Fadl n34, 9

<sup>158</sup> Abou El Fadl, 'In Recognition of Women' (Scholar of the House)

<http://www.scholarofthehouse.org/inreofwobykh.html> accessed 6 June 2017.

<sup>159</sup> Mohammad Akram Nadwi, *al-Muhaddithat: the women scholars in Islam* (2<sup>nd</sup> edn Interface Publications, 2013)

<sup>160</sup> Asma Sayeed, *Women and the Transmission of Religious Knowledge in Islam* (Cambridge University Press 2015).

<sup>161</sup> Nadwi n159, xviii

<sup>162</sup> Nadwi n159, 5

rulings, were teachers of both men and women or were women who came to the attention of other scholars because of some noteworthy act (such as fighting in a battle).

The best-known female scholar of Islam is also its earliest, namely Aisha. Within Sunni Islam her opinions are given as much weight as those of any male scholar, even by conservative Muslims. Where scholars have disagreed with her, it has never been suggested this is due to her gender. She continues to command respect and status as a highly intelligent scholar<sup>163</sup>. She is also one of the most prolific narrators of *ahadith*; according to Sayeed with between 1500 and 2400 *ahadith* attributed to her<sup>164</sup>. In addition Sayeed also cites examples of her '*functions as an exegete and a critical traditionalist*'<sup>165</sup>.

In her historical tracing of female scholars, Sayeed is alert to the risk of adopting an anachronistic approach and stressed that it is important that current notions of gender equality or female agency are not superimposed on their historical works. It may be more significant to understand when, how and why women became excluded from scholarship and if they continue to be excluded. Nadwi links the demise of female scholarship to the general period of decline in Islam's intellectual flourishing from 900AH onwards<sup>166</sup>. However, although his work is very important in establishing the extensive contributions of women, Sayeed provides a more critical examination of the reasons for their exclusion. She argues there is no clear historical continuum as women's participation in juristic endeavours rose and fell as a result of external impediments. She identifies much female activity in the first 150 years of Islam which then became negligible from the mid-second to the fourth centuries<sup>167</sup>. She uses detailed analyses of the chain of transmitters in the *ahadith* to demonstrate the decline of women as narrators. She argues that this decline is reflected in other historical works such as biographies, and works discussing social and political matters. Sayeed's

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<sup>163</sup> For a more detailed account of the life of Aisha see, Resit Haylamaz, *Aisha, the Wife, the Companion, the Scholar* (Tughra Books 2014)

<sup>164</sup> Sayeed n160, 25

<sup>165</sup> Sayeed n160, 19

<sup>166</sup> Nadwi n159, 260

<sup>167</sup> Sayeed n159, 81

central argument is that '*evolving social uses of religious knowledge throughout Islamic history dramatically impacted women's roles, alternately promoting or inhibiting their religious participation in the public arena*'<sup>168</sup>. As an example she demonstrates how the professionalization of *hadith* scholarship had the effect of excluding women<sup>169</sup>. Whilst this may have been an unintended consequence, Sayeed points out there were other ways in which there was active resistance to women's participation in *hadith* scholarship<sup>170</sup>. She makes little mention of a strictly religious interpretation of the Quran as an explanation for the demise of women's involvement and demonstrates that women's fortunes as scholars of *hadith*, have not been restricted by traditional interpretations of Islam, nor by the absorption of patriarchal values<sup>171</sup>. Rather, the marginalisation of women occurs due to external factors such as institutionalisation of religious authority and education. However, I suggest that the manner in which Islam was interpreted will also have an impact on the social conditions of women scholars<sup>172</sup>.

### Contemporary trends

Sayeed argues that Muslim's women's access is currently flourishing<sup>173</sup>. I would suggest that in the public space a number of trends are emerging. First there is a re-imagining of Islamic law without patriarchal or misogynistic interpretations. Muslim female academics have embarked on a scholarly journey to re-examine the sources of Islamic law, as believing women and practising Muslims. Some have made use of feminist literature as their starting position whilst others such as Barlas have relied on the Quran describing the distinctive way in which it addresses '*sexual sameness and difference*', compared with the understanding of Western models<sup>174</sup>. Barlas in particular argues that a *patriarchal reading of*

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<sup>168</sup> Sayeed n160, 91

<sup>169</sup> Sayeed n160, 93

<sup>170</sup> Sayeed n160, 97-100

<sup>171</sup> Sayeed n160, 193

<sup>172</sup> For example, if the religious understanding is that women cannot travel without a male guardian, then that will have an impact on women's social conditions and prevent them from participating in the collection of *hadith* from different parts of the world, unless they are able to secure a male guardian to travel with.

<sup>173</sup> Sayeed n160, 194

<sup>174</sup> Asma Barlas, "*Believing Women*" in *Islam: Unreading Patriarchal Interpretations of the Quran* (University of Texas Press 2002) 27

*scripts is not specific to men and nor is a liberatory reading specific to women*<sup>175</sup>. Wadud also describes how her challenges of gender biases emanate from within a pro-faith perspective whereby she ‘*accepts certain aspects of Islam as sacred*’<sup>176</sup>. Therefore she argues her critique is not the same as that of the classical or neo-Orientalist scholar<sup>177</sup> who is not constrained by such beliefs<sup>178</sup>.

Sayeed identifies another trend; the growth of female only educational facilities. Her criticisms expose how this route for women’s access to religious education is at odds with the traditional manner in which women received religious knowledge<sup>179</sup>. What may seem like an advancement for Muslim women’s education is in her view a restricted form of access, producing conservative visions of Islamic practice. Notwithstanding her criticisms, female only educational environments continue to flourish. Furthermore the internet has allowed women to receive education without having to leave their homes<sup>180</sup>.

A further trend that is occurring ‘on the ground’, into which there has been little research to date, is the emergence of Muslim female speakers and activists, *some* of whom are speaking to mixed gender audiences that are primarily Muslims. Some of these speakers are academics speaking to broader audiences on political and religious matters<sup>181</sup>. Some of the female speakers do restrict themselves to female only audiences and have a more conservative approach to their teachings<sup>182</sup>. There is a mixture of different types of speakers, coming from a range of backgrounds and there have been some recent attempts to produce a

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<sup>175</sup> Barlas n174, 21

<sup>176</sup> Amina Wadud, *Qur’an and Woman Rereading the Sacred Text from a Woman’s Perspective* (first published 1992, Oxford University Press 1999) xvii

<sup>177</sup> Wadud n176, xvii

<sup>178</sup> Ayesha A.Hidayatullah, n133, provides a good overview of the differing approaches by some of the leading female academics within this discourse.

<sup>179</sup> Sayeed n160, 195-187

<sup>180</sup> See, for example, Farhat Hashmi whose online Quranic *tafsir* courses have transformed women’s opportunities to engage with the Quran. <https://www.farhathashmi.com/> accessed 8 June 2017

<sup>181</sup> See, for example, Dalia Fahmy

<http://www.liu.edu/Brooklyn/Academics/Faculty/Faculty/F/Dalia-Fahmy> accessed 8 June 2017 and Dalia Mogahed, who is a researcher, author and former director of the Institute for Social Policy and Understanding.

<sup>182</sup> <https://ayshawazwaz.wordpress.com/category/who-is-aysha-wazwaz/> accessed 18 February 2017. Aysha Wazwaz is an academic speaker who has set up her own online courses in traditional Islamic studies.

directory of speakers<sup>183</sup>. They speak on Islamic matters, personal development within an Islamic framework or on topics of more general activism. These women would clearly describe themselves as ‘believing women’ and as practising Muslims. Some of their views may contrast quite sharply with the first group of academics<sup>184</sup> and even with one another but there is an eclectic mix of female speakers who all speak from within an Islamic framework. All of these trends are in their early stages and there is much room for development and growth. For example, while some Muslim women are speaking before mixed Muslim audiences, it is restricted not just in terms of the audience that they are speaking to but with regard to the topics. Female Muslim speakers tend to speak on matters that are of specific interest to women (such as the role of a wife), rather than gender neutral topics (such as *riba* or *zakat*). I know of no female speaker who would speak predominantly to male audiences on matters of specific interest to men. The common thread in these multiple forms of engagement by Muslim women is that the women must directly interpret and interact with the Islamic sources in order to claim legitimacy and authority.

In the final chapter I will critically examine some of the arguments why women may have been precluded from decision making or other roles in shari’a councils. As I have demonstrated, in theory at least, women have both authority and legitimacy to interpret the sources. Having scrutinised the general sources, in the next two chapters I examine the specifics of Islamic law of marriage and divorce and its relationship with English law.

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<sup>183</sup> To date I have located two lists, one for American speakers and another for UK & Europe. These lists are circulated via social media and the general public is encouraged to add names to the lists in order to keep them up to date.

[https://docs.google.com/spreadsheets/d/10q\\_kZd2mk8cMd3n1L62VsE5XnrKb9emejMip1vmXVhU/edit#gid=1862099924](https://docs.google.com/spreadsheets/d/10q_kZd2mk8cMd3n1L62VsE5XnrKb9emejMip1vmXVhU/edit#gid=1862099924) accessed 10 January 2017

<sup>184</sup> For example see Zari Faris who consistently participates in debates on the topic of feminism. Her general view is that Muslim women do not need to depend on theories of feminism in order to obtain justice in Islam. <https://zarafaris.com/2016/02/26/debate-video-islam-and-feminism-compatible-or-conflicting-zara-faris-mdi-vs-marina-mahathir-sisters-in-islam/> accessed 10 January 2017

## Chapter 4 – The relationship between Islamic and English Laws of Marriage: choices for Muslims and choices for English Law.

### Introduction

British Muslim couples must potentially navigate their way through two systems of law in order to enter into their marriages and to terminate them. Muslims will wish to ensure that they comply with Islamic requirements of a valid marriage; they *may* also wish to ensure their marriage is valid in accordance with English law. There is an unnecessarily complex and restrictive system of marriage under English law<sup>1</sup> that has Christian roots deeply embedded within it. It is, by its nature, exclusionary. English law of marriage could potentially be made simpler and more inclusive of the different ways in which people may marry. A somewhat more radical alternative is that the state could simply remove itself from marital laws altogether and deal only with the consequences of a relationship, rather than deciding on whether people are ‘married’. These issues will be explored in this chapter.

When I refer to civil law, I am including all aspects of English family law as understood by those who practise family law in England and Wales. In essence I am referring to the body of law available to a couple both on entry into a marriage and on the breakdown of their relationship. Clearly a Muslim couple is concerned with some Islamic law. The extent to which civil law is engaged by a Muslim couple will, in part, depend upon whether the parties have entered into a marriage recognised by civil law. If there is no valid marriage for the purposes of civil law, then a court has no jurisdiction to terminate the marriage. Even if the marriage is not recognised by civil law, it may still be the case that the civil law is available to parties where there are disputes about children or certain types of financial disputes.

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<sup>1</sup> On 17<sup>th</sup> December 2015, the Law Commission published its scoping paper on the law governing marriage in England and Wales. The Law Commission stated that existing marriage law is ‘*unnecessarily restrictive, outdated and fails to serve a diverse society*’. It recommends extensive reform. [http://www.lawcom.gov.uk/wp-content/uploads/2015/12/Getting\\_Married\\_scoping\\_paper.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/12/Getting_Married_scoping_paper.pdf) accessed 17 January 2017.

In this thesis I am not examining the law relating to children or finances. As a general point it can be said that when it comes to disputes concerning children, English civil law does not on the whole differentiate between married and unmarried parents of a child. The existence of a marriage may *sometimes* have an impact, but for most parents the full range of private law orders are available to settle any disputes regarding a child. The lack of a marriage *may* also have some impact on the application of the law relating to protection against domestic violence, but for most cases it will not make a significant difference. It is therefore entirely possible for English law to develop rights and obligations in family law which are not contingent on marriage.

The key area where it becomes important whether parties have entered into a marriage recognised by English law is in relation to the division of finances. Whilst English law, via the law of trusts, is making important strides for unmarried couples when it comes to the family home,<sup>2</sup> there is nowhere near the protection that is afforded to married couples in dividing the matrimonial assets. This, I would argue, is the single most important distinction between a married and unmarried couple: the financial consequences on the breakdown of the relationship. The financially weak, unmarried party is at risk of significant disadvantage by not being married. I will return to this theme when I consider '*nikaah*' only marriages.

My analysis of the law relating to marriage and divorce is divided into two chapters. In this chapter I consider the concept of marriage both under English law and Islamic law. I explore the options available to Muslims in getting married and I address the concerns around Muslims who enter into *nikaah* only marriages. I also briefly examine some of the more controversial issues around the marital relationship as understood in Islam. In Chapter 5 I undertake a similar analysis with the law relating to divorce. My aim in each of these chapters is to understand the interplay between English law and Islamic law in practical terms, to examine how a Muslim couple may navigate their way through the two

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<sup>2</sup> See some of the leading cases on establishing a common intention constructive trust in the family home including *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC and *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC

systems and I offer some suggestions about the way forward. I also consider how English law and shari'a councils can help Muslim women achieve their intended outcomes in a way that does not require them to compromise or exit their faith.

### **Not all Muslims need shari'a councils to apply Islamic law**

At the outset it needs to be understood that the existence of shari'a councils is not vital to British Muslims' application of shari'a or Islamic law to themselves. Muslims can fulfil their obligations as Muslims without recourse to a shari'a council and indeed most Muslims do so. All the women who participated in my study had entered into a religious marriage (*nikaah*). None of them were married in a shari'a council nor had anything to do with a shari'a council at the time their marriages were entered into. This is normal practice though one should note that Imams or clerics who adjudicate in divorces or other matrimonial disputes in shari'a councils are very often connected with local mosques and may well conduct Islamic marriage ceremonies. But such ceremonies are generally not conducted as part of the services offered by a shari'a council<sup>3</sup>. There is very little research that indicates high levels of Muslims marrying without a *nikaah* ceremony<sup>4</sup>. Conversely there is clear evidence that Muslims do 'marry' Islamically without any civil law marriage. On the whole Muslims who enter into *nikaah* only marriages are not considered by the civil law to be married and instead are treated by that law as cohabitantes. I will return to the complexities raised by such marriages later in this chapter.

Although, perhaps less likely, a Muslim couple can of course simply marry and divorce in accordance with civil law alone, in the same manner as any other British non-Muslims. Indeed, on the face of it, it appears that many Muslims rely exclusively on the civil system as they never approach a shari'a council at all, either at the stage of entering into a marriage or in its termination. However, not approaching a shari'a council does not mean Islamic law has not been engaged by the parties. It is entirely possible that the parties have married and divorced

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<sup>3</sup> It could even be argued that shari'a councils ought to have more involvement prior to the marriage in advising parties about their marital obligations, as well as providing a venue for the conducting of marriage ceremonies.

<sup>4</sup> 'Non-practising' or 'cultural' Muslims is generally an under-researched topic.

in accordance with Islamic law, without ever having approached a shari'a council as we shall see later. The existence of a shari'a council is not essential to Muslims to apply Islamic or shari'a law to their lives. Even where Muslim couples take their dispute to a civil court it is entirely possible they will negotiate and make their decisions using Islamic principles as their guide. Civil law may form the framework within which the Muslim couple are operating but since English law encourages parties to reach agreements on matters of finance and children they are free to negotiate using Islamic principles in the shadow of English law<sup>5</sup>.

The above points are made to demonstrate access to a shari'a council is not essential to Muslims' general engagement with and application of the shari'a or Islamic law. A Muslim couple can quite happily marry, divorce, sort out their finances and their children fully in accordance with Islamic law without ever setting foot inside a shari'a council. Very little research has been conducted into Muslims who marry and divorce outside of the civil law system and outside the shari'a councils. We therefore have no idea of the extent to which this is occurring or if it is problematic in any way. In some respects this is the area most in need of research. Muslim women who access a civil court and/or a shari'a council are likely to eventually succeed in attaining a divorce. The concern might be better placed in investigating to what extent Muslim women are denied access and thereby remain in unhappy marriages.

This raises the question: when is it that Muslims have a need for shari'a councils? In my view, shari'a councils are essential for Muslim women who find themselves in very specific circumstances: where their husbands refuse to religiously divorce them or where they doubt the validity of the Islamic divorce and require a religious determination. I will examine these matters further when considering the issue of divorce in chapter 5. Shari'a councils have very little, if anything, to do with parties' entry into a marriage, other than determining for the purposes of a divorce whether a valid marriage was entered into.

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<sup>5</sup> For example, a Muslim woman is free to negotiate her children's contact with the father based on Islamic notions of the father's Islamic rights, provided the parties' ultimate agreement does not directly contravene English law.

## Islam and the Benefits of Marriage

The relationship of marriage occupies a pivotal place within Islam. There is no other human relationship that is discussed in more detail. Who can marry whom, what the requirements of a valid marriage contract are, what the rights and obligations of each party are within that marriage, are all issues that have been analysed in detail by Muslim jurists. In any book of *fiqh*, there are entire volumes devoted to the marriage contract and the marital relationship.

The marital relationship is identified in the Quran and in the *ahadith* literature as an important relationship. It is referred to as a relationship of tranquillity, compassion, love and mercy<sup>6</sup>, and the Quran in particular uses poetic imagery in its descriptions of marriage. For example, spouses are described as garments or veils for one another<sup>7</sup>. Both traditional and contemporary scholars have written at length about what this imagery tells us about the relationship between a husband and wife<sup>8</sup>. A garment is normally used to cover oneself, particularly in covering one's modesty. A garment is also used as a protection against external forces and it can be used to beautify oneself or to provide cover for one's flaws. Scholars have stated that by using the metaphor of spouses being garments for each other, the Quran is telling us that the relationship of marriage should entail spouses protecting one another, covering each other's deficiencies and beautifying one another<sup>9</sup>.

With these verses, the Quran presents the relationship of marriage in an egalitarian manner. Love and mercy are qualities that God places between a couple so that each spouse can lead a tranquil life. These are not qualities specific to one gender nor are they presented as such. In verse 2:187, both spouses are said to be veils or garments of one another, indicating both are fulfilling the same

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<sup>6</sup> The Quran 30:21

<sup>7</sup> The Quran 2:187 'they [your wives] are garments to you and you are garments to them'

<sup>8</sup> <http://www.muslimcentral.com/quran-weekly-marriage-makeover-04-like-garment/> accessed 9 June 2017

<https://www.acast.com/quranweekly/marriage-makeover-04-like-a-garment> accessed 17 January 2017 typifies the analysis of this verse by a contemporary speaker.

<sup>9</sup> Yasir Qadhi *Like a Garment*

[https://d1.islamhouse.com/data/en/ih\\_books/single/en\\_Like\\_A\\_Garment.pdf](https://d1.islamhouse.com/data/en/ih_books/single/en_Like_A_Garment.pdf) accessed 9 June 2017

role for one another. It is interesting that whilst these verses have been discussed at length, they are not treated as providing absolute rules in the same way that verses which imply that husbands have authority over women or that women must be obedient to their husbands are sometimes presented. Mir-Hosseini describes this as a hazy boundary between moral and legal obligations; the moral injunctions are overshadowed by what are perceived to be the legal elements of the contract which involve exchange<sup>10</sup>. I will return to this theme later in this chapter, when discussing the marital relationship.

Marriage is also given a religious significance in Islam. The Prophet has stated that marriage is one half of a person's religion<sup>11</sup>. Scholars have offered many reasons to explain why marriage has such a significant effect on one's religion. Marriage brings with it responsibilities that spouses owe one another for which they will be accountable to God. Being a good wife or good husband is a means for both parties to attain God's pleasure. Spouses are meant to provide one another with comfort, support and companionship, particularly at times of difficulty when an individual may find their faith weakened. Marriage is seen as a protection against illicit relationships, as it gives men and women the opportunity to fulfil their desires in a legitimate way. Physical desires of lust and attraction are seen as natural desires and Islam provides for their fulfilment within marriage alone. Any sexual relationship outside of marriage is completely forbidden and even potentially punishable as a crime against God. Again this is gender neutral and the benefits of marriage apply to both spouses in the same manner. It should be noted that the changing social reality for many Muslim women both as minorities in Western lands and in Muslim majority lands is that they are unable to find a suitable spouse. This has significant implications for the moral decisions made by the women regarding sexual intimacy, sexual desires and more generally relationships outside of marriage. Imtoul and Hussein contend that for unmarried Muslim women their adulthood is defined by Islamic

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<sup>10</sup> Ziba Mir-Hosseini, *Marriage on Trial Islamic Family Law in Iran and Morocco* (I.B.Tauris revised edition 2011) 33

<sup>11</sup> At-Tirmidi *Hadith* no 3096

discourses that are disconnected to their actual lives<sup>12</sup>. It is not the aim of this thesis to explore the impact of unmarried Muslim women as it would not be expected that they will attempt to access the services of a shari'a council for the purposes of a divorce. However, it may be that shari'a councils and Muslims scholars alike are required to re-visit the debates around different forms of marriage such as temporary marriages, transit marriages and other customary relationships<sup>13</sup>.

To be married is clearly encouraged both in the Quran and by the Prophet himself in his sayings and his actions<sup>14</sup>. Marriage comes within the category of a recommended act so in of itself there is no punishment or reward whether married or unmarried. The Prophet had multiple marriages. As a young man he had a monogamous marriage with Khadija and after her death, he had polygynous marriages. For Muslims, being married is to follow in the Prophet's *sunnah*. Marriage is seen as more than a romantic concept, and the Quran provides more substantial rules on matters such as which parties are forbidden (whether temporarily or permanently) to marry one another, the formation of the marriage contract and obligations and duties that the spouses owe one another once married.

All of these topics are then supported within the *hadith* literature by the actions of the Prophet himself, by his behaviour in his own marriages, by his advice to other companions regarding their marriages, and in the rulings that he gave when disputes arose. As with any other aspect of their lives, Muslims believe that being a good spouse is not just for the benefit of their worldly life but also a means to success in the hereafter. Being a good spouse is strongly linked to a person's direct relationship with God and this spiritual aspect of marriage features heavily in encouraging parties to compromise with one another, to be patient with one another during difficult times, to accept one another's

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<sup>12</sup> Alia Imtoul and Shakira Hussein, 'Challenging the myth of the happy celibate: Muslim women negotiating contemporary relationships' [2009] *Contemporary Islam* Volume 3:1 25-39, 27

<sup>13</sup> For a more detailed discussion of alternate sexual liaisons see, Kecia Ali, *Sexual Ethics and Islam Feminist Reflections on Qur'an, Hadith, and Jurisprudence* (One World Publications 2006)

<sup>14</sup> Sunan Ibn Majah *Hadith* no 1846 in which the Prophet stated that marriage was his sunnah (ie part of his way of life) and anyone who avoided it was not part of his ummah.

shortcomings, and to remember that the sacrifices made by the parties will be rewarded by God in the hereafter<sup>15</sup>. For Muslims, it is not just a case of ensuring that the initial marriage contract complies with Islamic law but that the entire married life is one that is pleasing to God, as is the manner in which any divorce is obtained. Whilst the Quran does not place any greater burden on one party to maintain a marriage Bano noted in her study the *'language of reconciliation embodies dynamics of power that place emphasis on woman's divinely ordained obligations to stabilize marriage'*<sup>16</sup>.

Finally, a marital relationship is seen as the most appropriate environment within which to bring up children and it ensures that the lineage of a family is protected<sup>17</sup>. It is argued that a family unit which is governed by marriage ensures children know who both their parents are and each parent has complementary obligations towards their children which they are able to carry out simultaneously. For all these reasons the protection of marriage is an important goal of the shari'a. A strong family is seen as the bedrock of a society and this is an objective common to Western societies.

Barlas points out that within Islam, these requirements of marriage, its purposes and the nature of the human beings who enter into marriage are not distinguished in any way as between the sexes. She argues this is because as the Quran states men and women originated from the same self<sup>18</sup> (*nafs*) and are thereby endowed with the same pure nature (*fitra*)<sup>19</sup>. Similarly Bauer points out that the notion of equality between men and women begins at the point of creation<sup>20</sup>. Stowasser has argued that by the time classical Quranic exegetes were taking place Islamic law had *'a theological-legal paradigm that enshrined*

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<sup>15</sup> See the discussion in Chapter 2

<sup>16</sup> Samia Bano, 'In Pursuit of Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the 'Shari'a Debate' in Britain' (2008) Ecclesiastical Law Society 283-309, 302

<sup>17</sup> The concept of the *maqasid* or goals of the *shari'a* was discussed in Chapter 2. One of the traditionally understood *maqasid's* is protection or preservation of offspring which has evolved into caring for the family, see Jasser Auda *Maqasid Al-Shariah An Introductory Guide*, (2008) [http://www.jasserauda.net/new/pdf/maqasid\\_guide-Feb\\_2008.pdf](http://www.jasserauda.net/new/pdf/maqasid_guide-Feb_2008.pdf) accessed 9 June 2017

<sup>18</sup> The Quran 16:72

<sup>19</sup> Asma Barlas, *Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur'an* (University of Texas Press 2002), 183

<sup>20</sup> Karen Bauer, *Gender Hierarchy in the Qur'an: Medieval Interpretations, Modern Responses* (Cambridge University Press 2015) 101

*cultural assumptions about gender, women and institutionalised structures governing male-female relations established mirroring social reality*<sup>21</sup>. This is to some extent demonstrated by Bauer in her scrutiny of the Quranic verses and *ahadith* relating to the creation of men and women. Nonetheless, Bauer endorses Barlas' view that modern interpreters hold that the Quranic verses indicate men and women to have been created with equal status<sup>22</sup>. It is critical to establish this as a starting point because it will influence the manner in which verses addressing the specific relationship of marriage are subsequently interpreted.

## Conditions for a Valid Marriage in Islam

### Marriage as a contract in Islam

The basic starting point in Islam is that marriage is formed by a contract. Whilst marriage itself entails a spiritual dimension and is considered an act of worship, its formation and validity lie within the Islamic law of contract. The marriage contract is referred to as the '*nikaah*'. The lexical meaning of the word *nikaah* is 'sexual intercourse' or 'marriage contract'. The meaning which the shari'a ascribes to it is 'a contract entailing permissibility of mutual physical enjoyment'. One of the primary purposes of marriage is therefore is to provide a lawful space for the fulfilment of sexual desires of both men and women<sup>23</sup>.

### Basic components

The basic components of a marriage contract are a bride, a groom, an offer and acceptance, the *mahr* and two witnesses. The requirement of a guardian (a *Wali*) is contested as between the *sunni* schools of thought. On the whole it should be the case that, whilst marriage is a serious matter, it ought to be fairly simple to enter into a valid marriage. It is one of the three things in the context of a marital relationship whether undertaken in seriousness or jest is binding<sup>24</sup>. This is to discourage individuals from entering into a marriage or indeed pronouncing a

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<sup>21</sup> Barbara Freyer Stowasser *Women in the Qur'an: Traditions, and Interpretation* (Oxford University Press 1994), 7

<sup>22</sup> Bauer n20, 101-136

<sup>23</sup> For a fuller exploration of the sexual relationship in Islam, particularly the agency of women to act as fully moral and sexual human beings see, Kecia Ali, *Sexual Ethics & Islam; Feminist Reflections on Qu'ran, Hadith and Jurisprudence* (Oneworld).

<sup>24</sup> Abu Dawood Book of Divorce *hadith* 9 *The Prophet (saws) said: 'There are three things which, whether undertaken seriously or in jest, are treated as serious: Marriage, divorce and taking back a wife (after a divorce which is not final)*

divorce as a joke or after having done one of these acts to later allege it was just a joke. So whether an individual does so seriously or as a joke, if all the components of the marriage contract are satisfied then a valid marriage has been entered into and will need a valid type of termination in order to end it. One of the reasons why marriage should be made easy is that the Prophet stated that if marriage is not facilitated there will be manifest corruption on earth<sup>25</sup>. Meaning marriage should be made easy for individuals, otherwise they risk having illicit relationships and all the consequences that flow from the break-down of family life.

### **Bride and Groom**

The bride and groom of a *nikaah* contract must be male and female. Perhaps surprisingly, the issue of same sex relationships has been addressed in some traditional Islamic works of *fiqh*. Early Islamic scholars recognised that members of the same sex may be attracted to one another and in addressing the boundaries of interaction between men and women, some scholars even placed similar restrictions in interactions between men and young boys, especially where it was felt that the men may be attracted to handsome young boys<sup>26</sup>. Ali makes the point however that Muslims seeking ‘*to reconcile a “homosexual” identity with a Muslim identity and to legitimise same-sex intimate partnerships*’ is without precedent in Muslim history<sup>27</sup>.

### **Prohibited Degrees**

The first and most obvious component of the Islamic marriage contract is that the bride and groom must be specified. Whilst there is no requirement for the contract to be in writing, it must still be clear who is marrying whom and those parties must not be forbidden to marry one another. The two verses in the Quran which identify the prohibited degrees for the purposes of marriage are 4:22 and

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<sup>25</sup> At-Tirmidi *hadith* 1084. The Prophet’s words in this *hadith* are directed at those who act as guardians of women, advising them not to unreasonably prevent marriage when they are approached by appropriate suitors. The context of the *hadith* appears to be situations where women were being prevented from marrying men of their choice.

<sup>26</sup> Judith E. Tucker, *Women, Family, and Gender in Islamic Law* (Cambridge University Press 2008) 182

<sup>27</sup> Ali n23, 78

4:23<sup>28</sup>. Similar to English law, the Quran explicitly identifies certain relationships where the parties are prohibited to marry one another either due to blood or marital ties.

However, the Quran has an additional category included in verse 4:23 of 'fosterage' or 'suckling'. This has some parallels in English law with adoption, although there are some significant differences. Islam does not recognise the concept of adoption as understood by English law. In English law the effect of adoption is to give adoptive parents the same rights and obligations over their adoptive child, as they would have over a biological child. In Islam, the preservation of lineage forms part of the protection of the family, so it is not permissible to 'adopt' a child as one's own. Under English law, an adopted child is legally the child of its adoptive parents and as such adoptive parents cannot marry their adoptive children. Although Islam highly encourages Muslims to take care of orphan children, it does not allow for the creation of a legal relationship in these circumstances<sup>29</sup>. Instead, if a relationship of 'fostering' or 'suckling' is created, marriage becomes forbidden. Here fostering or suckling refers to a woman breastfeeding a child that is not her own biological child. There is some difference between the *sunni* schools as to how many occasions a child must be given breast milk before this relationship is created (ranging from three to ten)<sup>30</sup>.

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<sup>28</sup> And do not marry those [women] whom your fathers married, except what has already occurred. Indeed, it was an immorality and hateful [to Allah ] and was evil as a way. (4:22) Prohibited to you [for marriage] are your mothers, your daughters, your sisters, your father's sisters, your mother's sisters, your brother's daughters, your sister's daughters, your [milk] mothers who nursed you, your sisters through nursing, your wives' mothers, and your step-daughters under your guardianship [born] of your wives unto whom you have gone in. But if you have not gone in unto them, there is no sin upon you. And [also prohibited are] the wives of your sons who are from your [own] loins, and that you take [in marriage] two sisters simultaneously, except for what has already occurred. Indeed, Allah is ever Forgiving and Merciful.(4:23)

<sup>29</sup>In normal circumstances Islam prohibits a man from marrying his former daughter in law. But during the adulthood of his 'adopted' son (Zaid Ibn Harith), God commanded the Prophet to marry his 'adopted' son's former wife. This is used as a proof that there is no such concept as adoption in Islam. The Prophet was uncomfortable about doing this because he had considered his 'adopted' son as a son from a young age . The Prophet had treated him as a son to the extent that the rest of the community referred to him as Zaid ibn Mohammed meaning Zaid son of Mohammed. It was not until Zaid was an adult and divorced, that the Prophet received revelation regarding the issue of adoption. The Quran 33:37

<sup>30</sup> The female who breastfeeds the child is regarded as the mother and her husband as the father of the child, as the Prophet stated 'that suckling forbids (from marriage) that which is forbidden due to birth '. Most scholars are also of the view that this suckling must take place before the

Finally it is also worth noting that when considering who is forbidden to marry in Islam, some relations are forbidden to marry one another permanently. So for example, a father cannot ever marry his own child, whether this is his natural child or a child that has been breastfed by his wife, nor can a brother ever marry his own sister. Others are forbidden to marry temporarily due to a particular circumstance that one or both of the parties may find themselves in. Should the circumstances change the prohibition to marry may be removed and the parties are free to marry one another. For example, a man with four wives will not be permitted to marry a fifth wife. Should his circumstances change by the death or divorce of one of his current wives then he would be free to marry again. In total the two verses create 14 categories of prohibited classes of women for marriage, seven due to blood and seven due to marriage or suckling.

English law has also prohibited degrees of relationship for marriage both by kindred and affinity and includes relationships created by adoption<sup>31</sup>. Whilst English law gives the same legal status to adoption as it gives to a biological child, there is no specific status attached to a child suckled by a female who is not the child's biological mother. In grappling with the issue of who may marry whom, English civil law and Islamic law have some areas where they absolutely agree on in terms of prohibited relationships<sup>32</sup> and other areas where they differ<sup>33</sup>. It is therefore possible for Muslims in certain situations to breach

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child reaches the age of two years although some companions of the Prophet, such as Aisha took the view that this was not necessarily the case. It is well known that Aisha's view was that an adult could be given breast milk specifically in order to create this relationship of fosterage in order to alleviate a hardship. For example, if a couple were taking care of an older male child aged fifteen years or above, the wife would need to wear hijab in the presence of the child at all times. She could alleviate this difficulty by giving this child a cup of her breast milk. This child is then becomes *mahram* to her, so she is not permitted to marry him and can remove her hijab in his presence.

<sup>31</sup> Since 1949 all prohibitions in English law have been codified and are contained in the First Schedule to the Marriage Act as amended, the Marriage (Prohibited Degrees of Relationship Act) 1986 and Marriage Act 1949 s78 (as amended).

<sup>32</sup> The core biological family ties of parents to children; brothers, sisters, uncles, aunts and nieces, whether half blood or full blood are agreed by both Islamic and English law as being within prohibited degrees for the purposes of marriage.

<sup>33</sup> For example there is the issue of a step child. All sunni schools within Islam allow a step-father to marry his former step-daughter, provided the father has never had any sexual relations with the step-daughter's mother, when he was married to her. Some scholars have included the mere opportunity of a sexual relationship with the mother which, they say, will prevent the father from

English law but it does not appear that this is a matter which has greatly troubled Muslims or English lawyers.

#### Minimum age requirements of the parties

Almost all countries, whether Muslim majority or otherwise have a minimum age requirement for the purposes of marriage though there is some disparity as to what that age should be, even in Western nations. In England and Wales a marriage is void if either party to a marriage is below the age of 16 years<sup>34</sup>. Between the ages of 16 and 18, generally parental consent or the consent of specified persons is required as a formality to the marriage<sup>35</sup>. Once a child reaches 18 years of age, parental consent is no longer required in order to enter into a valid marriage. In Islam neither the Quran nor the Prophet proscribed any minimum age. It was left to later scholars to discuss this issue. Traditional Islamic scholars did not set a minimum age for marriage relying upon individuals to demonstrate a capacity to appreciate the consequences of what they were doing or, put another way, having the capacity to '*discharge responsibilities and pursue rights*'<sup>36</sup>.

What is clear from all societies is that the minimum age of marriage is very much dependent upon cultural and customary norms of a particular historical period. The fact that Islam has no set age allows for some flexibility<sup>37</sup> but it has undeniably led to abuse and the problems associated with child marriages. This is not an area that I propose to examine in any detail given that Muslims in the UK must comply with the minimum age requirements of English law. In any event almost all Muslim majority countries have introduced minimum age

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marrying his former step-daughter. English law, however, will allow a step-father to marry his step-child, if both parties have attained the age of 21 years and the step-child was never treated as a 'child of the family' whilst under the age of 18 years. In both cases, we are assuming that the marital relationship between the father and mother has ended either by divorce or death of the mother.

<sup>34</sup> The Matrimonial Causes Act 1973 s11(a)(ii)

<sup>35</sup> Failure to obtain appropriate consent does not necessarily render the marriage void: see The Marriage Act 1949 s3.

<sup>36</sup> Raffia Arshad, *Islamic Family Law* (Sweet & Maxwell 2010) 48

<sup>37</sup> Ann Black, Hossein Esmaili & Nadrisyah Hosen, *Modern Perspectives on Islamic Law* (Edward Elgar Publishing Ltd 2013), 116 Black et al state that as there is no minimum age laid down in the Quran the jurists developed the position that adulthood is attained at puberty, when one is capable of giving consent and consummating a marriage.

requirements<sup>38</sup>, leading to the conclusion that having a minimum age requirement is not contrary to Islam. Although there are reported cases of Muslims in the UK entering into *nikaahs* under the age of sixteen years<sup>39</sup>, it is difficult to tell how widespread this problem is<sup>40</sup>. One would expect that most Muslims, similar to the rest of the British population, marry later than below the age of sixteen years. Any regulations of under-age marriage or of forced marriage<sup>41</sup> (which are quite distinct issues) are generally seen as protective measures for women, particularly women who may be in a vulnerable position<sup>42</sup>. Whilst civil law regulates the minimum age for marriage, regulating *nikaahs* taking place where one or both parties is under the age of sixteen years may prove to be trickier and this matter requires a fuller investigation. It may be that some of the reasons why there are *nikaahs* conducted with a party who is under the age of sixteen years are not dissimilar from reasons why contraceptives are provided to under-age and sexually active teenagers. Muslims may feel that if young people are sexually active, it is preferable for them to enter into a *nikaah* whatever the age of the parties, in order to legitimise the relationship, however unwise it might be<sup>43</sup>.

