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**British Muslims and Transformative
Processes of the Islamic Legal Traditions:**

Negotiating Law, Culture and Religion with
Specific Reference to Islamic Family Law and
Faith Based Alternative Dispute Resolution

By

Rajnaara Chowdhury Akhtar

LLB, LLM

A thesis submitted in fulfilment of the requirements for the
degree of Doctor of Philosophy in Law

University of Warwick, School of Law
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Declarations

Inclusion of Material from a Prior Published Article

I have drawn upon a previously published article which I wrote during the course of this study:

R. Akhtar, 'British Muslims and the Evolution of the Practice of Islamic Law with Particular Reference to Dispute Resolution', (2010) 6:1 *Journal of Islamic State Practices in International Law*, pp 27-39

Declaration

In fulfilment of the requirements of the University of Warwick for the presentation of a PhD thesis I hereby declare the following: This thesis comprises my own work and has not been submitted for a degree at any other University.

Rajnaara Chowdhury Akhtar

Abstract

This cross disciplinary socio-legal research study provides a unique contribution to the study of British Muslims, faith based ADR mechanisms and the state. The existence of informal religio-centric dispute resolution forums exemplifies a form of legal pluralism in action.

The study investigated the approach to Islamic family law and dispute resolution of a sample of 250 British Muslims aged 18-45, primarily British-born, university educated and practicing their faith or understanding their religious obligations. Empirical research was undertaken using both quantitative and qualitative research methods, and conclusions were drawn by assessing the findings using Grounded Theory methodology.

Empirical research focussing on younger generations of British Muslims and the transformative processes of the Islamic legal traditions impacting on the application of religious laws are absent. The present study is unique in a number of regards, with a focus on the subject group's interaction with, and perception of, dispute resolution forums available for resolving Islamic family law disputes.

This thesis argues that British Muslims from within the socio-demographic profile of the subject group: 1) believe faith based ADR mechanisms such as Shariah Councils are necessary for providing expertise on Islamic family law issues, however in their present form they are imperfect; 2) believe Shariah Councils are more competent than national courts in dealing with Islamic law issues; 3) have plural approaches to negotiating law, culture and religion; and 4) believe there should not be a separate legal system for Muslims in Britain, as this is separatist and divergent from their identities as 'British Muslims' which is an evolving self-identification.

Participants displayed numerous perceptions about the manner and form of interaction between British Muslims, faith based ADR mechanisms and the British legal system. Six categories are coined in the research findings exploring these opinions, the most popular being a 'rights-based evaluation promoting Interlegality' and 'necessity for validation of religious beliefs'.

Table of Statutes

ENGLAND

Arbitration Act 1996

Marriage (Registration of Buildings) Act 1990

Divorce (Religious Marriages) Act 2002

Equality Act 2010

Family Law Act 1996

Criminal Justice and Public Order Act 1994

Courts and Legal Services Act 1990

Matrimonial Causes Act 1973

PAKISTAN

Protection of Women (Criminal Laws Amendment) Act 2006

INDIA (pre-partition)

The Muslim Personal Law (Shariat) Application Act 1937

Bills

Arbitration and Mediation Services (Equality) Bill (HL Bill 7) 2012

Inheritance (Cohabitants) Bill 2011

International Treaties

The Convention on the Elimination of All Forms of Discrimination against Women 1979

Table of Cases

Raja Deedar Hussain Case [2 Moo. I. A. 411]

Forbes v Eden (1867) LR 1 Sc & Div 568

Uddin v Choudhury [2009], EWCA (Civ) 1205

R v Chief Rabbi, ex parte Wachmann, [1992] 1 WLR 1036

Blake v Associated Newspapers [2003] EWHC 1960

EM (Lebanon) v Secretary of State for the Home Department [2008] 64 UKHL

Khan v Khan [2008] Bus LR D73

Ali v Ali [1968] P 564

Oxley v Hiscock [2004] EWCA Civ 546

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Glossary of Terms

<i>Ahl al adl</i>	People of Justice
<i>Ahwal al-shakhsiyya</i>	Muslim Personal Law / family law
<i>Alamiyyat al-Islam</i>	Islam is a global religion
<i>Aql</i>	Human reason
<i>Dar al Islam</i>	Land of Islam
<i>Dar al-Adl</i>	Land of covenant
<i>Dar al-Sulh</i>	Land of truce
<i>Darurat</i>	Necessities
<i>Dawa</i>	Inviting (others to Islam)
<i>Dhimmi</i>	Non-Muslim living in an Islamic state
<i>Faskh</i>	Annulment
<i>Fatwa</i>	Juristic ruling
<i>Fiqh al-Aqalliyah</i>	Jurisprudence of Muslim Minorities
<i>Fiqh</i>	Islamic jurisprudence
<i>Hadd</i>	Major punishable crimes
<i>Hadith</i>	Sayings of the Prophet Muhammad as recorded by Islamic jurists
<i>Hajiyyat</i>	Needs
<i>Hajj</i>	Pilgrimage
<i>Halaal</i>	Permissible
<i>Hijab</i>	The covering used by Muslim women to conceal their hair, neck and upper chest.
<i>Hijrah</i>	Migration
<i>Ihtihsan</i>	Juristic reasoning

<i>Ijma</i>	Consensus of juristic opinion
<i>Ijtihad</i>	Independent reasoning undertaken by a <i>Mujtahid</i> scholar
<i>Ilm</i>	Learning/ Good standing
<i>Imam</i>	Religious scholar who also leads prayers at the mosque
<i>Istihsan</i>	Equitable reasoning
<i>Jihad</i>	Holy struggle
<i>Jilbabs</i>	Long flowing dress worn by some Muslim women
<i>Katib</i>	Court scribe
<i>Khula</i>	Divorce instigated by the female, in return of <i>mahr</i> (dower)
<i>Mahr</i>	A gift promised by the groom to the bride upon marriage
<i>Maqasid al-Shari'ah</i>	Ruling according to the intentions of Islamic law
<i>Maslaha</i>	Public interest doctrine
<i>Mufti</i>	Jurisconsult
<i>Mujtahids</i>	Highly trained Islamic jurists
<i>Musannif</i>	Author-jurist
<i>Nikkah</i>	Marriage contract
<i>Niqab</i>	The face covering used by some Muslim women to conceal their features with the (usual) exception of the eyes.
<i>Qadi</i>	Judge
<i>Qanun</i>	Edicts and decrees from the sultan
<i>Qiyas</i>	Analogy undertaken by trained jurists
<i>Qur'an</i>	The Revealed book
<i>Sahih</i>	Correct/ True
<i>Salaah</i>	Prayers
<i>Sawm</i>	Fasting
<i>Shariah</i>	The entire system of laws, principles and methodology regulating the lives of Muslims

<i>Shaykh</i>	Honorable title for a learned man (fem. <i>Shaykha</i>)
<i>Shura</i>	Group of jurisconsults
<i>Shuruti</i>	The notary
<i>Siyar</i>	The Law of Nations
<i>Siyasa shar'iyah</i>	Political rule according to the principles of the <i>Shariah</i>
<i>Sunna</i>	The Prophet's words of actions
<i>Tahara</i>	Cleanliness
<i>Tahsinat</i>	Improvements
<i>Talaq</i>	Unilateral pronouncement of divorce by a husband
<i>Talaq-i-tafwid</i>	Contractual delegation of the right to pronounce talaq from the husband to the wife
<i>Ulema</i>	Learned religious scholars
<i>Urf</i>	Custom
<i>Usul al-Fiqh</i>	Methodology of law
<i>Wahy</i>	Divine revelation
<i>Wali</i>	Guardian (of a bride)
<i>Wara</i>	Piety
<i>Zakah</i>	Legal alms

Introduction

The historic arrival and settlement of large numbers of Muslims in the British jurisdiction has presented the state with multi-faceted challenges, particularly with regards to administration of justice/dispute resolution and state legal institutions. The 2011 census revealed that Muslims formed 4.8 per cent of the population of England and Wales, accounting for 2.7 million residents.¹ Forming the largest faith group after Christianity,² the demographic profile of British Muslims reveals one-third below the age of 16 and 50 per cent below the age of 25.³ These statistics demonstrate the prospect of mounting pressures for mechanisms which respond to the particular legal needs of Muslim religious communities, as they are citizens of the state whose presence here is now established and growing. One aspect proven to present a recurring challenge is the issue of Islamic family laws which have great normative influences on the lives of Muslims, with consequences for the formal legal system. Key questions arise including: what are the legal and socio-legal needs particular to this religious group? How can the legal system meet these needs? Is the state obliged to intervene in the provision of legal or quasi-legal solutions for religious communities in light of its accepted monolithic legal tradition?

¹ The Office of National Statistics. Available online at <http://www.ons.gov.uk/ons/rel/census/2011-census/key-statistics-for-local-authorities-in-england-and-wales/rpt-religion.html> (Last visited 12 December 2012). The number of Muslims in Scotland was revealed to be 42,600 in the 2001 census with the data from the 2011 census yet to be released.

² Accounting for 59.3 per cent of the population.

³ Policy Research Centre, 'Census 2011, First Release of Data', available online at <http://www.policyresearch.org.uk/publications/policy-focus/214-census-2011-first-release-of-data> (Last visited 12 December 2012)

This research project aims to engage with these pertinent questions, focusing on the issue of British Muslims and faith based Alternative Dispute Resolution (ADR) pertaining to Islamic family law and the transformative processes which have impacted on these legal traditions over time and specifically within the British context. Empirical research was undertaken to investigate the perceptions of Islamic law held by British Muslims and the extent to which they engage with it; both in terms of comprehension of its tenets, and the resolution of disputes pertaining to it. This assisted in mapping out the quasi-legal space occupied by Islamic law in the lives of British Muslims and the extent of its normative influence, thus allowing conclusions to be drawn about the necessity or otherwise of state intervention for managing its dispute resolution mechanisms.

The impact of interpretive thinking and juristic reasoning on the process of formulating principles of law and developing institutions of dispute resolution was considered in light of the traditionalist/rationalist divide. These factors then assisted in the analysis of the processes and mechanisms for faith based ADR which exists in Britain specific to its Muslim communities.⁴

The consideration of law in context necessarily encompassed the investigation of legal pluralism, multiculturalism and the impact on Britain's mono-legal tradition. This, in turn, gave rise to consideration of cultural and religious diversity within the law and the possible obstacles to access to justice presented by the legal traditions historically accepted in Britain. In a multicultural society

⁴ All references to faith based ADR mechanisms within this thesis refer to those pertaining to the Muslim communities. It is acknowledged that many other religious groups in Britain employ faith based ADR mechanisms too.

with a mono-legal culture, the same laws may be applicable to all; however the impact of these laws may vary tremendously. As pointed out by Huntington, “culture counts, and cultural identity is what is most meaningful to most people.”⁵ Thus, questions arise about the religio-cultural identities of British Muslims and accommodation of cultural variations within the law for an effective legal system.