### Consent

Irrespective of age, the issue of free and unfettered consent of the parties to a marriage, has received particular attention in recent years, as successive governments have sought to tackle forced marriages. This highly politicised debate has demonstrated the complex nature of understanding ‘consent’,

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<sup>38</sup> Despite almost all Muslim majority countries having set a minimum age for marriage, there are still significant problems in Muslim majority countries with under age marriage. Bangladesh is a prime example where the minimum age for women to marry is 18 and for men is 21 and, despite the availability of penal sanctions for breach of the age requirements, according to UNICEF child marriage rates in Bangladesh are amongst the highest in the world.

<sup>39</sup> For example, the case of *Re K: A Local Authority v N and Others* [2007] 1F.L.R. 399 where the female alleged she had been forced to ‘marry’ by undertaking a *nikaah* at the age of fifteen years.

<sup>40</sup> Ralph Grillo, *Muslim Families, Politics and the Law* (Ashgate Publishing Co 2015) 54-56 discusses the possible extent of underage marriages amongst Muslims and the media and political debates this has raised.

<sup>41</sup> See the work of the Forced Marriage Unit and the criminalization of forced marriages by the Forced Marriage (Civil Protection) Act 2007 and Anti-Social Behaviour and Policing Act 2014.

<sup>42</sup> See Mairead Enright, ‘Choice Culture and the Politics of Belonging: The Emerging Law of Forced and Arranged Marriage’ (2009) *Modern Law Review* 72(3) 331. For a more detailed analysis regarding the politicisation and appropriateness of the law relating to forced marriages.

<sup>43</sup> For a more detailed discussion regarding sexual intimacy, *nikaahs* and secret relationships see, Anika Liversage ‘Secrets and Lies: When Ethnic Minority Youth Have a *Nikah*’ in Prakash Shah, Marie-Claire Foblets and Mathias Rohe (eds), *Family, Religion and Law Cultural Encounters in Europe* (Ashgate Publishing Limited 2014) 165-180

'agency' and 'autonomy'. There is a difficult balance to achieve between providing protection for women who are being 'forced' to undertake particular paths and allowing women freedom and autonomy to submit to Islamic religious or cultural constraints or doctrines. The liberal perception of 'autonomy' appears to suggest that where women have freedom to choose, they will choose to exit religious or cultural beliefs. Enright discusses this in the context of divorce law and argues that Muslims on '*best behaviour*' choose state law and '*worst behaviour*' are those who forsake English law in favour of a '*dangerous and foreign tradition*' of Islam<sup>44</sup>. Gill and Mitra-Khan describe the policy initiatives of criminalising forced marriage having been '*predicated on a desire to 'modernise' minority communities, which was in turn based on a concept of cultural othering*'<sup>45</sup>.

In many ways the criticisms that can be made of the state's approach to forced marriage are similar to the criticisms of the state's framing of the debate around shari'a councils, and Muslim women's freedom to engage with them. Gill and Mitra-Kahn argue that forced marriage is predominately viewed as a problem from the *experiences of the victims (ie othered women) and its perpetrators (ie othered men and othered cultures) temporarily threaten the moral (and, by extension, liberal) culture of the nation*<sup>46</sup>. They point out that in the context of forced marriage the focus has been on the right to exit: minority women ought to leave their families, religion or communities in order to seek fairer treatment from the liberal mainstream society<sup>47</sup>. One can argue a similar position is taken when it comes to shari'a councils and Muslims women's use of them. In other words Muslim women must exit their religion and their use of shari'a councils, in order to obtain the benefits of liberal laws which provide them with the equal rights, which they seek. But a factor that is ignored from this view-point is Muslim women's desire to be Muslim and to be bound by religious laws, however contested those laws might be. Franks examines this contested space whereby Muslim '*women choose an Islamic revivalist path but within a Western secularised*

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<sup>44</sup> Mairead Enright, 'The beginning of the sharpness: loyalty, citizenship and Muslim divorce practice' (2013) *International Journal of Law in Context* 295-317, 295

<sup>45</sup> Aisha Gill and Trishima Mitra-Khan, 'Modernising the other' [2012] *Policy & Politics* 40(1) 107, 109

<sup>46</sup> Gill and Mitra-Khan, n45, 114

<sup>47</sup> Gill and Mitra-Khan n45, 115

*society*<sup>48</sup> and notes how some of her participants turned to Islam as a means of securing their rights over customary law<sup>49</sup>.

As with any other contract a marriage contract in Islam requires an offer and acceptance. Islam does not dictate which party may make the offer or accept it but cultural norms and conventions mean that it is usually the man who makes the offer<sup>50</sup>. In considering how Islam identifies the requirements for consent or acceptance of an offer, Tucker points out that the traditional scholars of Islam took the notion of consent seriously and most agreed that the absence of consent by an adult female rendered the contract invalid<sup>51</sup>. At times distinctions were made between the female who has been married previously (ie assumed not to be a virgin) and the female who has never been married before (assumed to be a virgin), particularly in analysing what amounts to her consent to the marriage. It was understood that a female who has never been married before may be shy in vocalising her consent, so the Prophet explained that smiling or remaining silent may amount to consent on her part. There are a number of *ahadith* in which the Prophet stated that the consent of an adult woman, whether previously married or unmarried, is a requirement of the marriage contract<sup>52</sup>. The Prophet did not distinguish between women on the issue of whether consent was needed from them. Instead it seems there was a highly contextualised and pragmatic approach adopted for the manner in which consent might be manifested. There appears to be no question that the consent of an adult woman is an essential requirement for the marriage contract to be valid.

There is further supporting evidence of the requirement of consent by the *hadith* of the woman who came to see the Prophet complaining that her father had forced her to marry against her will. The Prophet informed her that her marriage was invalid and that she was free to marry whomsoever she wished. The woman

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<sup>48</sup> Mufanwy Franks, 'Islamic Feminist Strategies in a Liberal Democracy: How Feminist are they?' (2005) *Comparative Islamic Studies* 197-224

<sup>49</sup> Franks n48, 217

<sup>50</sup> In the marriage between the Prophet and Khadija it was Khadija who, through a friend, asked the Prophet to marry her.

<sup>51</sup> Tucker n26,42

<sup>52</sup> A number of different *ahadith* effectively make the same points: At-Tirmidi V2 Bk6 1107 and 1109, Abu-Dawud Bk11 2087, Sahih Al-Bukhari Vol 7 Bk62 67, An-Nasa'i Vol 4 Bk26 3272.

informed the Prophet that she was willing to accept her marriage but that she had come to the Prophet so that the Prophet could rule on the matter and fathers would know that they could not force their daughters to marry against their will<sup>53</sup>. It is interesting to note that at no point in this *hadith* did the Prophet question the woman's account, require any further proof from her or criticise her. The woman's claim was accepted and a ruling in her favour was made.

The changing and fluid ways in which Muslim women enter into marriages has been the subject of a number of academic studies. Ahmad explores the academic research and the contemporary marriage practices of educated British Muslim women from a South Asian background<sup>54</sup>. She notes the women's abilities to challenge patriarchal attitudes through Islamic knowledge. More importantly, she demonstrates that despite the multiple ways in which women in her study were negotiating the finding of a suitable spouse they still expected parental involvement in the process of finding a match<sup>55</sup>. Further in identifying the women's tensions around getting married, although there was some anxiety around 'forced marriages', of greater concern to the women was parental failures to adequately check potential husband's credentials<sup>56</sup>.

Under English law, any doubts about the parties' freedom to consent<sup>57</sup> in a marriage are treated as a possible basis for a voidable ground allowing the marriage to be annulled<sup>58</sup>. The case law addressing freedom to consent has been influenced by cases where parties have been subjected to emotional or

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<sup>53</sup> Sahih Al-Bukhari 4845 – the woman in this hadith is Khansa Bint Khidaam from the women of Ansaar (ie from the women of Medina) who were known to be forceful and opinionated. Forcing women to marry against their own wishes appears to be a practice of *jahilliyah* ie the practice of the Arabs before the revelation of Islam

<sup>54</sup> Fauzia Ahmed, 'Graduating towards marriage? Attitudes towards marriage and relationships amongst university-educated British Muslim women' (2012) Culture and Religion Volume 12:2 193-210

<sup>55</sup> Ahmed n54, 197

<sup>56</sup> Ahmed n54, 199. Indeed in the five core interrelated areas of tension which Ahmed identifies none of them include a concern that the women's consent will be overridden by

<sup>57</sup> This is distinct from the issue of capacity. A lack of capacity is a ground for the marriage to be declared void ab initio under s11(a)(iii) of the MCA 1973.

<sup>58</sup> The Matrimonial Causes Act 1973 s12(c)

psychological pressures or threats of ostracization<sup>59</sup>. Although English law is capable of taking into account the cultural experiences of individuals and adapt its laws accordingly<sup>60</sup>, the politicisation of the debate concerning forced marriage demonstrates that English law does not intervene as a neutral arbiter. Rather, when it comes to minorities, there are often other underlying objectives which are the focus of the intervention by English law<sup>61</sup>. That is not to say English law should not intervene at all but rather if we consider the work of academics such as Ahmed<sup>62</sup> one can see that viewing Muslim marriage practices as strict divisions between ‘arranged’, ‘forced’ and ‘love’ is at best unhelpful leading to clumsy state responses. Further, that for Muslim women, issues of choice were dependant on a number of other factors such as education, social class, availability of suitable spouses etc.

#### The role of the Guardian (the *Wali*)

The consent of the female to the marriage and the role played by the guardian (*wali*) are linked but distinct concepts within the *nikaah* contract. The distinction, however, is not always easy to draw and can lead to the *wali* overriding the wishes of the woman. In the above-mentioned *hadith* of Khansa the Prophet clearly did not permit the father, who was presumably Khansa’s *wali*, from overriding the wishes of his daughter.

The role of the *wali* is important not just for the validity of a contract but Chaudhry argues the function fulfilled by the *wali* sets the tone of the marriage contract and thereby sets the tone of the marriage itself<sup>63</sup>. No distinction is made in Islam between adult male and female subjects in their capacity to enter into any other contract except marriage. Adult men act independently and, as a

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<sup>59</sup> An example is *Hirani v Hirani* (1982) 4 FLR 232 which took into account the petitioner’s subjective state of mind and the severe emotional pressure brought about by the threat of ostracization by her family rendering her consent as invalid.

<sup>60</sup> I will consider this argument in the context of *mahr* later in this chapter.

<sup>61</sup> The control of immigration is one of the key policy objectives identified by both Enright and Gill & Mitra-Khan as an underlying reason for the introduction of legislation criminalising forced marriages. This is an example of an objective unrelated to the needs of women but which has been very influential in shaping laws that are ostensibly for the protection of women.

<sup>62</sup> Ahmed n54, 99. Ahmed notes the plethora of matrimonial services available to help Muslims meet potential spouses both

<sup>63</sup> Ayesha S. Chaudhry, ‘Producing Gender-Egalitarian Islamic Law A Case Study of Guardianship (Wilayah) in Prophetic Practice’ in Ziba Mir-Hosseneini, Mulki Al-Sharmani and Jana Rumminger (eds) *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (Oneworld 2015) 95

groom, the man will contract on his own behalf. The appointment of a *wali* on behalf of the woman is contested amongst Muslims, as is the nature of the role of the *wali*. This has been a contested issue from the time of the Prophet's companions. One of the reasons for this is that the legal basis requiring a *wali* comes from the *hadith* rather than the Quran<sup>64</sup>.

The *wali* is generally understood to be a male member of the woman's family<sup>65</sup>. He will be her father, her paternal grandfather or another near male relative such as a son or uncle, referred to as the *asbah*. Of the four main *Sunni* schools, it was the majority of scholars from the Hanafi school only who agreed that the marriage contract could be formed without the intervention of the *wali*, more so for a woman who was previously married<sup>66</sup>. As mentioned by Tucker, they took the view that as a woman was legally competent to enter into any other contract, it made no sense for her to be subject to a restraint of this nature, when it came to the contract most concerned with her happiness and well-being<sup>67</sup>. They also used supporting evidence from both the Quran and *ahadith* to justify their position. In the Quran each time God speaks about a woman getting married, no mention is made of a guardian overseeing her marriage, or of the necessity of the guardian's consent. In the *ahadith* we have evidence from the Prophet's statement that the guardian has no authority over a girl<sup>68</sup>. There is even evidence from the Prophet's companion Ali, who, although his strong advice was that a female should not marry without a guardian's approval, nonetheless held the marriage to be valid. These ruptures in the requirement for a *wali* indicate that this was a far from settled obligation even in the very early days of Islam.

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<sup>64</sup> Ann Black, Hosseing Esmaeili and Nadirsyah Hosen, *Modern Perspectives on Islamic Law* (Edward Elgar Publishing Limited 2013), 115

<sup>65</sup> There has been debate about whether a female can hold the position of *wali*. The more detailed exploration took place within the Hanafi school. Many Hanafi jurists accepted the right of the female to act as a *wali*. Some Hanafi jurists placed restrictions on this guardianship. The 'natural' guardian was still understood to be a Muslim male.

<sup>66</sup> Even then some Hanafi scholars adopted a doctrine of *kafa* which allowed a *wali* to petition a judge where a woman had contracted her marriage with an 'unsuitable' spouse.

<sup>67</sup> Tucker n26, 145

<sup>68</sup> See *hadith at* n53

As against this, we have *ahadith* from the Prophet in which he stated there can be no marriage without a guardian<sup>69</sup>. Other commentators have argued that this statement implies that there are no blessings in a marriage without the guardian, rather than ruling as to the validity of the marriage. The differentiation between validity of a contract without a guardian and appropriateness without a guardian is not always clearly identified in scholarly discussions. This distinction may also help to explain the conflicting accounts of what the Prophet said in relation to the guardian.

Tucker examined the contradictory and ambivalent ways in which classical jurists addressed women's ability to interact in the legal system<sup>70</sup>. She discusses the role of the *wali* in the broader context of women contracting, holding property, appearing as witnesses in court, managing assets and inheriting. She argues that the discussions by traditional scholars not only demonstrated the multiple discourses taking place regarding women as legal subjects but they addressed these issues as moral and anthropological matters, as well as legal<sup>71</sup>. So the role of the *wali* is very much situated in the practical and moral concerns of a society rather than a strict religious requirement for the validity of a marriage contract. This has important implications for the way in which the role of the *wali* ought to be understood and carried out in a modern context. Ahmed's research tells us that even where we have highly educated British Muslim women they do not appear to be content to simply find their own spouses without the benefit of parental guidance or support<sup>72</sup>.

In her analysis of the concept of *wilayah* Lamrabet, places the role of the *wali* within the general concept of *wilaya*. In the Quran God states that men and women are *awliyah* (plural of *wali*) of one another<sup>73</sup>. In this context it is used to describe men and women as protectors and supporters of one another, who

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<sup>69</sup> Abu-Dawood *hadith* 2085 and Al-Tirmidhi *hadith* 1101

<sup>70</sup> Tucker n26, 149

<sup>71</sup> Tucker n26, 149

<sup>72</sup> Ahmed n54

<sup>73</sup> The Quran 9:71

provide strength to each other<sup>74</sup>. The one who acts as a *wali* fulfils all of these obligations and The Quran places the obligation to enjoin good and forbid evil on both men and women equally<sup>75</sup>. Lamrabet argues that this demonstrates an equality of citizenship and civil obligations upon men and women jointly. Lamrabet considers *wilayah* as a general topic and its application where it has been enjoined upon men and women to discharge for the benefit of one another and the community as a whole. Whereas Chaudhry specifically considers the role of the *wali* in the context of a marriage contract<sup>76</sup> and asserts that although the *ahadith* place boundaries on the authority of the *wali*, they also institutionalise the guardian's role<sup>77</sup>. Her analysis demonstrates the difficulties that can arise in attempting to draw out gender-egalitarian visions of Islam from the Prophetic traditions. However gender-egalitarian a view one attempts to draw from these items of evidence, there is still a body of Islamic scholarship which can point to evidence supporting the role of a *wali* as a condition for the validity of the marriage contract, particularly for previously unmarried women (albeit with their consent). In her survey of some Muslim majority countries Welchman found that whilst most of them distinguish between the consent of the women and the role of the *wali*, they maintain the requirement of the *wali* for the validity of the contract<sup>78</sup>. It therefore remains an entrenched concept in many parts of Muslim majority nations.

The additional point to note with the classical evidence is that, although one can debate about the validity of a marriage contract with or without a *wali*, the actual role of the *wali* is not addressed in any great detail by past or present scholarship. In this regard Lamrabet's explorations of what is meant by *wilayah* more generally are useful in understanding the role of the *wali*. We have little practical evidence of exactly what a *wali* would do other than agreeing to, or

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<sup>74</sup> Aisha Lamrabet, 'An Egalitarian Reading of the Concepts of Khilafa, Wilayah and Qiwwamah' in Ziba Mir-Hosseini, Mulki Al-Sharmani and Jana Rumminger (eds), *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (Oneworld 2015), 72

<sup>75</sup> The Quran 9:71

<sup>76</sup> Chaudhry n63, 94

<sup>77</sup> Chaudhry n63, 97

<sup>78</sup> Lynn Welchman, 'Qiwwamah and Wilayah as Legal Postulates in Muslim Family Laws' in Ziba Mir-Hosseini, Mulki Al-Sharmani and Jana Rumminger (eds), *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (Oneworld 2015), 132-162

disagreeing with a marriage contract. This is particularly important in light of the fact that the majority of scholars from schools other than Hanafi were of the opinion that all women required a *wali* for the validity of the marriage contract. Black et al make the point that in contemporary times the role of the *wali* has been criticised as unnecessary and paternalistic<sup>79</sup>. This may be true for some women who consider themselves sufficiently capable. Even so, as demonstrated by Ahmed, this does not reflect the lived experiences of how women perceive the task of finding a suitable spouse to include parental enquiries and investigations. Black et al suggest the role could be confined to a symbolic practice<sup>80</sup> and this may be the case for women who find suitable matches without family involvement though their families are supportive of the marriage. Where there is no familial support or there are active attempts to prevent the marriage then the question of validity becomes more important<sup>81</sup>.

The alternative is to make the role of the *wali* a more effective one so that the *wali* is not only part and parcel of the enquiry into the suitability of a spouse but plays a more active role in the negotiations of the marriage terms. This would entail developing ways in which a *wali* is equipped to represent the female in achieving suitable contract terms which could include increased rights to *mahr* and a right to a delegated divorce as well as securing more personalised agreements concerning living arrangements and working or studying. I am not suggesting an expansion of the role of the *wali* on issues of validity but where it is used it could be used more effectively to the advantage of women, not unlike a lawyer negotiating a contract on behalf of a client<sup>82</sup>.

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<sup>79</sup> Black et al n37, 116 Indeed similar accusations of paternalism as made against feminists who advocate

<sup>80</sup> Black et al n37, 116

<sup>81</sup> In Shaheen Sardar Ali, 'Is an Adult Muslim Woman *Sui Juris*? Some Reflections on the Concept of "Consent in Marriage" without a *Wali* (with Particular Reference to the *Saima Waheed Case*)' (1996) Year Book of Islamic & Middle Eastern Law 156-174, Ali reflected on the Pakistani case of Saima Waheed the opinions of the different schools regarding the validity of a marriage with or without the *wali's* consent and the extent to which the *wali* can prevent a marriage by withholding consent.

<sup>82</sup> See, Lisa Wynn, 'Marriage Contracts and Women's Rights in Saudi Arabia' in Asifa Quraishi and Frank E. Vogel (eds), *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (Harvard Law School 2008), 200-214, where she argued that in negotiating marriage contracts in Saudi Arabia, it was family members who were in a stronger position to obtain favourable terms for the wife, moreover this provided her with an external scapegoat.

Despite the criticism of paternalism, there is evidence that supports parents encouraging their daughters to pursue education and professional careers for financial independency<sup>83</sup> and this could be taken further by the *wali* ensuring terms are stipulated into a marriage contract which protect those interests. Similarly, Mohammad argues that transnational marriages<sup>84</sup> can work to the advantage of women enabling them to negotiate more egalitarian terms<sup>85</sup>. Again there is potential for the *wali* to act in the interests of his charge by negotiating advantageous terms. In classical scholarship the debates amongst the schools concerning the role of the *wali* have largely concentrated on validity of the contract or the *wali's* right to rescind the contract. Very little imagination has gone into developing this role to benefit women. In my own work I did not specifically address with the women the role of the *wali* in their marriage contracts. However, as discussed in Chapter 7 it is clear family support and the impact of male<sup>86</sup> family members was for many of the women influential in their marriages. They also relied upon male family members during their divorces and post-divorce lives.

### **The Mahr**

*Mahr* is an essential requirement of a marriage contract. Guinchi argues that Islamic law, far from dissolving is penetrating into the West through official and unofficial means<sup>87</sup> and I would suggest *mahr* is a very obvious example of this. Though it must be said English law has no clear or consistent approach as to how it should treat *mahr*. From an Islamic perspective the obligation to pay *mahr* is discharged by the husband directly to the wife. Black e al describe the *mahr* as '*property or a financial entitlement that accrues to the wife for her exclusive use*'<sup>88</sup>. It can be paid immediately at the time of the marriage or deferred. If deferred it

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<sup>83</sup> Fauzia Ahmed, 'Modern traditions? British Muslim women and academic achievement' (2001) *Gender and Education* Volume 13:2 173-152

<sup>84</sup> Here the term transnational marriages refers to British wives marrying migrant husbands displacing the cultural norm of wives moving to live with their husbands. Instead the overseas husbands are accommodated within the wives' families.

<sup>85</sup> Robina Mohammad, 'Transnational shift: marriage, home and belonging for British-Pakistani Muslim women' (2015) *Social & Cultural Geography* Volume 16:6 593-614

<sup>86</sup> Here I refer mainly to fathers and brothers of the women.

<sup>87</sup> Elisa Giunchi, 'Muslim Family Law and Legal Practice in the West' in Elisa Giunchi (ed), *Muslim Family Law in Western Courts* (Routledge 2014) 6

<sup>88</sup> Black et al n37, 117

is treated as a debt by the husband owed to his wife. *Mahr* ought to provide financial security for the wife as well as acting as a deterrent to the husband in exercising his right to divorce<sup>89</sup>. Spencer identifies the range of different definitions given to *mahr* by Western scholars but concludes that none of them is able to capture its exact nature<sup>90</sup>. This may be because the precise nature of the role of *mahr* is contested. A definition will reflect what is understood to be the function(s) of *mahr* and this will influence whether *mahr* is considered to be for the advantage of women or a cause for their oppression. As Lovdal queries is it a '*sales price for the woman's uterus or a gift to honour her?*'<sup>91</sup>. Spencer highlights both the advantages that *mahr* can provide for women, including financial protection and as dis-incentive to a husband who may be considering divorcing his wife and the disadvantages of *mahr*, including the somewhat complex consequences where the *mahr* has not been paid in full and circumstances which allow the husband to evade the payment of *mahr* or allow for its return to the husband. Additionally, *mahr's* conceptualisation as a payment for the sexual availability of the wife perpetuates patriarchal structures within the family<sup>92</sup>.

There is no legally specified sum in Islam for the payment of *mahr*. Much will depend on the cultural norms of the Muslim communities to which a couple belong. There is huge diversity amongst Muslims as to what is an appropriate amount as a *mahr* payment. For many Muslims it is sufficient for it to be a nominal sum thereby fulfilling the validity requirements of a marriage contract. It is interesting that *mahr* for which there is consensus amongst scholars as to its necessity for the validity of a marriage contract, can be reduced to a nominal sum without any real concerns expressed. Whereas the requirement for a *wali* which has been subjected to critique by classical scholars and yet the *wali's* role has remained largely resistant to being reduced to a nominal role. This is perhaps an oversimplification as a nominal *mahr* can work to the advantage of a wife if she wishes to be divorced from her husband. And further, as suggested earlier, there

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<sup>89</sup> Chapter 5 will examine in more detail the relationship between *mahr* and divorce.

<sup>90</sup> Katharine Spencer, '*Mahr* as Contract: internal pluralism and external perspectives' (2011) Onati Socio-Legal Series Volume 1 n2, 6

<sup>91</sup> Lene Lovdal 'Private International Law, Muslim laws and Gender Equality: The adjudication of *mahr* in Scandinavian, English and French Courts' (Thesis University of Oslo 2008)

<sup>92</sup> Spencer n90, 7

are occasions where in practice the *wali* is performing a nominal role, akin to a Western father 'giving away' the bride.

### English law and *mahr*

English law has an underdeveloped relationship with *mahr*, which is arguably where English law stands with Islamic family law generally. One of the reasons why English law and *mahr* is still very much in the embryonic stage is that very few cases have come before English courts where the issue of *mahr* has been adjudicated upon. Fournier describes the complex nature of the transplant of the doctrine of *mahr* from Islamic orders to European orders and the complex hybridity created along the way<sup>93</sup>. She describes it as '*a panoply of conflicting images, contradictions, and distributive endowments in the transit from Islamic family law to Western adjudication*<sup>94</sup>.'

The lack of case law in English law perhaps indicates that there are no significant concerns regarding *mahr* which require adjudication. This may be correct. But as I will examine in Chapter 5, the importance of *mahr* becomes relevant at the point of an Islamic divorce, when it can be used as a negotiating tool. English law clearly separates finances and divorce. A civil divorce is generally not dependant on the parties' financial obligations. The lack of case law on *mahr* may be because the issue of *mahr* has been decided by the parties in reaching a determination on their religious divorce. It is therefore of no further relevance by the time ancillary relief matters are being adjudicated upon or negotiated. Or it may be that the *mahr* is, as is often the case, a nominal sum so it is not worth pursuing as a separate matter. Even if it is a larger sum, and the parties are married the *mahr* can be offset by other matrimonial assets in the ancillary relief claim. The likelihood of *mahr* claims coming before English courts is fairly low.

In the very limited cases where *mahr* has come before the courts, its payment has been treated as a contractual term of the *nikaah* contract. There are three

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<sup>93</sup> Pascale Fournier 'Flirting with God in western secular courts: *Mahr* in the west' (2010) International Journal of Law, Policy and Family 67-94

<sup>94</sup> Fournier n93, 68

key reported cases<sup>95</sup>. The earlier two cases of *Shahnaz v Rizwan*<sup>96</sup> and *Qureshi v Qureshi*<sup>97</sup> both involved couples whose marriages were recognised by English law and in both cases the courts allowed the wives to succeed in their claims for *mahr* as a contractual rights. In both of these cases the availability of ancillary relief and its enforcement was problematic for the wives. Allowing the women to pursue contractual claims was the only way to secure any financial provision for them. In circumstances where ancillary relief is available it is likely that *mahr* will form part of the ancillary relief assets as a whole rather than being treated as a separate contractual claim. We have no case law where a married couple have applied for ancillary relief whilst maintaining the *mahr* as a separate contractual claim. The most recent case on *mahr* is *Uddin v Choudhury*<sup>98</sup> where the parties had no civil marriage. Again the court treated the *mahr* clause as a contractual term.

In conceptualising the *mahr* as a contractual right this seems to imply that English law is applying Islamic law because Islamic law also treats the *nikaah* as a contract and *mahr* as a contractual right. Bowen, however, argues that in *Uddin* the court was actually conceptualising the *mahr* through the lens of the English law of contract<sup>99</sup>. Although the court heard expert evidence on the issue of *mahr*, the court itself did not examine the factors which would impact on the wife's entitlement to the *mahr*: namely the wife's request for an Islamic divorce, the lack of consummation of the marriage and the parties' customary or social expectations concerning the *mahr*<sup>100</sup>. From an Islamic perspective all of these

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<sup>95</sup> In, Werner F. Menski, 'Immigration and multiculturalism in Britain: New issues in research and policy' <http://casas.org.uk/papers/pdfpapers/osakalecture.pdf> accessed 14 June 2017 reference is made to the unreported case of *Ali v Ali* [2000] in which Menksi provided expert evidence. In this case the wife received the agreed *mahr* payment less £1 in an effort not to be seen to be applying Islamic law but also not to disadvantage the wife by denying her claim.

<sup>96</sup> *Shahnaz v Rizwan* [1965] 1 QB 390

<sup>97</sup> *Qureshi v Qureshi* [1972] Fam 173

<sup>98</sup> *Uddin v Choudhury* [2009] EWCA Civ 1205

<sup>99</sup> John R. Bowen, 'On British Islam: Religion, Law and Everyday Practice in Shari'a Councils' (Princeton University Press 2016) 193

<sup>100</sup> In Richard Freedland and Martin Lau, 'The Shari'a and English Law: Identity and Justice for British Muslims' in Asifa Quraishi and Frank E. Vogel (eds) *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (Harvard University Press 2008) 331- 348, they describe the treatment of *mahr* in English law as: 'some aspects of traditional Islamic marriage have therefore found expression in English law, but rather than simply applying Islamic law, English courts have used an oblique method....[mahr] is given legal efficacy as part of the law of contract'

factors have an impact on the determination of who is entitled to the *mahr*. As Bowen argues the judge accepted the expert evidence as providing matters of fact regarding Islamic law and therefore '*recognised, not shari'a, but contractual acts taken in an Islamic context*'<sup>101</sup>. Fournier makes a similar point in arguing that the *mahr* in a Western courtroom is determined by concepts that are foreign to it. As a result Western courts take a fragmented approach to it<sup>102</sup>. It is perhaps expected that an English court will 'Anglicise' the foreign doctrines or concepts that come before it, not unlike Muslims who are 'Islamifying' their Western lives to accord with their religious beliefs<sup>103</sup>. Bowen argues that the approach of English courts, as depicted in *Uddin*, is to treat Islamic law as a species of foreign law, rather than investigate how the parties understood Islam to apply to themselves<sup>104</sup>. Spencer makes some very persuasive arguments as to why Western judges should not attempt to apply Islamic law and cites the existence of shari'a councils in support of the argument that civil courts should apply secular civil law<sup>105</sup>.

In view of the recent case law on pre and post nuptial agreements it may be that *mahr* is conceptualised as a pre or post nuptial, or separation agreement. Akhtar examines the potential relationship between Muslim marriages and prenuptial agreements in light of *Radmacher v Grantino*<sup>106</sup>. English law is becoming less hostile to pre or post nuptial agreements and Akhtar argues that Muslims can benefit from this development by, in effect, creating separation agreements which embody Islamic contractual components and which can be enforced by English law<sup>107</sup>. This is an area which would need considerable development, particularly as English law is itself in the early stages of accommodating prenuptial agreements. The Law Commission in its consultation document

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<sup>101</sup> Bowen n99, 187

<sup>102</sup> Pascale Fournier, *Muslim Marriage in Western Courts Lost in Transplantation* (2010 Routledge) 108

<sup>103</sup> See later this chapter for my examination of *nikaah* only marriages as an example of Muslims Islamifying cohabitation.

<sup>104</sup> Bowen n99, 190

<sup>105</sup> Spencer n90, 17

<sup>106</sup> *Radmacher v Grantino* [2010] UKSC 42

<sup>107</sup> Zia Akhtar 'Prenuptial Agreements, Sacred Marriages and the *Radmacher* Judgment' (2013) 8 J. Comp.L 192-210

rejected any special regulation of religious marriage contracts<sup>108</sup> but recognised in general the potential for undue influence and inequality of bargaining position as vitiating factors<sup>109</sup>. Kennet suggests in light of the strict safeguards proposed, an agreement on *mahr* is only likely to be treated as a prenuptial agreement where parties had expressly intended for it to fulfil that role<sup>110</sup>. Bano points out that many of the women who participated in her study were '*placed at the margins of the decision making and negotiation processes that underpinned the terms on which the mahr was included as part of the nikaah contract*'<sup>111</sup>. For Muslim women entering into a marriage contract *mahr* is likely to be only one of a number of possible areas of negotiation (if it is negotiated at all).

The treatment of *mahr* is a good example of the complexities faced by English courts when attempting to apply an Islamic doctrine in a Western legal setting. English judges do not possess the expertise to apply Islamic law and therefore must rely on expert evidence and then re-conceptualise the Islamic doctrine within the parameters of English law. If we accept that the application of Islamic concepts ought to be limited in this way, then Muslims will need access to alternative forums, such as shari'a councils, in order to resolve their disputes 'Islamically'. The challenge for shari'a councils will be to apply the Islamic doctrines in a Western context, rather than attempting to eliminate the Western influence. One can see examples of the emerging hybridisation between Islamic law and English law by shari'a councils in the area of divorce. In Chapter 5 I will examine the ways in which shari'a councils make use of civil law in order to make religious determinations.

As entry into a marital relationship is primarily seen as contractual, Muslims are generally free to add conditions into their contracts, as long as they do not defeat the overall purposes of marriage. Whilst there has been some debate amongst

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<sup>108</sup> Law Commission Consultation Paper 198 'Marital Property Agreements' para 1.35

<sup>109</sup> Law Commission Consultation Paper 198 'Marital Property Agreements' para 6.24

<sup>110</sup> Wendy Kennett, 'Women Living under Shariah Law – Part Two Choice and Transparency' (2012) *Women in Society* Volume 3, Spring  
<http://genderstudies.research.southwales.ac.uk/wis/> accessed 13 June 2017

<sup>111</sup> Samia Bano 'Muslim Marriage and *Mahr*: The Experience of British Muslim Women' in Rbya Mehdi and Jorgen S. Nielsen (eds) *Embedding Mahr in the European Legal System* (DJOF Publishing 2011) 281

classical scholars regarding conditions in *nikaah* contracts, the most important condition for women is the delegated divorce. I will address this condition in chapter 5.

### The marital relationship

English law is principally concerned with rules regarding entry into and exit from a marital relationship. It determines how and when parties are married or divorced. It does not directly set out parties' rights and obligations towards one another whilst in the marriage<sup>112</sup>. The Quran, however, addresses this relationship through some of its most contested verses and we have the Prophet's own marriages as examples of how husbands and wives ought to behave with one another. As mentioned in Chapter 3 one of the most prolific narrators of *ahadith* is Aisha, the youngest wife of the Prophet. Many of the *ahadith* that she narrates explain her day-to-day relationship with the Prophet and, as a result they are said to provide a realistic template for Muslim husbands and wives.

I will briefly address one of the most contested verses in the Quran, verse 4:34, because it may have an impact on the way in which shari'a councils adjudicate on a particular relationship. For example, a shari'a council may be asked to consider an application for a divorce by a wife whereby the wife is making allegations that she has been harmed by the husband's behaviour. Whether a shari'a council considers harm to have occurred will to an extent depend upon what it recognises as the parties' rights and obligations within the marriage. If, as an example, the view taken is that wives must be obedient to their husbands, then there is no harm to the wife in expecting her to comply with her husband's wishes. As a result of which her request for a divorce may be denied.

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<sup>112</sup> Although English law does not set out any specific rights or obligations of a husband or wife, the case law around the law of nullity, particularly on capacity, discusses the nature of the marital relationship and what is expected of parties in a marriage, in order to determine whether parties have sufficient capacity to enter into it. See, for example cases such as *Sandwell Metropolitan Borough Council v RG and GG and SK and SKG* [2013] EWCH 2373 (COP), and *Sheffield City Council v E and S* [2004] EWCH 2808 (Fam) and *Re RS (Forced Marriage Protection Order)* [2015] EWCH 3534 (Fam). These cases all discuss different aspects of capacity but in doing so they all explore what are the expected rights and obligations within a marriage to decide if the relevant party has the capacity to consent to a marriage.

In verse 4:34 Allah says in the Quran:

*Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth. So righteous women are devoutly obedient, guarding in [the husband's] absence what Allah would have them guard. But those [wives] from whom you fear arrogance – [first] advise them; [then if they persist], forsake them in bed; and [finally] strike them [lightly]. But if they obey you [once more], seek no means against them. Indeed Allah is ever Exalted and Grand. (Saheeh International Translation)*

From this translation the verse seems to clearly confirm men's authority over women and in the event of disobedience a husband's right to reprimand his wife in stages, with the final stage permitting violence. This verse has been subjected to extensive scrutiny both in classical scholarship and more recently by Muslim feminist scholars. Barlas argues that the interpretative meanings from verses such as this one used to support men's authority over women cannot be justified contextually and also contradict the general egalitarian verses about human equality<sup>113</sup>. Earlier in this chapter when I examined the verses regarding marriage generally I made the point that no distinction was made between husbands and wives in the comfort, love and protection each provided to the other. No distinction was made in describing them as garments for one another. The Quran does not distinguish between men and women when it comes to their spirituality, their obedience to God or their accountability to God on the Day of Judgment. The general theme of the equal treatment of men and women as human beings penetrates throughout the Quran.

Barlas' argument seems to be that this context should inform our readings of the specific verses concerning the marital relationship. Although I agree that the general views of the equality of human beings should inform our understanding of specific verses, I would also argue that the relationship of marriage has been singled out in the Quran, so one has to accept that the roles of men and women within a marriage may include differences which may result in what appears to

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<sup>113</sup> Barlas n19, 184

be inequality. Equality before God can be achieved by human beings fulfilling differing but complementary roles when it comes to the marital relationship.

A number of other translations of the verse provide for alternative meanings which are more nuanced. Bakhtiar has produced a translation of the verse which she states has internal consistency and reliability<sup>114</sup> and gives a woman's point of view. She states that her translation supports her contention that the Quran speaks to men and women as complementing one another rather than as superior-inferior to one another<sup>115</sup>. In her translation of verse 4:34 she states: *Men are supporters of wives because God has given some of them an advantage over others and because they have spent of their wealth. So the ones(f) in accord with morality are the ones(f) who are morally obligated with the ones(f) who guard the unseen of what God has kept safe. And those(f) whose resistance you fear, then admonish them(f) and abandon them(f) in their sleeping places and go away from them(f). Then if they(f) obey you, then look not for any way against them(f). Truly God has been Lofty, Great<sup>116</sup>.*

In Bakhtiar's translation there are two key differences. First the emphasis is placed on men as supporters of women, rather than a level of superiority assigned to men, and secondly, in reprimanding women, the final stage suggested is a period of separation rather than any form of violence. Describing men as supporters of women is part of the holistic approach to the Quran which Hidayatullah refers to as a 'keystone feminist exegetical strategy' but as Hidayatullah points out it is a method of interpretation that was employed by classical scholars<sup>117</sup>. Indeed it is arguable that an approach which interprets a verse without the holistic approach is in contradiction with what the Quran demands of a believer<sup>118</sup>. Bauer argues that despite the androcentric worldview of classical interpreters of the Quran it is false to assume that they only

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<sup>114</sup> Laleh Bakhtiar, *The Sublime Quran English Translation* (Library of Islam 2009) preface xii

<sup>115</sup> Bakhtiar n114, preface xviii-xix

<sup>116</sup> Bakhtiar n114, 70

<sup>117</sup> Aysha A Hidayatullah *Feminist Edges of the Quran* (Oxford University Press 2014) 87-88

<sup>118</sup> Both Asma Barlas and Amina Wadud make this argument by using verses such as 3:7 which includes: *But those firm in knowledge say, "We believe in it. All [of it] is from our Lord".* This suggests an holistic approach in believing in the entire Quran.

understood the Quran in isolated parts. To the contrary she argues that they took it for granted that the Quran forms a coherent body but that their '*notions of equality, gender relations and hierarchy in marriage are very different from the notions held today*'<sup>119</sup>. This seems a much more plausible argument to make, that the verses were interpreted in line with the views held at the time regarding the division of roles within a marital relationship, rather than exegetes failing to understand the Quran as a whole.

Barlas argues that from the Quran the role of the husband as the breadwinner provides a normative position regarding men's obligation to provide for women. It is not describing all men's superiority over all women but rather informing men that they are the breadwinners because of the resources God has blessed them with and again she cites classical support for this interpretation<sup>120</sup>. If this part of the verse is specifically only referring to financial rights and obligations then it needs to be understood in light of any other verses that address finances in order to give it the coherency which Barlas suggests it ought to be read with. For example, the Quran allows for men in certain circumstances to take a greater share of inheritance than women<sup>121</sup>. So a blessing of God in allowing men a greater share is then reflected in an obligation to provide. I would argue that if we are considering coherency of financial rights and obligations in the Quran, then all the verses which address finances need to be considered in light of one another.

As a final point in relation to financial obligations, whilst the Quran may impose the financial obligation upon the husband there is clear evidence from the *hadith* which not only permits women to provide but arguably encourages them to do so<sup>122</sup>. This demonstrates that although the obligation to provide is settled on the husband, parties are free to reach an agreement as to who is best placed to meet

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<sup>119</sup> Bauer n20, 167

<sup>120</sup> Barlas n19, 187

<sup>121</sup> The Quran 4:11, 4:12 & 4:176

<sup>122</sup> The hadith of Zaynab, wife of Abdullah bin Masaud, who came to the Prophet to enquire whether she could give her *zakat* money to her husband and children by providing for them. She was informed by the Prophet that she would receive double the reward for doing so: one reward for paying *zakat* and one reward for looking after her family members (Bukhari Volume 2 Book 24 number 507)

the financial needs of the family. Ali argues that the role of men in having any authority over women is dependent on financially providing. If they are not providing in full then they lose any resultant authority<sup>123</sup>. However this presupposes that the verse specifies the only advantage that men have over women is a financial one. But the verse states that some men have an advantage over some women **and** because they spend. The spending is in addition to what must be other advantages<sup>124</sup>. Even Ali concedes that there is strength in scriptural interpretations positing a privileged role for men<sup>125</sup>. Eshkevari concludes that this verse is essentially addressing men's protective role over women given the reality of women's weaker position both historically and in the present-day.

The second part of the verse allowing for the reprimanding of women is more difficult to reconcile with contemporary views of autonomy, independence and domestic violence. Brown describes it as the '*ultimate crisis of scripture in the modern world*'<sup>126</sup>. Much of the contemporary debate with regard to this verse focuses on the demand for obedience from the wife, and the meaning of the word '*daraba*'.

### **Obedience of the wife**

Bauer states this part of the verse is clearly addressing men and directing them as to how to behave in the event of the wife's disobedience<sup>127</sup>. Wadud's notes that the verse does not specifically mention obedience to the husband, rather she argues the verse expects co-operation between spouses and the obedience referred to is the subservience to God<sup>128</sup>. Even in the Saheeh International

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<sup>123</sup> Kecia Ali, *Sexual Ethics & Islam Feminist Reflections on Qur'an, Hadith and Jurisprudence* (Oneworld 2006) 119

<sup>124</sup> See, Hassan Yousefi Eshkevari, 'Rethinking Men's Authority Over Women Qiwama, Wilaya and their Underlying Assumptions' in Ziba Mir-Hosseini, Kari Vogt, Lena Larsen and Christian Moe (eds) *Gender and Equality in Muslim Family Law Justice and Ethics in the Islamic Legal Tradition*, (I.B. Taurus 2013) 191-211 where he states the verse identifies two reason for men's authority, namely the advantages God has given to some men (which are not specified but Eshkevari suggests include men's physical strength) and because they spend their wealth on women.

<sup>125</sup> Kecia Ali n123, 133

<sup>126</sup> Jonathan A.C Brown, *Misquoting Muhammad The Challenge and Choices of Interpreting the Prophet's Legacy* (Oneworld 2014) 270

<sup>127</sup> Bauer n20, 170

<sup>128</sup> Amina Wadud, *Quran and Woman* (Oxford University Press 1999) 74

translation above it refers to a 'devoutly' obedient wife suggesting that it is referring to obedience to God, as Islam does not expect any human being to be devoutly obedient to another. In this verse obedience to God entails, in the absence of the husband, protecting his wealth and one's own chastity. Barlas cites the general verses of men and women as protectors of one another<sup>129</sup> in support of negating male privilege in this context<sup>130</sup>. In Franks' study she questioned Christian and Muslim revivalists about the concept of a wife's obedience to her husband. Out of the 30 Muslim women who participated only one responded to say that a wife is not required to be obedient to her husband<sup>131</sup>. What is interesting to note, however, is that for those who affirmed the religious requirement of wifely obedience, they differed as to the degree of obedience required of them. The majority of them tempered the obedience to say it is only required when the husband is correct in his judgment. Franks interprets the results to mean that her respondents held the Quran as a higher authority than the husband and wives will only be obedient to the extent that they consider husbands' actions to be Islamic and will therefore approach each issue afresh<sup>132</sup>. The requirement of obedience, even where accepted that it is sanctioned by the Quran, it is also limited<sup>133</sup> and kept in check by the more general verses of the Quran and the requirement for a husband to behave Islamically<sup>134</sup>. There is very little, if any, support from classical scholars for absolute obedience and in practical terms, from Franks' study, obedience seems to be treated as a very flexible concept depending on whether the women felt their husbands were correct. Theoretical notions of obedience do not appear to mirror the practical reality of women's experiences and the way in which women curb its impact.

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<sup>129</sup> The Quran 9:71 is an example of a verse where men and women are referred to as *awliyah* of one another (defined variously as protectors, helpers, supporters, friends)

<sup>130</sup> Barlas n19,186

<sup>131</sup> Myfany Franks, 'Islamic Feminist Strategies in a Liberal Democracy: How Feminist are they?' [2005] *Comparative Islamic Studies* 197-224, 211. In addition Franks states that the majority of the Christian revivalists and Evangelicals also agreed that their religious beliefs require women to be obedient to their husbands.

<sup>132</sup> Franks n131, 212

<sup>133</sup> See Bauer n20, 180-181 and her explanation of Al-Tabari's limited notions of wifely obedience.

<sup>134</sup> Bauer n20, 178 describes the hierarchy of men and women in a marriage as being similar to a 'just ruler'. She argues '*men were expected to behave in a way that befitted their position of power*' and

### Physical punishment

*Daraba* is normally interpreted to mean 'to strike'. Scholars have identified that *daraba* has many different meanings to it and the one which best fits the context of a relationship of marriage is used by Bakhtiar, namely to leave or abandon. Brown highlights that this was the Prophet's reaction when he was having difficulties with the conduct of his own wives; he separated himself from them all and gave them the option of divorce<sup>135</sup>. There is no indication that he physically attacked his wives for any form of marital 'disobedience'. Brown contends that the most striking feature in interpreting this verse is that almost all scholars, across the centuries, have been at pains to restrict the apparent meaning of the verse<sup>136</sup>. He argues that the scholars inherited the Prophet's unease with violence against women and so their interpretations and rulings sought to limit the supposed meaning<sup>137</sup>. Bauer supports this by stating that all sources which mention hitting also qualify the hitting by limiting the extent of the hitting<sup>138</sup>. But we are still left with the issue that the scholars' efforts concentrated on limiting the effect of the verse rather than denying a husband's right to use violence, though many were uneasy about it. Both Wadud and Barlas posited that the verse was aimed at restricting unchecked violence. Barlas suggests it is at most a symbolic 'hitting' rather than an actual punitive type of hitting that the verse is referring to and more likely it is referring to the husband separating himself from his wife<sup>139</sup>.

It is evident that this verse has been subjected to many different readings throughout Islamic history and it continues to cause tensions. Barlas argues that this demonstrates it is ambiguous and, to that extent, allows for new understandings<sup>140</sup>. I accept this view and I would also accept Bakhtiar's translation of the verse which maintains consistency with Quranic themes, as well as accepting that rather than permitting violence the verse is aimed at

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<sup>135</sup> Brown n126, 271

<sup>136</sup> Brown n126, 274

<sup>137</sup> For a more detailed analysis of this verse, in particular extent to which violence is permitted by this verse see, Ayesha S Chaudhry *Domestic Violence and the Islamic Tradition Ethics, Law, and the Muslim Discourse on Gender* (Oxford University Press 2013)

<sup>138</sup> Bauer n20, 211-212. The limitations include not inflicting injury, not breaking bones, not leaving a mark or hitting with a *siwak* (a small stick used for cleaning teeth).

<sup>139</sup> Barlas n19, 188

<sup>140</sup> Barlas n 19, 189

restricting a husband to separating himself from his wife, because this was the practice of the Prophet. Having said that, I would argue that the verse does still produce a hierarchy within the marital relationship which has a practical impact on Muslims in their marital arrangements and influences the way in which shari'a councils frame their adjudication of any disputes. If there was no difference between the way in which English law understood the marital relationship and Islamic law understood it, what need would parties have to mediate within an Islamic framework? Muslims wish to mediate within an Islamic framework precisely because a religious understanding of their roles is important to them.

### Muslim marriages and civil law

Having considered the requirements of an Islamic marriage I shall now examine the phenomena of increasing numbers of British Muslims who appear to be marrying only in accordance with Islamic law. I will explore some of the case law that this has generated and the impact of this on future developments both for English law and shari'a councils. In Chapters 6 and 7 I shall analyse my own data on *nikaah* only marriages. For now, I make my arguments on the assumption that *nikaah* only marriages will continue to rise. The framing of the debate on *nikaah* only marriages suggests they are problematic because weak or ill-informed Muslim women are induced into forgoing a civil marriage which would in all circumstances have been better for them<sup>141</sup>. This is debateable and in any event I argue that rather than exceptionalising non-state registered Muslim marriages, it is the English law of marriage and cohabitation which needs revising. In many respects I argue Muslims are behaving in a very similar manner to their non-Muslim British counterparts<sup>142</sup>.

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<sup>141</sup> See for example Aina Khan's roadshow encouraging Muslims to 'register' their marriages [http://www.duncanlewis.co.uk/IslamicLaw\\_news/Aina\\_Khan%E2%80%99s\\_%E2%80%9CRegister\\_our\\_Marriage\\_Roadshow%E2%80%9D\\_in\\_Newcastle\\_on\\_23rd\\_March\\_2016\\_\(14\\_April\\_2016\).html](http://www.duncanlewis.co.uk/IslamicLaw_news/Aina_Khan%E2%80%99s_%E2%80%9CRegister_our_Marriage_Roadshow%E2%80%9D_in_Newcastle_on_23rd_March_2016_(14_April_2016).html) accessed 14 June 2017 and <http://news.bbc.co.uk/1/hi/8493660.stm> accessed 14 June 2017

<sup>142</sup> According to the Office for National Statistics cohabiting couples are the fastest growing type of family in the UK and in 2014 accounted for 16.4% of all families in the UK. This indicates that a civil marriage is increasingly seen as less important for British citizens generally and I argue Muslims are behaving in a similar manner to mainstream British society. <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2015-01-28#cohabiting-couples> accessed 17 June 2017

There has been some limited research conducted to try to establish the extent of *nikaah* only marriages amongst Muslims. Shah-Kazemi's study found that in 27 per cent of the files which she scrutinized from a shari'a council in London, the couples did not have a recognised marriage<sup>143</sup>. Other studies have found higher proportions of non-state registered Muslim marriages, including Bano<sup>144</sup> where 16 out of 25 women's marriages were non-state registered and Douglas et al<sup>145</sup> where 14 out of 27 cases observed at Birmingham Central Mosque involved non-state recognised relationships. Although Khan estimates that around 80 per cent of Muslim marriages are non-state recognised she cites no empirical evidence to support this figure<sup>146</sup>.

Other research by Vora<sup>147</sup> and Akhtar<sup>148</sup> into this topic engaged with participants that had entered into non-state recognised marriages only and so does not assist in trying to estimate the extent to which Muslims are opting out of civil marriages. Akhtar's work exceptionally has included both male and female participants, whereas all other research has only considered this issue from the perspective of women whose relationships have broken down. Akhtar summarises the reasons her participants gave for not entering into a civil marriage as a combination of '*practical conveniences, priorities and the demands on time*' and further that many couples '*have no perceived need to engage with the law as far as their successful marriages are concerned*'<sup>149</sup>. She does not suggest wide spread deliberate misleading by any one party and I question whether the

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<sup>143</sup> Sonia Nurin Shah-Kazemi, *Untying the Knot Muslim Women, Divorce and the Shariah* (The Nuffield Foundation 2001) 31

<sup>144</sup> Samia Bano, *Complexity, difference and Muslim personal law: Rethinking relationships between Shariah councils and South Asian Muslim women in Britain* (Doctoral dissertation). UK: Warwick University (2004)

<sup>145</sup> Douglas, G., Doe, C. N., Sandberg, R., Gillat-ray, S., & Khan, A. 'Accommodating religious divorce in the secular state: A case study analysis' in M. Maclean & J. Eekelaar (Eds.), *Managing Family Justice in Diverse Societies*. (Oxford Hart Publishing 2013)

<sup>146</sup> <http://www.telegraph.co.uk/women/womens-life/11715461/Muslim-Sharia-marriage-in-the-UK-is-not-toxic-polygamous-men-are.html> accessed 14 June 2017

<sup>147</sup> Vishal Vora, 'Unregistered Muslim Marriages in England and Wales: The Issue of Discrimination through 'non-marriage' Declarations in Yasir Suleiman (ed) *Muslims in the UK and Europe II* (Centre of Islamic Studies University of Cambridge 2016) 129-143

<sup>148</sup> Rajnaara C Akhtar, 'Unregistered Muslim Marriages: An Emerging Culture of Celebrating Rites and Conceding Rights' in Joanna Miles, Perveez Moody and Rebecca Probert (eds), *Marriage Rights and Rights* (Hart Publishing 2015) 167-192

<sup>149</sup> Akhtar n148, 188

response would be any different had British non-Muslim cohabitants been asked why they cohabit rather than getting married in accordance with civil law.

It had previously been argued that in order to meet the demands of English law and Islamic norms, Muslims do many things twice including marriage and divorce<sup>150</sup>. Yilmaz has explored some of the reasons why Muslims marry twice<sup>151</sup>. The more recent data identified above indicates that we may now be seeing a trend amongst Muslims to do these acts only once and that one being the Islamic one.

### English law of marriage

It is recognised the English law has long debated whether marriage is simply a contract or provides a status to the parties. In *Radmacher v Granatino*<sup>152</sup> Lady Hale, in addressing the nature of marriage, confirmed that marriage represents a form of a contractually acquired status<sup>153</sup>. Once parties enter into a valid marriage their contract is subject to the obligations and benefits which the state imposes. The state therefore has an interest in deciding who can acquire this status and how they go about acquiring it.

By its very nature English law of marriage is exclusionary. It has developed a somewhat complex set of rules depending on the type of ceremony that is undertaken<sup>154</sup>. It requires an authorised venue and an authorised celebrant to register the marriage. Marriages have preliminary formalities to complete, the exact nature of which will depend upon the type of ceremony undertaken. Non-Anglican marriages require parties to obtain a superintendent's certificate or Registrar General's licence. Parties must satisfy the appropriate notice requirements, residence requirements and all necessary requirements for consents before a certificate or licence will be granted. Parties will also need to

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<sup>150</sup> David Pearl and Werner Menski, *Muslim Family Law* (Sweet & Maxwell 1988) 46.

<sup>151</sup> Ihsan Yilmaz, 'Muslim Alternative Dispute Resolution and Neo-Ijtihad in England' (2003) *Alternatives Turkish Journal of International Relations* V2:1 1-23.

<sup>152</sup> *Radmacher v Granatino* [2010] WLR 1367

<sup>153</sup> *Radmacher* n152, [132]

<sup>154</sup> The Marriage Act 1949 consolidated a number of previous pieces of legislation concerning the various formalities.

confirm there are no lawful impediments to the marriage. For an Anglican ceremony, the preliminary requirements allow for more choice in that the parties may arrange for the publication of banns or they may obtain a common or special licence, or a superintendent's certificate<sup>155</sup>.

Once the preliminaries have been complied with the requirements for the ceremony itself depend on whether it is a civil or religious ceremony and if religious, certain religious ceremonies are treated in a more favourable manner. Ceremonies under the auspices of the Church of England (and Wales), Society of Friends and Jewish law, are specifically accommodated<sup>156</sup>. For all other religious ceremonies, the venue must be a registered building<sup>157</sup>, a registrar or authorised person must be present during the ceremony<sup>158</sup>, as must two witnesses, and prescribed words must be used. In effect the same requirements as for a civil ceremony, but with the allowance that the ceremony is of a religious nature. A civil ceremony must take place in a registered or approved building and must be conducted in the presence of approved personnel, in the presence of at least two witnesses. There is also a prescribed form of words which the parties must exchange<sup>159</sup>. The civil ceremony must be entirely secular in its nature<sup>160</sup>.

As the law currently stands if a Muslim couple wish to ensure their marriage is legally recognised they have two choices. They may either undertake two separate ceremonies, a *nikaah* and a separate civil marriage that complies with the formalities of civil law or they can try to ensure that the *nikaah* ceremony itself complies with the formalities of civil law. In either case the formalities are unnecessarily complicated. As noted, '*serious practical questions arise when one considers the disparities between the requirements for a valid nikaah and the formalities that civil law currently requires parties to fulfil*'<sup>161</sup>. English law is

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<sup>155</sup> See, Marriage Act 1949 Part II and s78(2)

<sup>156</sup> See, Marriage Act 1949 s26(1)(c), s26(1)(d), s47

<sup>157</sup> See, Marriage Act 1949 s41 & 42 as amended by Marriage Amendments Act 1958 and the Marriage (Registration of Buildings) Act 1990.

<sup>158</sup> See Marriage Act 1949 s43 and s53(e)

<sup>159</sup> See, Marriage Act 1949 s45 & s44

<sup>160</sup> See Marriage Act 1949 s26(1)(bb)

<sup>161</sup> Kathryn O'Sullivan and Leyla Jackson, 'Muslim Marriage (non) recognition: implications and possible solutions' (2017) *Journal of Social Welfare and Family* 2017 Vol 39 no1, 22-41, 23

concerned with ensuring parties are monogamous, have capacity to marry, are 'genuinely' getting married and meet the formalities so that they are worthy of the status of marriage. Islamic law however is primarily concerned with legitimising relationships so that parties are not committing the major sin of *zina*. Islamic law prescribes no particular formalities prior to the ceremony, no specific words need to be used, there is no specific venue in which the ceremony needs to take place and no specified celebrant is required (although most *nikaahs* are in practice conducted by an Imaam). The approaches are significantly different and therefore more complicated to reconcile in one ceremony. Attempts have been made to make this easier by allowing for mosques to register themselves for the purposes of marriage ceremonies but the take up has been very low<sup>162</sup>. One might add that this type of tinkering can lead to greater confusion if parties believe they have complied with civil law requirements<sup>163</sup>. Edge points out that as there is no necessity for the Muslim marriage to take place in a religious building, Muslims will often marry at home or in an unregistered venue such as a restaurant or marriage hall<sup>164</sup>. Increasing the number of registered mosques is therefore only likely to have minimal impact in assisting Muslims to enter into legally recognised marriages. It is reasonable to assume therefore that if Muslims are going to choose to undertake only one of the ceremonies it will be the Islamic one.

The Law Commission scoping paper, 'Getting Married', published in December 2015, identified the 'thriving and largely unregulated market in celebrants conducting non-legally binding marriage ceremonies'<sup>165</sup>. This issue is therefore

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<sup>162</sup> Estimates for the number of mosques and Islamic centres registered for this purpose range from 164 in 2007 to 263 in 2014 out of a total of just under 2000 mosques. See Ralph Grillo, *Muslim Families, Politics and the Law* (Routledge 2015) 43 and Vishal Vora, 'Unregistered Muslim Marriages in England and Wales: The Issue of Discrimination through 'non-marriage' Declarations in Yasir Suleiman (ed) *Muslims in the UK and Europe II* (Centre of Islamic Studies University of Cambridge 2016) 129-143, 130. Also noted in Muslims in Britain: [http://www.muslimsinbritain.org/resources/masjid\\_report.pdf](http://www.muslimsinbritain.org/resources/masjid_report.pdf) accessed 7th February 2017

<sup>163</sup> See *MA v JA* [2012] EWHC 2219 (Fam) where both parties to a *nikaah* believed their marriage was legally recognised because the *nikaah* ceremony took place in a registered mosque, though none of the other formalities had been complied with.

<sup>164</sup> Ian Edge, 'Islamic finance, alternative dispute resolution and family law: Developments Towards Legal Pluralism', in Robin Griffith-Jones (ed) *Islam and English Law, Rights, Responsibilities and the Place of Shari'a* (Cambridge University Press 2013) 116-143, 127

<sup>165</sup> Law Commission, *Getting Married A Scoping Paper* (Law Com17 December 2015) para 1.23

not limited to Muslim marriages though the Law Commission noted that the practice of religious-only marriages has been highlighted in Muslim communities<sup>166</sup>. The Law Commission advocates for a thorough review of the law of marriage and accepts there are a number of areas in need of reform, specifically in relation to the formalities establishing entry into a state-recognised relationship<sup>167</sup>. These criticisms of English law are relevant for any couple for whom the current laws of marriage do not accommodate their particular religious or non-religious needs<sup>168</sup>.

### English Law's response to *nikaah* only marriages: the non-marriage

The response of English law to marriages which do not conform with the requirements of civil law can be described as at best confusing and inconsistent. As the Law Commission explains, when legislators drafted the laws of marriage in 1823 they anticipated that the consequences of parties failing to comply with some of the necessary formalities would be a declaration that the marriage was void. No consideration was given to circumstances where parties entered into a 'marriage' without actually complying with any of the formalities<sup>169</sup>. Despite some amendments and the consolidation of the legislation<sup>170</sup>, it was believed that when it came to compliance with formalities, a marriage was either valid or void<sup>171</sup>. Crucially even where a marriage is declared void parties can still apply for ancillary relief. Probert points out that today's society is '*culturally, socially and linguistically much more diverse*'<sup>172</sup>. As a consequence there are infinitely more ways in which a couple may enter a marital union where none or very few of the formalities of English law are complied with.

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<sup>166</sup> Law Commission n151, para 1.34

<sup>167</sup> Law Commission n151, para 1.36

<sup>168</sup> Law Commission n151, para 1.7 and as the Commission points out would include, for example. Inter-faith marriages, or non-religious marriages such as those by members of the British Humanist Association.

<sup>169</sup> Law Commission n151, para 2.70 & 2.71

<sup>170</sup> Culminating in the Marriage Act 1949 which consolidated a number of statutes from 1823 onwards.

<sup>171</sup> Rebecca Probert, 'The evolving concept of non-marriage', (2013) 25 Child and Family Law Quarterly, 314-335, 316

<sup>172</sup> Probert n171, 316

The response of case law to marriages that are considered neither valid nor void has been to create a category of what is referred to as a 'non-marriage'<sup>173</sup>. This is where parties have undertaken a ceremony which bears little or no resemblance to the formalities expected by English law. The effect is that a couple who have undergone a ceremony which is declared as a non-marriage, are treated as unmarried cohabitants. This places *nikaah*-only marriages in a somewhat curious position whereby the parties consider themselves to be married, their families and communities consider them to be married, there is a religious process which parties are required to undergo in order to terminate their marriages, yet the law on the whole, categorises them as non-marriages. However, even this cannot be said with certainty as there are occasions when English law has held a *nikaah*-only marriage to be valid<sup>174</sup> and other occasions where it has been held to be a void marriage<sup>175</sup>.

Having created the non-marriage category the judiciary has attempted to introduce some clarity into this area by establishing factors which are to be taken into account when deciding whether a marriage ceremony should be classed as a non-marriage<sup>176</sup>. Despite this it remains the case that a *nikaah*-only marriage may be declared valid, or may be declared void, or may be held to be a non-marriage. This depends on the extent of the non-compliance with civil law and the intentions of the parties. This is clearly an unsatisfactory state of affairs and has been examined in some depth by academics<sup>177</sup>.

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<sup>173</sup> One might query why *nikaah*-only marriages are placed in this category of non-marriage at all. If parties have undergone a ceremony of marriage recognised by their faith as a marriage but which does not comply with the formalities of English law, then it is arguably a void marriage rather than a non-marriage. The difficulty arises from the manner in which the legislation determines a void marriage and in particular the requirement for 'knowing and wilfully' failing to comply with certain formal requirements (see s25 and s49 Marriage Act 1949).

<sup>174</sup> *MA v JA* [2012] EWHC 2219 (Fam)

<sup>175</sup> *K v K* [2016] EWCH 3380 (Fam)

<sup>176</sup> As stated in the case of *Hudson v Leigh* [2009] EWHC 1306 (Fam). The factors have been subjected to criticism. See, for example, Probert (2013).

<sup>177</sup> See Probert n171, Vora n147, O'Sullivan & Jackson n161 and Ruth Gaffney-Rhys, 'Case Commentary Hudson v Leigh – the concept of the non-marriage' (2010) 22 Child and Family Law Quarterly 351-363

## Areas for reform

I argue that there are two separate but interrelated areas of concern where reform is needed and will be of benefit not only to Muslims but to wider society. First: the state's regulation of marriage and its current non-recognition of *nikaah*-only marriages. There are a number of ways in which this exclusion may be tackled to make marriage simpler and easier. Those Muslims who wish their *nikaahs* to be recognised by English law should be able to achieve this without having to jump unnecessarily complex hurdles. Second is the lack of financial protection available for cohabitants in the event of a relationship break-down. If reforms are made in both of these areas, then the potential for women to be left in a financially vulnerable position is minimised and we are closer to Bonthuys' notion of the state protecting '*socially valuable relationships*'<sup>178</sup>. This places the emphasis on the relationship itself rather than the status of marriage<sup>179</sup>. The aim of the state ought to be to make marriage simpler and easier for those who wish to enter into a state-recognised relationship. And for those that do not enter into such a relationship, the state can still provide a financial safety net without compromising the institution of marriage.

### **Making entry into state recognised marriage simpler and easier.**

A radical approach could be to simply recognise a *nikaah* marriage as a valid marriage<sup>180</sup>. This is an approach that needs more detailed research and from my own investigations it would appear not all Muslims wish to automatically enter into a state recognised relationship which would require the state's intervention to terminate it. I will explore this with the interviews in Chapter 7.

When examining previous case law, Muslim marriages appear to have been declared non-marriages where they have failed to fulfil notice or certificate requirements, and/or they have taken place in an unregistered building and/or

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<sup>178</sup> Elsje Bonthuys, 'A Patchwork of Marriages: The Legal Relevance of Marriage in a Plural Legal System' (2016) *Onati Socio-Legal Series* v6, n6, 1303-1323, 1317-1318

<sup>179</sup> In many respects the state already acknowledges that the distinction between married and unmarried couples has limited impact in private law disputes concerning children or where one party requires protection against domestic violence.

<sup>180</sup> John Eekelaar, 'Marriage: a modest proposal' (2013) *January Family Law* 83-85

in the presence of an unregistered celebrant<sup>181</sup>. Simplification of the marriage process could include at the very least, the removal of a registered building as a requirement<sup>182</sup>. As discussed by O’Sullivan and Jackson a continental model could be adopted whereby the emphasis is placed on ensuring the celebrant is legally authorised to perform a ceremony, whether religious or otherwise, and the place of marriage an irrelevant factor in deciding on the validity of marriage<sup>183</sup>. This would make marriage simpler for Muslims and non-Muslims alike who may wish to have a more personalised service of marriage, at a venue of their choosing<sup>184</sup>.

Vora suggests a registration model based on the Scottish system as the way forward<sup>185</sup>. He argues that the lack of concern in Scotland for unregistered Muslim marriages indicates that the Scottish system is working. This does perhaps require a more detailed investigation. But, like the continental model the Scottish system is not reliant on an authorised venue for religious marriages. Rather it requires the celebrant of a religious ceremony to be authorised<sup>186</sup>. However, this still does not accommodate the fact that Muslim marriages do not require an imam or anyone else to act as a celebrant in order for them to be held valid in Islam, though most couples will have an imam conducting the *nikaah* ceremony. Moreover we are not even certain that every imam would be willing to apply for authorisation.

In addressing the complex notice requirements, another option may be to introduce a registration system allowing either party to register their marriage after the ceremony, similar to the manner in which a birth or death is registered. The registration of a birth or death is no less significant than the registration of a marriage and introducing a procedure which allows for post registration can

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<sup>181</sup> See Probert n171, for a detailed discussion of which specific instances of non-compliance have resulted in the marriage being declared as a non-marriage. Some breaches of formalities appear to be given greater weight than others.

<sup>182</sup> See my discussion above on the low take up of mosques for registration.

<sup>183</sup> O’Sullivan & Jackson n161, 33-34

<sup>184</sup> See, for example, the Humanist Society who have campaigned for their personalised non-religious ceremonies to be recognised <https://humanism.org.uk/ceremonies/non-religious-weddings/> accessed 15 June 2017

<sup>185</sup> Vora n147, 139-142

<sup>186</sup> Marriage (Scotland) Act 1977 s12

incorporate within it notice periods, opportunities for objection and appeals against registration.

None of the amendments suggested above will provide a fail-safe solution. They are measures which will allow for the state recognition of marriages to be made simpler and easier to comply with. They will mean that attaining the status of marriage is not totally excluded for those who wish to marry in an 'unconventional' manner, whilst allowing parties the freedom to refrain from obtaining state recognition, if they so wish.

A more radical suggestion has been made by academics such as Bonthuys to remove the state's involvement in declaring what amounts to a valid marriage<sup>187</sup>. The Law Commission in its scoping paper stated that there is a view that marriage should not be dealt with by the law but should be determined by the religious affiliations of the parties<sup>188</sup>. The Law Commission took the position, that at the very least the state has a role to play in checking parties' eligibility, capacity and consent and protecting against sham and forced marriages. But the state has the same interest in these matters when it comes to cohabitees and yet takes little interest in ensuring all these requirements are met for cohabitees.

Further, the Law Commission explains that the state has an interest in maintaining a record of marriages taking place though what exactly that interest may be is not clearly articulated<sup>189</sup>. Bonthuys argues that in the South African context the Eurocentric focus on marriage as the primary indicator of family status does not align with the lived experiences of South Africans<sup>190</sup>. As a result the most radical of Bonthuys suggestions is for people to be allowed to enter into family relationships in any manner, including getting married if they so choose, but that the state should not involve itself in regulating the conditions and requirements for a valid marriage<sup>191</sup>. A more inclusionary and pluralistic

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<sup>187</sup> Bonthuys n178

<sup>188</sup> Law Commission n151, para 3.7

<sup>189</sup> Law Commission n151, para 3.8

<sup>190</sup> Bonthuys n178, 1314

<sup>191</sup> Bonthuys n178, 1318

approach to family law would mean that the law supports “*socially responsible intimate human relationships*<sup>192</sup>”. Irrespective of the marriage ceremony, it is the nature of the relationship and its consequences on breakdown that the law is seeking to protect. In this way the protection of the law is not dependant on the status of marriage but rather on the relationship of the parties itself.

I would favour taking steps that reduce the law’s role in determining whether a valid ceremony has been entered into and instead focus on protecting those in the weaker or marginalised positions. In some ways English law has already taken some steps to this effect by providing parity as between married and unmarried couples when it comes to children and/or domestic violence. In both of these areas, rights and obligations are not wholly or even mainly dependent on a marriage ceremony. Indeed for the most part the marital status of the parties will make little difference to the outcome. If a consequence of the inclusionary approach is that polygynous or polygamous relationships are given some form of recognition then so be it. Again, the law does not reject claims concerning children or domestic violence because one party may be in multiple relationships. In this way the law is not placing a value judgment on relationships or giving them any hierarchical structure, rather it is giving value to the relationship itself. I recognise however there may be state interest in maintaining a record of marriages as the law currently provides certain benefits and advantages to those in a marital union. A state record can be used as evidence of the relationship in the event of a dispute and state records address the ‘public’ notion of marriage. This could all be achieved through a post ceremony registration system so that the law has little involvement in the ceremony itself. With the extensive technology that is now available checks can be built into a registration system to minimise fraudulent claims leaving parties free to enter into marriages in whatever way they choose. This could form part of the Shachar’s concept of joint governance whereby the ceremonial aspects of marriage ceremonies are retained in the hands of relevant communities.

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<sup>192</sup> Bonthuys n178, 1317

### Financial protection for all cohabittees

Even with the simplification of the law regarding entry into a state-recognised marriage unless Bonthuy's approach is adopted, there will still be couples who enter a *nikah* marriage without state recognition. This may be as a result of choice by both parties, or of innocent misunderstanding, or of deliberate misleading by one party. We may therefore still be left with a financially vulnerable group (albeit a smaller one), mainly women, whose vulnerability will continue because they will be classed as cohabittees. The debate surrounding the financial protection of cohabittees has been rumbling on for many years now<sup>193</sup>. Whilst there has been reluctance on the part of legislators to introduce a clear statutory framework imposing financial interdependence between cohabittees,<sup>194</sup> case law has had to face claims by cohabittees and thus had no choice but to at least address the void. The law of trusts has been used primarily to provide relief in respect of the family home<sup>195</sup>. More specifically for Muslims, as examined earlier in this chapter, some Muslim women have obtained relief by enforcing their financial rights to *mahr* through the law of contract<sup>196</sup>. The judiciary appear to be at least attempting to address the concerns of women who may be in a financially vulnerable state<sup>197</sup>. It is noted that in Vora's investigations eight of the ten women that he interviewed were '*under the illusion that they would be granted the same legal rights as other married couples*'<sup>198</sup>. This would suggest it is the consequence, particularly the financial consequence, of state

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<sup>193</sup> See the recommendations of the Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com 307 2007). Also, see, the Cohabitation Rights Bill [HL] which underwent its first reading on 13 June 2016.

<sup>194</sup> Excluding Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) which provides for very limited relief.

<sup>195</sup> See, earlier discussion *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432, *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776 are just two of the most important cases in this area. The English law of trusts is now developing a body of case law that is specifically attempting to provide a framework for the equalisation of property rights concerning the family home, especially where parties are unmarried. See also the recent decision of the Supreme Court in *ex parte Brewster* [2017] UKSC 8 which highlighted the discriminatory nature of pension rights as between married and unmarried couples:

<http://www.telegraph.co.uk/news/2017/02/08/unmarried-woman-wins-automatic-right-late-partners-pension/> accessed 9 February 2017. The Supreme Court provided relief to a cohabitee on her partner's death by recognising her entitlement to her partner's pension.

<sup>196</sup> See earlier discussions of *Shahnaz v Rizwan* [1965] 1 QB 390 and *Uddin v Choudhury* [2009] EWCA Civ 1205 and *Qureshi v Qureshi* [1972] Fam 173

<sup>197</sup> More recently the judiciary has gone as far as providing relief to a cohabitee on her partner's death by recognising her entitlement to her partner's pension, see *ex parte Brewster* [2017] UKSC 8

<sup>198</sup> Vora n147, 138

recognition which is of concern to the women. One might ask whether non-Muslim cohabitantes are under the same or a similar illusion<sup>199</sup>. In any event, I argue that if there is some clear legislative guidance providing some degree of financial protection, the lack of a civil marriage will not have such severe financial consequences.

A final practical consideration to note is that legal aid has been systematically withdrawn in family law matters<sup>200</sup>. Any suggestion that Muslims ought to be forced to comply with civil law and register their marriages will be at odds with the general policy of English law which has become more 'hands off'. As observed by Douglas, the initiatives to encourage parties to conciliate can be traced back to the 1930s and there has been an increasing drive to encourage mediation as the appropriate forum for resolving ancillary disputes<sup>201</sup>. It would seem incongruous to require Muslims to be forced into civil marriages in order to have the benefit of a legal system, where access to legal aid has been severely curtailed and as Douglas states '*is an inappropriate forum for handling sensitive emotional issues arising from family breakdown*'<sup>202</sup>.

The Law Commission has rightly noted the law of marriage to be a complex area requiring further consultation and a full law commission investigation. In my view it has too prematurely asserted the assumption that legal regulation is required for the process of getting married<sup>203</sup>, although it did go on to say that not every element of the process needs to be regulated<sup>204</sup>. Whilst the law may not be ready for Bonthuys radical pluralism with the removal of state

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<sup>199</sup> According to the Office for National Statistics it states that '*Although there is no such thing as a common law marriage in the UK, 51% of respondents to the British Social Attitudes Survey in 2008 thought that unmarried couples who live together for some time probably or definitely had a 'common law marriage' which gives them the same legal rights as married couples, although this is not legally the case*'.