Background of Subject Group

British Muslims are equal citizens of the state. Their ascription to a faith followed by a (sizeable) minority gives rise to many challenges in the application of their religious doctrines, which are compounded by the transformative processes which have occurred over the past 14 centuries impacting the formulation and implementation of Islamic laws in general. The term 'transformative processes' is employed within this thesis to illustrate the evolution and accommodation which has been a consistent and definitive feature of Islamic jurisprudence throughout its history. There has never been a single Islamic law, but rather a plurality of accepted texts and opinions. The status of Muslims living as citizens of states where they are following a minority religion is not a situation that Muslim jurists have accepted and widely 'legislated' for despite being presented with this dilemma at various historic junctures, at which point localised responses occurred.

Modern European democracies are by no means the first time Muslims have faced the issue of integration, citizenship and loyalties towards entities other than Muslim caliphates. The Indian subcontinent and the African continent have

⁵ S. Huntington, *The Clash of Civilizations and the Remaking of World Order*, (1996) The Free Press, at 20.

been exposed to this issue for centuries due to colonialism and migration. However, there was no widely accepted and adequate resolution to the issue of citizenship due to a lack of consensus between Muslim religious scholars around the globe. The emergence of *Fiqh al Aqaliyyah* marked a starting point, approaching the issue of Muslim minorities and their contextual realities as a distinctive juridical challenge.⁶ However, it has failed to gain wide currency and as a result, in Europe and Britain today, the issue remains unresolved and requires an exploration of thesis from Islamic history on the issue of international law and citizenship/loyalties. The inhabitation of this new legal 'space' was viewed in the traditional Islamic discourse as the 'other,' and was in contrast with the norm of residing within the Muslim jurisdictions over which laws such as the *Siyar* could be implemented.⁷

The problem was further compounded by the codification of Islamic laws which took place during the colonial era across the Indian sub-continent and during the latter stages of the last Muslim Caliphate – the Ottoman Empire. For those who hailed from these territories, the previously fluid system of law became rigid and resulted in a more inflexible approach to religion where personal family law issues were concerned. From the period of the mid-twentieth century, the movement toward codified civil law within Muslim-majority jurisdictions became prevalent with Egypt, Syria, Iraq, Jordan and Libya

⁶ See M. Rafeek, *Fiqh al Aqaliyyät (Jurisprudence for Minorities) and the Problems of Contemporary Muslim Minorities of Britain from the Perspective of Islamic Jurisprudence*, (2012) PhD thesis, University of Portsmouth and Markfield Institute of Higher Education

⁷ The *Siyar* refers to the Islamic Law of Nations, which shall be further expanded in Chapter Three.

devising their own individual codes which embedded Islamic law principles to a lesser or greater degree.⁸

In Britain today, the Muslim community is extensively diverse in cultures of origin; however, a large percentage are ethnically from the Indian-subcontinent covering Bangladesh, Pakistan and India.⁹ There are many outcomes of this diversity, including the lack of uniformity in the rules of law which they adhere to. This coupled with the perceived inadequacy of the state legal system in dealing with Muslim family law issues resulted, during the 1970s, in the rise of faith based ADR mechanisms widely known as 'Shariah Councils' which have prevailed to the current day in varying forms. However, the Islamic legal premise for the Shariah Councils are unclear and there are two potential models which they currently follow,¹⁰ both of which pre-date the era of the modern nation state, whether secular or a religious theocracy in nature.

Scope of the Research

Due to the use of Grounded Theory Methodology, this thesis does not test a strict hypothesis. However, the focal research questions are testing whether British Muslims can demonstrate understanding of obligations and methodology relating to Islamic family laws, and whether dispute resolution

⁸ E. Hill, 'Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971', (1988) 3:1 *Arab Law Quarterly*, pp 33-64, at 39.

⁹ In 2001, three quarters of Muslims (74 per cent) were from an Asian ethnic background, predominantly Pakistani (43 per cent), Bangladeshi (16 per cent), Indian (8 per cent) and Other Asian (6 per cent). Statistics from the Office of National Statistics, available here: <http://www.statistics.gov.uk/cci/nugget.asp?id=957> (last accessed 5 April 2011). The initial data for the 2011 census was released on 11 December 2012, but these breakdowns are not yet available.

¹⁰ These are the traditional Qadi court system, or the tribal 'Hakim' system. This will be explored in greater detail in Chapter Five.

using faith based ADR mechanisms is viewed as an alternative to engaging with the official state legal system.

The study engaged the subject group in empirical research to ascertain the transformative processes which have impacted on the practical application of Muslim family law in non-Muslim majority jurisdictions such as Britain. This included consideration of the following questions: What is the Islamic legal basis for the Shariah Councils in Britain and can their origins be traced in Islamic history? How does the subject group perceive its religious obligations and how does this impact on their subjective analysis of their practice of the faith? How widespread is knowledge about Islamic family laws? How prevalent are disputes relating to Islamic family law and what experiences does the subject group have of this? What perceptions can be attributed to the subject group in respect of the national courts' abilities to deal with certain aspects of Islamic family law and how does this compare to faith based ADR?

Examining these points necessitated establishing a framework by charting the historic development of Islamic law generally and the Islamic Law of Nations specifically in order to ascertain the Islamic legal space occupied by Muslims who are citizens within majority non-Muslim jurisdictions. Further to this, it provides a context for the origins and evolution of the Islamic laws being implemented today and the structural framework for implementation in the form of faith based ADR.

Rationale for this study

A discursive analysis reveals that much of the media and political discourse in Europe focuses on its Muslim population and Shariah Law (as it is widely and

unevenly understood). Few studies have been undertaken which directly engages the subject group examining the positionality of religious laws in their lives and the status of faith based ADR. Most of the surveys popularly recounted to prove so called Muslim separatist ideals are unscientific, 'open' polls from which it is impossible to subjectively or objectively analyse the respondents' views.

Where faith based ADR in particular is concerned, the limited research which has been conducted into bodies such as Shariah Councils has reflected a system of entrenched inequality to the detriment of women who seek to use it. One of the conclusions reached by Samia Bano¹¹ in her thesis was that "the process of dispute resolution is 'gendered' to produce particular outcomes. The contradiction of a traditional interpretation of the role of women in Islam with the complex realities of these women's lives is neither explored nor challenged by the religious scholars as the meanings of culture and religion are understood as homogeneous and fixed."¹² Despite the shortcomings, the influence and case loads of Shariah Councils are seen to be increasing. In addition, there are now official Muslim Arbitration Tribunals which seek to uphold Islamic laws whose decisions can be enforced through the national Courts in certain cases. In order to contextualise and understand the existence and usage of these institutions, it is necessary to engage the potential users in a discourse which analyses their knowledge and perceptions of the laws being applied, and reveals their positioning where faith based ADR is concerned. The issue is placed in the

¹¹ S. Bano, *Complexity, Difference and 'Muslim Personal Law': Rethinking the Relationship between Shariah Councils and South Asian Muslim Women in Britain*, (2004) PhD thesis, University of Warwick

¹² *Ibid*, at 197-198.

context of liberal multiculturalism and its corresponding negotiations with the law. Conceptual analysis of these concurrent themes is necessary and provides the contextual framework for the operation of faith based ADR in 21st century Britain.

A further investigation into the validity of Shariah Councils based on Islamic legal principles will reveal whether there is an illusion of religious sanctioning of these bodies or whether they do indeed provide British Muslims with a living Islamic law.

Research methodology

The research methodologies employed within this study are diverse utilising both quantitative and qualitative methods to engender maximum engagement with the subject group. There were three distinct stages, commencing with a survey of opinion and knowledge utilising an in-depth questionnaire which engaged British Muslims aged between 18-45, from a cross section of genders, ethnicities, spoken languages and places of residence in Britain. This was followed by Focus Group discussions in four key British cities engaging the subject group in a greater depth of discussions. The final stage of empirical research involved interviewing three experts in the field of ADR and the Muslim community.¹³

The data compiled was then analysed using Grounded Theory methodology in order to allow for the generation of theory based essentially on the engagement with the subject group. The lack of preceding studies in this area supported the

¹³ These experts are Professor Tariq Ramadan (University of Oxford), Shaykh Fais Al Aqtab Siddiqi (The Muslim Arbitration Tribunal), and Shaykh Sohaib Hasan (The Islamic Shariah Councils)

Grounded Theory and required entrance into the field prepared for the emergence of any eventuality. As a result, factors such as gender weighing of the respondents to the questionnaires and socio-demographic profiles were uncontrolled. The analysis of the data revealed a greater proportion of female respondents, a greater proportion of university graduates and a greater proportion who described their religious observance as 'practicing'. These factors were unforeseeable as respondents were drawn at random, and based on the Grounded Theory approach, analysis of the empirical research and possible extrapolation is necessarily focussed by these factors.

The data revealed the attitudes held by British Muslims concerning Islamic family law and dispute resolution, mapping their loyalties and their recognition of Islam as manifested personally and spiritually, *vis a vis* its interaction with the non-Muslim state in which they reside. This revelation in attitudes and perceptions of religious rules and regulations in theory and practice advances the mapping of the British Muslim socio-legal culture which has manifested itself in younger generations of Muslims.

Ethical Considerations

Due to direct engagement with the subject group in this study, a number of ethical considerations were respected. These included confidentiality during the collection of certain personal data, anonymity of respondents, informed consent where anonymity would be waived in the Focus Group discussions, and respect for the opinions espoused especially when offered in a group setting. The background and aims of the research were explained at each stage of the research to ensure participants understood the research aims.

It was intended that the respondents for this research would be drawn from across communities, professions and social backgrounds in order to draw comprehensively on the Muslim communities in Britain. The most prominent ethical issue presented during this stage concerned the need for confidentiality with the research questionnaires. An outline of the research aims was included within the questionnaire to ensure that the respondents' consent was informed.

One important aim of the research questionnaires was to access women who are not actively engaged in society. This required consideration of issues such as social limitations which may affect their willingness to participate and also, protecting them from any resultant negative responses from family members or the community. This was achieved by ensuring strict privacy during their engagement and complete confidentiality thereafter.

The questionnaire included a request to provide socio demographic information in some depth, as this is crucial to the analysis of the data collected. Questions included age, family situation, educational attainments, ethnic origin, city or town of residence and description of religious practice. There was no indication of who the respondent is by name on the questionnaire thus protecting their specific identities. The questionnaires were stored in a private room without public access to further ensure confidentiality.

The ethical considerations outlined above were presented for Ethical Approval to the Research and Ethics Committee at the University of Warwick. Approval was granted.

Limitations of the Research

As with any socio-legal research project, this study comes with its limitations. Primarily, all discussions pertaining to Islamic law are restricted to the Sunni schools of thought. This decision was made consciously, respecting the vast differences in Islamic theology which exist. Other schools of thought within the Islamic legal traditions are separate disciplines in their own rights which, although overlapping at certain junctures, require entirely separate negotiations. An entire thesis of its own would have to be dedicated to looking at these same issues from the perspective of the Shia School of thought for example.