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2015-01-28#cohabiting-couples> accessed 17 June 2017

<sup>200</sup> See Legal Aid, Sentencing of Offenders Act 2012 s9 and schedule 1. Generally divorcing couples are expected to enter into mediation to resolve disputes concerning finances or children, unless there are allegations of violence supported by documentary evidence.

<sup>201</sup> Gillian Douglas, 'Who Regulates Marriage? The Case of Religious Marriage and Divorce' in Russell Sandberg (ed) *Religion and Legal Pluralism* (2015 Ashgate ) 53-66

<sup>202</sup> Douglas n201

<sup>203</sup> Law Commission n151, 3.8

<sup>204</sup> Law Commission n151, 3.11

interference in determining the existence of marriage, it is certainly ready to make getting married easier and simpler. Whatever approach is taken, it needs to be one that is more inclusionary and allows for different forms of marriage to be recognised which are then protected. As an aside I would note that recognition of multiple forms of marriage does not necessarily mean English law is also tied to recognising multiple forms of separation.

### **Shari'a councils and Muslim marriages**

As stated in my introduction to this chapter shari'a councils are not normally involved in the initial marriage stage of a couples' life. It may be that an Imaam who conducts a *nikaah* also serves on a shari'a council but the shari'a council as a body is rarely involved. A shari'a council will normally be asked to intervene when problems arise in the relationship, which is to be investigated in more detail in Chapter 5. In order to adjudicate on any divorce the shari'a council will need to be satisfied a valid marriage in Islam has been entered into. In order to mediate between the parties and to decide if parties are breaching their obligations towards one another, the shari'a council will have views on the nature of marriage, the roles of men and women, the obligations and rights they owe one another and to God. Parties who come before them frame their discussions and claims within an Islamic context and not unreasonably will be expecting a similar approach from the shari'a council. Additionally shari'a councils may be contending with the impact of civil law where the parties have entered into a civil marriage or there are applications concerning children, domestic violence or finances before a civil court. The topics covered in this Chapter will inform the approaches taken by shari'a councils and further I have demonstrated the complex considerations which arise in attempting to accommodate a *nikaah* within the current English law of marriage.

## Chapter 5 – The relationship between Islamic and English laws of divorce as navigated by Muslim women.

### Introduction

When terminating their marriages, Muslim women often face a complex maze of English civil law and Islamic law. Unlike marriage, however, divorce does not begin with a free choice for the parties as to whether they will terminate their relationship under civil law or Islamic law. How they terminate their relationship has already been dictated to an extent by their decision with regard to entry into the marriage. If the parties have entered into a civil marriage, then in order to be divorced, they will have to go through a civil divorce: there is no choice. Even if there is no civil marriage parties may still have disputes concerning children or certain types of financial disputes which a civil court is required to adjudicate upon or approve. There may even be civil proceedings concerning domestic violence. There are some aspects of civil law which require determination by a court such as a civil divorce. In other matters, most notably with regard to children and finances, parties are encouraged to reach an agreement themselves and only need approach a court in the event that they fail to agree or require the approval of the court for their financial agreement<sup>1</sup>. As a general matter of policy English law has increasingly sought to privatise family law, narrowing the opportunities available for parties to have their disputes adjudicated upon by a civil judge. Sandberg and Thompson point out that *'there is now much uncertainty as to what the proper role of the State should be in terms of dealing with family disputes'*<sup>2</sup>. And further that the moves toward accommodation of prenuptial agreements has been accepted as a 'new respect' for individual autonomy<sup>3</sup>. English family law itself presents a complex arena for the termination of a relationship and resolution of ancillary matters.

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<sup>1</sup> See, Chapter 4 discussion on the lack of availability of legal aid in family proceedings.

<sup>2</sup> Russel Sandberg and Sharon Thompson, 'The Sharia Law Debate: The Missing Family Law Context', (2016) 177 Law & Justice 181-192, 187

<sup>3</sup> Sandberg and Thompson n2, 189

Muslims who have contracted a *nikaah* will also wish to be satisfied that their marriage has been terminated in accordance with Islamic law, whether this occurs by the husband pronouncing a divorce (*talaq*) or by a wife initiating a *khul* divorce or by a judicial body such as a shari'a council ruling on the matter, all of which are to be examined later in this chapter. Within the Islamic context there may be disputes concerning *mahr* which require a determination. Islamic law generally, not unlike the current policy of English law, encourages parties to negotiate and reach agreements themselves regarding their separation. Indeed Islamic law allows parties to end their marriage without requiring judicial approval.

The range of possibilities for Muslim women is complex. At one end of the spectrum, take the case of a Muslim woman who has entered into a *nikah* only marriage whose husband divorces her by pronouncing a unilateral *talaq* or they both agree to end the marriage. There is no involvement by a civil court or shari'a council and no breaches of any laws. In effect the parties enter into a *nikaah* and are able to separate from that union without the involvement of any judicial authority. One can see the appeal of a *nikaah* only marriage, particularly for Muslim men. It is simple to enter into and, for a Muslim male it can be even simpler to terminate by simply pronouncing the *talaq*. There may still remain complex issues concerning finances and children but the marriage itself is relatively simple to terminate, without any form of judicial intervention and at minimal cost. Although Muslim women have no recourse to a unilateral *talaq*, there may still be an appeal in a union considered legitimate by them, but which does not require complex or expensive civil court proceedings to terminate. The *nikaah* has allowed them to cohabit without the legal benefits or burdens of marriage, similar to cohabittees.

At the other end of the spectrum there are Muslim women who have entered into both a civil marriage and *nikaah*, both of which now require terminating, potentially through separate judicial processes. In addition they may have disputes about finances or children which require adjudication. They may even need injunctive orders for domestic violence. This may require a combination of

proceedings before a civil court, an application to a shari'a council and engagement with mediators to address disputes concerning finances and children. Between the two ends of the spectrum Muslim women may be interacting with aspects of English law to determine some matters and aspects of Islamic law to determine others. Muslims must therefore navigate their way through both English and Islamic law as well as across cultural and familial norms in order to resolve all matters. They, together with other ethnic minorities, have sometimes been referred to as '*skilled cultural navigators*' across legal systems<sup>4</sup>. Fournier argues that '*the religious and secular spheres are not experienced by Jewish/ Muslim women as two mutually exclusive domains but rather as one highly complex battlefield*'<sup>5</sup>. I would support Fournier's contention. The effect of making use of Islamic law or shari'a councils is not that it produces a separate parallel system but that it adds another dimension to an already complex arena of negotiations, compromises and determinations.

The aim for English law should be to find a balance between enabling freedom of choice for Muslims to enter and leave a relationship in a manner which accords with their faith and providing the protection of the state for vulnerable women or women who wish to access state mechanisms and state law. This is not an easy balance to strike; nonetheless it is realistic and achievable.

In this chapter I shall examine the main ways in which Islamic law allows parties to terminate their marital relationship. As Islamic law differentiates between men and women I argue shari'a councils are specifically of significance to Muslim women whose husbands have refused to agree to the ending of their marriages. I will analyse how this compares with the English law of divorce and explore the evolving relationship between shari'a councils and English law.

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<sup>4</sup> Roger Ballard, 'Desh Pardesh. The South Asian Presence in Britain' in Roger Ballard (ed) *The Emergence of Desh Pardesh* (Hurst & Co 1994), 30-33

<sup>5</sup> Pascale Fournier 'Please divorce me! Subversive agency, resistance and gendered religious scripts' in Elisa Guinchi (ed) *Muslim Family Law in Western Courts* (Routledge 2014) 32

## Termination of a marriage in Islam

In all cases it is likely that a Muslim couple will want to be satisfied that their marriage is terminated in accordance with Islamic law. As noted in Chapter 4, the marital relationship in Islam is essentially contractual in nature.. However much it may be culturally frowned upon, there is ample evidence from both the Quran and *sunnah* to indicate the permissibility of divorce. Whilst some scholars have stated that divorce falls into the category of a disliked action<sup>6</sup> and should only take place as a last resort, its permissibility is not denied and there is broad consensus amongst Muslim scholars in this regard. There are a number of verses in the Quran which address how to deal with disputes between husbands and wives and if parties cannot be reconciled, the Quran then primarily addresses men about the best manner in which they ought to pronounce a *talaq* upon their wives, should they decide to take this course of action. One would assume that the reason the verses are aimed at men is because men have the unilateral right of a divorce and they are being encouraged not to use this right too hastily. Barlas suggests the reason that most of these verses address men is because Islam was seeking to limit men's ability and frequency in divorcing their wives<sup>7</sup>.

Although the verses on divorce come from different parts of the Quran and are not necessarily in order, it is clear that Islam encourages parties to take the issue of separation in stages, to consider whether the marriage can be saved and if not, to be compassionate and kind in the manner in which the divorce takes place.

*O you who have believed, it is not lawful for you to inherit women by compulsion. And do not make difficulties for them in order to take [back] part of what you gave them unless they commit a clear immorality. And live with them in kindness. For if you dislike them - perhaps you dislike a thing and Allah makes therein much good*<sup>8</sup>

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<sup>6</sup> See discussions regarding categorisation of actions in Chapter 3

<sup>7</sup> Asma Barlas, *Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur'an* (University of Texas Press 2002) 192

<sup>8</sup> The Quran 4:19

So the first stage is to encourage parties, particularly men, to remember that, even if they dislike something about their wives, there may be much good in the spouse that Allah has given to them, advising men to try and see past whatever it is that they dislike in order to live in goodness with their spouse. This notion is also encouraged by the *hadith* of the Prophet in which he said ‘A believing man must not hate a believing woman, if he dislikes one of her traits he will be pleased with another’<sup>9</sup>. Barlas states it is a ‘reflection of the deeply egalitarian nature of the Quran’, that it advises compassion and tolerance not just in marriage but during the difficult time of divorce<sup>10</sup>.

### Attempting to save the marriage

*And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted [with all things]*<sup>11</sup>.

Where a marital dispute continues the next stage identified in the Quran is to encourage parties to resolve their differences through a form of mediation in which each party brings an arbiter from their respective side to assist with a possible reconciliation. No indication is given in this verse as to who can be used as an arbiter, so it is completely at the discretion of the parties as to who is appointed. The emphasis in this verse is to enable a reconciliation to take place. The arbiters are not there to judge who is at fault. Note that the verse refers to Allah assisting the parties where *both* are desiring of a reconciliation. It is envisaged that this process will take place quite early on when a potential dispute is perhaps just arising to try and quell it. It is interesting to note that this verse, which is attempting to put in place a form of mediation between the parties with a view to achieving harmony appears immediately after the ‘wife beating’ verse examined in Chapter 4.

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<sup>9</sup> Sahih Muslim 1468 Bk 17:81

<sup>10</sup> Barlas n7, 192

<sup>11</sup> The Quran 4:35

If parties are not reconciled the final stage is to consider divorce. There are a number of verses that address how the husband should pronounce his *talaq*<sup>12</sup>, what the waiting period is after the pronouncement of the *talaq*<sup>13</sup>, what is due to the wife upon her husband divorcing her<sup>14</sup>, how this differs if the parties have never been intimate with one another<sup>15</sup>, and what the consequences of the *talaq* are upon the parties, should they decide to reconcile again<sup>16</sup>. As before these verses are not grouped together but appear in different chapters of the Quran or within the same chapter but in different sections and not necessarily in a chronological order. I will return to these verses later in this chapter.

The reason that I have referred to the stages prior to a husband pronouncing *talaq* upon his wife is that they are very often reflected in the processes undertaken by shari'a councils. A shari'a council is unlikely to pronounce a termination of a marriage without having at least made some attempt to abide by these verses and consider reconciliation. Whilst the exact method or process of shari'a councils may differ, their attempts to consider reconciliation is an attempt to implement the spirit of the Quranic verses and they may well consider this to be part of their religious obligation when adjudicating on a divorce. This was reflected in my own research of the divorce process which is examined in Chapter 6. It may be worth noting, however, that the verses on reconciliation appear to be directing the couple to receive assistance and support from family members in attempting to conciliate between the parties. They do not require an adjudicating body to take on that role, although that seems to be what has happened with shari'a councils.

Whether it is appropriate in every case to consider reconciliation is a separate issue and I will discuss in Chapters 6 and 7 how a shari'a council may put in place a screening process to enable it to decide whether a case is suitable for discussions regarding reconciliation. The Quranic verses do not state that parties

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<sup>12</sup> The Quran 2:229 and 2:230

<sup>13</sup> The Quran 2:228

<sup>14</sup> The Quran 2:241

<sup>15</sup> The Quran 33:49

<sup>16</sup> The Quran 2:230

must attempt a reconciliation; rather they emphasise that the possibility should be given serious consideration. For a shari'a council to have in place a screening process to determine if the case is suitable for reconciliation discussions, in my view, does not conflict with the Quranic verses.

One other issue to note here is that in many cases attempts at arbitration and reconciliation have already been made within a family environment prior to a couple considering any civil court or shari'a council involvement. The use of unofficial arbiters in a family environment is very difficult for English law to police, even if there was any suggestion that it should be policed. Unofficial mediation through the family has been recognised as providing both support to women and pressure to remain in unhappy or abusive relationships<sup>17</sup>. Bano points out that the divergent experiences of women mean that any state policies aimed at specific minority groups must be approached with caution<sup>18</sup>. Whilst I agree with this assertion I refer to the point made in Chapter 4 about the privatisation of family law disputes which Douglas refers to as '*the general dejuridification of family matters and the drive to encourage alternative dispute resolution*'<sup>19</sup>. This general policy makes it difficult for the state to dictate how disputes ought to be resolved if they are pushed into the private space. In her work Qureshi examined the different ways in which family support materialised for Muslim women and recognised its unpredictability, sometimes assisting the women in their negotiations and at other times 'backfiring'<sup>20</sup>.

### English law and saving marriages

In comparing the approach taken by English law to the issue of reconciliation, we can see that, whilst a reconciliation process is not so clearly identified in English law, English law of divorce itself incorporates opportunities for reconciliation and sometimes forces parties to remain married against their wishes. If a legal

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<sup>17</sup> See, Samia Bano, *Muslim Women and Shari'ah Councils Transcending the Boundaries of Community and Law* (Palgrave Macmillan 2012) 194-204

<sup>18</sup> Bano n17, 200

<sup>19</sup> See, Gillian Douglas, 'Who Regulates Marriage? The Case of Religious Marriage and Divorce' in Sandberg (ed), *Religion and Legal Pluralism* (Ashgate 2015) for a more detailed discussion.

<sup>20</sup> Kaveri Qureshi, *Marital Breakdown Amongst British Asians Conjugal, Legal Pluralism and New Kinship* (Palgrave Macmillan 2016) 101-124

representative acts for the petitioner in proceedings for a divorce, he or she is required to file a statement to confirm whether reconciliation has been discussed and that details of agencies qualified to help effect a reconciliation have been given<sup>21</sup>. This does not translate into a duty to discuss reconciliation but rather to inform the court whether this has been discussed with the petitioner. This is the extent of the formal recognition regarding reconciliation.

However, in a somewhat more sophisticated manner, English law facilitates and encourages the possibility of reconciliation at various different stages of divorce proceedings. At the outset neither party is permitted to commence proceedings for divorce within the first year of marriage<sup>22</sup>. This absolute bar to presenting a divorce petition exists to prevent a couple from giving up on their marriage at too early a stage. This does not prevent a couple from relying on matters which have occurred in that first year in any subsequent divorce proceedings, but does mean a couple are forced to remain legally married for at least one year, even if they are living apart<sup>23</sup>.

Other ways in which parties may be encouraged to reconcile during the divorce process include allowing parties to cohabit for certain periods of time without this having a fatal effect on their divorce petition<sup>24</sup>. It should be noted also that where no fault is being ascribed to either party, English law will not allow parties to commence proceedings until they have been living separate and apart for at least two years and the respondent consents to the decree. Parties are not permitted to divorce one another immediately on the basis of incompatibility even where they both agree. Whilst English law does not set out a clearly identifiable process specifically aimed at considering reconciliation, there are different stages at which reconciliation is facilitated or encouraged.

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<sup>21</sup> Family Proceedings Rule 2010 r7.6

<sup>22</sup> Matrimonial Causes Act 1973 s3 as amended by the Matrimonial and Family Proceedings Act 1984.

<sup>23</sup> There is no similar bar to the presentation of a petition for nullity or for judicial separation in the first year of marriage.

<sup>24</sup> Generally speaking, a petitioner may continue to cohabit for up to six months after the last incident relied upon in a petition and this will not prevent the petitioner from pursuing the divorce. Periods of cohabitation that exceed six months will have a more significant impact depending upon the fact relied upon for which the divorce is sought.

English law has in fact attempted to introduce a divorce process in which the issues of supporting reconciliation, a no fault approach and a cooling off period are the central themes<sup>25</sup>. Pilot schemes were introduced following criticisms of the current divorce law and proposals put forward by the Law Commission<sup>26</sup>. Although the government took on board the Law Commission's proposals, it also made some significant changes to them, most notably, increasing the role of mediation and reducing the role of lawyers. It was envisaged by the government that under the new divorce process, specific time periods would be set aside for parties to consider and reflect on whether their marriage had irretrievably broken down. Parties would be required to attend mediation sessions with a view to identifying whether their marriage could be 'saved'.

Where a marriage could not be saved, parties were expected to co-operate in order to reach agreements regarding their finances and/or children, failing which their divorce could be delayed unless this resulted in hardship. This method of divorce was introduced under Part II of the Family Law Act 1996 and ran under a number of pilot schemes. Independent researchers were assigned to assess the success or otherwise of the schemes<sup>27</sup>. Despite having a divorce process containing what would appear to be laudable aims of reducing conflict and encouraging reconciliation, the process was never implemented. The researchers identified a number of significant flaws. Most disappointingly for the government, the possibility of reconciliation did not appear to be significantly enhanced by this process. Some of the research even suggested that those unsure about their marriage tended to become more certain about divorce once they embarked on this process. As a result of this the whole process was discarded<sup>28</sup>.

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<sup>25</sup> Law Commission, *Family Law The Ground for Divorce* (Law Com192, 1990) following the publication of *Facing the Future-A Discussion Paper on the Ground for Divorce* (Law Com 170 1988)

<sup>26</sup> Law Commission 192 n25

<sup>27</sup> Information is taken from JF Pearce, GC Davis, SG Goldie, G Bevan, S Clisby, Z Cumming, R Dingwall, P Fenn, S Finch, R Fitzgerald, D Greatbatch, & A James, *Monitoring Publicly Funded Family Mediation* ( Legal Services Commission 2000)

<sup>28</sup> [http://news.bbc.co.uk/1/hi/uk\\_politics/1120846.stm](http://news.bbc.co.uk/1/hi/uk_politics/1120846.stm) accessed 17 June 2017

The point being made here is not to investigate what is the best method of achieving a reconciliation between spouses, but rather to recognise that English lawmakers are just as concerned about supporting marriage and encouraging parties to reconcile as is Islamic law. The methods may differ but both English law and Islamic law support the concept of attempting to 'save' marriages <sup>29</sup>.

Although these principles now appear to be redundant, as pointed out they serve as indicators of what Parliament considers to be good divorce law, which in Parliament's view includes the facilitation of reconciliation <sup>30</sup>. Shari'a council methods of reconciliation have attracted considerable criticism because they are deemed to be unfair towards women or place a disproportionate level of pressure on women to reconcile when it is inappropriate for them to do so. Bano noted in her fieldwork how women were encouraged to reconcile even where they did not wish to, were 'coaxed' into participating in meetings even though they had made allegations of violence and the forum itself was male dominated and often imbued with conservative interpretations of women's roles<sup>31</sup>. Despite these criticisms Bano also noted some of her participants found the process useful. The concern therefore is not necessarily that reconciliation is considered by the shari'a councils; rather it is the manner in which it is 'foisted' upon women without any due consideration as to its appropriateness and the marginalisation of women's agency and experiences. It would be useful for shari'a councils to collate data on their success rates of effecting reconciliations, so that they can self-reflect on whether their methods are actually achieving any real benefits.

### Termination of the marriage

Islamic law distinguishes between the manner in which a husband may divorce his wife and the manner in which a wife may divorce her husband. English law makes no such distinctions. One of the aims of those concerned with gender

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<sup>29</sup> To this end section 1 of the Family Law Act 1996 sets out the following general principles:

(a) *that the institution of marriage is to be supported;*

(b) *that the parties to a marriage which may have broken down are to be encouraged to take all practicable steps, whether by marriage counselling or otherwise, to save the marriage...*

<sup>30</sup> Nigel Lowe and Gillian Douglas, *Bromley's Family Law* Oxford University Press 2015) 235

<sup>31</sup> Bano n17, 210-213

equality in Islam has been to try and balance the differences between the way men and women are permitted to divorce, so each has an equal opportunity to end the marriage

### **Talaq by the Husband**

The most well-known form of divorce amongst Muslims is a unilateral *talaq* pronounced by the husband extra-judicially. All of the verses in the Quran where there are commandments concerning *talaq* are directed at men, guiding them as to the manner in which to pronounce the *talaq* upon their wives or informing them of the consequences of taking such action. It has largely remained unquestioned that this right is one which belongs to the husband alone. It only becomes possible for a wife to use it, should the husband delegate it to her (see below for *talaq-i-tawfid*). Even in Muslim majority countries where family law reforms have taken place those reforms have concentrated on strengthening the accepted methods by which women may end the marriage or on attempting to curtail the husband's use of the *talaq* by, for example, requiring registration<sup>32</sup>. The reforms have not involved women simply being given an equal unilateral right to a *talaq*.

Classical *fiqh* and indeed much of the contemporary Islamic scholarship has not questioned the validity of a Muslim man's right to pronounce a divorce. It is accepted that even if a man does not pronounce *talaq* in the best of circumstances, with the best of manners as he is directed to in the Quran, the *talaq* itself is still a valid termination of the marriage. What a Muslim judge will be looking for is the validity of the divorce and he will leave the issue of whether the husband has invoked the *talaq* in the best way possible as a matter for Allah to judge. There is no real explanation as to why the rules regarding the manner of pronouncing the *talaq* are not treated as affecting the validity of the *talaq*. I will consider this issue later in this Chapter.

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<sup>32</sup> See, Abdullahi An-Na'im (ed) *Islamic Family Law in a Changing World, A Global Resource Book* (Zed Books Ltd 2002) for a survey of the practices of different Muslim majority countries.

Islam recognises that, in any marriage, spouses may separate and then reconcile and that this may occur a number of times in a relationship. Islamic law permits parties to divorce and reconcile but places limits on such actions. As much as Islam wishes to encourage marriage and reconciliation, divorce is a serious matter and it has consequences. In particular, by allowing a husband a unilateral right to divorce his wife, there is the potential for a husband to abuse this right.

A husband has the right to divorce his wife up to two times and still reconcile with her. Once a third divorce is pronounced by the husband, the parties are not permitted to reconcile unless the wife has entered into a new marriage with a different husband, consummated that new marriage and then that new marriage is subsequently terminated<sup>33</sup>. The original couple are then allowed to perform a new *nikaah* in order to be remarried. The third divorce is referred to as an 'irrevocable' divorce. The first two divorces are 'revocable' because the husband has a period of time in which he can revoke the divorce and resume marital relations, without having to conduct a new *nikaah* ceremony. If he does not revoke the divorce during the specified period, the divorce becomes valid and the marriage is terminated. Both parties are free to marry someone else. In a revocable divorce even if the husband does not revoke the divorce in the specified period of time (the *iddah* period), provided the wife consents, the parties can re- marry one another by entering into a fresh *nikaah*.

Once the husband pronounces *talaq* for the third time, however, the matter is completely out of the husbands' hands. The husband may not revoke the divorce and nor is there an opportunity for the parties to remarry, even if this is something that they both desire. The only possibility for remarriage in such circumstances is, as stated above, the wife entering into new marriage which is consummated and terminated.

We may consider this entire process as though the husband holds three divorce cards which are held entirely at his discretion. He decides to end the marriage so plays his first card by pronouncing *talaq* upon his wife in clear, unambiguous

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<sup>33</sup> The Quran 2:229 and 2:230

terms. This can be pronounced orally or in writing. The Quran commands men that if they wish to pronounce a divorce they must do so at a time when the wife can commence her waiting period immediately<sup>34</sup>. This means that the *talaq* should only be pronounced when the wife is not menstruating and the parties have not had any sexual relations with one another since the wife's last state of menstruation (referred to as either a purified period of time or a period of purity). Pronouncing the *talaq* in this way is seen as the best circumstances in which a husband may divorce a wife.

Once the husband pronounces this *talaq*, the wife enters into the *iddah* (waiting) period<sup>35</sup>. This lasts for either three menstrual cycles or three months if the wife no longer menstruates or, if the wife is pregnant, until the birth of her child. During the *iddah* period the husband is obligated to maintain the wife and she can continue to live in the family home<sup>36</sup>. The *iddah* period also enables the husband to reconsider his position and he can take back his wife if he decides to reconcile. Just as the right to the *talaq* is at his complete discretion, so too is the right to reconcile during the *iddah* period<sup>37</sup>. If the husband does not take back his wife then the parties are divorced. The wife is free to remarry and the parties have no marital ties with one another. The option to revoke the *talaq* comes to an end once the *iddah* period ends. Although this is a revocable divorce there is, in this sense, a limit placed on the husband's right to revoke and, should he not exercise this right, both parties can consider themselves fully divorced. If after the *iddah* period the parties wish to reconcile they must go through a fresh *nikaah* ceremony. A new *nikaah* ceremony will require the consent of both parties so it is not something the husband can unilaterally decide and will require a new *mahr* payment.

If the parties do reconcile, whether during the *iddah* period or by a new *nikaah*, the husband has still used up one of his divorce cards. If further problems arise

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<sup>34</sup> The Quran 65:1

<sup>35</sup> The Quran 2:228

<sup>36</sup> The Quran 2:228, 2:231 & 2:241

<sup>37</sup> The Quran 2:228

in the marriage and the husband decides to pronounce a *talaq* for the second time, the exact same process is followed with the same consequences.

If the parties reconcile after a second *talaq*, the husband has used up his second divorce card. Again this reconciliation could have taken place by the husband taking back his wife during the *iddah* period or by both parties consenting to a fresh *nikaah* after the *iddah* period has ended. This would leave the husband with one final divorce card. Should he use his final divorce card, this is now an irrevocable divorce<sup>38</sup>. Although the wife will go through an *iddah* period, the husband may not reconcile with her. He has no choice in the matter. Nor can they agree to a fresh *nikaah* after the *iddah* period, unless the wife marries and divorces someone else<sup>39</sup>. The passage of time between pronouncing the first, second or third *talaq* does not affect the validity of the divorce<sup>40</sup>.

#### **A *talaq* pronounced not using the best method**

This would include a divorce pronounced when the wife is either menstruating or during a period of time when the parties had engaged in sexual relations but the wife has not yet menstruated. These two issues are the understood conditions from verse 65:1 in the Quran. Further, we have the *hadith* in which the Prophet became angry at a companion who attempted to divorce his wife whilst she was menstruating: the Prophet ordered him to take his wife back implying perhaps that he did not treat the *talaq* as valid<sup>41</sup>. However, it would seem that most classical scholars held that a failure to comply with these requirements does not affect the validity of the divorce itself<sup>42</sup>. Most classical

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<sup>38</sup> The Quran 2:230

<sup>39</sup> The Quran 2:229 & 2:230

<sup>40</sup> Controversies have arisen where a husband has used ambiguous words in pronouncing a *talaq* or pronounced the *talaq* in anger or whilst intoxicated or in jest. Where ambiguous words are used, a Muslim judge will look to the intention of the husband to decide on the validity of the *talaq*: did the husband mean a divorce by the words used? In such circumstances the customary meanings of phrases are taken into account.

<sup>41</sup> The *hadith* reported in Bukhari and *Bulugh Al Maram*, and concerns the companion Ibn Umar, who divorced his wife while she was in a state of menstruation. The Prophet ordered him to take her back and commanded Ibn Umar to either retain his wife or divorce her in a state of purity. It is unclear whether Ibn Umar's attempt to divorce his wife was treated as invalid or as a valid divorce and revocation.

<sup>42</sup> Two prominent Saudi scholars took the view that such a divorce is not valid. See Abd Al-Aziz Bin Baz in *Fatawwa Al-lajna Al-Daima* 20/58 who was the grand mufti of Saudi Arabia and Muhammed Ibn Uthaymeen in *Fatawwa Islamiyaah* 3/268 both of whom held that a failure to

scholars have concluded that the *talaq* is valid and counts as the husband using up one of his divorce cards. The husband is, however, sinful for the manner in which he has divorced his wife and he will be held to account by God on the Day of Judgment for this sin. As Ali and other academics have mentioned the differences of opinion on these issues are indicative of the disparate interpretive approaches that are taken<sup>43</sup>.

Even where Muslim majority countries have reformed divorce laws in an attempt to limit a husband's use of *talaq*, the validity of the *talaq* is rarely challenged<sup>44</sup>. In none of the research undertaken does it appear that investigations are ever carried out by shari'a councils to determine whether a wife was menstruating<sup>45</sup> at the time that a *talaq* was pronounced or whether the parties had engaged in any sexual activity. These understood Quranic requirements seem to be ignored by the men pronouncing the *talaq* and more importantly by shari'a councils, even if it was only to question or remind a husband as to his obligations. When we compare this to the extensive scrutiny of verses where obligations are imposed on women<sup>46</sup>, it appears a wife's obligations are framed in absolute terms with consequences if breached<sup>47</sup>. Whereas the husband's failure to abide by the Quranic terms is treated as a matter between him and God; it does not affect the validity of the divorce. The conditions of when a *talaq* may be pronounced, if applied as strict conditions would impose significant limitations on men's power to simply pronounce a *talaq* as and when they choose. Yet there has been little attempt to make them mandatory requirements for the validity of a divorce<sup>48</sup>. Wadud correctly points

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comply with these requirements would mean the *talaq* is not valid. This was also the position of Ibn Taymiyyah, a jurist of the fourteenth century.

<sup>43</sup> Kecia Ali, *Sexual Ethics in Islam: Feminist Reflections on Qur'an, Hadith and Jurisprudence* (Oneworld 2012), 26

<sup>44</sup> Kecia Ali n43, 34

<sup>45</sup> One should also note that when it comes to issues of menstruation, whether for the purposes of determining if the divorce has been pronounced in the best circumstances or for determining the *iddah* period, the evidence of the wife takes precedence. Her word is accepted as to her own menstruation.

<sup>46</sup> See, for example, Chapter 4 discussions on the concept of wifely obedience.

<sup>47</sup> For example, in classical scholarly discussions a consequence of a wife's failure to be obedient is that a husband is relieved of his duty to financially provide for her.

<sup>48</sup> Kecia Ali n43, 29-31 discusses an interesting matter addressed primarily within the Hanafi madhab. The classical scholars analysed in some detail the position of a wife whose husband pronounced a *talaq* but who subsequently denied that he had divorced her and wished to engage

out that, as a general example of male patriarchy, when a stipulation is made with regard to male privilege, 'men tend to reject it as a limitation upon their God given rights'<sup>49</sup>. Ali makes the point that the husband's unrestricted right to a unilateral repudiation is not a necessary interpretation of scripture<sup>50</sup>. I agree with her up to a point. There is no denying that from the scripture and Prophetic *hadith* the right to pronounce the *talaq* divorce has been placed in the hands of the husband but I would accept that the juristic interpretation of this right has not given sufficient weight to the limitations of this right and made use of the limitations to control the husband's use of *talaq*.

### The triple *talaq*

A controversial form of *talaq* has been the 'three in one' divorce. Here the husband pronounces *talaq* three times on one occasion. The question arises whether or not this amounts to a revocable or irrevocable divorce. In effect, has the husband used up all three of his divorce cards in one go? Many Muslims are under the mistaken impression that in order for there to be a valid *talaq* in any event, 'I divorce you' must be said three times. This is not correct but the controversy amongst scholars is in establishing the effect of saying it three times. This is a controversy that has divided scholars since the time of the companions and it is not one that I shall seek to resolve, other than to say that many classical scholars found it to be reprehensible to pronounce an irrevocable divorce in this manner, even if they said it was valid and binding as an *irrevocable* divorce<sup>51</sup>.

It is open to shari'a councils to follow the different opinions and therefore perfectly possible that one shari'a council will, on the same set of facts, consider an irrevocable divorce to have taken place, whilst another will take the view that

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in sexual relations with her. The Hanafi scholars concluded that the wife would be entitled to kill her former husband, in a discreet manner such as by poisoning, rather than engaging in sexual activity with him. The classical scholars appear to have discussed this extreme situation in order to demonstrate that rulings by courts have limited impact and human beings are still answerable to God for their actions. It also demonstrates that scholars recognised the extent of power in the hands of the husband and attempted to explore ways in which women could protect themselves from abuse of power, even if it meant they took extreme action.

<sup>49</sup> Amina Wadud *Quran and Woman: Rereading Sacred Text from a Woman's Perspective* (Oxford University Press 1999) 79

<sup>50</sup> Kecia Ali, 'Progressive Muslims and Islamic Jurisprudence' in Omid Safi (ed) *Progressive Muslims on Justice, Gender, and Pluralism* (Oneworld 2003, reprinted 2011) 163-189, 183

<sup>51</sup> Kecia Ali n43, 26

only one revocable divorce has been effective<sup>52</sup>. The topic of the triple *talaq* has featured in the discourse around *talaq* in Muslim majority countries and there have been some high profile campaigns in countries such as India<sup>53</sup>. One point to make on this is that in contemporary debates, the issue does not really appear to be about the validity of this type of *talaq*, but rather the financial consequences for women. Thus the area where reform is needed is in ensuring that women are not left financially destitute as a consequence of a divorce. Classical discussions on these issues suggest a paternalistic concern to protect women from men's reckless pronouncements whilst at the same time confirming the validity of the *talaq* where it had been pronounced.

Guinchi points out that in Muslim majority countries Islamic precepts have been used to expand women's rights<sup>54</sup>. Shari'a councils are not bound by the codified norms of Muslim majority countries so one would expect them to use their freedom to provide more creative responses. Although there has been some organic development it has been relatively slow and depends upon the type of matter that comes before the shari'a council<sup>55</sup>. In any case knowledge of the different opinions, ideological orientation, exposure to a different understanding of the religion, local cultural norms, are just some of the factors which have an impact on the decision made. In this way a Muslim judge has the ability to shape how strictly the rules of *talaq* are applied and this also helps to explain why different shari'a councils may come to quite different decisions based on the same set of facts. It enables Muslims to 'forum shop' between different shari'a councils to try and find the 'right' decision for them. Volpe and Turner argue that the lack of institutional structures in European settings means what is created is

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<sup>52</sup> For an explanation of the different opinions held on the effect of a triple divorce see Nehaludin Ahmed, 'A Critical Appraisal of "Triple Divorce" in Islamic Law' [2009] *International Journal of Law, Policy and the Family* 23, 53-61

<sup>53</sup> See the following article as an example of the campaigning on this issue: <https://www.theguardian.com/world/2016/oct/20/talaq-and-the-battle-to-ban-the-three-words-that-grant-indias-muslim-men-instant-divorce> accessed 30 January 2017

<sup>54</sup> Elisa Guinchi, 'Muslim Family Law and Legal Practice in the West' in Elisa Guinchi (ed), *Muslim Family Law in Western Courts* (Routledge 2014) 9

<sup>55</sup> For example, shari'a councils the inclusion of females as part of the shari'a council staff members or making use of civil law when granting an Islamic divorce have all occurred in response to the types of cases and in response to concerns raised by the women.

a complex tangles of 'rights' and 'duties'<sup>56</sup>. Shari'a councils do not undertake holistic examinations of topics such as marriage or divorce in contemporary contexts and nor do they have any real incentive to do so. Their development of Islamic law is reactive rather than proactive.

### Mahr and talaq

The concept of *mahr* was examined in detail in Chapter 4. The main consequence of a *talaq* for the husband is that he must pay his wife the *mahr* as agreed in their *nikaah* contract or if paid, he is not entitled to ask for it back<sup>57</sup>. This is on the basis that they have consummated their relationship<sup>58</sup>. Until the husband pays it, it is treated as a debt that he owes the wife. If the marriage was never consummated but a figure had been agreed, the husband pays half<sup>59</sup>. If no figure was agreed the Quran advises the husband to give his wife a parting gift according to his financial ability<sup>60</sup>.

The claim to the *mahr* by the wife can be seen as a disadvantage for the husband in pronouncing a *talaq*. This may of course depend on the size of the *mahr*. For many Muslim communities in the UK, the *mahr* is a relatively modest or token sum, although there can be a difference depending on whether any jewellery given to the wife is included in the *mahr*. It would appear that a Muslim man is financially better off in not giving a *talaq* and instead waiting for his wife to request a divorce by *khul*, particularly as, on pronouncing the *talaq*, he is also liable to maintain his wife during her period of *iddah*<sup>61</sup> or during a two year period of breastfeeding<sup>62</sup>. These financial rights are the minimum which the Quran provides.

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<sup>56</sup> Frederic Volpi & Bryan S. Turner, *Making Islamic Authority Matter* (2007) Theory Culture and Society Volume 24:2, 10

<sup>57</sup> The Quran 2:229 and 4:19-21

<sup>58</sup> In classical discussions of *fiqh* consummation is not limited to actual sexual intercourse taking place between the parties. It would include the opportunity for consummation also so if a couple spent a night together the assumption is that the marriage has been consummated and as such the *mahr* becomes due.

<sup>59</sup> The Quran 2:237

<sup>60</sup> The Quran 2:236

<sup>61</sup> The Quran 2:228

<sup>62</sup> The Quran 2:233

## Shari'a council's limitations

Specifically on the issue of *talaq* we must not forget that this is performed extra-judicially. A Muslim man is not required to apply to a shari'a council for it. There is no data collated outside of those who have used the services of shari'a councils that indicates how widespread the practice of pronouncing *talaq* is amongst British Muslim men. Nor do we have the views of Muslim women who have been divorced by a *talaq* but never sought assistance from a shari'a council. From the research that we do have perhaps the only point that can be made is that there is a significant body of women whose husbands have refused to pronounce a *talaq* thereby requiring them to apply to a shari'a council. Otherwise presumably they would have had no need for the shari'a council.

Bowen recognises three competing theories to explain how shari'a councils operate<sup>63</sup>. He argues a shari'a council may perform its functions as a judicial authority, or as mediating authority or as an attesting authority. In its attesting capacity the shari'a council either certifies that the marriage has already been terminated or facilitates the pronouncement of the *talaq*<sup>64</sup>. It would appear that when it comes to husband's pronouncements of *talaqs* shari'a councils generally recognise a husband's right to a unilateral divorce and by and large operate as attesting authorities. This may explain why they are likely to have little incentive to investigate the circumstances in which the *talaq* was pronounced.

Shari'a councils are only likely to provide a ruling on the validity or otherwise of any such pronouncement, if parties approach a shari'a council requesting this. To this end, as we shall see later in this chapter, shari'a councils sometimes make use of English civil law to help determine validity, particularly where there might be some ambiguity over what the husband intended by his words or actions or where the husband is attempting to obtain a civil divorce without acquiescing to a religious one. For a wife who wishes to be divorced, the risk to her in leaving it to her husband to pronounce the *talaq* is that just as the right to pronounce the

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<sup>63</sup> John R. Bowen, 'On British Islam, Religion, Law, and Everyday British Practice in Shari'a Councils', (Princeton University Press 2016) 89

<sup>64</sup> Bowen n63, 89-90

*talaq* is the husband's right alone, so too is his right to revoke the *talaq* during the *iddah* period<sup>65</sup>. For a woman who wishes to be divorced there is a risk that the husband will pronounce the *talaq* and then revoke it during the *iddah* period. Having an unfettered right to a divorce and an unfettered right to revoke that divorce, leaves women vulnerable to husbands changing their minds at a whim: Islamic law limits this by making the third divorce irrevocable, by requiring husbands to divorce their wives in a state of purity and by treating divorces pronounced in jest or anger as valid. The advantage of the *talaq* however is that in theory at least the wife is entitled to the *mahr* and maintenance during her *iddah*<sup>66</sup>. It also means that parties are not required to go before any authority for the relationship to be terminated.

In a modern context, there are also a number of other dilemmas that require determination when it comes to the validity of a *talaq*. These include a *talaq* by text message or by social media, via a third party, in an email or by a telephone call. Black et al state that the consensus from some Muslim majority countries appears to allow for the use of new media providing the husband has clearly articulated himself<sup>67</sup>. Shari'a councils are therefore expected to keep up to date with contemporary international discussions and debates and may not always have the ability or resources to do so.

Other limitations of a shari'a council are more general and not just applicable to the *talaq*. A shari'a council is not the only forum that a Muslim couple may turn to in order to receive a ruling. Muslims may seek rulings from a local individual scholar or someone they deem to be suitably knowledgeable. With the availability of information on the internet, there is nothing to prevent a Muslim couple from researching online and coming to their own conclusion regarding the validity or otherwise of the *talaq* that has or is about to be pronounced (or indeed any other religious query)<sup>68</sup>. Ali discusses the cyber environment and

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<sup>65</sup> The Quran 2:228

<sup>66</sup> Whether in practice she achieves this is a separate matter.

<sup>67</sup> Ann Black, Hossein Esmaeili and Nadirsyah Hosen, 'Modern Perspectives on Islamic Law' (Edward Elgar Publishing Limited 2013) 132

<sup>68</sup> <https://islamqa.info/en/36580> accessed 30 January 2017. This is an example on an online query asking about the validity of a 'triple talaq'.

acknowledges this has changed the relationship between the questioner and adviser. It is no longer a face to face encounter but an impersonal relationship between the adviser and many possible recipients of that advice<sup>69</sup>. In a face to face encounter, the adviser can give very specific advice tailored to the specific circumstances of the questioner and can take into account local customs and local civil laws; this is the manner in which a shari'a council operates.

A cyber question means that parties can post a question specific to their own personal circumstances and receive a reply online or can rely on an answer given to someone else's question and using their own judgement apply the answer to their own situation. Muslims therefore create their own unique legal subjectivity and self-determine how they will apply Islamic law to themselves. The proliferation of information available on the internet means that Muslims can simply type a question online and receive a range of published responses, all citing evidence from different sources and opinions of different scholars. Muslims are not bound to get their rulings from a shari'a council in order to consider themselves to have received a valid decision regarding their circumstances. A shari'a council is not their only option and may not even be their first option. In many respects this contrasts quite sharply with English law. For a couple who have entered into a marriage under civil law there is no option but for a civil court to determine whether the marriage can be terminated. Muslims are able to obtain online rulings and apply those ruling to themselves, without making use of a shari'a council or any other authority.

This is very difficult for English law to 'police'. Even if English law is able to 'police' shari'a councils, it will not be able to control Muslims application of Islamic law upon themselves. It is important to appreciate the limitations of shari'a councils particularly when it comes to men pronouncing a *talaq*. For Muslims, the availability of information online, coupled with the belief that they are able to follow God's law without an intermediary, means that shari'a councils have a significantly less important role than English courts when it comes to

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<sup>69</sup>Shaheen Sardar Ali, *Modern Challenges to Islamic Law* (Cambridge University Press 2016) 237-238

administering law. That is not to say shari'a councils are unimportant; they certainly have a very important place for women in specific circumstances. But they are not the only arbiters of the application of Islamic law upon Muslims

As a final note on *talaq* by the husband Wadud notes that the verses on divorce were all revealed during the Madinan period of revelation when social reforms were being introduced into existing practices with a view to improving the situation for women<sup>70</sup>. Wadud also notes the patriarchal order of society at the time of revelation and the interpretation and understanding of the verses in this context. She argues that although the Quran makes no reference to women repudiating a marriage this does not mean that they cannot<sup>71</sup>. This seems to be a very weak basis to argue for similar rights of repudiation. Whilst Muslims may accept there must be stronger controls on husbands' use of *talaq*, as this can be justified through the Quran itself and from the *ahadith*, it is unlikely they would accept a right of repudiation by the wife, without some direct evidence of such a right coming from either the Quran or the *ahadith*.

### Delegated Divorce (*Talaq-i-tawfid*)

Whilst acknowledging that the wife has no similar option of *talaq* as of right, it should be noted that it is possible that her husband can delegate one of his divorce cards to her. This is a well-known method of divorce within Islamic scholarship, discussed both in traditional and contemporary texts and yet very rarely applied in practice<sup>72</sup>. In classical texts this is very often discussed in chapters pertaining to the marriage contract itself, as an agreed condition within the contract. A husband can in fact delegate one of his divorce cards to his wife at any point, whether in marriage contract or at a later point in the marriage. The

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<sup>70</sup> Amina Wadud, n49, 78

<sup>71</sup> Wadud n49, 80

<sup>72</sup> See, for example, Mir-Hosseini, *Marriage on Trial* (I.B.Tauras 2011) where she recognises its limited use in Muslim majority countries such as Morocco and Iran. On the other hand Shaheen Sardar Ali n69, 128 comments of the standardisation of a delegated divorce within *nikaah* contracts in Pakistan and their recognition by Pakistani law and Pakistani courts. Ali is unable to explain why this 'norm' has not been adopted by the Muslim diaspora in the UK.

delegation of the divorce right is legitimised by the wider obligation upon Muslims to abide by their contractual conditions<sup>73</sup>.

There are differences amongst scholars as to whether this delegation is for a limited period of time or continues indefinitely until the wife chooses to use it. Other questions that have arisen include: Can the husband revoke his delegated divorce before it is used by the wife? If the wife exercises the delegated divorce right, will it carry the same consequences as the husband's *talaq*, such as the payment of the *mahr* by the husband or maintenance of the wife during her *iddah*? If the wife exercises it to pronounce a divorce, can the husband revoke it, in the same way that he can revoke his own divorce? It would make little sense to permit a wife the right to use a delegated divorce if her husband were able immediately to revoke it thereby forcing a reconciliation.

Can the wife exercise it and then change her mind and decide to reconcile? There are many differences of opinion on all of these questions and the Hanbali school devoted the most attention to this subject<sup>74</sup>. Some Scholars construe the delegated right in a very narrow manner, thus strictly controlling the circumstances in which the wife may exercise this right; others take a wider approach and allow for a much more effective use of this right in redressing the balance of power between the husband and wife. In either case Mir-Hosseini argues that the delegated divorce fails to address the inherent inequality of *talaq* and fails to protect the women most in need, namely men who abuse their right to a *talaq*<sup>75</sup>. Although the delegated divorce would place the wife in the same position as the husband, in that she is able to divorce him without recourse to any judicial authority, it is still dependant on the husband acquiescing to the delegation in the first place, so the inherent differentiation between men and women exists. Mir-Hosseini is correct that the delegated divorce has no impact on men who abuse their right of *talaq*.

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<sup>73</sup> The Quran 5:1 and 17:34

<sup>74</sup> Judith E Tucker, 'Women, Family, and Gender in Islamic Law' (Cambridge University Press 2008) 49

<sup>75</sup> Ziba Mir-Hosseini *Marriage on Trial Islamic Family Law in Iran and Morocco* (I.B.Tauris revised edition 2011 )216

Often the delegated divorce has been linked to the occurrence of a specific event. Modern scholars have discussed conditions which permit women to study or work, a breach of which would enable the wife to exercise a delegated divorce. Tucker argues that a blanket delegation of the right to a divorce, whereby a wife could choose at will to exercise the right, was resisted by scholars by, for example, allowing the husband to retain his right to revoke the divorce<sup>76</sup>. She states that conditional delegation, however, '*conferred some real power to the wife*' enabling her to free herself of a marriage which breaches some fundamental aspect her life, such as the husband taking another wife or moving to another area. It is important to note that a husband who takes a second wife or decides to move to a different area are not in themselves grounds upon which a judge would necessarily grant a wife a judicial divorce, so the use of a delegated divorce in such circumstances could be invaluable.

Given that this topic has been discussed so extensively by scholars and there are such clear advantages why are delegated divorces not used more readily by women? One could argue that a case of a delegated divorce, similar to that of a husband's *talaq*, is unlikely to require the services of a shari'a council. Yet there is very little evidence of British Muslims including delegated divorce conditions into their marriage contracts.

In 2008, following a lengthy period of consultation with many interested Muslim groups The Muslim Institute led by Dr Ghayasuddin Siddiqui produced a standardised Muslim Marriage Contract which included, inter alia, a standard term providing the wife with a right to a delegated divorce<sup>77</sup>. The exercise of which would not cause her to lose her *mahr*.

It is unfortunate that this marriage contract does not seem to have been taken up by mosques or those conducting Islamic marriages<sup>78</sup>. Grillo discusses some of the

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<sup>76</sup> Tucker n74, 92

<sup>77</sup> <http://muslimmarriagecontract.org/MuslimMarriageContract.html> accessed 31 January 2017

<sup>78</sup> The contract was drafted by Mufti Barakatullah, at the time a leading member of the Islamic Shari'a Council in London. Although as noted in Chapter 4 shari'a councils have little involvement

opposition to this contract both from Muslims and non-Muslims<sup>79</sup>. Even after an attempt was made to re-launch it in 2011, it has failed to have any significant impact<sup>80</sup>. In 2014 the Canadian Council of Muslim Women created an online toolkit for marriage contracts, allowing Muslims to choose different clauses to suit their needs, the aim of which was to equalise the position of men and women<sup>81</sup>.

I suspect that discussion of the Muslim marriage contract or a delegated right to a divorce is not dissimilar to parties discussing a pre-nuptial agreement. It is uncomfortable because it suggests parties are preparing for this relationship to fail. For a Muslim woman, there may be the added pressure that she will be seen as lacking in her 'religiosity' by making such demands. As examined in Chapter 4 this is where the role of the guardian could be used more effectively as a negotiator on the part of the wife, rather than leaving it to the wife to raise these issues. In theory the classical Islamic scholarship is full of discussions regarding the additional terms that can be inserted into the marriage contract yet in practice no real progress appears to have been made.

Another issue that I have mentioned earlier in this chapter is the framing of women's rights in Islamic discourse. Women's rights are not presented in absolute terms, though their obligations often are and the underlying implicit tone of the language used does not always encourage women to make use of these rights<sup>82</sup>. The Muslim Marriage Contract with its standardisation of many of

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in the contracting of the marriage, many of those members may be leading members or imams of local mosques and in that capacity have greater opportunity to influence marriage contracts. It is difficult to understand why the Muslim Marriage Contract has received so little support amongst Muslims, when it has been carefully researched and received support from a range of wide range of Muslims and Muslim organisations

<sup>79</sup> Ralph Grillo, *Muslim Families, Politics and the Law: A Legal Industry in Multicultural Britain* (Ashgate Publishing 2015) 45-46

<sup>80</sup>The experience of one woman, who tried to make use of it, was documented in The Guardian <http://www.theguardian.com/commentisfree/belief/2011/oct/13/muslim-marriage-contract> accessed 31 January 2017

<sup>81</sup> <http://ccmw.com/wp-content/uploads/2014/04/Muslim-Marriage-Contract-Toolkit-English.rev02-2014.pdf> accessed 18 June 2017 There is no evidence on their website which indicates how successful they have been in encouraging Muslims to make use of the toolkit.

<sup>82</sup> As a counter to this attitude both Barlas n17-and Lamrabet Lamrabet A, 'Women in the Quran: An Emancipatory Reading' (trans Myriam Francois-Cerrah) (Square View 2016) make the point that female companions around the Prophet, (most notably Umm Salamah) had no hesitation in

these rights would make it easier for women to benefit from these rights and put the burden upon men to justify why they are not agreeable to them. Perhaps the Muslim Marriage Contract contained too many new standard clauses with an undue emphasis on its 'reformist' nature. This speaks to how entrenched the existing marriage contract is within Muslim societies and has implications for the manner in which reform ought to be tackled, a matter I will examine in Chapter 8. Interestingly Abu-Lughod notes the failure of a similar attempt to push through a new model marriage contract in Egypt in the mid-1980s in the hope of 'educating' Muslim women about their rights<sup>83</sup>. The women were already participating in their own type of 'organic feminism' in order to secure property rights. This again supports Mahmood's argument that there limits to understanding Muslim women's agency through the lens of Western feminist discourses.

### Options for termination of the marriage available to the wife

Since there is no unilateral right to a divorce available to a wife and the likelihood of her husband having agreed a delegated divorce with her is minimal, we need to consider the most commonly used methods by which a wife can terminate her marriage. In considering the options available to the wife I will only be examining those options that a shari'a council is most likely to consider. The assumption therefore is that at least one of the parties, usually the husband, is not agreeable to a divorce. Had he been agreeable parties could have simply religiously terminated their relationship without the services of the shari'a council.

A Muslim wife who wants her marriage terminated has two main routes open to her. If her husband consents to her request, the marriage can be terminated upon the wife providing an agreed consideration, often the return of the *mahr*. This is known as a *khul*. If the husband refuses, she needs to apply to an

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asking the Prophet about the manner in which God spoke to women through the Quran. The females companions were never chastised by the Prophet and indeed Umm Salamah was responded to directly by God in the verses revealed regarding her questions (The Quran 3:195).

<sup>83</sup> Lila Abu-Lughod, *The Active Social Life of "Muslim Women's Rights": A Plea for Ethnography, Not Polemic, With Cases from Egypt and Palestine* (2010) *Journal of Middle East Women's Studies* Volume 6:1, 1-45, 24-25

authority that can issue an order terminating the marriage, known as a *faskh*. In the UK that authority is likely to be a shari'a council. We have no data as to the extent to which Muslims conclude the termination of their marriages in accordance with Islamic law but outside of shari'a councils. As *khul* and *fask* are the two most widely used and widely known methods of terminating a marriage by a wife, I will examine these.

#### **Khul - a separation with compensation**

Most scholars have agreed that a *khul* is initiated by the wife's request to end the marriage and in return the husband receives compensation. Traditionally it has been understood that the consent of both parties is required. The compensation is normally in the form of the return of the *mahr* payment. The proof that this is a form of valid termination of the marriage is found in both the Quran and in the *hadith* of the Prophet. In the Quran it is said:

*Divorce is twice. Then, either keep [her] in an acceptable manner or release [her] with good treatment. And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep [within] the limits of Allah . **But if you fear that they will not keep [within] the limits of Allah, then there is no blame upon either of them concerning that by which she ransoms herself.** These are the limits of Allah , so do not transgress them. And whoever transgresses the limits of Allah - it is those who are the wrongdoers<sup>84</sup> (emphasis added).*

Similarly the Quran states:

*And if a woman fears from her husband contempt or evasion, there is no sin upon them if they make terms of settlement between them – and settlement is best. And present in [human] souls is stinginess. But if you do good and fear Allah – then indeed Allah is ever, of what you do, Aware<sup>85</sup>.*

In addition there is the *hadith* of the Prophet in which the wife of the companion Thabit Ibn Qais required a divorce<sup>86</sup>. There are differing versions of this *hadith*

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<sup>84</sup> The Quran 2:229 Saheeh International Translation

<sup>85</sup> The Quran 4:128 Saheeh International Translation

<sup>86</sup> In some reports the wife is named Jamila, in others Habibah so there is some uncertainty about whether there were two wives of Thabit or if this was the same woman.

reported in multiple sources which give variant details<sup>87</sup>. All reports agree, however, that the wife explained to the Prophet there was no criticism of her husband's character or religion. Indeed, in one narration the wife states that, were it not for fear of Allah she would spit on her husband's face and the *hadith* narrator explains that this was due to the husband's ugly appearance. The Prophet asks the wife if she is willing to return the garden that was given to her as her *mahr*, to which she replies 'yes' and the Prophet separated them.

It has been said that the ruling regarding a *khul* is that it is disliked, in that it is not the preferred method of divorce. The reason for this, as set out in the beginning of verse 2:229, is that a husband ought to either live with his wife in kindness or let her go in kindness. In either case it is better for him to allow the divorce without causing difficulties. The same verse goes on to state that it is not lawful to take back what has been given when the husband is divorcing the wife. We do know, however, from the *hadith* mentioned above that the Prophet *ordered* the wife to return the garden gifted to her by her husband which would suggest this was not a *talaq* but a form of divorce which we understand to be a *khul*. The Quranic verse 4:128 does not mention giving any compensation and simply advises parties to settle matters amicably because settlement is better for them. It does, however, mention the 'stinginess' that is present in human beings and the very short commentary under the translations suggests stinginess here refers to 'holding on to self-interests'<sup>88</sup>. In other translations there are references to 'greed'<sup>89</sup>, or 'avarice'<sup>90</sup>, implying it is better for parties to settle on agreed terms that are not unreasonable.

#### Unresolved issues and future challenges regarding *khul*

Despite the relative simplicity of the Quranic verses and the *hadith* which provide the basic elements of this type of termination of the marriage, there are still important areas of dispute amongst scholars. Questions have arisen including whether the husband *must* consent, whether a judicial authority can

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<sup>87</sup> Reported in Bukhari (in the book of divorce at 5273), in An-Nasai (in the book of divorce 3497), in Abu-Dawud (2229), and in At-Tirmidi (1185)

<sup>88</sup> The Saheeh International Translation 129

<sup>89</sup> Pickthall and Yusuf Ali Translations

<sup>90</sup> Shakir Translation and Arberry translation.

consent for him and what is considered an appropriate level of compensation to be paid. In some narrations of the *hadith*, it states the husband agreed and in others no mention is made of the husband's reaction. In the different narrations the Prophet either 'orders' the husband to separate from the wife or 'asks' the husband to separate from her. These differences have an impact on the differing approaches that are taken to the issue of *khul* and the role played by the husband or judicial authority in facilitating the *khul*.

It is interesting to note from the *hadith* that the wife's wish to separate was because she simply found her husband unattractive. She made a point of informing the Prophet that there was no fault in her husband's character or his religion. The Prophet did not question the wife any further, he did not ask her to be patient, consider other options, or attempt a reconciliation. The Prophet considered the wife's account to provide a sufficiently strong reason that he moved straight onto the manner of the divorce. A shari'a council's insistence of entering into a reconciliation process in *every* application that comes before it is simply not supported by the manner in which the Prophet addressed the concerns of the wife of Thabit Ibn Qais.

There is no requirement that this request for a *khul* be made by the wife whilst she is not menstruating or in a state of purity. Although there is an *iddah* of one month<sup>91</sup> (or some scholars have stated it is three months<sup>92</sup>) or until delivery if the wife is pregnant, a husband cannot force a reconciliation during the *iddah* period<sup>93</sup>. Otherwise, it would defeat the purpose of this entire method to end the marriage. This distinction of the husband's right during the *iddah* is an important one to appreciate. One might query why a shari'a council appears to persuade

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<sup>91</sup> The *iddah* of one month/one menstrual cycle for *khul* comes from one of the narrations of the *hadith* of Thabit's wife where at the end of the *hadith* the Prophet told the wife her *iddah* was one month.

<sup>92</sup> This view is based on the Quranic verse of 2:228 which states generally that the waiting period for divorced women is three menstrual cycles.

<sup>93</sup> Some scholars have stated that the reason the husband cannot take back his wife during her *iddah* (as is possible for him if he pronounces a revocable *talaq*) is because of the compensation she has paid to him. Her releasing herself from the marital contract by the payment of compensation, prevents the husband from attempting to take her back and should he wish to reconcile with her, he will need her consent for a new marriage contract with him. A new contract will require the payment of *mahr* again by him.

men to agree to a *khul* rather than persuading them to pronounce a *talaq*. After all a *talaq* would allow a woman to keep her *mahr*. However, a *talaq* would also give the husband the right to reconcile. Although unscrupulous husbands can use this to their advantage by refusing to give a *talaq*, the process of a *khul*, enables a woman to retain her own agency in any possible reconciliation. The *khul* can be viewed as an important way in which women are able to use their Islamic rights and be satisfied that they have attained a religious divorce which will be acceptable to God<sup>94</sup>.

Whether a shari'a council or indeed a judge can 'order' a husband to consent to a *khul* largely depends on what type of divorce the *khul* is considered to be. If it is considered to be an agreement between the parties, which is outside of the judicial process (as a *talaq* is) then it will need the consent of the husband. If however it is seen as a type of judicial divorce, where it is an adjudicator pronouncing the termination of the marriage then it is possible for a judge to order the husband to consent or indeed dispose with his consent altogether.

Similar to the discussions on *talaq* Giunchi states imams in the West seem to ignore (or perhaps are unaware of) the innovative extensions that are made to women's rights in Muslim majority countries<sup>95</sup>. She gives the example of judges from Muslim majority countries that do not require the consent of the husband for the *khul*<sup>96</sup>. As a general point Bowen argues that British shari'a councils' challenges are exacerbated precisely because they are not operating from an agreed set of laws, as would be the case in Muslim Majority countries<sup>97</sup>. He states shari'a councils not only begin their decision-making functions from diverse starting points and diverse sets of laws and jurisprudence, but each scholar has his own '*repertoire of texts and traditions, different cultural backgrounds, differing Islamic schools of thought and differing theological*

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<sup>94</sup> Bowen n63, 136 notes a similar response from the Amra Bone, of Birmingham Central Mosque, who explains that the *talaq* 'empowers' men. However the preferred method of divorce of Birmingham Central Mosque shari'a council is to dissolve the marriage itself at the behest of the wife, thereby placing '*greater emphasis on the empowering the wife within the broader community*'.

<sup>95</sup> Elisa Giunchi n54, 7-8

<sup>96</sup> Guinchi n54, 8

<sup>97</sup> Bowen n63, 103

*allegiances*<sup>98</sup>. Added to this, British imams are contending not only with the pluralism within Islam, but with the influence of English civil law and British cultural norms of the parties before them. Bowen also recognizes that the differing '*judicial temperament*' of each scholar has a significant practical effect on the outcome<sup>99</sup>. There are clearly many competing factors which help to explain the diversity of decisions and the opportunity for forum-shopping but also produce a lack of uniformity.

Notwithstanding the challenges, it is evident that there is still room for judicial creativity in this area, whilst remaining faithful to the framework of Islam<sup>100</sup>. For example, in her research Tucker states that she could not identify a '*dominant position on the appropriate level of compensation*' to be paid to a husband by the wife in order to obtain the *khul*. Rather she identifies a '*broad range of possibilities*', with the most common opinion that the wife should simply return the *mahr* or its value or what he gave her<sup>101</sup>. Many of the traditional scholars expressed the view that a man negotiating for more than the *mahr*, whilst permissible, was extremely disliked<sup>102</sup>. A determined husband who does not wish to give a *talaq* is in a relatively strong bargaining position if the wife wishes to 'buy' her way out of the marriage. Shari'a councils ought to recognize this inequality and take the example of the Prophet in more robustly facilitating the *khul*. Indeed they could set a modest or nominal level of compensation, if any at all, rather than leaving it to parties to negotiate.

#### **Faskh – a judicial ruling**

Where a husband does not give a *talaq* and the parties cannot reach an agreement regarding *khul*, the wife will need a judicial termination of her marriage. This is known as a *faskh* and requires a judge to rule on the matter. Unlike *talaq* or *khul*, there is no clear evidence in the Quran mandating the *faskh*

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<sup>98</sup> Bowen n63, 103

<sup>99</sup> Bowen n63, 103

<sup>100</sup> In her comparison between the *khul* practices of Mauritania and Egypt, Corinne Fortier demonstrates how cultural norms play a significant impact on the rights and obligations of parties in negotiating a *khul*. Corinne Fortier, 'The Right to Divorce for Women (*khul*) in Islam: Comparative Practices in Mauritania and Egypt' in Mehdi, Menski and Nielsen (eds), *Interpreting Divorce Laws in Islam* (DJOF Publishing 2012) 163

<sup>101</sup> Tucker n74, 97

<sup>102</sup> Tucker n74, 97 noted the dominant Hanafi opinion that whilst it was 'abominable' for the husband to take more than the *mahr* as compensation for the *khul*, it was valid.

as a method of termination of the marriage. It is accepted however that verses 2:231 and 4:35 by implication allow for a *faskh* ruling to be made. In any event, scholars have accepted the authority of a judge to make a ruling based on general Islamic principles of preventing harm. Normally one would expect an application for *faskh* to be made by the wife but here is nothing precluding the husband from making such an application<sup>103</sup>. As the application for *faskh* is based on establishing harm, it is considered to be a fault based application, in that the wife must establish some defect in her husband or harm that she is suffering which is attributable to her spouse.

There have been significant differences amongst the schools of thought, as to what amounts to a sufficient defect in the marriage enabling a judge to annul it. In a somewhat paternalistic approach to protecting the wife, some traditional scholars of Islam allowed the wife's family to apply from if they felt the marriage was harming her. Whilst all the schools of thought appear to agree that the impotence of a husband would be sufficient to order a decree of divorce, some scholars, particularly Hanafi, were extremely restrictive in their approach and did not consider anything beyond this ground as a reason for a *faskh* pronouncement<sup>104</sup>. Other scholars took a much wider view of what constitutes 'harm' and the Maliki school allowed for the widest interpretation including, for instance, a husband who suffered from a form of insanity, leprosy, or other disease, failure to maintain, becoming an apostate, cruelty towards the wife, gross neglect, lengthy disappearance of the husband or imprisonment. Tucker suggests that one of the reasons why there is such a great deal of diversity amongst the difference schools of thought regarding harm is because the concept is underpinned by the wide diversity of views regarding the wife's rights within the marriage<sup>105</sup>.

The pronouncement of the *faskh* as a route to ending the marriage is important. It means that a woman who wants to be released from a marriage has a way out

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<sup>103</sup> It would seem unnecessary in view of the husband's right to a *talaq*, unless he wishes to challenge the payment of the *mahr* or maintenance during *iddah*.

<sup>104</sup> Black et al n67, 135

<sup>105</sup> Tucker n74, 94. Refer back to my discussions in Chapter 4 on the marital relationship.

where her husband refuses to pronounce a *talaq* or to consent to a *khul*. On the pronouncement of the *faskh*, the wife preserves her right to her *mahr* and to financial provision during her *iddah*, as she does when it is a *talaq*. There can be circumstances where the *faskh* is more appropriate than *khul*. There is no evidence to suggest shari'a councils provide Muslim women with any advice as to which process is better for them in their particular circumstances. It seems every application is treated as an application for a *khul* and in the event that the shari'a council is unable to facilitate an agreement only then will it consider whether to grant a *faskh*. This is not only time consuming but may mean women must at least initially attempt to negotiate their way out of a marriage where serious allegations of harm or violence have been made.

There are other methods of divorce which are very rarely used today and for this reason I have not examined them in this thesis. They include *li'an* (which is used where there are allegations of adultery), *ila* and *zihar* (both of which concern husbands who vow not to have sexual relations with their wives). I mention them only to point out that they are considered to be pre-Islamic practices which were subsequently regulated by the Quran but have very little application in a contemporary setting<sup>106</sup>. Moreover Islamic law permits a divorce to take place where both parties are in agreement as to its ending (*mubarah*) unlike a *khul* in which the wife is purchasing the husband's consent. In a *mubarah* both parties are agreed that they wish to divorce and can end the relationship without seeking approval from a court or any other authority. A no fault based divorce is a matter which English law has struggled to implement<sup>107</sup>. Similarly, although it is available in Islamic law, it does not appear to be a method that is widely used by couples.

In examining the different types of ways in which Muslim men and women may be divorced there can be little doubt that the Quranic verses and Prophetic tradition have given husbands a unilateral right to a divorce not given to wives. The options given to wives, though not as extensive, do provide women with

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<sup>106</sup> Black et al n67, 138

<sup>107</sup> See discussions in Chapter 4

realistic opportunities to divorce even if this is against the husband's wishes. To that end shari'a councils provide an important service. However, it is also clear both classical and modern juristic interpretations of divorce rights are influenced by patriarchal mind-sets. Shari'a councils tend to maintain classical interpretations and further are shielded from or do not expose themselves to the debates and reforms undertaken in Muslim majority countries.

### **Divorce under English law**

The English law of divorce has had its own contentious history. In many respects, as with Islamic law of divorce, English law has struggled with very similar social policy, religious and cultural concerns. In Chapter 4 I identified ways in which English law attempts to support the institution of marriage and marital relationships<sup>108</sup>. English law recognises that stable marriages provide a strong foundation for family law and ensure that as a society we create healthy environment in order for individuals to become productive members of society. There is therefore a difficult balancing act which the law attempts to achieve. On the one hand the law wishes to support and encourage parties to marry and most importantly remain married; on the other individuals should have the agency to extricate themselves from an unhappy marital union.

The English law of marriage has traditionally been based on Christian concepts of marriage. As a result any reforms to marriage and divorce laws have been intrinsically associated with Christian values. Prior to 1857, divorce was in the hands of the ecclesiastical courts which effectively accepted the indissolubility of marriage. In the circumstances the only possibility for termination of a marriage lay in either taking the very expensive route of a private Act of Parliament or petitioning for nullity. It was not until the introduction of the Matrimonial Causes Act 1857 that courts were empowered to grant a divorce. This Act enabled a divorce to be granted by the court on the one ground of adultery, although there was a distinction between the husband's claim for adultery and the wife's claim. Where the wife petitioned for adultery, it had to be coupled with another factor such as bigamy or cruelty, a simple adultery by itself was not

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<sup>108</sup> Nigel Lowe and Gillian Douglas G, *Bromley's Family Law* (Oxford University Press 2015) 211

sufficient. In contrast, when the husband petitioned the law did not require any other factor to be proved<sup>109</sup>. It is interesting to note that both English law and Islamic law regard the sexual relationship fundamental in marriage. For English law it formed the only basis upon which a divorce could be granted, albeit the sexual rights of a husband were clearly given preference to those of the wife. For Islamic law, all four schools of *fiqh* agreed that the inability of the husband to have a sexual relationship with his wife is a sufficiently serious harm to her enabling a *faskh* to be granted.

In the more recent history of English law there has been an increasingly secularised approach to marriage and divorce, although the Christian influences remain<sup>110</sup>. The current law of divorce is contained in the Matrimonial Causes Act 1973. Divorce law has not changed for over four decades and a key concern is still to avoid making divorce 'too easy'. Whether having a restrictive divorce law system supports the institution of marriage continues to be a highly contested topic.

The current substantive law of divorce identifies one ground for divorce: the irretrievable breakdown of the marriage<sup>111</sup>. That ground is established by proving any one of the five possible facts<sup>112</sup>. Of these five facts only two allow a party to commence proceedings immediately<sup>113</sup>, provided of course at least one year has passed since the date of the marriage. The other three facts require a period of separation of at least two years by the parties, before proceedings can be commenced<sup>114</sup>. Unlike Islamic law there is no distinction between the

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<sup>109</sup> Summarised from Bromley n105, 212

<sup>110</sup> See, for example, in Chapter 4 the examination of the concept of a non-marriage. It is arguable that the more a ceremony of marriage resembles a Christian ceremony, the more likely it is considered to have the 'hallmarks of a marriage'.

<sup>111</sup> Matrimonial Causes Act 1973 s1(1)

<sup>112</sup> Matrimonial Causes Act 1973 s1(2)

<sup>113</sup> Matrimonial Causes Act 1973 s1(2)(a-b). Fact (a) requires the petitioner to prove the respondent's adultery and that the petitioner finds it intolerable to live with the respondent. Fact (b) requires the petitioner to prove that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

<sup>114</sup> Matrimonial Causes Act 1973 s1(2)(c-e). Fact (c) requires the petitioner to prove that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition. Fact (d) requires the petitioner to prove the parties have been living separate and apart for at least two continuous years immediately preceding the presentation of the petition and the respondent consents to the decree. Fact (e) requires the

husband and wife as to the ground to be relied upon or the process which is undertaken. In theory it ought to be the case that Islamic law is more flexible than English law in the circumstances in which it will allow parties to terminate their relationships. There is no minimum time period that they must remain married and they can agree to end the marriage on the basis of incompatibility. In practice a conservative interpretation of the Islamic injunctions on marriage together with a disproportionate responsibility placed on women to 'be patient' can lead to rigidity and stifle the development of Islamic law.

### **Conclusion: a developing relationship between Islamic and English laws of divorce**

By including both English law and Islamic cultural norms into their decision making we are beginning to see an organic emergence of Islamic law that is specific to British Muslims. Pilgram refers to this as '*British-Muslim Family Law*' as '*an emerging socio-legal field*'<sup>115</sup>. She highlights the interaction between Muslim law and English law to create hybrid legal subjectivity and argues that this has created a legal services market tailored to the needs of Muslim clients<sup>116</sup>. Pilgram interviewed solicitors who are specifically providing services that are tailored to meeting the needs of Muslims clients by ensuring compliance with English law whilst fulfilling their obligations as Muslims<sup>117</sup>.

In Chapter 4 I examined the different ways in which the English law of marriage may accommodate a *nikaah* marriage or at least simplify the process of marriage to make it easier for Muslim marriages to be recognised. Islamic laws of divorce are more difficult to reconcile with English law. Islamic law on the whole provides for the ending of a marriage without judicial or state intervention and has some clear differences between the way in which men and women are permitted to terminate their marital union. English law makes no such distinction and every divorce must be determined by a court. Although one

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petitioner to prove the parties have been living separate and apart for at least five years immediately preceding the presentation of the petition.

<sup>115</sup> Lisa Pilgram, 'Law, Orientalism, Citizenship: British-Muslim Family Law' 166-186 unpublished Phd candidate The Open University

<sup>116</sup> Pilgram n115, 167

<sup>117</sup> Pilgram gives the example of the drafting of a will which is fully valid under English law but the bequests it contains are in compliance with Islamic law.

might add most civil divorces are undefended so enter into the special procedure which largely consists of checking the paperwork at various stages. An English judge rarely carries out an investigation as to the truth of any allegations<sup>118</sup>. The English process for a divorce generally ignores the parties' Islamic divorce. Provision has been made to alleviate the position of Jewish wives whose husbands refuse to grant them a religious divorce by withholding the making of the decree absolute<sup>119</sup>. It is debateable whether the extension of this provision to include Muslims would actually provide any real benefits for Muslim women. Firstly, unlike Jewish wives Muslim women can obtain a religious divorce without their husband's consent and secondly, withholding the decree absolute will not prevent a Muslim husband from contracting a *nikaah* with a new wife. So a Muslim wife is not necessarily any better off by the refusal to grant the decree absolute and may be worse off. Besides, as examined in Chapter 4, there are increasing numbers of Muslims who do not have civil marriages.

For those who have entered into civil marriages a formal recognition in the civil divorce process regarding the Islamic marriage may place pressure on the parties to address the Islamic marriage. A suggestion made by one of the mufti's interviewed by Bowen is for civil divorce papers to include a question asking parties, particularly the husband, if they consent to the religious divorce<sup>120</sup>. This seems to be an eminently sensible suggestion and indeed could be extended to other family disputes. The question of whether parties have entered into a religious marriage and what, if anything is happening in relation to it could become a more visible aspect of family proceedings<sup>121</sup>. It may also place some pressure on shari'a councils to deal with an Islamic divorce quicker if the information is required by a civil court. What may be even more beneficial to a Muslim wife would be to allow her to use her husband's failure to co-operate in

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<sup>118</sup> There has been criticism that the role of judges in undefended divorces (which account for 98 per cent of divorces) is a waste. Ministry of Justice *Family Justice Review Final Report* (2011) para 4.166. It has been suggested these functions could be carried out by administrators.