The theoretical paradigms presented in this thesis cover a wide and diverse range of theoretical frameworks, which resulted in the possibility for a restrictive conceptual analysis of these differing areas. However, in order to adequately converge on the issue of British Muslims and their interaction with faith based ADR and the state legal system, a number of perfunctory theoretical manifestations required consideration. While this adds to the breadth of coverage and consideration, at times it may limit the depth of the discourse.

It was envisaged that further limitations may arise in the sampling, and though purely speculative at the start of the study, this was later proven to be accurate in the data analysis stage. Respondents were diverse in terms of ethnic backgrounds, age, family situation and place of residence in the UK; however, they appeared to overwhelmingly fit a broad yet defined socio-demographic profile. Although a wide number of respondents were engaged across the country, access to the lay public required drawing on personal contacts from

various cities. This presented the possibility that certain sections of the Muslim communities in Britain may be omitted. Data analysis did, in fact, reveal that the respondents were largely university educated British Muslims with a large percentage describing their manifestation of religious beliefs as 'practising', which is no doubt a reflection of my own social group. No restrictions were placed on the respondents engaged in the questionnaire other than age (18-45) and the requirement to hold a British passport. Beyond this, the sample was randomly selected. Thus, while the research was not intended to monitor the opinions of Muslims from a certain educational and religious background, the majority of respondents embody this group. Thus, this study and its findings present a strong indication of the socio-legal practices of British Muslims who are largely university educated and describe their religious observations as either 'practising' or 'understanding of their obligations but not practicing'. This is a strong indicator that the findings may be extrapolated across British Muslims fitting this socio-demographic profile. As a result, this thesis provides a unique contribution to existing studies and literature concerning university educated and religiously aware British Muslims and the socio-legal interaction between living Islamic law and faith based ADR.

An ideal follow up to the research would have entailed further focus groups where the data from the questionnaires was presented and discussed however; this was not possible due to financial constraints.

Structure of this Thesis

This thesis is presented in two Parts, each precipitated with an introduction. Part I provides the theoretical foundations of this study and encompasses three

substantive chapters. Part II presents the research methodology, engagement within the field and the research findings attained utilising the Grounded Theory, covering Chapters Four to Eight. Finally, Chapter Nine provides the conclusion to this study.

Part I

Part I of this thesis encompasses three chapters presenting the theoretical paradigms engaged within this research. Chapter One is titled 'Negotiating Theoretical, Legal and Social Perspectives on Legal Pluralism, Normative Pluralism and the Prerequisites of Citizenship Responsibilities.' This chapter details the complexities surrounding the establishment of informal quasi-legal bodies intended to provide faith based dispute resolution. It concludes that the negotiation between the theoretical, legal and social perspectives on legal pluralism reveals that some communities within Britain are living a legal plural reality. Whether the 'laws' are imposed by informal bodies such as Shariah Councils, or self regulated through individual religious convictions; they are powerful rules which can be more coercive than state law.

Chapter Two is titled 'Islamic Law: Early Theoretical Developments, Institutional Authority and the Law in Practice' and explores the constituent elements of Islamic law while negotiating away from the prevalent understanding of the term 'law'. Significantly, this chapter separates Islamic law from more popular 'Muslim practice' in an effort to separate cultural manifestations of religious practices, from laws which can be traced back to Islamic sources. It concludes with the observation that the past fourteen centuries have witnessed vast transformative processes comprising massive upheaval, progression and accommodation within the Islamic legal traditions. Significantly, Chapter Two finds that Islamic jurisprudence developed in a manner which accommodated differing social contexts and encouraged a plurality of acceptable and enforceable opinions.

Chapter Three is titled 'Contextualising As-Siyar, International Law and the State: Necessity, Frameworks, Compatibility, and the Legal System' and surveys the Islamic Law of Nations initially propounded by the eminent Mohammad Shaybani. This chapter conceptualises the division of the world according to traditional Islamic doctrine into '*Dar al-Islam*'(land of Islam) and '*Dar al-Harb*'(Land of War); and traces through the emergence of '*Dar al-Suhl*' or the land of treaty. This Chapter concludes with the recognition that early jurisprudence ceased to be adequate in dealing with new global realities and that through the course of Islamic history, Muslim state practice moved away from the early principles and expanded the remit of acceptable conduct. The emergence of *Dar al-Suhl* is now accepted as covering the majority of the global terrain and allowing for Muslims to be active citizens in jurisdictions which are not Muslim-majority.

Chapter One

Negotiating Theoretical, Legal and Institutional Perspectives on Legal Pluralism

Introduction to Theoretical Framework

The process of globalisation and advancements in new technologies facilitating easier communication and mobility have resulted in intensified migratory patterns and promulgated complex social identities. As a result, cultural and religious diversity has increased across Europe and the wider world making legal pluralism a reality in many jurisdictions and a challenge to formal judicial systems. In modern nation states, “the exponents of state law frequently seek to fortify their claims by asserting that no normative order other than state law can properly be given the title ‘law’.”¹⁴ Conversely, Santos¹⁵ provides a wide definition of ‘law’ as “a body of regularized procedures and normative standards, considered justiciable in any given group, which contributes to the creation and prevention of disputes, and to their settlement through an argumentative discourse, coupled with the threat of force.”¹⁶ The reality is that many religious and cultural groups adhere to forms of law which do not identify in form or capacity with state law; however, these forms of law have equal, if not greater, coercive power over their followers than state law. According to

¹⁴ G.R. Woodman, ‘The Possibilities of Co-Existence of Religious Laws with Other Laws’, (2008) in R. Medhi, *et al*, *Law and Religion in Multicultural Societies*, DJØF Publishing Copenhagen, pp 23-42, at 24.

¹⁵ B. Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, (1995) Routledge

¹⁶ *Ibid*, at 428-429

Ehrlich's¹⁷ description of 'living law', social groups may enforce 'law' more forcibly than the state.¹⁸ An example of such a living law would be '*angrezi shariat*' as coined by Menski.¹⁹ Thus, even in jurisdictions which claim a mono-legal system; there is a likelihood that legal pluralism is in play. This notion is challenged by the idea of legal centralism under which only the state can be the lawgiver. Griffiths describes legal centralism as the idea that "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organisation exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state."²⁰

This chapter considers the theoretical scope and applicability of legal and normative pluralism in Britain in light of the interaction between the state legal system and informal faith based alternative disputes resolution (ADR) mechanisms. In light of the theoretical debates, it will also consider legal pluralism as a human right entrenched in the European Convention on Human Rights (ECHR) and the resultant conflict with theoretical norms of the state legal system. The analysis will necessarily converge on socio-legal considerations involving multiculturalism and religious freedoms.

¹⁷ G. Ehrlich, (1936), *Fundamental Principles of the Sociology of Law* (translated by W. Moll), Cambridge, Harvard University Press, as cited by J. Griffiths, 'What is Legal Pluralism' (1986) 24, *Journal Legal Pluralism & Unofficial Law*, pp. 1-55, at 3.

¹⁸ Ehrlich (1936), *Ibid*, at 63-64.

¹⁹ D. Pearl, and W. Menski, *Muslim Family Law*, (3rd Edn) (1998) London: Sweet and Maxwell, at 276.

²⁰ J. Griffiths, 'What is Legal Pluralism' (1986) 24, *Journal Legal Pluralism & Unofficial Law*, pp. 1-55, at 3.

Finally, this chapter will consider the operational context of faith based ADR mechanisms in Britain in light of British legal culture and the discourse pertaining to legal pluralism which many accept is a reality in practice but which has never formally been accepted.²¹

Legal Pluralism

In the post-modern world, legal pluralism has become a key concept.²² Before considering the specifics of legal pluralism, it is necessary to consider what the term 'law' embodies in respect of its application in society. Menski argues for a tripartite combination of laws which form the overall picture - "social norms, state laws and values/ethics, with overlapping boundaries, all inevitably interrelated and constantly forced to compete and sub-triangulate."²³ This formulation takes varying coercive social factors into account, but is rejected by those who take a positivist view of the law. The key question for the purposes of this study is to what extent socially originating non-state rules and regulations, as identified by Menski and others, coerce the behaviour of citizens of the state. Legal positivist theorists would exclude all but state actors from the formulation and conception of the law, while legal pluralism theorists provide for the interaction of social normative influences. Twining²⁴ elaborates how western legal culture, at least on the academic front, has tended to be "state oriented, secular, positivist, 'top-down', Northo-centric, unempirical, and

²¹ W. Menski, 'Law, Religion and Culture in Multicultural Britain', (2008) in R. Mehdi, *et al*, *Law and Religion in Multicultural Societies*, DJØF Publishing Copenhagen, pp 43-62, at 45.

²² I. Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralism in England, Turkey and Pakistan*, (2005) Ashgate, at 2.

²³ Menski (2008), *op. cit.*, at 51.

²⁴ W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, (2009) Cambridge University Press

universalist in respect of morals.”²⁵ Such a representation supports the opinion that so called universal laws are in fact ethnocentric and do not adequately reflect global dynamism where legal culture is concerned. Bourdieu²⁶ provides a disparate narrative wherein “law consecrates the established order by consecrating the vision of that order which is held by the State.”²⁷ Law is a legal field which is responsible for creating and maintaining ‘social units’, however, he states that this is circular as it is the social world which first creates the law.²⁸ His vision of the law is an autonomous system which is closely tied to other social realms and comprises a dynamic mutual relationship of influence and control.

If the discourse is to be focussed on ethnic or religious communities in Britain, even a superficial analysis would impart the obvious divergences that certain groups appear to display. For example, the Sikh turban is an obvious manifestation of dress within certain communities which adhere to an accepted or expected code of dress. The normative origins of this can be traced to religious beliefs, and the coercive force of such beliefs is evidently compelling. Thus, there are clearly normative influences at play here, and the conviction with which such dress codes are adhered to belies coercive factors which can readily be compared with laws manifesting from the state.

In identifying the complex theoretical paradigms for legal pluralism, Griffiths sets out the following description:

²⁵ Ibid, at 6.

²⁶ P. Bourdieu, (Translated by Richard Terdiman) ‘The Force of Law: Towards a Sociology of the Juridical Field’, 1987, 38, *Hastings Law Journal*, 805-853

²⁷ Ibid at 838.

²⁸ Ibid, at 839.

“Legal Pluralism is an attribute of a social field and not of ‘law’ or of a ‘legal system’. A descriptive theory of legal pluralism deals with the fact that within any given field, law of various provenance may be operative. It is when in a social field more than one source of ‘law’, more than one ‘legal order’, is observable, that the social order of that field can be said to exhibit legal pluralism.”²⁹

Thus, Legal pluralism can be defined as “the presence in a social field of more than one legal order”³⁰ or it can be envisaged as “the factual description of the operation of several legal regulations that attempts to achieve justice by responding to cultural or legal diversity in society.”³¹ The arguments surrounding the idea of pluralism in law are complex, and Tamanaha³² suggest that analytical and instrumental problems arise.³³ On the one hand, there are theorists who support the notion of positive law and view formal law emanating from the state as the only form of legal authority which can constitute law.³⁴ On the other hand, the idea that social, cultural and religious laws form part of a plural system of law,³⁵ which result in social control, is proposed as a dynamic reality in many societies, including British society. Where legal pluralism in the strict sense is concerned, Griffiths reminds us that many who write about it hold it in low esteem as it is an ‘imperfect form of law’.³⁶ However imperfect it may be, it carries greater resonance with the practical applicability and power of

²⁹ Griffiths, (1986), op. cit. at 38.

³⁰ Ibid, at 1.

³¹ Yilmaz, (2005), op. cit., at 10.

³² B. Tamanaha, ‘A non-Essentialist Version of Legal Pluralism’, (2000) 27, 2, *Journal of Law and Society*, pp. 296-321

³³ Ibid, at 297.

³⁴ For example, H.L.A. Hart

³⁵ For example, J. Griffiths

³⁶ Griffiths, (1986) op. cit., at 8.

rules of law within inescapably plural contemporary societies and is certainly more sustainable than positivist notions on these fronts. Many academics have advanced the pluralism paradigm by now addressing questions of accommodation of plurality as a matter of realistic progression.³⁷ In societies which are increasingly facing complex social dynamics, acceptance and accommodation may present the only course for the development of legal systems which are able to achieve justice subjectively, instead of injustice objectively.

Legal Pluralism v Legal Centralism

The idea that law relies on customary practice for its authority goes against the idea of positive law. Where legal pluralism is concerned, as set out above, the theoretical framework does not conform to positivist ideals of the law. The normative ordering required for law to exist as a binding force not in conflict with the society it seeks to regulate necessarily requires interaction.³⁸ Tie concludes that “this early form of legal pluralism reasoned that positive law had the potential to undermine the very sense of sociality over which it presided.”³⁹ This has become more evident with increased interaction between the states’ legal institutions and faith based ADR mechanisms. In the British example, the Muslim Arbitration Tribunal (MAT) was established utilising the provisions of the Arbitration Act 1996, and now operates by adhering to the principles of the

³⁷ For example, R. Ballard, R. Grillo, *et al*, ‘Cultural Diversity: Challenge and Accommodation’, (2009) in R. Grillo, *et al* (Eds), *Legal Practice and Cultural Diversity*, Ashgate Publishing, pp9-30.

³⁸ Erhlick, as quoted by W. Tie, *Legal Pluralism, Toward a Multicultural Conception of Law*, (1999), Ashgate Publishing, at 47.

³⁹ *Ibid*.

Act, while adjudicating based on Islamic legal tenets.⁴⁰ This interaction does not undermine the position of the law emanating from the state; however, it provides a structural framework for interaction with other socio-legal orderings.

The classic position of the state legal system is being challenged by the emergence of diverse communities within it. This is helping to promote legal pluralism over legal centralism, although the state may be resisting such a transition. Theorists such as Tie⁴¹ identify the evolution of legal pluralism over time, tracing the contextual advancement of the theory. Tie maps contemporary legal pluralism by focussing on the individual and his/her experiences in their social reality and the impact this has on the construction of the law.⁴² Legal pluralism at play here would be the result of self-identification. On this point, anthropologists such as Moore⁴³ reject the positivist notions that only the state can be the source of law which governs individuals' lives. She asserts that a 'semi-autonomous social field'⁴⁴ exists between the state carrying out its legislative functions, and the individual subjects of the law within society which dictate "the mode of compliance or non-compliance to state-made legal rules."⁴⁵ These normative influences can be seen within Muslim communities in Britain where the coercive powers of Islamic laws are strong. Griffiths sums up Moore's descriptive theory as "the theory of the normative heterogeneity entailed by the

⁴⁰ R. Akhtar, 'British Muslims and the evolution of the practice of Islamic Law with particular reference to dispute resolution', (2010) 6:1 *Journal of Islamic State Practices in International Law*, pp 27-39.

⁴¹ Tie, (1999), op. cit.

⁴² Ibid, at 50.

⁴³ S. Moore, 'Law and Social Change: the Semi Autonomous Social Field as an Appropriate Subject of Study,' (1973) 7, *Law and Society Review*, pp. 719–746.

⁴⁴ Ibid.

⁴⁵ Ibid, at 721.

fact that social space is normatively full rather than empty, and of the complexity of the working of norms entailed by such heterogeneity.”⁴⁶

Griffiths⁴⁷ additionally provides steps towards theorising circumstances of legal pluralism and provides four propositions, one of which is ‘The law of inside washing of dirty linen’ which focuses on the internal resolution of disputes within semi-autonomous social fields.⁴⁸ This theory allows for subjective internal analysis on what constitutes ‘dirty laundry’ which the group must resolve internally. The semi-autonomous social field can constitute a family, a business, and one would expect - even a religious community. Griffiths describes such groups as ‘Imperialistic’ in nature,⁴⁹ as the ‘dirty linen’ does not necessarily belong to every individual within the social group, however is dominated by the group. Faith based ADR mechanisms can be seen within this remit as they are only used to resolve disputes between members of an identifiable semi-autonomous social field and are separate from the state. There is perhaps also an element of ‘the law of equal return on social control energy’ in play. where the family and smaller, more interdependent social fields are able to exercise more control than the state. Some have suggested that this influence accounts for much of the work of Shariah Councils and similar bodies.

Legal Centralism only allows the influence of non-state laws on the legal sphere from a normative base as the sole avenue for affecting the state legal system.

⁴⁶ Griffiths, (1986), op.cit., at 34.

⁴⁷ J. Griffiths, ‘Four Laws of Interaction in Circumstances of Legal Pluralism: First Steps Towards an Explanatory Theory’, (1985) in A. Allot, and R. Woodman, (Eds) *People’s Law and State Law (The Bellagio Papers)*, Foris Publications, pp. 217-227.

⁴⁸ The remaining three propositions are: The law of maximization of litigation profit; The law of equal return on social control energy; and The law of convergence (and divergence) of norms.

⁴⁹ Griffiths, (1985), op. cit., at 218.

Woodman however rejects this argument saying that there exists ‘no empirical distinction between state law and other normative orders which might justify it’.⁵⁰ Thus, the debate is focussed on the question of what is law? Kelsen’s ‘pure law’ theory rejects the social reality behind law in order to expound it as a science in its own right stripped of the influence of these varying factors.⁵¹ Such positivist definitions of the law result in abstract conceptions which remove it from its social context and define it in rigid and idealistic terms. In contrast, Moore states that “law and the social context in which it operates must be inspected together,”⁵² an obvious yet profound observation.

Thus, there is a need to consider the law in its social context and correspondingly, dispute resolution mechanisms as a direct response to social impetus. Tie⁵³ suggests all ‘alternative’ fields for dispute resolution are “dependent in a variety of ways upon the possibility (if not actual existence) of centralised law.”⁵⁴ Conversely, the socio-legal theory which is drawn from critical legal studies effectively “undermined the insular image of law”⁵⁵ which is associated with the conception of ‘formal law’ related to legal positivism.⁵⁶ In accentuating this reality, the concept of law must alter, and be recognised as being a facet of the socio-cultural diversity that it administers.⁵⁷ This narration

⁵⁰ Woodman, (2008), op. cit., at 26.

⁵¹ H. Kelsen, *Pure Theory of Law*, (Translation from the Second (Revised and Enlarged) German Edition by Max Knight), (1967), University of California Press, Berkeley and Los Angeles, at 1

⁵² S.F. Moore, (1973), ‘Law and Social Change: The Semi-Autonomous Social Field as an appropriate Subject of Study’ in 7 *Law and Society Review*, pp719-746, at 719.

⁵³ Tie, (1999), op. cit.

⁵⁴ Ibid, at viii.

⁵⁵ Ibid, at 10.

⁵⁶ As propagated by H. Hart, (1961), *The Concept of Law*, Clarendon Press, Oxford

⁵⁷ Tie, (1999), op. cit., at 21.

opposes the theoretical foundations of legal modernity;⁵⁸ such narratives of positivist law are narrow and deficient unless positively restricted to the abstract sciences of the law.

Law and Social Fields

In considering Legal Pluralism, social fields can exist in a number of forms. Theoretically, there may be social fields which exercise complete autonomy, those which are semi-autonomous and those within which there is a complete absence of autonomy wherein an overarching external dominating force exists. Deliberating the existence of semi-autonomous social fields reflects the living reality of law which is impacted upon by a variety of norms and regulations, only part of which emanates from the state as direct and enforceable rules of law. All of these have a possible and probable impact on individuals' behaviour.

Moore suggests that the categories of autonomy and absence of autonomy are rare if in existence at all.⁵⁹ "It is well established that between the body politic and the individual, there are interposed various smaller social fields to which the individual "belongs." These social fields have their own customs and rules and the means of coercing or inducing compliance."⁶⁰ This reflects the multi-strata's of each individual's social reality which must be considered in legal theory and, in the specific case of British Muslims, it provides a quasi-legal space for the operation of faith based ADR mechanisms.

⁵⁸ I. Yilmaz, (2005), *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralism in England, Turkey and Pakistan*, Ashgate, at 12.

⁵⁹ Moore, (1973), op. cit., at 742.

⁶⁰ Ibid, at 721.

If this scenario is applied to Muslim communities in Britain, the semi-autonomous social fields are tangible manifestations. Using the example of faith based ADR in the form of Shariah Councils, these bodies provide a forum within which social norms (arising from religious customs) are enforced using a self-regulatory mechanism which is beyond the state law and in some instances more coercive as far as the protagonists are concerned. Analogies can be drawn with Moore's display of the operation of the social field where New York fashion houses are concerned wherein self-regulation, self-enforcement and self-propelling occur, in which some actors have more powerful positions than others and greater or lesser bargaining chips.⁶¹ For those who do not abide by the social norms, there may be no legal sanctions but the social and economic sanctions are definitively coercive. Within the dress making industry, the consequences will be economic ruin, whereas within the Muslim communities there may be social exclusion, ill-repute and a sense of religious or spiritual failure. Each of these coercive factors will influence the individual's choices.

Legal Pluralism can be seen in practice in semi-autonomous social fields. The next issue to consider is the form that this legal pluralism takes.

Forms of Legal Pluralism

According to Griffiths, legal pluralism arises in two forms, strong and weak.⁶²

Others such as Merry⁶³ and Vanderlinden⁶⁴ have suggested variations on this conceptualisation, including 'new' and 'old' legal pluralism, and 'relative legal

⁶¹ Ibid, at 723-729.

⁶² Griffiths, (1986) op. cit.

⁶³ S. Merry, 'Legal Pluralism', (1988) 22 *Law and Society Review*, pp. 869-896, at 869.