<sup>119</sup> Matrimonial Causes Act s10A added by the Divorce (Religious Marriages) Act 2002

<sup>120</sup> Bowen n63, 217, this could either be treated as a *talaq* by the husband or an agreed divorce. From the perspective of the wife it would be safer to treat it as an agreed divorce so as not to leave her open to the possibility of the husband revoking the *talaq*.

<sup>121</sup> For example parties in a religious marriage could come within their own category in the definition of an 'associated person' in domestic violence proceedings (Family Law Act 1996 Part IV s62(3)) so that a religious marriage becomes a more visible part of family law generally.

the religious divorce as a factor to increase her financial provision. In effect, the court would impose a financial penalty on the husband for his recalcitrant behaviour.

Shari'a councils have been more proactive in their efforts to incorporate aspects of English divorce law into their own processes. Increasingly shari'a councils use the commencement or pronouncement of a civil divorce as evidence of the breakdown of the marriage and thereby provide a religious ruling terminating the marriage<sup>122</sup>. Some shari'a councils take a stricter approach and will only use evidence from the civil divorce if the husband was the petitioner or if, as a respondent, he acknowledged that he would not contest the divorce<sup>123</sup>. Shari'a councils are alert to the possibility of a husband failing to acquiesce to a religious divorce whilst simultaneously obtaining a civil divorce, yet they appear to be taking an ad hoc approach to the impact of a civil divorce. An agreed and formalised approach of the effect of a civil divorce on the religious marriage would provide clarity to Muslims and more Muslim women would feel confident that their civil divorce is sufficient to free them from their religious bounds of marriage.

Bowen describes the relationship between Islamic law and English law as sites of '*practical convergences*'. He argues that this works best when '*each party can retain its own evaluative framework and find pathways for convergences*'<sup>124</sup>. The organic and practical manner in which English and Islamic laws are developing would support Bowen's analysis. I would add that this relationship is still very much at the embryonic stage. English law of marriage is likely to go through extensive reforms which may well lead to reformation of the divorce law. Muslims views on marriage and divorce need to be articulated as part of the wider debates on marriage and divorce so that the sites of practical convergences can continue to develop.

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<sup>122</sup> Gillian Douglas, Norman Doe, Sophie Gilliat-Ray, Russell Sandber and Asma Khan, '*Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts*' [2011] Cardiff Law School, 40

<sup>123</sup> See Chapter 6

<sup>124</sup> Bowen n63, 217

## Chapter 6: The IJB: Processes, Procedures and File Examinations.

### Introduction and Background

In this chapter I report my findings from the shari'a council<sup>1</sup>. In total I analyzed data from one hundred closed files and observed sixteen meetings between Maulana Abdul Hadi ("MHA") and the parties. These consisted of six meetings that were listed for a joint meeting but two of the husbands did not turn up, so only four joint meetings took place. In the two where the husbands did not attend the meeting went ahead with the wife alone. Of the remainder, three meetings were with husbands alone and the rest were with the wives alone. In addition I observed one Board Meeting where eleven cases were determined in the absence of the parties. I accept these are relatively small samples. However, in total they amount to 127 individual cases that I have examined at different stages of a shari'a council process. They are sufficient to give me an insight into the workings of one particular shari'a council and the wide range of complex matters that the shari'a council deals with.

### The IJB procedure

The IJB procedure for opening and closing files is a fairly rudimentary, manual procedure. On the opening of a file each applicant is allocated a hard copy file and a unique number. A fee of £150.00 is taken regardless of how complicated the file becomes<sup>2</sup>. The administrator carries out some identity checks. Copy paperwork and handwritten notes are kept in the file. Notes on the file can be in English, Urdu or in Arabic depending on who has dealt with the file<sup>3</sup>. There is no electronic management of files. Once the case has concluded with a termination of the marriage, the file is placed in storage but there is no particular system for this and the administrator largely relies on his memory to locate the file.

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<sup>1</sup> In Chapter 7 I analyze the interviews.

<sup>2</sup> Though this can be waived at the discretion of the IJB.

<sup>3</sup> I can read and write Urdu fairly fluently and although I can read Arabic my understanding is limited. I have studied Arabic as a language and Quranic Arabic up to intermediate level.

Once the application is made the next step for the IJB is to contact the husband, normally in writing, to notify him of the application. In this letter no details are given to the husband about any allegations and he is asked to contact the IJB. The husband is normally given a month to respond, longer if he is abroad. If no response is received a second letter is sent. If there is still no response the IJB will consider alternative methods of contacting the husband. As in a court procedure, the IJB wish to ensure that the husband is aware of the application or at least that every reasonable effort has been made to make him aware of it<sup>4</sup>. At this point the IJB may also request the wife attends for an interview to obtain further details about her application and the whereabouts of her husband.

What happens next depends upon whether the husband has become involved. Parties might have individual meetings, joint meetings, discussions regarding reconciliation or the husband consenting to a divorce. If no agreement is reached, or if the husband does not engage in the process the file is put before the Board. Board meetings take place every six to eight weeks where a number of files will be considered by Board members. The Board consists of members of MJAH from different masjids across England and although there is no specific quorum required, normally around nine or ten members will be in attendance. All Board members are male. The administrator will prepare a summary of each file and attends the Board Meeting. The Board can decide to grant a *faskh* or give directions as to further information they require. A file may therefore go before the Board on a number of occasions. Parties are notified of the Board's decision by the administrator.

### **The applicants - gender, ages, marriage duration, employment status and ethnicity**

The primary users of IJB services are women and this is the case for all shari'a councils that have been subjected to academic scrutiny in England and Wales.

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<sup>4</sup> However, unlike the court process, the IJB does not simply leave it to the applicant to demonstrate that every effort has been made to notify the husband. The IJB will itself try to locate the husband by for instance, hand deliver letters, contact family members, put adverts in newspapers and take the steps one would expect an applicant to take to satisfy a civil court.

The Applicants' ages ranged from early 20s with very short marriages<sup>5</sup> to Applicants in their 50s. The IJB do not keep records of parties' employment status unless it is relevant to the application and in most cases it is not relevant to the application being made<sup>6</sup>. There is little else on the file that gives any indication of the socio-economic backgrounds of the parties. I could find no discernable patterns regarding matters of age, marriage duration or employment status of parties.

With regard to ethnicities, 64 percent of the applicants came from a Pakistani background being either British Pakistani or immigrant Pakistanis (who have often entered the UK as spouses). The IJB applicants included a diverse range of other Muslim ethnicities: Bangladeshi (7 percent), Yemeni (6 percent), Somalian (6 percent), European/ English converts (3 percent), Afghani (2 percent), Kenyan (2 percent), Iranian (2 percent), Palestinian (2 percent), and Moroccan, Indian, Malaysian, Malawi, Zambian and Arab (all 1 percent each). The IJB demonstrated development of relationships with Imaams or members of the different communities<sup>7</sup> but it is interesting to note that any such relationships appeared to be with male members of other communities. Thus decision-making remains part of the male authority within the different communities. In other cases there are aspects of the marriage contract or the marital relationship where the culture of the individuals has an impact which the IJB has sought to recognize<sup>8</sup>. It is of benefit that the IJB demonstrated knowledge of some cultural

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<sup>5</sup> one barely lasted four months and the applicant was aged 24 years

<sup>6</sup> for example in file number 27 it is noted that both parties are GPs. This issue is relevant it is difficult to arrange a joint meeting between parties due to their work commitments

<sup>7</sup> As an example, in file number 50 both parties were from an Iranian background and the husband was still residing in Iran. The IJB were finding it very difficult to make any contact with the husband. They eventually managed to find a contact in Iran (not an Imaam or community leader of any kind) who managed to make contact with the husband's father and uncle in Iran. Both father and uncle confirmed to the IJB contact that there was no hope of a reconciliation and that the husband was not going to co-operate in the divorce process. As such the IJB felt this was sufficient information for them to terminate the marriage by *faskh*. There are similar examples of associations with members of the Somali and Yemeni communities.

<sup>8</sup> In file number 32, for instance, the both members of the couple were British Bangladeshis. The IJB noted that the *mahr* in this marriage contract amounted to £12,000. The IJB explained that the Bangladeshi community tends to give significantly larger amounts of *mahr* than in the Pakistani community where the *mahr* is often a nominal sum amounting to a few hundred pounds. Where the *mahr* is of a significant value it becomes an important negotiation tool so the cultural practice of the Bangladeshi community in giving such a large *mahr* has to be recognized by the IJB.

differences but there is a risk of essentializing the experiences of different groups. The IJB needs to ensure that generalizations and stereotypes do not prevail over the specifics of individual cases.

### Reasons why women apply

When anyone applies to an authority for the termination of their marriage it is self-evident that they are unhappy in that relationship. The overwhelming majority of applicants to the IJB cite reasons which would fall under the broad heading of 'unreasonable behaviour' were they to apply for a civil divorce. These reasons range from 'lack of understanding' or 'lack of compatibility' to serious allegations of abuse and violence. A lack of understanding or compatibility would not suffice in English law as examples of unreasonable behaviour<sup>9</sup> and parties would need a period of at least two or five years' separation in order to commence proceedings. Although the issue of fault is not specifically addressed by the IJB it does appear from all the files examined there is an expectation that applicants will be making allegations of some fault on the part of their husbands.

### Allegations of violence

This is an important issue as criticisms have been made of shari'a councils that they do not provide adequate safeguards, particularly for women who make allegations of violence against their husbands. In her study Bano reports that out of ten women who had been 'coaxed' into participating in reconciliation sessions with their husbands, four stated they had existing injunctive orders against their husbands<sup>10</sup>. It has been suggested that vulnerable women are encouraged or pressured to return to violent husbands by shari'a councils and that the issue of violence and abuse is not given due weight in the processes adopted by shari'a councils. I attempted to identify how allegations of violence

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<sup>9</sup> See, for example, the recent case of *Owens v Owens* [2017] EWCA Civ 182 where it was decided that the wife's allegations of unreasonable behaviour were 'at best flimsy' and amounted to incompatibility. In the circumstances the court decided that '*Parliament has decreed that it is not a ground for divorce that you find yourself in a wretchedly unhappy marriage*' para 84.

<sup>10</sup> Samia Bano, *Muslim Women and Shari'ah Councils: Transcending the Boundaries of Community and Law* (Palgrave MacMillan 2012) 127-128 and 213. Another example is the position taken by Southall Black Sisters who support the banning of shari'a councils because they put pressure on vulnerable women to reconcile with their husbands. See <https://www.theguardian.com/commentisfree/2016/dec/14/sharia-courts-family-law-women> accessed 22 May 2017

were perceived within the council process and whether any specific measures were taken where allegations of violence were made.

It seems clear that the IJB is aware of civil court processes regarding injunctions and restraining orders and the possibility of bail conditions limiting contact between the parties where criminal proceedings are pending. Where an injunction or any similar order has been made the IJB stated it will take copies of any documentation provided by the wife. The IJB is careful not to encourage or enable a breach of the order but I question whether the concern was the protection of the wife or the husband's vulnerability to breach. Although there is no specific policy in place the IJB informed me it would not consider it appropriate to hold joint meetings in such circumstances. Nor would it consider it appropriate to hold joint meetings where social services have advised that it is inappropriate to do so.

Where there is no such order in place or the order has expired the IJB appears to be less clear as to what its policy is. It was not apparent to me on what basis the IJB would decide the appropriateness of a joint meeting where allegations of violence had been made. There is an ambivalent or inconsistent attitude towards anything less than proven allegations of violence. I noted in my observations of the six cases where the wives were expecting a joint meeting that the IJB allowed women to wait in a separate office if they had previously indicated some concern. I saw that one of the administrators went out of his way to wait for a female applicant and as soon as she walked into the building he took her into an office room so she did not have to sit in the waiting area with her husband<sup>11</sup>. The staff also made other practical suggestions to the women who did not wish to come into contact with their husbands outside of the IJB building, such as waiting in the women's section of the mosque before leaving<sup>12</sup>. I observed the

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<sup>11</sup> The applicant in this case later informed me in her interview that she had explained to the IJB that she felt very distressed at the thought of facing her husband alone. She had been informed that as soon as she came into the building, the IJB would ensure she sat separately from her husband.

<sup>12</sup> The women's section of the mosque has a separate means of entry and exit, with security cameras. Daily activities for women take place in the women's section, so it is very unlikely a man would be able to enter into that area unnoticed.

staff members speaking to the women in a reassuring manner when they appeared nervous and this included women who attended for meetings on their own. These are commendable but do not translate into an overall policy or strategy on the part of the IJB.

There are concerns regarding joint meetings. Out of the four that I observed, one involved a wife who alleged serious allegations of violence and sexual assaults throughout her marriage. There were no current injunctive orders in place. The family background was very complex. Though the wife was able to articulate her views she clearly did not wish to participate in a joint meeting. I also noted that the husband had commenced proceedings for a civil divorce which the IJB was aware of prior to holding the meeting. This seemed to be an unnecessary meeting to hold for multiple reasons<sup>13</sup>. I noted that throughout the meeting the wife looked to me for reassurance and was very distressed. Had I not been present she would have been in an all-male environment although she did have supportive family members with her who waited outside. In my view the allegations of violence were given insufficient weight, most notably when after making the allegations of violence the wife was asked if there was any possibility of a reconciliation. At no point were the allegations of violence put to the husband.

In the other three cases of joint meetings there were no allegations of violence and in all three the women appeared capable of expressing themselves, indeed in some cases better than their husbands. However, there are other problematic issues regarding the meetings, unrelated to allegations of violence which I will address later in this chapter. One other matter to note: of the two joint meetings where husbands failed to attend, one involved a wife who alleged a previous history of domestic violence and police involvement (though no actual criminal

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<sup>13</sup> In addition to the civil proceedings and allegations of violence, it was apparent the parties had already participated in a number of meetings that had been arranged through family and friends. There were also complex proceedings for finances and disputes concerning children which were ongoing before a civil court. At the conclusion of the meeting MHA (who was leading the meeting) informed the parties he saw no possibility of a reconciliation and as the husband had already commenced proceedings for a civil divorce this was sufficient for the Islamic divorce. The decision was made despite the husband's continued protestations that he had not intended the civil divorce to count as an Islamic divorce.

charges). Parties were already divorced under civil law by the time this meeting took place. Again I would question the wisdom of attempting to hold a joint meeting in such circumstances.

From the case files there were 22 cases where the notes on the files included references to physical violence. In all of these cases, the wives were eventually divorced<sup>14</sup>. It was not clear from the files if joint meetings had been suggested as in most of them the husbands did not fully engage with the shari'a council process. One point may be added here, however: most of the files where allegations of violence were recorded did not contain any evidence of the violence alleged. English law now requires parties to mediate in matters of ancillary relief and children unless there is some *proof* of the allegations of violence<sup>15</sup>. These requirements are part of the drive to reduce the legal aid costs burden on the state. I accept the aim of civil law mediation is not to consider reconciliation but rather to conclude the ancillary matters. The point is that the civil system expects parties to sit in the same room where allegations of violence have been made unless they are able to provide proof of such allegations. It is hypocritical to criticize shari'a councils if they adopt a similar approach.

Notwithstanding this, this is an area where the IJB would certainly benefit from both training and some further thought needs to be given to appropriate policies. It was apparent that where parties raised issues of vulnerability and sought protection, (such as by having a social worker or family member present at meetings), the IJB was accommodating. But the IJB, in my view needs training in recognizing issues of vulnerability from the outset and needs to be more proactive in developing appropriate policies and procedures to deal with vulnerable applicants. In my conversations with the administrator on this issue he seemed open to my suggestions. One must bear in mind that the fact there has been violence, even serious allegations of violence does not prevent couples

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<sup>14</sup> As a comparator in Sonia Nurin Shah-Kazemi S. N *Untying the Knot Muslim Women, Divorce and the Shariah* (The Signal Press 2001) study she states that 15.5% of the total number of case files examined made reference to the women requiring support to escape situations of domestic violence, (60)

<sup>15</sup> The Civil Legal Aid (Procedure) Regulations 2012 section 33

from attending jointly before a civil judge. However a civil court has many safeguards in place. Parties may have legal representation, judges have powers under the law relating to contempt of court to deal with any outbursts in court and the seriousness of allegations of violence is well recognized. Civil judges are never asking parties if they wish to reconcile or attempting to encourage them to reconcile. In my view, the IJB needs to recognize the seriousness of such allegations too and develop its policies and procedures in a more proactive manner. In both of the joint meeting cases where there were allegations of violence, in my view, the joint meetings were not even necessary and a better screening process would have identified this.

### **Husbands' involvement in the process.**

In all of the files analyzed the husbands were the respondents. The husbands' levels of involvement very much depended on how far they were willing to co-operate with the process initiated by their wives. 44 percent of the husbands responded almost immediately to the IJB and participated in the process. Another 30 percent only responded after a number of attempts had been made to contact them and then somewhat reluctantly. Of the 26 files in which husbands failed to engage with the process, 7 informed the IJB that they would not be co-operating and 19 did not respond at all. As in a court case this does not prevent the IJB from reaching a decision but it does cause delay as the IJB attempts to satisfy itself that the husband is aware of the application<sup>16</sup>. This issue of delay is one which many of the women who were interviewed raised with me.

It was evident from the files the IJB is very careful to satisfy itself that the respondent husbands have knowledge of the application. At the very least the IJB seeks to do everything it can to notify the husbands. This is similar to what a civil court would expect, except that in the civil process it is the applicant who is under an obligation to satisfy the court that the respondent is aware of the proceedings. The IJB sometimes adopts innovative methods which are decided

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<sup>16</sup> The IJB pointed out that on occasions it has been contacted by irate husbands after a determination is made questioning the IJB's authority to terminate the marriage. The IJB's response is to ask any such callers to put their concerns in writing and it will consider their views. Husbands rarely follow up on any such calls.

on a case by case basis<sup>17</sup>. In my view husbands are given extraordinarily lengthy opportunities to respond which causes delays in the final determination of a case. Initially husbands are sent three letters over a period of at least three months. This is already a considerable amount of time without any progress. Thereafter much depends on the extent to which the husband participates in the process and a husband can drag matters out. The IJB needs a stricter timetable which it must maintain on each file. I shall discuss this matter later when I deal with matters that arose in the Board Meeting.

Since over 70 percent of husbands engage with the process whether reluctantly or otherwise, their participation can have a significant bearing on the manner in which cases proceed. In all the files that I examined, even where husbands refused to agree to the wife's application for a divorce, they were unable to prevent the wife from attaining a divorce. This is perhaps a reflection of the determination by the women to be divorced. In such circumstances the most that the husbands appeared to have achieved was that *some* of their financial demands were met in return for their consent to a *khul* divorce or they were able to cause delay in the granting of a *faskh*. As an alternative there was evidence that husbands were willing to consent to a *khul* if the wife co-operated in the civil divorce, thus the consent to the *khul* was not always conditional on a financial demand<sup>18</sup>.

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<sup>17</sup> In file number 61 an advert was placed in an Urdu newspaper and in file number 50 a third party was used to make contact with the husband's family in Iran. Other examples include telephoning the husband abroad as in file number 4 (where he was in Yemen), file number 10 (where he was in Hong Kong), file number 28 (where he was in Saudi Arabia) and file number 55 (where he was in Pakistan). Email and hand delivery of letters were also used. Sometimes hand delivery of letters is by the administrator himself or on occasions the IJB used the services of a third party to hand deliver letters

<sup>18</sup> In file number 8, for example, the IJB stated that the wife was receiving 'silly advice' from her family not to cooperate with the civil divorce and that she did not appreciate that it was in her own interests to obtain a civil divorce. The IJB agreed with the husband that it would not hand over the signed *khul* form which it had received from the husband's solicitors' until the wife obtained independent legal advice and co-operated in the civil divorce. Once the wife completed the acknowledgement of service with the assistance of her solicitors, the *khul* certificate was handed to her. The IJB took a similarly sensible approach in file number 20 where the husband wanted the wife to apply for a civil divorce before he would co-operate with an Islamic divorce. The IJB advised the wife of this and informed her that if she applied for a civil divorce it might encourage her husband to be more cooperative. The wife somewhat reluctantly provided the IJB with evidence of her divorce petition. The husband was informed of this and asked by the IJB to sign the *khul* form. The husband then stated that he would not sign the form until a decree

## Observations of the meetings

I have already addressed my concerns about joint meetings where there are allegations of violence. I now examine more general issues regarding meetings. As will be noted most of the meetings that I observed were between wives and MHA without the presence of their husbands, though the women often had a family member or friend with them for support. There were three meetings where husbands attended alone. The meetings were normally held in a conference room with a large, round table. All the meetings that I observed were chaired by MHA. No other Board or council members were present. MHA sat on one side of the table and I sat alongside him, with a few chairs between us. The parties sat on the opposite side and, if both attended, there was normally a space of a few chairs between them. The table is large enough to accommodate at least twelve people.

I thought that MHA was skilled, experienced and very knowledgeable on normative Islamic law of marriage and divorce. He generally appeared to adopt a conservative approach to the roles of men and women within marriage, though he took a pragmatic approach about issues such as women working or studying and the impact of this on a relationship. He had a good understanding of the civil divorce process. He spoke to the parties in a gentle, although sometimes firm manner. The parties responded to him respectfully referring to him as 'shaikh', 'mufti', 'sir' or even 'uncle'. It is inevitable that my presence affected MHA's behaviour but he appeared to behave quite naturally in the meetings with the parties and in the Board meeting.

Meetings with one party only are convened largely for the purposes of gathering information about background, children, civil proceedings, court orders and reasons for the divorce application. MHA also explored the possibility of a reconciliation or consent to a *khul* in less detail than in joint meetings.

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absolute had been granted. The IJB took the view that it was not prepared to wait as the wife had complied with the initial request and terminated the Islamic marriage by *faskh* instead.

In the four joint meetings I observed, I thought that MHA treated both parties fairly, allowing both an opportunity to speak and to present their version of events. There was no indication that the evidence of the women was given any less weight overall than that of the men; there were no suggestion, for example, that the evidence of two women was needed as corroboration to counter the evidence of one man. MHA also made it clear to the parties that he had no authority to force a reconciliation if each party did not agree but he asked the parties questions to elicit some good memories of their marriage, with some limited success. In my view the issue of reconciliation, though often an appropriate matter to raise with the parties, was on some occasions unnecessarily dwelt upon. Women were at times repeatedly asked if they wish to consider reconciling. This inevitably is going to place pressure on women though as far as I am aware in none of the meetings that I observed did the parties agree to reconcile. MHA also explored the issue of *khul* to find out if husbands were willing to consent, pointing out that there was little benefit in refusing to consent where the wife did not wish to remain in the marriage. There are therefore pressures placed on men to explain or justify why they are refusing to consent to a divorce and these shifts of pressure are more visible in joint meetings.

In all of the meetings, whether joint or otherwise, discussions took place within an Islamic framework so the parties made reference to what they believed Islam said on any given issue. Parties also asked questions and looked to MHA for guidance as to their Islamic rights and obligations. I noted that often the women wanted reassurance that they were 'good wives' and would frame their responses to demonstrate how they had fulfilled their perceived religious obligations as a wife. Their complaints against their husbands were not limited to the marital relationship but, for example, included matters such as the husband drinking alcohol or failing to pray five times a day. MHA would not always respond to questions about religious obligations or provide them with the reassurances that they were hoping for. Women may therefore feel they are at times ignored and their concerns overlooked, especially if after making

complaints about their husbands they are then asked if they will consider reconciling. I noted the women sometimes directed their responses towards me, especially when they revealed matters that were distressing for them and after their meetings would thank me because they felt better having had a female presence in the room. Notwithstanding this, many of the women, both in the joint meetings and single meetings demonstrated that they were able to confidently articulate their positions. This was most notable amongst those who had faith in their own religious knowledge or came to this process with supportive family members or had no doubts that the relationship had ended. I found all of the women were able to assert their views, maintain their desire for a divorce, and for some women this was a cathartic experience in the termination of their relationships.

Of the three meetings with the husbands alone, two of the husbands were responding to applications made by their wives. The third sought guidance on whether he should divorce his wife. MHA did not encourage the divorce and similar to the joint meetings attempted to elicit from the husband some positives about the marriage. Of the two husbands responding to their wives applications one was agreeable to the *khul* but his main concerns revolved around his children<sup>19</sup>. I was surprised MHA did not get the husband to sign a *khul* form immediately; rather he said the wife was to be informed of the husband's position. This was likely to cause unnecessary delays to a final determination and it seems to me delays are built into this process even where parties are in agreement<sup>20</sup>. The other husband seemed quite, distressed, confused and at a loss as to why he had been summoned to attend the IJB. MHA demonstrated some skill in speaking to him calmly and in the course of the meeting the husband confirmed he was currently subject to a 'restraining order'. MHA informed the husband a joint meeting with his wife was inappropriate.

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<sup>19</sup> The issue of children was complicated because one child resided with the husband and the other two resided with the wife and there were a number of practical issues. MHA did suggest some sensible practical compromises to the husband which MHA said he would also suggest to the wife.

<sup>20</sup> In the other case the husband was subject to a restraining order and although he wished to reconcile with his wife, MHA did inform him a joint meeting could not take place because of the injunction. The husband presented in a very confused and at times distressed manner

It was not clear to me, either at the outset of a meeting or at its conclusion, exactly what the purpose of the meeting was. Whatever type of meeting took place parties were not informed at the start what the objectives were nor were they told at the conclusion in clear, unambiguous terms what was to happen next. At most they were provided with some vague advice to think about things or told that the IJB will contact the other spouse and 'take it from there', or that the file would be passed onto the Board without explaining what possible determinations a Board could make. No clear timetable was provided. Joint meetings were apt to become particularly confusing when issues of reconciliation and consent to the divorce were discussed in the same meeting.

### The Board Meeting

At the Board meeting, an entire day was set aside to consider the files. Of the eleven cases scrutinised by the Board, two of them were determined immediately by the Board issuing a *faskh*. In another six cases a type of conditional *faskh* order was made. This was because either they were cases where the granting of the *faskh* was conditional on the wife commencing civil proceedings or they were cases where the Board decided that the husband would be asked to sign a *khul* and if he fails to do so the *faskh* is to be issued. In one case a *fatwa* was made confirming the husband's *talaq* and there were two cases where effectively appeals from husbands as determinations had already been made which the husbands were querying<sup>21</sup>.

By tying in the granting of a *faskh* with a civil divorce, it is apparent that the Board is attempting to ensure some consistency between the religious divorce and English law. Board members spent some time discussing the extent of compliance with civil law which the IJB ought to require before issuing a *faskh*. It was agreed that in the present cases that the wives would be asked to prove they had commenced civil proceedings. However no firm policy was decided and

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<sup>21</sup> One husband alleged his signature had been forged on a *khul* form so this was to be investigated. The other husband had dragged out the shari'a council process and then refused to sign the *khul* form, as a result of which the Board had issued a *faskh*. The husband stated he wishes to have more time and was asking for the *faskh* to be rescinded. The Board dismissed his appeal.

this is likely to continue to cause confusion and delay. If a firm policy was decided applicants could be notified at the outset and much quicker decisions could be made in each individual case.

I found the Board members gave careful consideration to each file presented to them. There appeared to be genuine concerns for the people involved in the cases and an almost paternalistic concern for the applicant women. Board members were troubled about delays after receiving complaints directly from women and questioned the administrative staff about procedural delays apparent in some of the files. In my view delays occur throughout the IJB process and the Board itself, albeit unwittingly, contributed to the delays. For example, I question if it was necessary for the Board to give husband's another opportunity to sign the *khul* form before issuing a *faskh*. By the time the matter comes before the Board, the husband has already had several attempts encouraging him to respond and several opportunities to sign the *khul*. More generally there was reluctance by the IJB to provide parties with an overall timetable. Parties are left unaware of what steps are to be taken and by when. This failure no doubt contributed to some of the complaints about delays which the Board members had encountered, as women would keep chasing the IJB to find out what was happening on their files. This was reflected in my interviews with the women.

Board members did not appear to me to be following one particular school of Islamic thought and at times debated what they considered to be a 'correct' opinion on a matter<sup>22</sup>. In granting a *faskh* they appeared to follow the Maliki approach of considering harm to the wife which allowed for a broad range of complaints to be taken into account. The Board also took into account matters such as the effect of the divorce on the wider family, the civil divorce, the cultural background of the parties, the level of involvement by the husbands and any demands being made by husbands. Finally, the Board had to address some complex international jurisdictional issues and, in my view, would benefit from

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<sup>22</sup> John R. Bowen *On British Islam, Religion, Law and Everyday Practice in Shari'a Councils* (Princeton University Press 2016)104-108 where the author refers to the debates that he observed taking place amongst the scholars of the shari'a councils participating in his study. He describes the exchanges which took place between scholars on matters where they disagreed.

training and support from a legal adviser similar to a court clerk in a magistrates court.

### Objectives of the IJB

In every application for a termination of marriage before the IJB, two themes emerged from my examination of the closed files, from the meetings I observed and from listening to the Board discussions. First, the IJB explores the prospects of saving the marriage and second, if the marriage cannot be saved, it considers the likelihood of the husband consenting to a *khul*. The manner and extent to which each question is explored largely depends on the extent to which the husband participates in the process.

### Efforts to reconcile the parties - reaching point of 'no hope'

In addressing whether there was any prospect of saving the marriage, the IJB considered whether the parties had reached the stage of 'no hope of a reconciliation'. This judgment of 'no hope' is very much dependent on the individual facts of a case and on some cases it is very clear that reconciliation is not a viable possibility<sup>23</sup>. There were cases where this issue of 'no hope' was not as clear cut. In file number 44, the wife complained that her husband was very quiet, their relationship lacked communication and the wife felt she had no feelings for her husband even though they resided in the same house. It is unlikely these allegations would suffice as examples of 'unreasonable behaviour' for a civil divorce. The IJB invited both parties to a joint meeting. The file noted that the couple were given an opportunity to discuss matters on their own to decide if there was any possibility of saving the marriage. After discussions, the

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<sup>23</sup> In file number 1, the husband was in prison for attacking his wife and children and, as the IJB understood the position, he would be in prison for a number of years and would then be deported back to Pakistan. The Board took the view that in these circumstances there was no hope of a reconciliation. In file number 6, the Board again took the view there was no hope of a reconciliation where the husband had been in prison for a serious sexual assault against the wife. There was a non-molestation order in favour of the wife, and the husband was back in prison for drugs offences. The husband's mother agreed with the wife's version of events. In this case the husband wrote to the IJB stating that he did not agree to the divorce and was going to mend his ways once he came out of prison. The Board, however, took the view that as the wife wished to proceed with the divorce, there was no hope. Both of these cases are obvious examples of demonstrating 'no hope'.

wife decided that there was no hope but the husband refused to sign the *khul* form. It is also noteworthy here that the file records the observations of MHA who conducted the meeting and who felt the wife was correct as the husband appeared even to him to be uninterested in the marriage. The Board therefore terminated the marriage.

In file 53, the IJB went further in facilitating a reconciliation. The wife had complained that her husband disrespected her, was lazy, did not financially support her or their three children and that there had been no physical relationship between the parties for six months. The husband engaged with the process and the file noted that both parties had regularly attended meetings at the IJB to discuss their issues, both individually and jointly. The parties agreed to a 'contract' in order to attempt a reconciliation. Their contract listed matters which the husband would try to implement, such as getting a job, becoming a good role model for their children, applying for a driving licence and providing monthly expenses. In less than two months, however, the wife returned to the IJB and stated that things were not working out. The IJB suggested she give it more time but a further four months passed and the wife returned to the IJB with further allegations against her husband. This time after attempting to contact the husband and without hearing further from him the Board terminated the marriage, noting on the file that it could see no hope of a reconciliation and would not prolong the marriage any further.

The point of reaching 'no hope' is a combination of the degree to which the wife is adamant that she wants a divorce and the judgment of the IJB. The files which I have analyzed all resulted in the eventual termination of the marriage, and, as stated above, it is difficult for me ascertain if there are women who have been encouraged to reconcile or whose request for a divorce has been refused and who therefore remain in a religious marriage which they wish to end. Finding the right balance between allowing a marriage to be dissolved when it is not working and encouraging parties to continue to work at their relationship is something which all societies and governments grapple with. It is not of course specific to Muslims. However, the IJB appears to have no systematic screening

process to determine whether reconciliation is appropriate. In some cases it may well be appropriate but that does not mean it is appropriate for every case. It was apparent to me discussions on reconciliation continued to take place even where women clearly stated they did not wish to be reconciled or where they had alleged domestic violence.

### Encouraging husbands to consent to *khul*

The fact that in 56 percent of the files examined, the marriage was terminated by a *faskh* is a strong indicator that most husbands were not agreeable to a divorce, requiring the Board to make a decision. 39 percent of the marriages ended by *khul* and 5 percent were cases where either the husband pronounced a *talaq* in the course of proceedings or the Board issued a *fatwa* confirmation to state the husband's actions had amounted to a *talaq*.

When a wife makes an application to the IJB, it is treated as an application for a *khul* so the IJB will first attempt to get the husband's version of events and find out if he is willing to consent. If reconciliation seems unlikely the IJB will attempt to persuade him to consent to the divorce and advise him to sign a *khul* form. The IJB's position is that the *khul* divorce requires the husband's consent<sup>24</sup>. Husbands who respond to their wives applications are therefore expected to explain why they are not consenting to the *khul* and are urged to consent in order to allow the divorce to proceed. This is not unlike the advice given to a respondent in civil divorce proceedings even where the respondent does not accept or admit to any allegations.

Thus, one can see shifts in the pressure placed on the parties. On the one hand, when the IJB explores whether there is any hope of saving the marriage, the focus is on the wife to say why she does not wish to remain in the marriage. On the other hand, pressure is placed on the husband to explain why he is not willing to consent to a divorce. Whilst these themes emerged from the files and in the Board meeting discussions, one can see their application in the meetings with the parties, especially in the joint meetings observed. In the joint meetings,

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<sup>24</sup> The IJB follows traditional interpretations regarding the requirements of a *khul*

both these themes are explored at the same time. This can be quite confusing, as they are two entirely separate issues that ought to be addressed separately. One might ask if men and women who attend the IJB are placed under the same level of pressures. This is difficult to judge. Certainly the women have the greater hurdle as it is their application for a divorce and further reconciliation is the preferred outcome for the IJB. In any event, I think that the IJB needs to adopt a more systematic approach to consider if it is appropriate to discuss reconciliation with the parties. This needs to be determined first. If the wife does not wish to reconcile, whatever her reason might be, then the only issue to consider is whether the husband will consent. This two stage approach would provide clarity to the process.

### ***Khul, faskh or talaq – which is better for the wife?***

Every application made by wife is treated as an application for *khul* by the IJB. As the IJB follows the opinion that a *khul* requires a husband's consent there then follows a lengthy process of attempting to persuade the husband to consent. It is not clear why this approach is taken. If the wife makes allegations against the husband, why does the IJB not proceed on the basis that a *faskh* has been applied for? It is understandable that the IJB may not encourage the husband to pronounce a *talaq* because as noted from Chapter 4, the husband can revoke the *talaq* so this may leave the wife vulnerable to a reconciliation against her wishes. But the rationale for pursuing a *khul* exhaustively in every case before consideration is given to a *faskh* is not clear. I raised this with the IJB and was informed that the IJB sees '*the husband consenting to the wife's application as a powerful statement in upholding the wife's right in Islam to request a divorce*'. The IJB feels it will be criticized in not giving women their Islamic rights. I am not wholly convinced by this argument. It seems a *faskh* is only considered after every possibility of securing a *khul* has been exhausted. There is nothing that I can find from classical scholarship which insists that this order must be complied with. The advantages of a *faskh* ruling rather than a *khul* are that the wife is not dependent on the husband's consent and nor is she required to negotiate her *mahr* or jewellery away in order to dissolve the marriage. It may be the case that reaching an agreement to a divorce by the *khul* method allows each party to

accept that the relationship has ended without an acrimonious dispute of attributing blame. Long term this may be better for the parties. However in my view too much emphasis is placed on obtaining the husband's consent before a *faskh* is even considered.

### **Mahr and jewellery**

The *mahr* and jewellery can become significant issues. Although these are independent items the issues concerning them often become conflated and much will depend on parties own cultural practices. Sometimes jewellery given to the wife is part of the *mahr*, sometimes it is an outright gift and sometimes a conditional gift depending on the cultural norms of the parties. Bowen refers to the differences of opinion in his study, even amongst scholars about whether jewellery forms part of the *mahr*<sup>25</sup>. The IJB takes the view that to count the jewellery as *mahr* it needs to be written on the *nikaah* document. That does not mean parties cannot negotiate in relation to the jewellery but that the IJB will only treat it as *mahr* if it is identified on the *nikaah* document. There are a number of issues that arise from the case files regarding *mahr* and jewellery. First the amount of *mahr* paid is by and large dictated by the cultural background of the parties. In most of the case files that I analyzed the ethnic background of the parties is Pakistani and the amount of *mahr* is relatively small, indeed often just a nominal sum, particularly where the parties were married in Pakistan. So the return of this *mahr* is not of great importance. In Arab or Bangladeshi cultures the amount of *mahr* paid is much greater. The IJB is aware of the different practices of different cultures when it comes to the amount of *mahr* and is able to take this into account in the negotiations with a husband for his consent to the divorce.

Disputes can occur as to the whereabouts of jewellery and whether *mahr* has already been paid to the wife. If the dispute cannot be resolved then the IJB can ask the wife to swear an oath and then issue a *faskh*. If the IJB considers the husband is behaving unreasonably with his demands it may issue the *faskh* without asking for an oath. The use of oaths is an interesting and practical way

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<sup>25</sup> Bowen, n22, 185-193

of disposing of a disputed issue of fact. It demonstrates an understanding of Islamic law and Islamic rules of evidence and its use enables the IJB to reach a conclusion on a matter without having to make a formal declaration. As a rule of evidence the oath follows the Islamic evidential principle of '*evidence is for the person who claims; the oath is for the person who denies*'<sup>26</sup>.