⁶⁴ J. Vanderlinden, 'Return to Legal Pluralism: Twenty Years Later', (1989) 28 *Journal of Legal Pluralism and Unofficial Law*, pp 149-159, at 153.

pluralism' instead of 'weak'. Woodman⁶⁵ also offers 'state law pluralism' and 'deep legal pluralism'. As a sub-type of 'state law pluralism', Woodman further expounds 'internal legal pluralism' which covers developed bodies of customary (possibly religious) laws.⁶⁶ Woodman states that the "only difference between the two types of legal pluralism is that the different bodies of law in state law pluralism are branches of one larger body of norms, whereas in the case of deep legal pluralism, state law and the other law or laws have separate and distinct sources of content and legitimacy."⁶⁷

Strong legal pluralism contends that not all law regulating a society emanates from state institutions and thus it is not systematic or uniform.⁶⁸ This form of legal pluralism is specifically excluded by legal centralism theories. The notion of weak legal pluralism on the other hand can exist under legal centralism where plural laws emanate from a sovereign and provide differing sets of laws for different groups of people. The "groups concerned are defined in terms of features such as ethnicity, religion, nationality or geography, and legal pluralism is justified as a technique of governance of pragmatic grounds."⁶⁹ This form of overt legal pluralism was seen under colonial occupation in jurisdictions such as pre-partitioned India due to the strict division of Indian communities based on religious grounds. This legacy of colonialism continues to the present day in some post-colonial societies. However, such an overt legal pluralism has never

⁶⁵ G. Woodman, 'The Idea of Legal Pluralism,' (1999) in B. Dupret, *et al*, *Legal Pluralism in the Arab World*, The Hague: Kluwer Law International, pp 3-19.

⁶⁶ *Ibid*, at 10.

⁶⁷ *Ibid*.

⁶⁸ Griffiths, (1986), *op. cit.* at 5.

⁶⁹ J. Venderlinden, J. 'Le Pluralisme juridique: essai de synthèse', (1971) J. Gilissen, (eds), *Le Pluralisme Juridique*, University of Brussels, pp 19-56' as quoted by Griffiths, (1986), *op. cit.* at 5.

been witnessed in Britain where strong legal pluralism is more prevalent, although not state sanctioned nor authorised. It can be said to reflect the living law within multicultural Britain. Menski⁷⁰ is a strong advocate of taking lessons from the Indian form of legal pluralism, and asserts that “virtually all countries face questions about how to accommodate diversities within old or new multi-ethnic populations.”⁷¹

Yilmaz⁷² describes two forms of weak legal pluralism, one vertical with “hierarchically arranged higher and lower legal systems or cultures,”⁷³ and the other horizontal where each sub-system has an equal position. An example of a weak legal pluralism is offered in the form of the Ottoman *Millet* system which allowed minority groups their own justice system.

The modern societies which have capitalist tendencies, and are urbanised and industrialised seem to present specific issues for legal pluralism theories. Primarily, the global movement of people between jurisdictions presents a cultural quandary which each society is dealing with in its own peculiar fashion. Legal pluralism in the modern era requires consideration of cultural and religious factors. Twining details the terms ‘cultural relativism’⁷⁴ and ‘legal relativism’⁷⁵ as theoretical frameworks which elaborate the different conceptual frameworks for comparing legal systems. On the cultural relativism front, he

⁷⁰ Menski makes this argument in numerous works. W. Menski, ‘Rethinking Legal Theory in the Light of South-North Migration’, (2006) P. Shah and W. Menski (Eds), *Migration, Diasporas and Legal Systems in Europe*, Routledge, Cavendish, at 13.

⁷¹ W. Menski, *Comparative Law in a Global Context; the Legal Systems of Asia and Africa*, (2006), New York, Cambridge University Press, at 58.

⁷² Yilmaz, (2005), op. cit.

⁷³ Ibid, at 16.

⁷⁴ W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, (2009) Cambridge University Press, at 41

⁷⁵ Ibid, at 42.

suggests that all legal theorists are bound by 'cultural blinders'⁷⁶ which impact on their work. Legal relativism encapsulates all divergences in this area, with its strong form viewing law as being inherently culture specific and legal orders being isolated. This is not reflected in the strong interlinks between semi-autonomous social fields. The issue of informal dispute resolution specifically draws on distinct semi-autonomous social fields where Muslim communities are concerned, and the specifics of coercive factors are being investigated in this research.

It is apparent from the discussion above that legal pluralism exists as a response to the demands of modern plural and diverse societies. However, theories remain abundant as to its actual constituent elements and parameters. Practical examples can only help to elucidate a clearer position in favour of one or another theory. The discourse can also be strengthened by considering legal pluralism from a rights based perspective.

Legal Pluralism as a human right (entrenched in ECHR provisions)

The provisions of Article 9 of the ECHR⁷⁷ grant freedom of religious thought and practice which gives rise to a question of compatibility and necessity where legal pluralism is concerned. Shariah Councils could argue that they form a tenet of religious observance and practice relating to Muslim family law.

⁷⁶ Ibid.

⁷⁷ 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

Despite arguments which may negate this, if the marker for such rights is based on subjective understandings and observances of religious practices, Shariah Councils and similar bodies may successfully argue the right to a quasi-legal space. Correspondingly, there is also a need to balance rights between upholding religious freedom and thus the individual and communal right to enforce religious norms, with other incongruous challenges such as the equal treatment of women which the Shariah Councils are popularly seen to counter.

One of the major concerns espoused by those who oppose Muslim family law being implemented in Britain (and the West at large) is the perceived inequality of treatment of women. Poulter⁷⁸ states that “Muslims should not be allowed to operate a system of Islamic personal law in England because of the risk that the rights of women will be violated in a discriminatory fashion.” He is not alone in making such an assertion.⁷⁹ It is clear that perceptions about Islamic laws and Muslim family law challenging human rights norms in Britain have played a great role in hindering any official recognition of these laws. There are numerous cultural and traditional norms which Muslim communities adhere to which do indeed appear to hinder the rights of women, however, the process of integration itself and transformative processes within the Islamic legal tradition will challenge many such norms which have been transported from countries of origin to Britain. The pivotal point of differentiation lays in identifying cultural norms *vis-à-vis* religious traditions/laws, as often the two are married together

⁷⁸ S. Poulter, ‘The Claim to a Separate System of Islamic Law for British Muslims’, (1990) C. Mallat and J. Connors, (Eds) *Islamic Family Law*, Graham and Trotman, pp 147-166, at 158.

⁷⁹ As well as academics, the discourse can also be seen at the political and social level, most recently under the guise of the Arbitration and Mediation Services (Equality) Bill 2012 presented at the House of Lords which sought to tackle some perceived discrimination faced by Muslim women under Shariah Law.

in Muslim majority jurisdictions. Much of the criticisms levelled against 'Shariah Law' in fact represent opposition to cultural practices which have over time come to represent the norms of societies identified by the West on religious terms. Thus, the Taliban's war against women being educated is seen as an Islamic oppression against women, rather than the cultural norms of a tribal people who believe women's place is in the strict confines of their homes. Any application of Muslim laws in non-Muslim majority jurisdictions must necessarily be predicated by a full analysis of authenticity in Islamic laws by its adherents. Such a task would exclude those who seek to throw the shadows of doubt over the authenticity of Islam as a religion per se,⁸⁰ as it is assumed its adherents are convinced of their faith and seeking steps towards implementation.

Those such as Poulter who argue against the recognition and implementation of Islamic family laws state that it is in the best interests of Muslim women. However, when one considers that the Shariah Councils are operating within a semi-autonomous social field in an arena over which the state has little control, the lack of recognition in fact further hinders women's rights as they are provided with little recourse to justice where the Shariah Councils are not providing a solution for them. Thus, the continued failure of the state to recognise Muslim family law practices has resulted in fertile grounds for the development of faith based ADR mechanisms such as Shariah Councils which are not only implementing the laws which the state refuses to recognise, but

⁸⁰ See for example, P. Crone, *Roman, Provincial and Islamic Law: The Origins of Islamic Patronage*, (1987) Cambridge University Press; J. Wansbrough, *Quranic Studies: Sources and Methods of Scriptural Interpretation*, (2004) Prometheus Books ; M. Cook, *Early Muslim Dogma: A Source-Critical Study*, (2003) Cambridge University Press.

also charging Muslim women hundreds of pounds for the service. The states' lack of recognition ensures that Shariah Councils can continue their work in an unregulated and non-transparent manner. The thousands of cases which Shariah Councils state they are hearing make this an imperative issue for state intervention, although obvious practical difficulties clearly arise.⁸¹ If forced to adhere to some form of institutional framework, Shariah Councils would also have the opportunity to prove their own credentials in providing a service which they deem essential and rebut some of the criticisms levelled against them.

Normative Pluralism and the State Legal System

Some writers have questioned the capacity of equating the term 'law' with religious normative orders⁸² and Chapter Two shall consider further how Islamic laws are formulated. It is clear that the construction of Islamic law and its inherent dynamism would place it beyond that which is considered coherent by the state legal system. Where modern nation states are concerned, it is recognised that laws are used as tools of social engineering, and thus act in a manner which shapes social norms and values.⁸³ For Islamic laws, although the normative origins are distinct, the desired outcome is clearly to shape Muslim society in a specified way. Where the Muslim communities are concerned, there is greater complexity derived from the reality that Islamic law is not homogenous and it exists in varying forms in Britain's diverse Muslim

⁸¹ Bradney offers some practical difficulties such as the remit of the system, and the role of the state. A. Bradney, *Religions, Rights and Laws*, (1993) Leicester University Press, at 58.

⁸² Woodman, (2008), op. cit., at 25.

⁸³ Yilmaz, (2005), op. cit., at 1.

communities. Thus, each British Muslim community is potentially a unique semi-autonomous social field.

One issue to consider is group membership and its prerequisites in terms of identifying those who are part of the semi-autonomous social field. The identity of Muslims in Britain is not restricted to racial grouping, but extends vastly beyond that. Yilmaz⁸⁴ suggests that they are identified on a cultural basis and Poulter⁸⁵ offers the following defining elements: “adherence to certain customs, traditions, religious beliefs and value systems which are greatly at variance from those of the majority white community.”⁸⁶ I would argue that Yilmaz and Poulter do not go far enough as even cultural identification extending across the grounds identified could omit certain groups of Muslims, such as converts to the faith whose only manifestations of religion are oral acceptance with no obvious cultural impact. Such a manifestation of religion can also cover British Muslims from numerous ethnic groups, whose adherence to the faith is limited to a declaration of it.

On the issue of semi-autonomous social fields, Griffiths renders Moore’s theory as being adequate for ‘locating legal pluralism in social structure’,⁸⁷ however, he suggests that it falls short of being adequate for a ‘descriptive theory of legal pluralism’ due to the lack of a conception for what constitutes ‘law’ or the ‘legal’.⁸⁸ The lack of conformity in opinion is merely reflective of the real

⁸⁴ I. Yilmaz, ‘Muslim Law in Britain: Reflections in the Socio-Legal Sphere and Differential Legal Treatment’, (2000) 20:2 *Journal of Muslim Minority Affairs*, pp 353-360, at 353.

⁸⁵ S. Poulter, ‘Cultural Pluralism and its Limits: A Legal Perspective’ in *CRE Britain: A Plural Society. Report of a Seminar*, London: Commission for Racial Equality, 1990.

⁸⁶ *Ibid*, at 3.

⁸⁷ *Ibid*, at 37.

⁸⁸ *Ibid*.

dynamism within theoretical considerations of the law. The debates surrounding legal-pluralism are a healthy reflection of societies around the globe varying their interaction with minority groups, in order to take steps towards real multiculturalism and an open legal system which is able to respond to the needs of all the citizens within its jurisdiction.

Multiculturalism and its Countenance

Multiculturalism is a progressive concept which Modood⁸⁹ defines as “the recognition of group difference within the public sphere of laws, policies, democratic discourse and the terms of a shared citizenship and national identity.”⁹⁰ From the Muslim perspective, Modood identifies advocates of multiculturalism who believe that a more superior form of multiculturalism can be traced within Islamic history than is witnessed in the West today.⁹¹ The term culture itself is difficult to define. From the seventeenth century to the first half of the twentieth century, the philosophical countenance of culture was very much in line with T.S Eliot’s portrayal: “No culture has appeared or developed except together with a religion: according to the point of view of the observer, the culture will appear to be the product of the religion.”⁹² However, this symbiosis between religion and culture has largely now been discredited in modern times. The post-modern reality is that any given culture can be impacted upon by a multitude of religions, as well as political and social norms distinct from religious conviction. Perhaps Eliot was reflecting the Englishman’s

⁸⁹ T. Modood, *Multiculturalism*, (2007) Polity Press

⁹⁰ Ibid, at 2.

⁹¹ T. Modood, ‘British Muslims and the Politics of Multiculturalism’, (2006) T. Modood, *et al* (Eds), *Multiculturalism, Muslims and Citizenship, A European Approach*, Routledge: Oxon, pp. 37-56, at 52.

⁹² T.S. Eliot., *Notes Towards the Definition of Culture*, (1949) Harcourt, Brace and Co, New York, at 13.

worldview at his time, however, it is clear that globalised society is very different today and diversity is its key axiom.

The academic discourse on multiculturalism considers the issue from the community/society perspective as well as the individuals' self-identification perspective. However, there exist palpable reservations about the use of the term 'multiculturalism' as an empirical description of societal diversity.⁹³ Where the Muslim community in Britain is concerned, the social perspective influences the issue of integration while the individual perspective provides the underlying adaptation process by virtue of which British Muslims are forming a new and unique culture. This latter manifestation of multiculturalism based on interaction and knowledge of the British legal system *vis a vis* Islamic family laws will be explored in this research. Thus, an apt definition of multiculturalism is provided by Tie⁹⁴ who states: "multiculturalism refers to a project that attempts to pluralise the terms through which subjects can understand their socio-cultural inter-relatedness against a core set of values about the importance of life."

There are a multitude of complexities in tracing any cultural norm. Jacoby⁹⁵ describes multiculturalism and the corollary cultural diversity and pluralism as a new ideology, and propounded the idea that "cultural differences are diminishing, not increasing"⁹⁶ and this is the very reason why multiculturalism is being glorified; to hide the 'unwelcome' truth. Jacoby rather cynically suggests that only one culture exists in the USA, and that is a culture of

⁹³ R. Mehdi, et al, *Law and Religion in Multicultural Societies*, (2008) DJØF Publishing Copenhagen, at 17

⁹⁴ Tie, (1999), *op. cit.*, at 30.

⁹⁵ R. Jacoby, 'The Myth of Multiculturalism', (1994) 208 *New Left Review*, pp121-126.

⁹⁶ *Ibid*, at 122.

'business, work and consuming.' Outlining the similarities between all Americans in terms of their material wants, their need to work and their desire to live in the suburbs and drive nice cars, he asserts that these aspirations continue despite a supposed difference in their cultures. This raises the questions of which aspect of their personality is more dominant and more reflective of their 'culture;' their ethnic origin or their American dreams? At what point does a new hybrid culture develop and is a society still 'multicultural' once this new culture has developed? These propositions provide points for discussion where British Muslims are concerned as with each new generation, a hybrid British-Muslim culture is more probable, and the question arises whether this is precipitating a new British culture.

A perhaps more instructive elucidation of multiculturalism can be found in the analysis offered by Tie⁹⁷ who presents an epistemological inference which "empowers subjects to entertain both their embeddedness within interpretative traditions and their capacity to alter the terms of their embeddedness"⁹⁸ where multiculturalism is concerned. Using this approach, the subjects of multiculturalism "negotiate alterations in their self-perceptions, both within themselves as individuals and as collectives."⁹⁹ This trans-cultural positioning allows for a multitude of factors which may impact on an individuals' cultural self identification. It allows for the contribution of plural moral and ethical frameworks which shape the cultural identity. Where British Muslims are

⁹⁷ Tie, (1999), op. cit., at 27.

⁹⁸ Ibid.

⁹⁹ Ibid. Tie summarises the theories of Charles Taylor and Frederick Jameson. C. Taylor, 'The Politics of Recognition', (1992), C. Taylor and A. Gutman, (Eds), *Multiculturalism and 'The Politics of Recognition'*, Princeton University Press, Princeton. F. Jameson, *Sartre: The Origins of a Style*, (1961) Yale University Press.

concerned, especially those who have converted to the faith or are second and subsequent generation, this plurality is a certainty. This also reflects the idea that multiculturalism in practice “not only leads to legal pluralism but also to value pluralism”¹⁰⁰ which draws an array of norms from the global sphere and presents it in the domestic sphere. Elements of this current research project seek to identify emerging trends in cultural identification within Britain’s Muslim communities.

In the emerging globalised world, cultural hybridisation is common place, and this is compounded in societies where people from differing cultural backgrounds have existed for significant lengths of time. In the context of Britain and the Muslim communities; this hybridisation has evidently occurred. Menski¹⁰¹ describes the ‘*Angrezi Shariat*’ which is the hybrid law developed by the British Muslim community seeking to implement aspects of Islamic family law in a manner which does not conflict with state law.¹⁰² While this terminology clearly reflects the apparent practices within some Muslim communities, there is a need to formulate a new theory based on the responses to emerging challenges faced by second and subsequent generations of Muslims.

Legal Pluralism and Religious Pluralism in Britain

Migrants are expected to adhere to the culture and legal norms of host states,¹⁰³ and in Britain, the Muslim community has been adapting. However, increasingly, religious groups (including Muslims but by no means exclusive to

¹⁰⁰ Mehdi, (2008) op. cit., at 18.

¹⁰¹ Pearl and Menski, (1998), op. cit., at 276.

¹⁰² References to state law in this thesis focus on the law of England and Wales.

¹⁰³ Yilmaz, (2000), op. cit., at 354.

them) are developing 'resistance strategies'¹⁰⁴ which allow them to merge their religious laws with state laws wherever possible. Such deliberate ordering of religious values and customs has allowed religious groups to flourish and advance their own post-modern culture. Thus, legal pluralism effectively arrived with the migrant communities.

The British government appears to be recognising this and has made a remarkable shift from refusing to protect religious groups under existing anti-discrimination laws until as late as 2010, when the Equality Act 2010 Chapter 1 Section 10 extended anti-discrimination protection to religious groups. On another front, the Marriage (Registration of Buildings) Act 1990 amended the Marriages Act 1949 to allow for the official solemnisation of religious marriages to occur where buildings are registered for the purpose under the 1990 Act. Again, this forms an official recognition of the dual marriage ceremonies undertaken within religious minority communities in Britain and attempts to combine and fuse them. However, the Divorce (Religious Marriages) Act 2002 fails to accommodate Muslim marriages while it provides in clause 10A for the court to withhold a decree absolute until the Jewish *get* has finalised. Thus, the couple would be considered religiously divorced according to Jewish tradition before the courts granted the civil divorce. This form of accommodation has not been extended to the Muslim community, wherein it would deal with a long standing similar problem, despite clause 10A (1) (a) (ii) apparently extending it to 'any other prescribed religious usages'. A test case is required here as there appears to be no reason why Muslim women seeking a *talaq* cannot use this

¹⁰⁴ Ibid.

clause to request the withholding of the civil divorce until the *talaq* is granted. This is backed up by the Lord Chancellor's Department and senior Appeal Court judges.¹⁰⁵ A foreseeable complication arises in the case of unregistered marriages where only the *nikkah* has been concluded, as in this case the courts have no jurisdiction to intervene as it relates to a marriage unrecognised by law.

Even in the absence of state action more generally, legal pluralism would not be affected. Griffiths points out that for legal pluralism to be in existence in a society, it does not necessarily require that the state recognise, incorporate or validate this parallel legal order.¹⁰⁶ Its mere existence as a social reality gives rise to legal pluralism. Woodman adds the reminder that legal pluralism has increased due, in part, to the migration of people who bring with them sets of religious laws which are "more authoritative for them than the laws observed by the majority."¹⁰⁷ He goes on to state that those arriving from former colonies where European laws were enforced come from an experience under which they were compelled to apply two sets of laws and a comparable transplantation of laws is perhaps being witnessed.¹⁰⁸ This is certainly an issue for British Muslims of South Asian origin.

The reality of legal pluralism in existence in Britain is reflected by statistics from Shah-Kazemi's research wherein at least 27% of the participants who

¹⁰⁵ Menski, (2008), op. cit., at 59.

¹⁰⁶ Griffiths, (1986), op. cit. 'What is Legal Pluralism' in *Journal Legal Pluralism & Unofficial Law*, 24, pp1-55, at 12.

¹⁰⁷ Woodman, (2008), op. cit., at 24.

¹⁰⁸ Ibid, at 25.

married in the UK did not register the marriage according to state law.¹⁰⁹ It can be expected that this number has increased in the last 10 years. Menski concludes that this is a form of 'legal pluralism in action'.¹¹⁰ This reflects the social state of affairs which give rise to legal pluralism thus supporting Griffiths' contention that the state does not need to be involved.

With the arrival of forums which implement Islamic law in Britain, the complexity deepens. In considering this, one must look at the law in the operational context rather than just as abstract rules.¹¹¹ Where there is a conflict between the laws of the state and the plural laws, it is the state legal system which takes priority. This gives rise to complex questions such as whether this then infringes on the citizens' human rights.

While officially Britain still espouses one set of laws for everyone, the reality is possibly very different, as it was "never a monolithic society based on monoculture."¹¹² The implementation of Islamic laws in Britain clearly reflects the changing nature of the state. The question is whether the state can compel British Muslims to abandon their norms and religious practice. Menski suggests that after the events of 9/11 and 7/7, a new reality is that "Muslims in Britain are simply refusing to follow English legal requirements, even though they are

¹⁰⁹ S. Shah-Kazemi, *Untying the knot: Muslim Women, Divorce and the Shariah*, (2001) Nuffield Foundation: London, at 31.

¹¹⁰ Menski, (2008), op. cit., at 47.

¹¹¹ A useful discussion relating to Legal Pluralism and Islamic law in Britain is provided by S. Bano, *Complexity, Difference and 'Muslim Personal Law': Rethinking the Relationship between Shariah Councils and South Asian Muslim Women in Britain* (PhD thesis, University of Warwick 2004) 26-36.