As an example, the types of circumstances in which an oath may be deemed appropriate is as follows: the parties dispute the whereabouts of, for example, jewellery. The husband is claiming it is in the possession of the wife and he wants it returned in order to consent to the *khul* and he wife states either that it was never given to her or she left it with the husband and his family. Initially the IJB will attempt to investigate the issue by interviewing both parties and perhaps even witnesses. On occasions one party may accept the jewellery is in their possession. In other cases where neither party is willing to concede that they have the jewellery, the IJB will ask the wife to take an oath. She must swear by Allah that the jewellery is not in her possession. That oath is taken in writing from her and, as a Muslim she is reminded of the seriousness of taking an oath by Allah, namely that if she is lying, she will be held to account for it on the Day of Judgment. Once the wife swears the oath in the presence of the IJB it will consider this to be a conclusion to the matter and will require the husband either consent to the *khul* or the IJB will issue the *faskh*

## Relationship with English Law

### *Nikaah* only marriages and civil marriages

This issue was explored in Chapter 4 and will be examined again in Chapter 7 from the perspective of the women. My examination of the files showed that the IJB is well aware of the difference between couples who have entered into a *nikaah* only marriages and couples who have also had civil marriages. 68 of the couples in my sample files had marriages that were considered valid in English law and therefore required a civil divorce to terminate them. 29 couples had

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<sup>26</sup> For a detailed discussion of this legal principle and the use of oaths generally within Islamic law see M.S Mohd Ab Malek, M.J Jeniwaty, M Sulaiman and S. Mohd Harun 'In the Purview of an Oath from the Jurisprudential Method of Islamic Law of Evidence' in Roaimah Omar, Hasan Bahrom and Geraldine De Mello (eds), *Islamic Perspectives Relating to Business, Arts, Culture and Communication: Proceedings of the 1<sup>st</sup> ICIBACC 2014* (Springer 2015) 463-474, 473

entered into *nikaah* only marriages. Three other couples had married abroad but the IJB questioned whether their marriages were recognized by English law, and so these were treated as *nikaah* only marriages<sup>27</sup>. Thus, according to the files, most Muslims had entered into marriages valid for the purposes of English law. On closer examination, however, I found that 54 out of the 68 couples were couples whose *nikaahs* had been conducted outside Europe (mainly in Pakistan and where one spouse was British or European and the other was not). The couples who had married outside Europe had each entered into a *nikaah* which was a legally valid marriage in the country in which the marriage was performed. As a result English law recognized the marriage as valid. Indeed it was in the parties' interests to ensure the marriage was valid in order to meet immigration requirements enabling the non-British spouse to enter the UK. Couples in these circumstances required a religious divorce and during the course of the IJB process were advised to obtain a civil divorce if they had not already done so.

If we examine the files of the 43 couples who were married in the UK or Europe, a different picture emerges. Only 14 of them had entered into marriages valid under English law. 29 had entered into *nikaah* only marriages. This reveals that a significant proportion of British Muslims whose marriages took place in the UK did not enter into civil marriages. There was no incentive to satisfy immigration authorities or indeed any other authority to undertake a civil marriage. No indication was given in the case files of reasons why couples had entered into *nikaah* only marriages. It is very difficult to find ascertain why from the files. This is a topic that I explored with the women whom I interviewed.

#### How English law is used and advice that the IJB gives

At no point did I get the impression that the IJB believes itself to be operating outside the framework of English law or that it considers itself to have the jurisdictional powers of an English court nor is the IJB asking for such powers. However, the IJB deals with a significant proportion of couples who have never entered into a civil marriage. For them the only issue regarding their marriage is

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<sup>27</sup> It is worth noting that the IJB did not obtain legal advice as to whether the parties' marriages were recognised under English law, and it may be that these cases raise some complex conflict of laws issues which were not immediately apparent to the IJB.

the termination of it under Islamic law. In this regard there is no impact on English civil law and, more importantly the civil law has no impact on the termination of this type of marriage. Where there is a valid civil marriage, the IJB will as a matter-of-course advise parties to seek a civil divorce, if they have not already done so<sup>28</sup>. This may be for a variety of reasons: sometimes the IJB wish to test the seriousness of the applicant or because it is at the request of the husband, or simply because the IJB wish to maintain consistency with English law<sup>29</sup>.

If the parties have already obtained a civil divorce then there are two ways in which the civil divorce becomes important. First, where the wife is the petitioner the IJB will check if the respondent husband has signed the acknowledgement of service to consent to the divorce. This consent will be treated as his consent to an Islamic divorce. Secondly, if the husband is the petitioner in the civil divorce then the IJB will treat this as an even clearer indication of his intention to divorce his wife by *talaq*. Where the husband does not acknowledge service or commence the civil proceedings, the IJB will make efforts to locate and engage with the husband but states it will take a pragmatic approach as there is a civil divorce taking place. The IJB will regard this as a strong indicator of no hope in the marriage and will see little point in denying a wife her Islamic divorce. In my observations, however, the IJB still proceeded to hold meetings to discuss reconciliation and tried to persuade a husband to consent to a *khul* even when it was aware that the husband had commenced a civil divorce. The IJB could have dealt with these types of cases much quicker. It would be of benefit to the users of shari'a councils, both applicants and respondents, for the IJB to articulate the consequences of the civil divorce upon the Islamic marriage and to ensure that the IJB complies with its own policies in a timely manner.

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<sup>28</sup> I have already noted above the lack of a consistent policy but despite this it is clear parties are at some point in the process advised to apply for a civil divorce. I also refer to the Board discussions on this. This was clearly an ongoing concern of the IJB and Board members were discussing an appropriate policy approach.

<sup>29</sup> The IJB, as noted earlier, has on occasions withheld the Islamic divorce until the proceedings for the civil divorce are commenced.

### Use of solicitors by the parties

There was little evidence in the files of parties making use of solicitors in the IJB procedure. It appears that where solicitors have been involved it is mainly because they are already involved in ongoing civil proceedings and the IJB has corresponded with the solicitors about the Islamic divorce. The IJB stated that on occasions the involvement of a solicitor can be more of a hindrance than a help by making matters unnecessarily antagonistic and prolonged<sup>30</sup>. Of the 100 files examined there were no examples of solicitors attending any meetings with the husband or wife.

### Conclusion

In this chapter I have sought to highlight the workings of one shari'a council in order to understand why shari'a councils exist, who they serve and how they are actually working in practice. I recognise that shari'a councils provide an essential service for some Muslim women: they provide the women with a forum within which to obtain religious termination of their marriages principally where their husbands refuse to allow the marriage to end. They empower women to be satisfied that they have terminated their relationships in accordance with their religious beliefs. This facilitates their freedom to move on with their lives and re-marry if they so choose thereby enabling Muslim women to exercise their own religious agency. As Moore states they '*serve as an increasingly important resource for women in troubled domestic situations who live in complicated networks of extended family and community*<sup>31</sup>'.

As my observations were of the IJB only my comments are specific for that organisation but I hope that they are also of relevance to shari'a councils more generally and to English law. First, I would suggest that once an application is made to the IJB, that it assigns a qualified and appropriate female support worker to the case. It is important women have access to female support. It was significant that some of the women directed their responses to me and later

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<sup>30</sup> In other cases the IJB's involvement with solicitors has been to inform the solicitors about the status of Islamic divorce or, as in the cases mentioned above, to agree that it will not provide the wife with an Islamic divorce until she has consented to the civil divorce.

<sup>31</sup> Kathleen M. Moore *The Unfamiliar Abode Islamic Law in the United States and Britain* (Oxford University Press 2010) 127

commented to me that they felt comforted by my presence, even though I was only observing them and not participating in the process itself. This support worker would take a detailed account from the wife and explore the issue of reconciliation with her. If the wife decides she does not wish to reconcile with her husband then this should not be pursued any further. The support worker should also consider the appropriateness of a joint meeting and whether any safeguarding measures need to be put into place. Consideration could be given to whether the wife should be provided with a separate place to wait, whether the support worker should attend meetings with the wife to provide moral support and generally the support worker ought to assess the wife's vulnerabilities. There are a whole range of additional practical measures which can be considered for each applicant<sup>32</sup>. In this way any additional requirements can be identified prior to any joint meetings or other action. The IJB will therefore take a much more proactive approach. All IJB staff and Board members would benefit from safeguarding training and in recognizing the impact of domestic violence.

Once the issue of reconciliation is determined, the shari'a council can move on to the next stage which is to adjudicate on the status of the marriage. Women ought to be provided with clear information regarding the different types of divorce methods and what each method entails. In the interests of open and fair justice, this may require both parties to attend jointly and provided any vulnerabilities have been considered and accommodated, it is reasonable to hold joint meetings. At the joint meeting the husband may, if it is considered appropriate, be asked if he will consent to the *khul* and if not, evidence can be given by each party in order to decide on the *faskh*. If the husband is unwilling to consent, making unreasonable demands or generally does not respond then matters should not be delayed. If a joint meeting is considered inappropriate then each party may still be given an opportunity to attend a meeting without their spouse. At the conclusion of any meetings parties should be informed what the next step will be and the timescale. If the file is to go before the Board, parties should be informed

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<sup>32</sup> Similar to the special measures which have been introduced into the criminal process by The Youth Justice and Criminal Evidence Act 1999. They need not be as extensive but consideration ought to be given to a broader range of practical measures.

when they will receive their decision. The final decision should be provided in writing with reasons.

More generally, a stricter timetable must be enforced in each case and parties ought to be provided with a guide in writing setting out the overall process and the purpose of meetings. I have highlighted throughout this chapter where delays are occurring. An electronic case file management system, though it has cost implications, would be of benefit to the IJB in ensuring a more efficient management of the files. Electronic case management systems also enable regular reviews of files to be carried out helping to minimize delays. The IJB needs to decide what its policy is regarding civil marriages and this is just one of many internal debates which need to take place<sup>33</sup>.

The IJB has the potential to provide a more professional service that not only provides the women with the outcomes that they desire but does so in a manner which is more supportive of their agency as Muslim women. Muslim men have the option of *talaq*; their agency is unquestioned even if they are discouraged from divorcing their wives. The IJB considers itself to be providing a forum whereby Muslim women can exercise their Islamic rights to request a divorce. This is true and it is apparent many women are benefiting from its services. But it is not enough to provide that forum without accommodating within it all of the support mechanisms that will enable women to access their Islamic rights quickly, smoothly and without feeling marginalized. Ahmed and Norton have noted that religious tribunals can draw a balance between promoting religious freedom whilst ensuring appropriate safeguards are in place<sup>34</sup>. The IJB has the potential but needs to consider carefully the design of its system of safeguards.

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<sup>33</sup> I will address some of the further internal debates in Chapter 7 after examining the interviews with the women.

<sup>34</sup> Farrah Ahmed and Jane Calderwood Norton, 'Religious tribunals, religious freedom, and concern for vulnerable women' (2012) 24 Child & Family L.Q 363-388

## Chapter 7: Voices of Muslim Women

### The Interviews

The examination of the files and observations of the IJB provide one perspective of the shari'a council experience. The interviews I conducted with the women provide another<sup>35</sup>. I interviewed twenty women all of whom had experienced a shari'a council process. Whilst my investigations of the files and my observations of the IJB gave me an insight into the processes and workings of the IJB the interviews enabled me to understand those processes from the perspectives of the women and to explore the women's experiences with civil law procedures. I also wanted to explore the following questions: Why do women use shari'a councils? Why do some only enter into religious marriages and not civil ones? Why do the women not rely on civil courts alone? Do shari'a councils meet the needs of Muslim women?

All the women were fluent English speakers. All had at some point worked outside the home, though were not necessarily working at the time I conducted their interviews. All were educated to at least GCSE level and many were educated to graduate and post graduate levels and had professional careers such as GPs, teachers, nurses, pharmacists and the like. As in Chapter 6 I recognize my own Muslim background in my understanding and interpretation of the women's experiences and acknowledge that there may well be unconscious elements of empathy and understanding on my part.

Prior to the interviews I had prepared a list of topics which I wished to address with each interviewee. This is reproduced in Appendix 2. The extent to which each topic was discussed with each participant depended on the factual circumstances of the case. For example, if the interviewee had no experience of the civil process or had not taken part in a joint meeting with a former spouse, then any discussion on these points was limited. The interviews were semi-structured and I encouraged participants to talk freely to me about the

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<sup>35</sup> The women whose views are cited in this chapter have fictitious names and no information is given which may reveal their identities.

questions. All the interviews were recorded and I transcribed them myself. The interviews have provided a rich source of data. I have however limited my analysis in this chapter to certain key themes in order to shed light on whether shari'a councils meet the needs of Muslim women and on the relationship between civil law and shari'a councils.

### Being Muslim

When I asked the women how they would describe their own practice of Islam, I received a range of responses. They said, for instance that they were 'practicing', 'half-way practicing', 'strong in faith', 'moderate, not fanatical but know right from wrong', 'religious', 'very moderate', 'practicing but not narrow minded', 'try to do as much as I can', 'in the middle, not extreme either way' and 'not 100% practicing but I am a trier'. These responses indicated that, for all of the women, their faith as Muslims was of significance to them. None of the women said that they were *not* religious or that religion was unimportant to them. When they spoke it was apparent that their faith was an important factor in their lives. Most of the women's responses suggested that, in their views they were at least trying to be 'practicing Muslims' and they equated practicing with attempting to fulfil acts of worship or the wearing of an hijab. It also became apparent in the interviews that, for many of the women their religion and belief in God were a source of comfort to them during the most difficult periods of their relationship breakdowns. As one respondent put it to me:

*'If I wasn't a Muslim I would be on anti-depressants...I don't know how I would do it...I would probably go off the rails if I didn't have Allah....Allah knows what's best for you...I don't know how other people [non-Muslims] go through it'* Halima

Throughout the interviews the women would at times refer to what they thought God would want from them in their marriages and divorces. As all of the women in my sample referred to themselves as Muslim and had approached a shari'a council to obtain a religious ruling, it is perhaps unsurprising that their religion was perceived as part of their identity. This was especially apparent in the discussions around the *nikaah* and why this was prioritized.

### Which shari'a council did they use?

Three of the women said they had made applications to more than one shari'a council<sup>36</sup>. There were fourteen applications to the IJB, five to the Birmingham Central Mosque and one application to each of the following: The Birmingham Fiqh Council, Islamic UK based in Birmingham, Showell Lane Masjid, The Shari'a Council in London, and to the Confederation of Sunni Mosques in Aston, Birmingham. This allowed some limited comparisons between the different shari'a councils.

### Types of marriages: *nikaahs* and civil marriages

Some limited research has been conducted to establish the extent of *nikaah* only marriages. Shah-Kazemi found that in 27 percent of the files which she scrutinized from a shari'a council in London, the couples did not have a recognized marriage<sup>37</sup>. Other studies have found higher proportions of non-state registered Muslim marriages. Bano identified 16 out of 25 women's marriages were non-state registered<sup>38</sup>, and Douglas et al noted that 14 out of 27 cases observed at Birmingham Central Mosque involved non-state recognized relationships<sup>39</sup>. Although Khan estimated that around 80 percent of Muslim marriages are non-state recognized she cites no evidence to support this figure<sup>40</sup>. My own findings from the IJB case files are in line with Shah-Kazemi's.

Unsurprisingly, all of the women whom I interviewed had undergone a *nikaah* ceremony: they are after all Muslim who want their relationship legitimized in Islam and terminated Islamically. Seven women told me that no civil ceremony had taken place. Thirteen women had state-recognised marriages of which nine

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<sup>36</sup> Abir had applied to Birmingham Central Mosque first, then to the IJB. Qaseema had divorced the same husband twice in a very short period of time. Her first application was dealt with by IJB and the second by Islamic UK based in Birmingham. Sophia went to three different shari'a councils, the first one was IJB, the second was Showell Lane Masjid and she obtained her divorce from the Confederation of Sunni Mosques.

<sup>37</sup> Sonia Nurin Shah-Kazemi n14,31

<sup>38</sup> Bano n10

<sup>39</sup> Douglas et al, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* (Cardiff Law School 2011)

<sup>40</sup> Aina Khan

[http://www.duncanlewis.co.uk/news/Aina\\_Khan%E2%80%99s\\_%E2%80%9CRegister\\_Our\\_Marriage\\_Roadshow%E2%80%9D\\_in\\_London\\_10th\\_June\\_\(30\\_April\\_2015\).html](http://www.duncanlewis.co.uk/news/Aina_Khan%E2%80%99s_%E2%80%9CRegister_Our_Marriage_Roadshow%E2%80%9D_in_London_10th_June_(30_April_2015).html) accessed 24 May 2017

were marriages which had taken place abroad. Only four women had undergone both a *nikaah* and a civil ceremony in the UK. This is roughly consistent with my findings from the closed files of the IJB, in that, although most of the women have a state-recognized marriage, often this is because they have been married abroad. Eleven women had married in the UK though only four had entered into state-recognized marriages. The pattern which emerges from the case files and the interviews; where marriages take place in the UK British Muslims appear to be more likely to enter into *nikaah* only marriages. It should be borne in mind that the sample of one hundred files and twenty interviews represent small samples, and that I was dealing only with cases where relationships have broken down. It might be that relationships where no civil marriages were entered into expose inherent weaknesses, leading to a higher risk of those relationships breaking down? A different picture might emerge if my research had included Muslims who were still married. But it is clear when British Muslims marry in the UK and there is no immigration requirement or other incentive, significant numbers do not marry in accordance with civil law.

### When does 'marriage begin'?

Irrespective of whether the women entered into a civil marriage or not, all of them agreed that they considered themselves married once a *nikaah* had taken place. Even if they did not begin living with their husbands for some time after the *nikaah*<sup>41</sup>, they considered their relationship to have been legitimized in the eyes of Allah by the *nikaah* ceremony. The following quotes from interviews are typical examples:

*'Legitimate in my eyes is through the eyes of Allah and that's the nikaah'* Bilqees

*'I know Islamically that's the one that matters to us [the nikaah]'* Fareeda

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<sup>41</sup> This could be for a variety of practical reasons although parties will consider themselves 'married'.

*'I would consider myself to be married once I had a nikaah and I am divorced when the khul is done'* Juwairya who was married in Pakistan so also had to undergo a civil divorce.

In answer to the question 'When did you consider yourself married?' *'from when I had the nikaah'* Halima's response here is the most typical response. Even though Halima's civil ceremony occurred two days after the *nikaah* and she began living with her husband after the civil ceremony, she still considered herself 'married' from the date of the *nikaah*.

*'An English marriage in my opinion is not considered a valid marriage in Islam as a marriage....An English marriage on its own is not something I would want to do. As a Muslim I would not consider that to be a marriage'* Juwairya

It is clear that these women considered themselves as having entered into a legitimate relationship from the point of the *nikaah*, irrespective of whether there was a civil ceremony and even if there was a civil ceremony whether it occurred before or after the *nikaah*. None of the women considered a civil ceremony alone to be sufficient.

### **Why did the women enter into *nikaah* only marriages?**

This question was directed at the 7 women who had entered into *nikaah* only marriages. There was a mixture of responses. Most of the women understood that in order to be 'married' under English law they needed to enter into a civil marriage or at least a marriage ceremony which was recognized in English law. Most women knew that the *nikaah* ceremony alone would not be valid as a marriage in English law. This does not mean that they fully understood all of the consequences of not having a state-recognized marriage but most of them appreciated that the civil law of divorce was not applicable where there was no civil marriage and that there would be financial consequences to not having a civil marriage. The women I interviewed gave a range of reasons why a civil marriage was not entered into, for example:

*'I didn't have a civil marriage as I didn't feel it was necessary....the most important thing was to be married in the eyes of Allah...and I felt the only reason I would have a civil marriage is to protect my assets'* Kulsoom

It is interesting to note that the marriage is discussed in terms of a relationship with God whereas the protection of assets is not framed in this way. This is a theme which one can see emerge both for marriage and divorce, as entry into and exit out of an intimate relationship are perceived to require clear legitimacy from God.

One of the women interviewed was in a polygamous relationship. She was the second wife and her husband was married under civil law to his first wife. She recognized that she was unable to enter into a civil marriage with her husband. Her view remained that the civil marriage was unimportant to her *'I think the main thing is the Islamic nikaah....in our religion we have to be married, it's very important and the English one, I don't see that as very important to be honest with you'* Noorie made these comments despite understanding that she was in a considerably weaker position financially by not having a civil marriage.

Only one of the women was unaware her marriage was not valid for English law purposes:

*'...I thought having your nikaah done stood in the courts...I wasn't aware of that at the time...'* Tayba

Two women out of the seven who did not have a civil ceremony stated they had not entered into civil marriages because they had been discouraged from doing so by their husbands. Both acknowledged there are negative and positive consequences though they concluded that not having a civil ceremony had been beneficial to them on this occasion. In explaining why they had wanted a civil ceremony and how they had been discouraged the women stated:

*'I think it's my security [the civil marriage]....because I am married in the eyes of British law as well...He would have had a lot more to lose....He counts his*

*pennies....so he would have thought about financially what he could lose....At the moment just because we are only married in Islamic law he thinks I can divorce you any time I want...'* Irum.

*'He didn't want the civil marriage and the reason is that he didn't want me to claim anything from him.....He was always frightened...He said that we don't need to go through English law'* Mariah

Five of the seven women stated that with hindsight, they were pleased they did not have a civil ceremony as it meant that their own finances were protected and they did not have to undergo a civil process. As they put it to me:

*'[We went through]...no English procedure of any sort. In retrospect very pleased I didn't have to go through this. Made things a lot easier...I'm glad I didn't do it that way'* Rabiya, who had a *nikaah* only marriage and was in a much stronger financial position than her husband.

*'Of course it is of benefit to me, definitely, it would have been a longer process if I had got married under English law...the shari'a law was spot on for me'* Bilqees.

*'..[not having a civil ceremony] was of benefit to me, it was definitely of benefit to me...with the courts I would have had to pay much more potentially...they say it gets split half and half and with the courts it would have been an even longer process...and to be honest traumatizing at the same time....it worked out in my favour in that way..'* Tayba, was a nurse practitioner and also the main financial provider in the relationship. She was unaware that her *nikaah* was not valid under English law until she sought legal advice to commence divorce proceedings. She did not consider herself to be duped by her husband. However, Tayba also concluded that if she were to marry again she would probably wish to have a civil ceremony:

*'you know what's funny this time round I probably would [have a civil ceremony]...I can't really explain why...With the nikaah, even though it worked in my favour the first time round it's not legitimate in the sense that when the khulla was official*

*they only sent me like a letter...whereas with the courts I feel it's more structured and official, legitimate'* Tayba

In response to whether they regretted the lack of a civil marriage, the two women who recognized some disadvantages to a *nikaah* only marriage commented:

*'In one way yes, in another way I think I got away lucky....My friends who have been through the same experience and have to go through courts, I know what they have had to go through....much more emotionally draining'* Irum

*'The positives were separating from him [husband] was much easier and no civil divorce to go through....hearing from other people now it could take anything up to 5 or 6 years. ...[Negatives] He took the gold and if I had rights I could have gone through English courts.....but I don't want anything of his anyway, it's all on haraam money<sup>42</sup>...'* Mariah

### **Why both?**

I now consider the accounts of the four women from the UK, who had entered into both a religious and a civil ceremony. I first explored with them why they had entered into a civil marriage.

*'I felt I lived in this country and I felt that I needed to adhere to the law of the land even though to me I was more nervous about having the nikaah. To me, that was more binding...'* Obaidah.

*'At the time I thought it was standard procedure. We never really thought about it, I just thought it was something you had to do.....the English one I thought was just the norm. To be married you have to be registered in this country....'* Halima.

For the other two couples, immigration compliance was a feature of their decision making regarding the civil marriage. For one couple, the civil ceremony was required to regulate the husband's status in the UK (to change it from

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<sup>42</sup> This means that her husband's earnings are not from a form of income that would be considered valid in Islam.

student to spouse), and for the other couple it was because they were intending to move to Malaysia. As the latter told me:

*'The only reason we did it was because he was offered a job in Malaysia as a teacher...We weren't sure they would recognize the nikaah certificate...We just quickly went and booked the civil ceremony...I just wore an abaya'* Fareeda

I explored with the four women whether, if they were to marry again, they would have a civil ceremony. One woman said she didn't know and the others answered in the negative.

*'I don't know if I would...I would rather have a really good Islamic contract...now looking at it with hindsight...we don't have any finances or a house'* Fareeda.

*'...We all change based on our experiences, 5 years ago I was very keen on a civil ceremony. I'm not anymore....Even though I valued the nikaah more, I still thought..... I want another occasion to dress up and feel married to all my English mates...Maybe that wasn't a good enough reason for all the hassle that it's been...'* Obaidah who went through a civil marriage and civil divorce as well as a nikaah and termination of that nikaah.

*'Yeah I do regret [the civil marriage]....If I get married again I ain't having a civil, no way...I don't see the reason for the civil, the reason I did it last time was because of the visa...But if I get married again to a British citizen I'd never have it...I just don't see the point in it...I don't see what benefit I will get from having a civil marriage...financially when you get divorced [maybe] but my husband doesn't own anything'* Qaseema, who underwent a civil ceremony as well as nikaah in the UK because her husband was residing in the UK as a student and they wished to alter his immigration status to that of a spouse.

*'Not the civil marriage no, a nikaah only...because of all the financial headache it's difficult...I've always worked so I'm financially stable and wouldn't want to go through that headache again...'* ...Now as more mature...I've changed my way of thinking...a legal divorce and everything. That's a lot of hassle and problems so it's

*easier just to have a nikaah...that's the most important [one] in front of Allah'*

Halima who went through a civil divorce and a shari'a council process and whose matrimonial home was held in her sole name.

In summary the reasons these women give for not wishing to enter into a civil marriage are either related to the experiences of the divorce process or that they see no personal benefit in the civil marriage. There is no suggestion that they are attempting to separate themselves from British society or attempting to lead 'parallel' lives. I query whether non-Muslim cohabitants responses would be very different.

### **Marriages abroad**

For the nine women whose marriages took place abroad: eight in Pakistan and one in India - there was little choice with regard to state-recognized marriages. For the non-British spouse of a British citizen, entry into the UK required compliance with immigration rules. This included compliance with any necessarily formalities so that the marriage was recognized by English law. The issue of separating the *nikaah* from the civil marriage never arose. Even within this group, however, two of the women indicated that if they were to get married again, they were likely to consider entering into a *nikaah* only marriage.

*'I think I would have just a nikaah...Well it depends on where I get married from...If it was just from here I would have just a nikaah...'* Juwairya, who was married in Pakistan and went through both a civil divorce and a shari'a council process.

*'for me it [the civil marriage] wouldn't matter...I would definitely make sure that the guy is from here...I would just do a nikaah...For me civil marriage doesn't really matter....I have to answer Allah, I don't have to answer this world...'* Layla, who was married in Pakistan and went through both a civil divorce and a shari'a council process.

Two women in this group explained that they would prefer to have both a civil marriage and a *nikaah*. One of them has in fact remarried and has had both a *nikaah* and civil marriage. She explained her reasons:

*'I feel married from the nikaah definitely... The civil marriage gives me an acknowledgement of where you're living...because we are living in an English community, for the whole wider purpose of the English community to understand and acknowledge that we're married because we live in British society'* Sophia, who was married in Pakistan, underwent a civil divorce and a religious termination of her marriage, before marrying her current husband.

*'[I would] probably go for both [the civil marriage and the nikaah]. I like to do everything by the law both shari'a and English law.'* Parveen, who was married in Pakistan and underwent a civil divorce and a shari'a council process.

### **The future for nikaah only marriages**

If the current law of marriage is not amended it is clear from the women's responses that the issue of *nikaah* only marriages will continue to feature in the lives of Muslims. Indeed, over half the women, in one way or another, demonstrated their preference for a *nikaah*-only marriage. There are three main reasons. First, the women felt a civil marriage to be unimportant as it added no more legitimacy to a marriage than the *nikaah*. Secondly, they believed that going through a civil divorce made the whole process of ending the marriage, more complicated, more traumatizing and at times significantly longer. Thirdly, if there are no financial matters that the women wish to address, then the civil marriage is seen as adding no tangible benefits even working to the financial detriment of some women. Akhtar summarizes the reasons her participants gave for not entering into state-recognized relationships as a combination of *'practical conveniences, priorities and the demands on time'* and that many couples *'have no perceived need to engage with the law as far as their successful*

*marriages are concerned*<sup>43</sup>. As in my own research Akhtar does not suggest there is wide-spread deliberate misleading of Muslim women by their husbands.

Although a number of the women appeared to recognize that having a state-recognized marriage *might* provide them with greater protection in terms of the financial assets, they also understood that this depended on who was in the stronger financial position. Some of the women whom I interviewed held professional jobs and entered their marriages with their own property and wealth, and did not need the protection of the civil law. Others had only limited financial assets, but even then some of them they thought the court process was not always the best method of ensuring that they were financially protected. As one respondent put it:

*'He would always help me...Even now he's giving me £200 a month....I know the type of person that he is, he will give whatever he has but if I was to fight with him then he won't give it'* Noorie, who was in a polygamous relationship.

It is also important to recognize that at least three of the women emphasized the value of a civil ceremony. They made the connection between compliance with civil law, the status of marriage and sense of belonging that this provides them with as part of British society. They also understood how complying with civil law impacts on their identities as British Muslims and saw it as important that non-Muslim British society acknowledge their marital status.

I have spent some time highlighting the differing views on this topic of *nikaah* only marriages and the reasons given by the women for preferring them. The multiple issues this raises demonstrates some of the complexities of the interactions taking place between English and Islamic law and the manner in which Muslim women are navigating through those complexities. The women in my sample appear to be prioritizing a *nikaah* over the civil marriage. There is a

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<sup>43</sup> Rajnaara C Akhtar 'Unregistered Muslim Marriages: An Emerging Culture of Celebrating Rites and Conceding Rights' in Joanna Miles, Perveez Moody and Rebecca Probert (eds), *Marriage Rites and Rights* (Hart Publishing 2015), 188

strong connection made by them between the *nikaah* and a relationship with God.

### **What outcomes did the women achieve?**

It was not always easy to identify what type of divorce was granted to the women by the shari'a councils. Often the women themselves were unclear as to whether their marriage had been terminated by a *khul* agreement or *faskh* ruling. They seemed a little clearer on the *talaq* and were aware that this was something pronounced by the husband. So my observations here are based on the women's understanding of what they thought they were granted.

Seven of the women were granted a *faskh*. Five were women whose husbands' pronounced a *talaq* either before or during the the shari'a council processes. In four of the cases, the husbands consented to a *khul* and in three cases the shari'a council accepted the civil divorce as an Islamic termination of the marriage. In one case, a woman commenced her application and then abandoned it (for multiple reasons).

Of the three women who were granted an Islamic divorce based on the civil divorce, two were from Birmingham Central Mosque and one was from the IJB. It is interesting to note that all three women were dissatisfied with their experiences. In the IJB case because the IJB were slow in recognizing the civil divorce and made parties attend a joint meeting, even though the civil divorce had been commenced by the husband. In the other two cases the women thought that the shari'a council had pronounced the divorces too quickly without going through an 'Islamic' process of some sort, leaving them dissatisfied with the 'Islamic' experience. All the women who applied for a divorce and saw the process through to the end obtained a divorce. To that extent they were all satisfied with the outcome.

### **Comparison of experiences between shari'a councils and civil law**

Where women required a civil divorce or had some experience of the civil law system because, for example, there were ongoing disputes concerning children, I

asked them how their experience of the civil court process compared with their experiences of the shari'a council process. Most women who had been through both a shari'a council process and a civil divorce said they found it a traumatizing experience, as if going through the termination of their relationships twice. Many of them agreed that rather than having two entirely separate processes, it would be a less confusing and traumatic if they could combine the processes. Views about exactly how this could be achieved were very varied suggesting that there would be many difficulties in attempting to combine the two processes.

Some women took the view it would be enough if there was greater co-operation between local courts and shari'a councils so that at any stage of the divorce process, they would be aware of what the other is doing. Other women went further and felt that findings made or evidence presented in one venue should be used in the other, so they would not have to explain themselves twice. More importantly it would mean parties could not get away with giving inconsistent accounts and changing their stories according to the venue .

Others suggested that civil courts could have an Islamic scholar able to pronounce an Islamic termination of the marriage at the same time as the civil divorce takes place. When asked if the women would be willing to accept a non-Muslim judge in a civil court pronouncing their Islamic divorce (based on Islamic grounds for divorce), the women were cautious and views differed about what was 'Islamically acceptable'. If the judgment of a non-Muslim judge is 'Islamically acceptable' then they *might* consider it to be valid but they would need to be satisfied of its validity within Islam first<sup>44</sup>. Even then some of the women seemed unsure about whether this would give them confidence that the marriage had ended.

Those who were unwilling to accept a non-Muslim judge's ruling, even if the judge applied Islamic law, held they needed a Muslim judge to pronounce a

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<sup>44</sup> This is I suggest, an example of the sorts of debates Muslims need to have. It is through internal scholarly debates that shari'a councils can provide leadership.

ruling to be absolutely certain that the marriage had ended and they were free to remarry. None of the women felt a civil judge pronouncing a civil divorce alone would be sufficient for them to consider themselves divorced<sup>45</sup>. As Juwairya put it, if a civil divorce alone was going to be sufficient then ... *'why bother with the nikaah in the first place?'*

It is interesting to note the women's conservative views on the impact that a civil divorce may have on their religious divorce, particularly as shari'a councils are attempting to make more effective use of civil divorces when they make religious determinations. A small minority of women took the view that shari'a councils should be kept entirely separate from the civil courts, although even then, that did not mean they would not be willing to access civil courts for some matters. This should not be taken to mean that Muslim women wished to separate themselves entirely from the benefits which the civil system could offer them. It was clear that women were at times making very strategic choices. When it came to the divorce, women wanted to be certain that they were 'divorced' in the eyes of Allah and this made a religious determination very important, especially in the event that they wish to remarry.

However, in disputes concerning children or finances, the women were much more inclined to accept the decision of a civil court. Many commented that they would like to consider the views of a shari'a council on these matters before deciding whether they were 'better off' going to a shari'a council or a civil court. Only a few of the women wanted matters concerning children and finances to be decided by a shari'a council, even if the decision appeared to be to their detriment. They said that they had faith that that the application of God's law is true justice.

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<sup>45</sup> Although one participant believed some of her Muslim friends might have accepted this and in her research Kaveri Qureshi *Marital Breakdown Among British Asians Conjugalities, Legal Pluralism and New Kinship* (Palgrave MacMillan 2016) 164-165 notes that in 5 out of 19 cases which she examined, Muslim women were satisfied that the civil divorce meant they were Islamically divorced too. Most of these women obtained advice from third parties which confirmed to them that they did not need a separate Islamic ruling.

With regard to the actual processes themselves, most of women who had experienced both stated that they had a 'better' experience with civil law. Although some women held both processes and experiences were, as noted by Abir, *'equally disappointing'* and Bilqees stated *'It [civil court] was the same to be honest, it was a bit of a joke as well'*.

On the whole the women who expressed a preference for their civil law experience gave a number of reasons. These included the greater professionalism and efficiency of the civil law system, the quality of their legal advisers and being kept well informed about the progress of their cases. In comparison many of the women complained that in their experiences of shari'a councils they were constantly having to 'chase up' their cases; there were long delays, the process was 'unprofessional' and sometimes that were 'looked down on' or not believed <sup>46</sup>. Kulsoom descried the IJB as a *'Mickey Mouse operation'*. At times the women found it difficult to pinpoint exactly what made them feel as though they were not believed or looked down on. The following are examples of the kind of complaints I encountered:

*'the kind of vibe you get, the attitude that you get....it must be you that is wrong...the body language, everything...it tells you a lot'* Tayba who went to the IJB.

*'I think the men had a certain arrogance about them, they think they are superior'* Mariah who went to the IJB.

*'I expected the Maulana to listen to my story and listen to his story and talk to us both but nothing like that happened. We were just going round in circles as to who was right and who was wrong and I felt like he was taking his side'* Abir who went to the IJB.

*'Their very patriarchal in the masjid which I don't always think is a bad thing... but I don't think they take women seriously...I don't see that as an Islamic thing, I see that as a very Asian Pakistani thing'* Emaan who went to the IJB.

*'Even then they are going to look at it from a man's perspective.... The fact that they don't give any value to the fact that I am saying I have been raped.....I didn't say all of this.....how can I?'* Gulshan who went to the IJB.

*'Men don't listen, they're very one sided...the first thing he [the imam] said to me which I was actually horrified by, I was quite offended actually, he said you need to go to the doctors and get some anti-depressants...I don't really think he cared to listen to me'* Mariah who went to the IJB.

*'I wasn't happy with the way this woman spoke to me. I was really confused...You're supposed to be the people who guide people like us...I expect them to be more concerned ...I expected more religious explanation'* Chandini whose case was handled by Birmingham Central Mosque and who was informed by a female member of staff that her civil divorce would be sufficient for a religious divorce.

*'They listened to what I said...but they didn't understand from my point of view, I felt it was a man's world'* Parveen who went to the IJB.

*'I remember going in to drop off my application and it was really daunting...I felt embarrassed....and okay I had my niqaab on but I felt embarrassed....You think the brothers are going to look at you and think bad wife, bad wife'* Kulsoom who went to the IJB and does not normally wear a niqaab.

Not all of the women were unhappy with their shari'a council experience. Some commented that the shari'a councils' had treated them and their husbands fairly. Some comments included:

*'I was really happy about it [interview with MHA]. I was dreading it before because I didn't know what to expect but after I had that interview I felt much better*

*because he listened to me...he didn't pressurize me to do anything'* Irum who went to the IJB.

*'They were really nice mash'Allah...I was nervous because there were 3 men. I was really emotional at the time...struggling to speak....They got me a glass of water...They were really sweet .....These guys masha'Allah they really listened...'* Fareeda who had been to The Birmingham Fiqh Council.

*'Maybe it was just me feeling out of place...I thought they might be judgmental but from the very first time they weren't. They weren't judgmental at all'* Juwairya who went to the IJB.

*'[in the shari'a council] I felt more confident, more comfortable to show my concerns and they knew how much I was suffering...They know about me, they know about my culture, they know about my religion...And doing [a] meeting together he could see both sides at the same time, it was easy for him to make a judgment'* Layla who attended a joint meeting which I observed at the IJB.

*'Overall alhumdullilah I had a positive experience....I was informed of the process...ok many times I had to take the initiative and be proactive but I think that's because they are understaffed...and the demand is growing but overall I think they were fair...the meeting wasn't biased or unjust so I feel the imam was fair'* Kulsoom who went to the IJB.

In comparing her experiences of two different shari'a councils Qaseema stated: *'I felt more comfortable at Islamic Council UK definitely...when I told Green Lane about the violence and stuff they didn't really acknowledge it but when I told them [Islamic Council UK] they were really helpful. [They said] don't worry insha'Allah we are going to sort it out for you...when people say little things like "don't worry we are here to help" it makes you feel a bit better'*

## Joint meetings

I interviewed all four of the women that I had observed in the joint meetings at the IJB. Additionally two other women from my sample had attended joint meetings too. It is fair to say none of the women relished the prospect of a joint meeting, although one did remark that she saw it as an opportunity to assert herself before her husband. Only one of the women was adamant that her joint meeting should not have taken place. This was the same joint meeting for which I expressed concerns in Chapter 6. She had this to say:

*'I hated it...The whole system is wrong...I didn't want to be in the same room as him...They said they had to see the two of us together to see if there was a chance of resolution...The sheikh said because he had applied for a divorce we were divorced but you were there, the sheikh said I should get back with him'* Gulshan had made serious allegations of violence and sexual assaults.

The other women, whilst expressing discomfort at having a joint meeting, recognized the benefits of a shari'a council ruling after hearing from both parties simultaneously. Aside from Gulshan's joint meeting all of the women that I had observed at the IJB joint meetings later commented that they had been treated fairly and were given an equitable opportunity to present their cases. Indeed some of the women found the experience cathartic. As stated by one of them:

*'Now having had the meeting with him I'm glad it happened. Because now I feel if he walked in now I wouldn't care...When I walked out of that meeting I actually felt stronger'*. Irum who had a joint meeting at the IJB.

All of the interviews that I conducted occurred some after the women's cases had concluded at the shari'a councils. This is important because I provide a snapshot of how the women felt at this particular point in their lives. Reflecting on their experiences after the event perhaps allows for an opportunity to re-consider their experiences more objectively.

It is worth noting that of the women in my sample who did not have joint meetings at least four stated they would have preferred it if a joint meeting had been held. They were disappointed that a matter as serious as a divorce was determined without being given an opportunity to confront their husbands or to explore the possibility of a reconciliation. They had expected shari'a councils to have been more forthright in encouraging parties to fulfill their spousal obligations as Muslims and were left frustrated by the failures to provide Islamic guidance.

The women sometimes gave inconsistent responses as to how satisfied they were with their shari'a council. As an example of the contradictory way in which comments were sometimes framed is the following:

*They [shari'a councils] need to sit down and think carefully about how they do things... At one point I really regretted it, they made me feel scared...looking at the other part they are doing a great job bless them'* Parveen who went to the IJB.

### **Involvement of women in the shari'a council**

Most of the women commented about the lack of females in the shari'a council process, particularly those women who went to the IJB where no women at all are employed. They said they would have been more comfortable speaking to a woman about personal or intimate matters and would have been less intimidated throughout the shari'a council process. Access to female staff would also in my view provide some support to the women during meetings at the shari'a council particularly in the absence of legal advisers, who many women saw as not just providing legal advice but also acting as a protective barrier between them and their husbands in the civil proceedings<sup>47</sup>.

### **Family Support**

All of the women emphasized the importance of family support during a very difficult period in their lives. Two women in the sample stated that they

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<sup>47</sup> It is interesting to note that most women felt it made little difference whether they came into contact with men or women in the civil courts. This is perhaps connected to the sense of professionalism that the women felt existed in the civil system.

undertook the divorce process completely without the support of their families. Indeed both stated they were “forced” to marry their husbands and commenced proceedings for a *khul* at the IJB without the support of their families in order to terminate their marriages. Both commented how since their divorces their families had come to accept their decisions and their relationships with their families had significantly improved. For both women the shari’a council provided them with the opportunity to exercise their religious agency and autonomy to exit their marriages, despite the lack of support from their families. Both women were granted *faskhs* by the IJB.

In all other cases the women emphasized the importance of family support to them and how that support materialized in different ways. The women themselves often drew a distinction between their families being unhappy about the divorce and their families nonetheless supporting them throughout the process and beyond. The women often relied upon their families for practical help with children as well as financial and emotional support. A number of the women commented on the support they received from male members of their families, as in the following examples:

*‘Dad wanted me to report it to the police [a violent attack by the husband]....my dad made me report it....my dad said the rest of your life is going to be like this if you keep letting him back’ Rabiya*

*‘my dad wants me to divorce...My dad has sat me down and had a good talk and has said you are not thinking straight...Have you forgotten what he’s done to you?’* Mariah, who abandoned her application for a religious divorce.

At least three of the women mentioned that their brothers had attended the shari’a councils with them to provide support and assistance. Whilst I did not specifically address with the women the role of the *wali* in their marriage contracts, it is apparent that male family members can be influential in providing support and in assisting the women to end their relationships. Although I do not advocate for an entrenching of the role of the *wali* in the marriage contract, the

advantages that male family members can bring as the women attempt to extricate themselves from a relationship are rarely expressed or researched.

## Conclusion

As noted previously the women viewed their marriages as formed primarily by the *nikaah* so the termination of this by a shari'a council is of greater significance to them, both religiously and emotionally, than a civil divorce. To that extent the women were satisfied that shari'a councils facilitated their need for a religious divorce. The dissatisfaction arose from the manner in which some of them perceived they were treated and their cases were handled. The women who were unhappy felt marginalized by their experiences, 'coaxed' into joint meetings, believed the entire process favored men and that they were being judged for requesting a divorce. Many of the women felt their complaints about their husbands were disregarded or given insufficient weight; instead they were expected to justify why they did not wish to reconcile. This was exacerbated by the 'unprofessional' manner of the process and delays which occurred without explanation, most notable when compared with civil courts.

But this was not the experience of all the women and even those who had complaints acknowledged that often, it is appropriate to explore the possibility of reconciliation, to hold joint meetings where both sides are given an equitable opportunity to present their side, to remind parties or guide them about their Islamic obligations towards one another, their children and to God. Some of the women believed themselves to be vindicated by the shari'a council process and all who pursued the religious divorce to its conclusion were satisfied that they were now religiously free from their marriages. Most women felt supported by their families, especially male family members, and even where they recognized that their families were not necessarily happy that they were divorced. Of note is that two women out of my sample of 20 secured their religious divorce from the IJB despite resistance from their own families. It would be false therefore to claim that all sharia councils in all cases force women to comply with the wishes of their families.

It is undeniable and frankly uncontroversial that women ought to have access to female support during their shari'a council process. The women were expected to discuss their most personal and private matters in an all-male environment. Whilst some felt capable of expressing themselves, for many it is a hugely daunting experience. In Chapter 6 I suggested a screening process to be undertaken by suitably qualified female support staff which would enable vulnerabilities or concerns to be identified, the possibility of reconciliation to be explored and would allow the women an opportunity to speak more freely in a less intimidating environment. In my view the interviews support this type of screening process.

In comparing their experiences between shari'a councils and civil law, the women noted the efficiencies within the civil system, the benefits of legal representation and the lack of 'judgmental' attitudes towards them. Having said that, it must be acknowledged that the civil court system is part of the apparatus of the state with funding and resources to match and not all women thought they were any better protected by the state. Indeed many of those who had experienced the civil court system were of the view that they would wish to avoid this experience the next time and saw themselves as entering into *nikaah* only marriages. This has some important policy implications and perhaps should be the starting point to begin the debate around forms of joint governance.

The women I interviewed were generally not asking for shari'a councils to be given a legal status equivalent to that of civil courts. What they wanted instead was at least greater co-operation between civil courts and shari'a councils. Shari'a councils undoubtedly provide an essential service for British Muslim women, particularly those whose husbands are unwilling to agree an Islamic termination of their marriages. There are, however, considerable improvements that could be made to the service that they provide whilst remaining faithful to Islam.

## Chapter 8: Conclusion

### *'And the male is not like the female' The Quran 3:36*

In trying to answer the question of whether shari'a councils meet the needs of Muslim women, my thesis began with carrying out a review of the literature currently available on shari'a councils to identify the themes that have emerged, where my work fits in and the gaps that remain. I then explored how Muslims, more specifically Muslim women, perceive laws. The reality for Muslims living in Western societies is that they are participating in multiple social and legal fields. Legal pluralism is their lived experience enabling them to navigate their way through those fields and create their own legal subjectivity. In Chapter 3, I explored Islamic law and its sources in order to make sense of the way in which Muslims structure their lives and determine disputes. For Muslims, the sources of Islamic law are not confined to law but rather provide the foundational guidance for any aspect of their lives. Within this chapter I briefly examined some of the different types of roles carried out by Muslim scholars and jurists. I argue that the historical functions of different types of legal personalities such as a judge or mufti have been amalgamated in modern shari'a councils leaving users of their services with multiple and sometimes inconsistent expectations. Users may be expecting a final judgment to be given similar to what they might have expected of a judge in a civil court, or a ruling on a discrete issue comparable to the opinion of a mufti, or more general religious guidance on marital obligations, perhaps even relationship counselling within an Islamic framework. Multiple expectations can lead to multiple disappointments or frustrations when those expectations are not met.

## Women's roles beyond service users of shari'a councils

From the very earliest period of Islam Muslim women have asked questions about their functions and roles within society<sup>1</sup>. In chapter 3 I examined the way in which women have contributed to the intellectual history of Islam and some of the reasons why historical fluctuations have occurred in their ability to participate as scholars. I argue that women's participation in shari'a councils must be facilitated as more than service users. In Chapters 6 and 7 I argued for female support staff to meet the practical day to day needs of the women who apply to shari'a councils. However, the participation of women must go beyond even those functions. Their intellectual contributions as decision makers must be encouraged and facilitated. In Chapter 3 I used the work of Nadwi and Sayeed to demonstrate that Muslim history is replete with the scholarly contributions of women and Sayeed in particular investigated the external factors which have at times restricted or hindered women's participation. The decline of women from Islam's scholarly tradition has not been rationalised from a religious perspective but from the impact of wider practical considerations. I shall now briefly critically examine some further arguments which might be made to prevent women's inclusion in shari'a councils.

## The sharing of public space between men and women

The participation of women in shari'a councils will inevitably require men and women to interact with one another. Male/female interaction in the public space is a recurring point of debate amongst Muslims, although Tucker points out it garnered little attention in traditional legal discourse<sup>2</sup>. The Quran does not

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<sup>1</sup> According to Barlas it is noteworthy that Muslim women questioning exactly what their roles are both towards God and within society, as believing women, is not a new occurrence. Barlas refers to a well-known incident in which Umm Salama, one of the wives of the Prophet, asked the Prophet why God did not speak directly to women in the revelations that he was receiving. She wanted to know why God spoke to and about men. In response God revealed the verse in the Quran that enshrines the equality between men and women when it comes to their spirituality and accountability before God. Barlas identifies a number of lessons from this incident, notably, that we have in Umm Salama an example from the '*pre-modern, illiterate Muslim women [who] were thinking critically about the role of language in shaping their sense of self*'.

<sup>2</sup> Judith.E.Tucker, *Women, Family, and Gender in Islamic Law* (Cambridge University Press 2008) 175-176. Tucker uses the evidences of social historians to support her argument that the life

explicitly forbid interaction between men and women and there is little evidence to suggest that women were ever categorically forbidden to take part in a particular act solely due to fears over the sharing of public space. That is not to say Muslim jurists did not examine male/female interactions but as Tucker states '*the underlying problem was always the same: sexual desire hovers relentlessly, always threatening to introduce a note of desire and undermine the stability of human society*<sup>3</sup>'. In their discussions the jurists agreed it was male desire which was problematic even if many of the restrictions such as those relating to dress fell more heavily on women. Tucker states that despite '*a shared anxiety about unregulated male-female interactions, the expulsion of women from public space was not the answer for most*<sup>4</sup>. Nadwi argues that one of the purposes of hijab is to enable women to participate in the public arena with the power of their bodies switched off<sup>5</sup>. Both Tucker and Nadwi accept that there are no direct discussions by jurists on practical issues of sharing public space<sup>6</sup> but those issues have become more prominent in contemporary debates. When it came to acts of worship such as prayer there was much clearer guidance by the Prophet and subsequent classical jurists in the gendering of public space<sup>7</sup>. And yet in other acts of worship such as hajj there is very little discourse on how to establish any form of separation between the sexes. This is all the more remarkable as the hajj rites necessitate men and women coming into extremely close proximity with another and women are ordered to remove any face veils or gloves during their performance of the hajj.

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experiences of men and women did not accord with a strict gendering of functions whereby men occupied the public space and women the private space.

<sup>3</sup> Tucker n2, 182

<sup>4</sup> Tucker n2, 183

<sup>5</sup> Mohammad Akram Nadwi, *al-Muhaddithat: the women scholars in Islam* (2<sup>nd</sup> edn Interface Publications, 2013). Similarly Sa'diyyah Shaikh, "Transforming Feminisms' in Omid Safi (ed), *Progressive Muslims on Justice, Gender, and Pluralism* (Oneworld Publications 2003) gives the example of the way in which veiling has increased mobility for Muslim women and has had the effect of neutralising public space, thus making it more acceptable for women to occupy it.

<sup>6</sup> For example, how did men and women sit in the same room? How did they interact with one another? How did they speak or disagree with one another?

<sup>7</sup> For example, in the congregational prayer men begin making their rows from the front whilst women begin making theirs rows from the back. When women complained that some of the men were inadvertently exposing themselves during prayer, the Prophet gave some practical advice to minimise this from happening, he did not order the women not to participate in congregational prayers.

Conservative interpretations of Islamic family law are seen as manifestations of the desire to assert and protect the Islamic identity of Muslims. Similarly, in contemporary debates, Muslims' discussions on the dangers of 'free-mixing' reveal a desire to protect against the perceived excesses of Western societies. Free-mixing is a term that is used to describe the unchecked interactions between men and women who are not *mahram* to one another<sup>8</sup>. Abou-Fadl approaches this topic of excluding women from public places from a slightly different angle, one which is more grounded in the traditional discourse of this subject. He examines it from the perspective of *fitnah* which he describes as '*turbulence, disorder, enticement and the opening of the doors to evil*'<sup>9</sup>. Undeniably there are occasions when the Prophet himself spoke of women being a source of fitnah for men<sup>10</sup>. But Abou-Fadl points out that there is a tension between the normative prescriptions of the Prophet and the actual practices of the companions. There are many examples of interactions between men and women at the time of the Prophet in the public space. In the narrations of the interactions no mention is made of possible *fitnah* occurring. No criticism is made of the women or of the men and no suggestion that the interactions resulted in any improper behaviour. In his examination of the role of female scholars and their male students, Nadwi highlights a range of practical steps that were taken in order to maintain appropriate boundaries in their interactions with one another<sup>11</sup>. Nadwi investigates a number of specific teacher-student relationships and it is clear there was direct interaction between men and women<sup>12</sup>. Similarly Phillips points out that throughout the history of Islamic

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<sup>8</sup> The term 'free-mixing' has in itself become a loaded term. To be accused of free-mixing connotes a sinful interaction. However what is meant by 'free-mixing' appears to be so wide it implies any occasion where men and women are not segregated is one in which there is 'free-mixing' and as such ought to be prohibited. For an example of wide manner in which free-mixing is construed see, <https://islamqa.info/en/103044> last accessed 26 June 2017.

<sup>9</sup> Abou El Fadl Khalid, *Speaking in God's Name, Islamic Law, Authority and Women*, (Oneworld 2010) 233

<sup>10</sup> *Hadith* in Bukhari no 5096, in which the Prophet was narrated to have said that the greatest *fitnah* for men was women.

<sup>11</sup> Mohammad Akram Nadwi Lecture on *Al-Muhaddithat: Notes for a talk on women scholars of Hadith* [http://www.interfacepublications.com/images/pdf/AKRAM\\_Article2.pdf](http://www.interfacepublications.com/images/pdf/AKRAM_Article2.pdf) last accessed 26 June 2017

<sup>12</sup> Nadwi n5, describes how some women would teach male students from behind a screen or curtain, some face to face in mosques and schools, others from inside their homes with the male students sat outside but sufficiently close to hear their teacher. This diversity of methods

scholarship, the female scholars and teachers who taught many male jurists did not confine their studies to personal interest or private coaching but were part of public educational institutes<sup>13</sup>.

Despite this, the sharing of public space remains a contested issue amongst Muslims and may be an underlying feature of women's exclusion from shari'a councils as staff members or adjudicators. Shari'a councils are often located within mosques and will replicate the gendering of space from the mosque itself. It is rare to find women holding positions of any significance within mosque boards or committees. There may be a fear that a shari'a council will lose its credibility if it is encouraging Western practices of free-mixing. Yet curiously there is no concern with free-mixing where women are the recipients of the services provided in an all-male environment. It seems to be an untenable position that women may be the users of shari'a council services but not active in the provision of those services.

Another concern that may arise is the question of whether women can act as adjudicators or judges in shari'a councils. There has been a significant body of discourse which has scrutinized this topic. Sisters in Islam have produced a comprehensive response to the arguments put forward to prevent women from acting as judges<sup>14</sup>. In any event, I would argue that the adjudicator in a shari'a council is not actually fulfilling all of the functions of a judge. Shari'a councils are not recognised as courts. The councils have no powers of enforcement. Parties can accept the rulings or ignore them. Even within Muslim societies the role of a judge is a state appointed post. In Chapter 7, from my own sample of women, it was evident some of them approached more than one shari'a council thereby demonstrating they did not consider the decision of any shari'a council to be absolute or binding. They treated it similar to the ruling or opinion that a mufti might give. I would argue that as shari'a councils do not operate as courts there

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demonstrates that the issue of male/female interaction has never been a settled matter in Islamic history.

<sup>13</sup> Abu Ameenah Bilal Phillips, *Usool Al-Hadith The Methodology of Hadith Evaluation* (International Islamic Publishing House 2007) 229

<sup>14</sup> [http://sistersinislam.org.my/files/downloads/women\\_as\\_judges\\_final.pdf](http://sistersinislam.org.my/files/downloads/women_as_judges_final.pdf) last accessed 26 June 2017

is no clear function of a judge within them. Of the different legal personalities which I examined in Chapter 3, it is only the role of the judge that is contested. It has never been suggested that any of the other scholarly roles are specific to men. Even within this contestation there is significant support from within Islam to enable women to take on the role of a judge, as has been the case in many Muslim majority countries.

### Contributions of Muslim feminist scholars

In Chapters 4 and 5, I examined the developing interrelationship between Islamic and English laws of marriage and divorce. I recognise that Muslim feminist scholars have made valuable contributions in re-examining the debates on the roles of Muslim women within family and society, and their agency as human beings whilst acknowledging their overall submission to God as believing women. Shaikh refers to the vibrant presence of Muslim women and activists<sup>15</sup>. Karam argues that the term feminism having originated in the West is '*tainted, impure and heavily pregnant with stereotypes*'<sup>16</sup> In the Muslim majority world feminism is portrayed as representing a mixture of different types of women: women who are aspiring to be men, women who have a deep-seated hatred of men, or women who simply wish to lead lives of immorality and sexual promiscuity especially when feminism is viewed as a Western concept requiring women to exit Islam in order to benefit from it. Although this view of feminism also exists in the West, feminism is particularly demonised in the minds of Muslims because it is perceived to represent women who question the authority of God and God's commands. For Muslim women, even Western Muslim women whose ancestry is located in Africa, the Middle East or the subcontinent, feminism has developed to reflect Eurocentric concerns of women thus excluding their experiences and realities<sup>17</sup>.

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<sup>15</sup> Sa'diyya Shaikh, 'Transforming Feminisms: Islam, Women and Gender Justice' in Omid Safi (ed) *Progressive Muslims on Justice, Gender and Pluralism* (Oneworld 2011) 147-162, 147

<sup>16</sup> Azza M. Karam, *Women, Islamisms and the State Contemporary Feminisms in Egypt* (first published in USA St Martin's Press, 1998 and first published in UK, Palgrave MacMillan 1998)

<sup>17</sup> See, for example, Bell Hooks, *Feminist Theory: From Margin to Centre* (South End Press 1984) for a critical examination of the way in which American feminist theories excluded the experiences of black women and the types of oppression that they are subjected to.

In the last two decades theories of feminism have been used to introduce a paradigm shift in the way in which Muslim women re-examine the sources of Islam and make sense of their relationship with God in a contemporary context<sup>18</sup>. The use of feminist theories has forced notions of gender-equality into the debates around Muslim women's roles both inside and outside the home. Additionally feminism has had an impact on the internal debates that Muslims continue to have regarding the interpretation of textual sources. The Muslim women who have engaged in this work have adopted a number of different approaches but critical to all of the approaches is the acceptance that the scholars speak as Muslims who take their world view from within an Islamic framework. This distinguishes their critique from those described as Orientalists, thereby rupturing 'traditional' representations of specific doctrines or concepts but using Islamic evidences to do so. Scholars who follow a 'traditional' viewpoint have had to re-assess their views in light of the challenges made by Muslims feminists<sup>19</sup>. I group them as feminist scholars, though I accept for some their relationship with feminism is fraught, ambivalent or uncomfortable. As stated by Hidayatullah their overall concern has been to challenge male power in their interpretation of rights and obligations<sup>20</sup>. Whilst acknowledging the contributions made and continue to be made by these scholars, a number them have begun to express limitations. Ali says honesty requires her to concede that interpretations of scripture can be read to conceive of male privilege<sup>21</sup>. Barlas ponders whether the ambiguity in the Quran is responsible for its own mis-readings<sup>22</sup>. Hidayatullah goes further in acknowledging that the demands for

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<sup>18</sup> See, Margot Badron 'Engaging Islamic Feminism' in Anitta Kynsilehto (ed), *Islamic Feminism: Current Perspectives* (Juvenes Print 2008) for her discussion on feminism's contribution to the lives of Muslim women.

<sup>19</sup> As an example, in Jonathan.A.Brown, *Misquoting Muhammad: The Challenge and Choices of Interpreting the Prophet's Legacy* (Oneworld 2015) 189-199, he re-examined the question of whether women can lead men in prayer. He did this as a result of Amina Wadud's arguments which are grounded in evidences from *ahadith* literature permitting women to lead men in prayers. As a result and after meticulous analysis he came to the view that '*none of the ulama's objections to [women leading prayers] rest on any firm, direct scriptural evidence, and solutions exist to the concerns they raise [against women leading the prayers]*'. This is a very important concession made and demonstrates the critical impact of Muslim feminist scholarship.

<sup>20</sup> Ayesha A. Hidayatullah, *Feminist Edges of the Quran* (Oxford University Press 2014) 4

<sup>21</sup> Kecia Ali, *Sexual Ethics in Islam Feminist Reflections on Qu'ran, Hadith and Jurisprudence* (Oneworld 2012) 133

<sup>22</sup> Asma Barlas, "*Believing Women*" in *Isla: Unreading Patriarchal Interpretations of the Qur'an* (University of Texas Press 2002) 205

gender justice may not cohere fully with the Quran and asks what it would mean if we concluded that the Quran *does* sanction male authority over women?<sup>23</sup> Wadud's admission to defeat in some of these difficult issues is likely to find the least favour amongst Muslims as she states there are parts of scriptural texts which are 'unacceptable' however much interpretation is exacted and so must be rejected<sup>24</sup>. Her outright rejection of Quranic texts undermines much of her earlier work. My own view is Hidayatullah's refreshingly honest concession is the way forward to open new modes of pursuing Quranic justice. It is to acknowledge that gender justice may be achievable without absolute equality. Academics such as Barlas have been engaged with distinguishing between the manner in which the Quran speaks to men and women in absolute equal terms and where it differentiates. More importantly Barlas as a believing Muslim has attempted to disentangle the reasons why certain verses differentiate between the genders from their patriarchal interpretations<sup>25</sup>. Mahmood's work asks us to perceive of agency in ways that are not constrained by the feminist discourse<sup>26</sup>.

Leading on from feminist scholarship is the need for Muslims more generally to have their own honest and intellectual internal debates and participate in external debates. Shari'a councils are operating on the 'coalface' and we are still very much in the nascent stages of the relationships between shari'a councils, Islamic family law and English law. But shari'a council members need to participate in internal<sup>27</sup> and external<sup>28</sup> debates that are taking place. This will provide some consultation, negotiation and exchange of information. But this does not resolve the much bigger debate as to how the state and minorities interact with one and how we determine the boundaries and framing of this interaction.

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<sup>23</sup> Hidayatullah n20,147

<sup>24</sup> Amina Wadud, *Inside the Gender Jihad: Women's Reform in Islam* (Oneworld 2008) 192-204

<sup>25</sup> Barlas n22

<sup>26</sup> Mahmood S, *Politics of Piety The Islamic Revival and The Feminist Subject* (2012 Princeton University Press)

<sup>27</sup> For example, in Chapter 7, I asked women if they would accept an Islamic ruling given by a non-Muslim judge. Many said they would need to know if this is Islamically possible. This is an internal debate that Muslim scholars need to have.

<sup>28</sup> For example, when the Law Commission consults on matters such as marriage, divorce, cohabitation, these are all matters in which shari'a councils and Muslim scholars ought to be contributing.

## Muslim women's voices

The women invested their religious and emotional needs into the shari'a council processes and were sometimes left frustrated precisely because they expected those needs to be met by the provision of religious guidance in supporting their marriages and divorces. One of the most obvious distinctive features of religiously based arbitration is that parties are not only expecting discussions to take place within an Islamic framework but they are expecting guidance on their religious obligations.

Even within my limited sample of twenty women, the women did not speak in one monolithic voice. Indeed I found it difficult sometimes to draw out common themes of understanding as there were multiple views, providing different perspectives and at times they were inconsistent and contradictory. Any state policies must therefore be very cautious as there is no single unifying voice speaking for all Muslim women's experiences. Clearly there are dissatisfactions with shari'a councils that I have observed and reported on in Chapter 6 and which Muslim women have expressed in Chapter 7. Those dissatisfactions do not a call for the abandonment of shari'a councils nor do the women suggest that they will be exiting their religions in order to access state institutions; rather I argue there is much work that needs to be done in order to enable Muslim women to remain faithful to the tenets of their faith whilst at the same time interacting with the state as British *Muslim* citizens. All these different aspects of identity matter to Muslim women and they should not be expected to discard any one identity in order to take the benefit of another.

## Future of shari'a councils

It has been argued that shari'a councils operate a 'parallel system of law'<sup>29</sup>. I would reject this simplistic description. My thesis has demonstrated that the relationship between civil laws of marriage and divorce and shari'a councils' application of Islamic law is much more complex, nuanced and fluid than can be adequately accounted for when describing it as a 'parallel'. There have been calls for shari'a councils to be made unlawful and criminalised. Baroness Cox, in a

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<sup>29</sup> See report of Civitas, Dennis MacEoin *Sharia Law or 'One Law for All?'* (Civitas 2009)

very determined manner, has repeatedly re-introduced her private members bill to the House of Lords<sup>30</sup>. Grillo examines the bill and Baroness Cox's own background and beliefs in substantial detail<sup>31</sup>. Grillo explains that Baroness Cox's own position on shari'a councils must be situated in her views on politics and Islam<sup>32</sup>. The Bill itself does not mention Muslims but it is clear from all the discussions, campaigns and debates around it that it is aimed at shari'a councils and the perceived threat of Islam to English law and to Muslim women. In Eekelaar's analysis of the Bill, he points out that it is by no means easy to discern the scope of the Bill's provisions<sup>33</sup>. He goes on to highlight some of the misjudgements of the Bill, for example, if the aim of the Bill is to apply to judicial activities and arbitration, and shari'a councils carry out neither functions, then the Bill will have little impact<sup>34</sup>.

Also the criminalisation of those who provide a religious framework to determine family law disputes seems wholly inappropriate. As Eekelaar points out, '*how can religious authorities be prevented from giving opinions about religious obligations to its adherents, in specific contexts*'<sup>35</sup>? Added to these misgivings are my concerns regarding the Bill more generally. It exceptionalizes Muslims and assumes that Muslim women must be released from the shackles of shari'a councils into the gender equal civil law system. It fails to take account of Muslim women's religious needs, namely, that as Muslim women they may desire a religiously sanctioned solution, so rather than improving their access, it proposes to deny them such access. It is also entirely inconsistent with the direction English family law is taking, which is to encourage parties to mediate. As I have stated in Chapter 4 the removal of shari'a councils will not prevent Muslims from applying the shari'a upon themselves. It will just make it more difficult for Muslim women to obtain a religious divorce and will require them to access alternative religious sources to obtain a ruling. Removal of shari'a

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<sup>30</sup> Arbitration and Mediation Services (Equality) Bill – second reading took place on 27 January 2017.

<sup>31</sup> Ralph Grillo, *Muslim Families, Politics and the Law* (Ashgate 2015) 137-181

<sup>32</sup> Grillo n28, 139

<sup>33</sup> John Eekelaar, 'The Arbitration and Mediation Services (Equality) Bill 2011' [2011] Fam Law 1212

<sup>34</sup> Eekelaar n33, 1213

<sup>35</sup> Eekelaar n33, 1215

councils will not extinguish Muslim women's need for a religious ruling or religious guidance.

The role and place of shari'a councils is reaching a pivotal point in English Legal history. Shari'a councils are no longer simply responding to a community need. They have a growing body of users to whom they provide a valuable service but they have remained reactive for far too long. The interest that shari'a councils have attracted from supporters, opponents and critical friends has culminated into the appointment of two separate reviews<sup>36</sup>. There are a number of ways in which my work has sought to move this debate forward both on a micro and on a macro level. In considering one shari'a council I have examined its processes and procedures in detail and suggested a number of improvements that can be made. This is so that Muslim women can achieve the outcomes they desire but in a manner that provides them with timely results and takes accounts of their needs as women going through the trauma of a marital breakdown. This is the immediate concern of the women who wish to obtain a religious termination of their marriages. Further my work supports the notion that there is a religious need which shari'a councils are fulfilling. Although this has been disputed it is clear that when the women spoke about marriage and divorce, they referred to their relationship with God, this is especially the case when the women articulated why the *nikaah* was more important than the civil marriage. It seems illogical to argue that Muslim women ought to be permitted to enter into an Islamic marriage in the form of a *nikaah* and then to suggest removal of that agency when it comes to terminating the relationship in accordance with their faith.

The privatisation of family arbitration is clearly of concern to feminists more generally because of its prioritising of autonomy and encouraging a settlement

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<sup>36</sup> <https://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/inquiries/parliament-2015/inquiry6/> last accessed 27 June 2017. As a result of the dissolution of Parliament and general election on 8 June 2017 this Committee has ceased to exist and there is no current information as to whether it will resume. <https://www.gov.uk/government/news/independent-review-into-sharia-law-launched> last accessed 27 June 2017. The independent review of shari'a councils was launched in May 2016 chaired by Professor Mona Siddiqui. See my comments in Chapter 2 regarding this review.

culture which may be to the detriment of the weaker party, often the female. The concern is one of sufficient safeguards and those safeguards include managing the imbalance in power during the arbitration process, as well as an appreciation of the wider societal inequalities. Notwithstanding this my research points to the continued use of shari'a councils by Muslim women and the continued desire at the very least for a religious ruling concerning divorce. The current feminist discourse is limited as it does not encompass the multiple ways in which Muslim women navigate their agency. And as noted above relying upon notions of gender equality will eventually mean that an impasse is reached when one can go no further in attempting to interpret scriptural texts within a gender equal framework. Muslim women's empowerment will not come from a removal of their autonomy, nor an exit from their communities or religion. Even in Walker's study where she asserts that a religious need has been assumed on behalf of the women, she confirmed that the women were not seeking an exit strategy<sup>37</sup>.

My detailed examination of the laws of marriage and divorce helps to identify where there are differences and similarities between English and Islamic laws and the ways in which English law could go further in accommodating the practices of Muslims. The current approach of English law is an *ad hoc* mix depending on the specific issue that English law is being asked to address. This leads to confusion and inconsistency. On a wider macro level it is arguable that it has been in the interests of the state and shari'a councils not to engage with one another. The state for fear of legitimising 'shari'a law' has maintained its 'hands off' approach. Shari'a councils by not demanding any form of recognition are quietly accommodated without having any real accountability. But the best interests of Muslims women as British Muslim citizens are not being met by the current framework and although improvements can be made to shari'a councils, tensions around their accommodation will remain. If, as Shachar suggests<sup>38</sup> we change the conditions to enable recognition of the legitimacy of other

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<sup>37</sup> Tanya Walker, *Shari'a Councils and Muslim Women in Britain: Rethinking the Role of Power and Authority* (2016 Brill)

<sup>38</sup> Ayelet Shachar, *Multicultural Jurisdictions Cultural Differences and Women's Rights* (2001 Cambridge University Press)

jurisdictions, then Muslims can engage with the state not just as citizens but as Muslim citizens. As I argued in Chapter 4, English law of marriage has rightly been criticised as unfit to meet the needs of a culturally, ethnically and religiously diverse society. The state may have interest in identifying who is married but it does not need to determine *how* couples marry. The regulation of marriage can be delineated between the state and Muslims enabling Muslim women to explore their agency from within an Islamic framework as British citizens. As a consequence Muslim debates about marriage and divorce would become part of the public arena rather than just an internal debate amongst Muslims. Muslims are part of British society and if we are genuinely concerned about the empowerment of Muslim women then we need to find new modalities for their agency using their voices.

I began this thesis with a quote from the fourth chapter of the Quran: The Women, verse 135. The verse commands each and every Muslim to stand for justice and speak the truth. I pray that in writing this thesis I have fulfilled what God demands from me in that verse. And Allah knows best.

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## **Others**

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Channel 4: Dispatches 'Undercover Mosques' first aired 15 January 2007.

## Appendix 1

### File record sheet

File Number:	Letter sent out? Y/N	Date letter sent?
Is applicant H or Wf & date application made?		
Wife's background: dob/job/ethnicity		
Husband's background: as above		
Date & place of nikaah		
Date & place of civil ceremony (if applicable)		
Children? Details re how many, gender & ages/dobs.		
Reasons for application: <ul style="list-style-type: none"> <li>• Include main allegations</li> <li>• Any issues of violence alleged?</li> </ul>		
Any NMO/Occupation order in force? If so date of order/any details re: order(s)		
Procedure undertaken by shariah council – include: <ul style="list-style-type: none"> <li>• Details of meetings whether joint or individual.</li> <li>• Did matter go the Board?</li> <li>• How long process took.</li> </ul>		
Any discussions regarding jewellery/finances/mahr?		
Outcome – include details of type of divorce granted: <ul style="list-style-type: none"> <li>• Talaq?</li> <li>• Khulla (with/without conditions?)</li> <li>• Faskh?</li> <li>• Confirmation letter?</li> <li>• Any other type?</li> <li>• Date it was granted?</li> </ul> (explain reasons including if divorce refused why refusal)		
Any civil proceedings re: divorce/finances/children? Stage of proceedings & any relevance to Islamic decisions?		
Any other issues of relevance?		

## Appendix 2

### Interview Questionnaire

- 1 Name /address /dob/ telephone
- 2 Ethnic background of both parties and languages spoken
- 3 Level or religiosity of both parties?
- 4 Qualifications/job
- 5 Details of marriage – when and how it came about (arranged/love etc), how long, family involvement?
- 6 Nikaah and civil marriage? Why both or why not both? Which more important to you?
- 7 Children? Details how many, ages and where they are now.
- 8 Breakdown of relationship – brief details. Why? [Violence/abuse alleged?]
- 9 Family support during breakdown?
- 10 Shariah Procedure:
  - a. Who applied and where to?
  - b. Issues that shariah court addressed? [Any discussion regarding mahr?]
  - c. What the procedure involved? Did you understand throughout?  
Language conducted in?
  - d. Meetings with Husband or his family? How? Where? How did you feel?
  - e. Decision made? Any documents?
  - f. How long it took?
  - g. Satisfied with procedure/outcome/way it was handled?
  - h. Any suggested improvements?
- 11 English law procedure
  - a. Same issues as above
- 12 Comparison
  - a. How did the 2 procedures compare? Which did you feel more confident in asserting your rights? Where did you feel most protected? Which did you understand better? How were you treated by the personnel? Try to address the experiences between the two in some depth and keep asking why or how or in what way to get concrete examples.
  - b. Any guidance from anyone on how you navigated between the two?
  - c. Why 2 procedures? Why go to shariah court at all? Why not just let an English judge decide? Or vice versa. the decisions being made?

- d. Which issue would you be happy for shariah court to deal with and which issues for English court?
- e. Views on whether procedures should be:
  - i. Kept separate – why?
  - ii. Amalgamated – if so how?
  - iii. Something else – what?
  - iv. Anything that they can learn from one another?