¹¹² H. A. Hellyer, 'British Muslims: Past, Present and Future', (2007) 97 *The Muslim World*, at. 225.

aware of them.”¹¹³ Thus, any such endeavour by the state will be fiercely opposed, and with the above average birth rate within the community and further immigration,¹¹⁴ numbers of British Muslims is set to grow and thus, the issue needs serious consideration.

British Muslims have displayed an ability to implement legal pluralism in practice by navigating between two systems of law, one official and one personal. Yilmaz’s¹¹⁵ study on legal pluralism concerning Muslim communities in Britain, Turkey and Pakistan revealed that in all three unique settings, official state law is undermined by the needs of the community and their self-adaptation in order to implement Islamic laws. While this study is not conclusive, it certainly seems to be supported by social norms within minority religious communities in Britain, each of whom have built their own informal systems and norms for dispute resolution. This challenges legal centralist views.

Muslims in Britain and Citizenship: the Impact of Religious Variances and Multiculturalism

British Muslim face tensions between the politics of recognition *vis a vis* the politics of identity.¹¹⁶ A major question is whether we can ever achieve an enforced legal assimilation in a multicultural society. Thus, can legal intervention diminish the influence of informal religious laws? Is this necessary

¹¹³ Menski, (2008), *op. cit.*, at 47

¹¹⁴ S. Hussein, *Muslims in the Map, A National Survey of Social Trends in Britain*, (2008) IB Tauris & Co Ltd, London, at 44.

¹¹⁵ Yilmaz, (2005), *op. cit.*, at 4.

¹¹⁶ Numerous texts consider this issue, including but not limited to: T. Modood *et al*, *Multiculturalism, Muslims and Citizenship*, (2006) Oxford: Routledge; and B. Parekh, *Rethinking Multiculturalism, Cultural Diversity and Political Theory*, (2002) Harvard University Press

or even desirable? Where British Muslims are concerned, Yilmaz¹¹⁷ proposes that demands for recognition of Muslim 'personal law' is a direct response to perceived discrimination by state law against Muslims.¹¹⁸ Such perceptions were supported by the lack of recognition of Muslims as a minority group under anti-discrimination legislation (which was not corrected until 2010) amongst others.

During the Ottoman rule when Sultan Sulayman entered the peace treaty with France in 1535, it provided for rights of Ottoman citizens residing in France and vice versa. However, these individuals remained citizens of their respective states. The contemporary reality is that British citizens who follow the Islamic faith are required to show loyalty to the state, but are theoretically governed by Islamic law in every aspect of their life. When considering the issue of citizenship and the state, the concept of the state within Islamic law is very different to contemporary international law as the notion of sovereignty of the state is a foreign concept. There is only one sovereign according to Islamic law and that is 'God' and the ultimate allegiance and loyalty is to Him. Thus, the notion of being loyal to the state over and above any other entity is unfamiliar to Islam thus Muslims are now negotiating away from a fundamental tenet of their faith.

A major issue which would be presented by recognition of some Islamic family laws within Britain is ascertaining what the specific rules are. Part of the dynamism of Islamic rules of law emanate from the diverse interpretations of

¹¹⁷ I. Yilmaz, 'Law as Chameleon: The Question of Incorporation of Muslim Personal Law into the English Law', (2001) 21:2 *Journal of Muslim Minority Affairs*, pp297-308.

¹¹⁸ *Ibid*, at 298.

rules of law. It would be a mammoth task to formulate one set of codified laws which could regulate the entire Muslim population in Britain. Islamic law has historically been a legal system of its own to the exclusion of those who do not form part of the membership of the group. Another question is how to identify those who qualify for group membership. This may seem self-explanatory but can give rise to a multitude of challenges especially if one party does not, for a plethora of potential reasons, want to be identified as part of that group.

On the other hand, Muslims themselves can be applying legal pluralism personally. Yilmaz states that this can occur at four levels: “individual, communal, national, and cross-national or global.”¹¹⁹ This presents added complexity and in the case of the latter category, it is removed from the jurisdiction of the state. The issue of identity where Muslim citizens are concerned is a pivotal point for consideration, particularly self-identification and its constituent factors.

The Muslim Diaspora? Identification and Change

A secondary, yet pertinent issue for consideration is the idea of a Muslim Diaspora and the significant question: when does a community cease to be a Diaspora? This question engages the issue of citizenship, as it draws on the affiliation of a citizen with the state, *vis a vis* his/her identification with the country of origin. The term ‘Diaspora’ is borrowed from the Greek language and refers to ‘dispersion’; most popularly used in reference to the Jewish people sent into exile from Palestine, and other melancholic associations. A more precise and modern definition is “the movement, migration, or scattering of a

¹¹⁹ Yilmaz, (2005), *op. cit.*, at 4.

people away from an established or ancestral homeland.”¹²⁰ Further development of the term has witnessed interplay between migration and the idea of contribution to development of the ‘home’ territory.¹²¹ However termed, the idea of diaspora is a mutual process of self-identification as well as external classification.

Vertovec¹²² provides an interesting analysis of the components of ‘Diaspora’, demonstrating how Diasporic identification hinges on elements which are variable and thus, identification can transform over time:

“Belonging to a diaspora entails a consciousness of, or emotional attachment to, commonly claimed origins and cultural attributes associated with them. Such origins and attributes may emphasize ethno-linguistic, regional, religious, national, or other features.”¹²³

Where British Muslims are concerned, the period of mass migration ended in the 1980’s, and 20-30 years on, the context and concept of minority communities has changed. While each distinct minority community manifests its interaction with the state by exhibiting diverse behaviours, Schuman¹²⁴ offers an interesting paradigm for the adaptation of Muslims migrants in the US, which can be seen as equally applicable in the British context. He outlines

¹²⁰ Dictionary definition, Merriam-Webster.

¹²¹ See generally, B. Page, and C. Mercer, ‘Why do People do Stuff? Reconceptualising Remittance Behaviour in Diaspora-Development Research Policy’, (2012) 12:1 *Progress in Development Studies*, pp. 1–18

¹²² S. Vertovec, ‘The Political Importance of Diasporas’, (2005) Migration Information Source, available online at <http://www.migrationinformation.org/Feature/display.cfm?ID=313> (Last visited 17 December 2012)

¹²³ Ibid.

¹²⁴ C. Schumann, ‘A Muslim Diaspora in the United States?’ (2007) 97 *The Muslim World*, pp. 11-32.

conceptual phases, described as 'politics of identity' and 'myth of return' in the 1970's, 'taking root and opening up' in the 1980s, and 'empowerment and the shaping of a new universalism' in the 1990s.¹²⁵ This provides an interesting model of the transitional processes which migrant communities undertake in defining and re-defining their identities. However, in the 21st century in the American context, the events of 9/11 shaped an altered and specific course which marginalises Muslims from the mainstream and imbues them with suspicion. In the British context, parallels can be drawn with Schuman's model of behaviour for the 1970, 80's and 90's. However, the 21st century has brought specific challenges, of which a significant part is a consequence of 9/11, but divergences are witnessed in terms of the responses of the communities and perceptions of Muslim communities' "withdrawal from civil society."¹²⁶

Diasporas are expected to retain strong ties with the land of ethnic origin, which subsequently dictates the interaction with the jurisdiction of migration.¹²⁷ Where British Muslims are concerned, the demographic profile reveals that approximately 60 per cent are now thought to have been born in the UK,¹²⁸ an increase from 46 per cent revealed by the 2001 census.¹²⁹ The consequence of this is likely to be Muslim communities who are removed from their lands of ethnic origin, with weakening ties, likely to be extinguished upon the passing of

¹²⁵ Ibid, at 14-27.

¹²⁶ J. Gest, *Apart, Alienated and Engaged Muslims in the West*, (2010) Hurst & Company, London, at 1.

¹²⁷ "Full assimilation in the new place or the total severing of ties to the homeland renders a group no longer diasporic," Saint-Blancat, quoted by P. Johnson, *Diaspora Conversions, Black Carib Religions and the Recovery of Africa*, (2007) Berkeley, University of California Press, at 33.

¹²⁸ S. Ahmed, *Seen and Not Heard, Voices of Young British Muslims*, (2009) Policy Research Centre Publication, at 48.

¹²⁹ S. Hussein, *Muslims in the Map, A National Survey of Social Trends in Britain*, (2008) IB Tauris & Co Ltd, London, at 44.

the older generations. With this progressive entrenchment, it is perhaps time to move away from the notion of a 'host'¹³⁰ community within which Muslims live, to the notion of a shared identity. Consequently, the use of the term 'Diaspora' to describe British Muslims as one monolithic group is also problematic. A study in 2009 conducted by the Policy Research Centre¹³¹ revealed that the young Muslims interviewed stated that there was nowhere else for them to return 'home' to, revealing a clear disconnection from the ideals of 'diaspora'.

Conversely, in identifying the nature of the relationship with the state, it is clear that there is no monolithic characteristic on this front either. Saeed¹³² describes the following potential affinities: "Muslims living in the West but hostile to the West, Muslims living in the West grudgingly with no interest in being part of Western Society, Muslims living in the West with some admiration for its values but undecided as to whether they want to be full members of the society, and Muslims who are 'Western' by virtue of where they were born and live and have no difficulty in being Western Muslims." ¹³³ He continues to explore the particulars of these affinities and it becomes apparent that despite the wide divergences between their attitudes to the state, none negates the need for or use of faith based ADR mechanisms.

¹³⁰ S.S. Ali, 'Religious Pluralism, Human Rights and Muslim Citizenship in Europe: Some Preliminary Reflections on an Evolving Methodology for Consensus', (2007) in T Leonon and J Goldschmidt (eds) *Religious Pluralism and Human Rights in Europe* (Intersentia, Antwerp) pp. 57-79, at 59.

¹³¹ Ahmed, (2009), op. cit.

¹³² A. Saeed, 'Muslims in the West and their attitudes to full participation in Western societies: some reflections', (2009) in G.B. Levey and T. Modood, *Secularism, Religion and Multicultural Citizenship* Cambridge University Press, pp 200-215

¹³³ Ibid, at 208.

The present research study engages young Muslims ages 18-45, of whom 70 per cent were revealed to have been born in the UK. Thus, the respondents will not be termed as part of a 'diaspora', and will be termed 'British Muslims,' as their connection to the lands of origin come under question. This is a significant distinction as this study aims to explore the socio-legal behaviour of British Muslims with citizenship loyalties to the state. Where faith based ADR is concerned, Bano opines that "the development of Shariah Councils encapsulates the development of Islamic religious practice in Britain."¹³⁴ It therefore follows that the development of Muslim Arbitration Tribunal (MAT) type forums reflects an increase in awareness of and interaction with, the British legal system by British Muslims. Thus, we are witnessing an integrationist methodology for implementing religious laws. In light of this, a more prudent description for British Muslims may be to term them 'citizens who follow a minority religion' as they are not a class apart but very much a part of that nation through the requisites of citizenship and personal acclimatisation.

Developments such as the MAT do not undermine the need for the national courts to show an affinity for understanding cultural and religious differences which exist in the UK. Cases such as *EM Lebanon*¹³⁵ can always be contrasted with *Khan v Khan*.¹³⁶ In *EM Lebanon*, Lord Hope stated "[t]he appellant came to this country as a fugitive from Shari'a law." His statement stirred outrage in some quarters of the Muslim community and legal profession, as his description of an arbitrary nature of awarding custody of children in Lebanon to fathers was wholly inaccurate and superficial. Conversely, in *Khan v Khan*, Lady Justice

¹³⁴ Bano, (2004), op. cit., at 117.

¹³⁵ *EM (Lebanon) v Secretary of State for the Home Department*, [2008] 64 UKHL

¹³⁶ [2008] Bus LR D73

Arden commented “where the parties are members of a particular community, then in my judgement the court must bear in mind that they may observe different traditions and practices from those of the majority of the population.”¹³⁷ She further opined that pluralism was a fundamental value espoused by the ECHR which “involves a recognition that different groups in society may have different traditions, practices and attitudes.”

Of course questions arise about whether, when and to what degree the state should be expected to provide for these differences, and the perspective of the participants will be explored in this research. Where ADR is concerned, the state has provided quasi-legal space for forums other than state institutions, however, the logic prompting this development concentrated on the need to ‘unclog’ a strained legal system and reduce costs of the adversarial process. Thus, the resultant exposition of ‘pluralism’ within faith based ADR mechanisms was inadvertent.

Legal Framework for Alternative Dispute Resolution Mechanisms and Arbitration in Britain

The development of more sophisticated forms of ADR stemmed from the need to provide forums for civil litigation which reduced the cost and time elements associated with the process.¹³⁸ Additional factors to consider where litigation concerns family members include the formality of the adversarial process which can lead to greater estrangement, resentment and loss of trust between the disputants. Thus, the provision of ADR enables dispute resolution which is user friendly and can be targeted to the needs of the disputants. The process

¹³⁷ Para 45-47.

¹³⁸ A. Bevan, *Alternative Dispute Resolution, a Lawyer's Guide to Mediation and Other Forms of Dispute Resolution*, (1992) Sweet & Maxwell, at 1

assumes the same objective as formal litigation, which is to establish the rights and responsibilities of the parties.¹³⁹

Traditional dispute resolution is expected to be 'client' led as it is essentially a service being provided by lawyers in return for payment. Where the clients require the application of specified rules of law, whether formal or informal in nature, the legal system has a duty to provide the relevant legal space, within reasonable limits, in order to adequately fulfil its principle function of enabling the pursuit of justice. It must be accepted that the state legal system and its institutions have a limited remit where legal specificities of certain groups within society are concerned, and therefore there needs to be supplementary legal space for attaining a form of subjective justice. ADR methods provide a fashioned remedy for this existential need. The use of mechanisms which do not involve the formal institutions of the state legal system extends the scope for dispute resolution options significantly. This raises questions about unintended impacts on the position of the state's monolithic legal system, as evidently legal pluralism in some form can be seen in action here.

The forms of ADR are many and varied, of which arbitration is the most structured with the espousal of legislative construction, which shall be considered in greater detail further below. Other forms of ADR include, but are not limited to, the following: Negotiation, Adjudication, Mediation, Med-Arb (Mediation followed by Arbitration), Conciliation, Private Judging (Seen in the

¹³⁹ A. Tweeddale, & K. Tweeddale, *Arbitration of Commercial Disputes, International and English Law and Practice*, (2005) Oxford University Press, at 4.

USA) and Mini-Trials.¹⁴⁰ For family law issues, Mediation is an ideal forum which takes into account the sensitivity of the issues and provides a process conducive to finding a balance between the parties. Here, a diplomatic third party helps the disputing parties reach a settlement between them, and the role is merely to assist in this process.¹⁴¹

Considering the other forms of ADR which are available, each has its own merits with varied scope in terms of applicability in family law disputes. Negotiation as ADR is non-adjudicatory and provides the perfect first-port for dispute resolution. Negotiations can be private between parties, or involve lawyers as a means to settle a dispute before they require more costly and formal litigation. It is envisaged that most disputes can utilise ADR in the form of negotiation and family law disputes are prime contenders. Within Islamic legal and social tradition, negotiations between families are customary for resolving matrimonial disputes.

In considering other ADR processes relevant to Muslim family law disputes, a Conciliator would allow for greater intervention than a mediator in assisting in dispute resolution between the parties.¹⁴² However, Conciliation would depend largely on the position of trust, power and respect held by the individual Conciliator, in order to possess the authority to enforce a resolution. Adjudication is a process used mainly for construction related disputes. Mini-

¹⁴⁰ An array of text books are available discussing ADR in detail, including, Bevan, (1992), op. cit., S. Blake *et al*, *A Practical Approach to Alternative Dispute Resolution*, (2011) Oxford University Press; P. Newman, *Alternative Dispute Resolution*, (1999) CLT Professional Publishing Ltd.

¹⁴¹ P. Newman, *Alternative Dispute Resolution*, (1999) CLT Professional Publishing Ltd., at 9.

¹⁴² Ibid.

Trials are more formal and very similar to court proceedings in nature.¹⁴³ It is highly probable that Muslim couples seeking dispute resolution between them would informally seek Negotiation and Mediation as a first means for resolution. Mini-Trials are an unlikely scenario.

ADR and Muslim Family Law in British Muslim Communities

Where Muslim family law in Britain is concerned, the existing framework supports faith based ADR in the form of Negotiation, Mediation, Conciliation and Arbitration; with Shariah Councils and the MAT fulfilling one or more of these numerous functions. However, one pivotal disparity is that the disputing parties are not able to progress on to the national courts if the issues remain unresolved, and the courts and judges will not apply Muslim Family law unless some aspect of state laws are intertwined, such as contract law for *Mahr* cases. Only Arbitration is able to utilise the enforcement powers of the High Court, and thus far, only the Muslim Arbitration Tribunal purports to implement the structural framework specified in the Arbitration Act. However, crucially, the need to enforce a decision has not yet risen and so this remains untested.

The Arbitration Act 1996 embodies the current legal position on an area which has been law in Britain since 1698 when the first recorded British statute was formulated, the Arbitration Act 1698.¹⁴⁴ In the remit of ADR, Arbitration is a powerful tool as it permits dispute resolution without the expense and time of a court hearing, while accommodating equal enforcement powers where decisions are concerned. The Arbitration Act's primary function was envisaged

¹⁴³ Ibid.

¹⁴⁴ H. Crowter, *Dispute Resolution Guides, Introduction to Arbitration*, (1998) LLP Reference Publishing, at 5.

as covering commercial disputes, where parties are generally under contractual obligations to resolve disagreements using this mechanism. However, this by no means limits the scope and the practiced reality has brought many other forms of civil litigation within its capacity. The form of law applied in the arbitration process can be specified by the parties, and thus, forums such as the MAT have been established by applying specific rules of Muslim law to the disputes brought before them. The privacy allowed in hearings, with the additional expertise of Arbitrators means that this is a cheaper method of resolving disputes than engaging in the courts, and also provides for a forum wherein certain levels of expertise are guaranteed which may be absent within the traditional courts and judiciary.

The Arbitration Act was deliberately drafted to allow autonomy to both the disputing parties and the arbitrators away from the courts.¹⁴⁵ Arbitration procedures are required to meet certain basic standards where time span and costs are concerned, without compromising on issues such as expert evidence and legal representations which are still within the remit of the Act.¹⁴⁶

Where Muslim family law is concerned, the nature of disputes is exceptionally personal and requires a skilled, tactful and sensitive approach to resolution, applying a specific set of laws; dynamic though they may be in nature. ADR in numerous forms, and most strikingly in the form of arbitration, provides the requisite legal space for achieving dispute resolution in an informal yet

¹⁴⁵ Newman, (1999), op. cit. at 3-4.

¹⁴⁶ Section 37.

controlled environment.¹⁴⁷ In light of these discussions, the operational context of faith based ADR mechanisms such as Shariah Councils requires further exploration in order to substantiate its positioning in the informal dispute resolution process.

Operational Contexts of Shariah Councils

Historically, Muslims living in jurisdictions such as colonial India were allowed autonomy and self governance on issues concerning 'personal status' laws, or *ahwal al-shakhsiyya*. Thus, Islamic legal traditions on issues related to family law remained the purview of the communities themselves and this has in modern times become an entrenched phenomenon in Diasporic communities wherein transformative processes constructed and reconstructed legal traditions and developed socio-legal solutions to resolve disputes. Scholars such as Menski and Ballard describe this as 'legal self-organisation'.¹⁴⁸ Where traditions purporting to carry the status of religious 'laws' are involved, there must necessarily be some form of authority to determine the nature of the laws and the regulations needed to fulfil them. For the cycle of justice to be complete, there must also essentially exist forums for resolving disputes arising from conflicting interests involving the application and maintenance of these laws. Thus, the Shariah Councils were ushered in.

Operationally, the Shariah Councils are conducted in a manner that strictly separates and segregates them from the state's legal institutions, however,

¹⁴⁷ Research shows that the more formalised the method of dispute resolution is involved, the greater the loss of control over the dispute by the parties to it. Newman (1999), op. cit., at 9.

¹⁴⁸ P. Shah, and W. Menski, (Eds) *Migration, Diasporas and Legal Systems in Europe*, (2006), Routledge, Cavendish, at 4.

questions still arise about the institutional pluralism which appears to manifest as a result of their existence. They operate solely for the use of Muslims and they purport to solely apply 'Islamic laws' to resolve disputes involving marriage and divorce between Muslims in Britain. These disputes usually revolve around issues of *nikkah*, *talaq* and *mahr* and as these issues are largely alien concepts to the state legal system, alternative informal legal spaces are sought, where Islamic laws are understood and applied.

It should be noted that the 'laws' which are being applied by Shariah Councils are limited to the subjective understanding and adherence of the individuals within the institutions. One may easily argue that this remains the case for all religious laws regardless of specific faith or denomination. However, the burden of proving the origins of laws become more pronounced when considered in the quasi-legal space occupied by Shariah Councils. On the other hand, they do provide a transnational service in a way the British Courts will fail to do, as the members of the Councils are usually versed in the languages and customs of the state where the disputants ethnically originated from, and thus have an ability to contextualise disputes beyond the national boundaries where specific customs and norms are concerned. This reality means that they are better tailored to meet the needs of certain sections of Muslim communities, namely those who can still be labelled as forming part of the 'diaspora'. However, this also means that idiosyncrasies and customs which are alien to state laws and cultures may also be enforced within this forum, to the point that even the very approach to dispute resolution may be brought into question. As shall be detailed in Chapter Four (Negotiating Faith Based ADR Mechanisms: Conceptual

Frameworks, religious Theology and a Plural Legal System), a major cause for concern has been the issue of equality for women. Charges of discrimination have been made repeatedly against Shariah Councils.¹⁴⁹ Thus, one pivotal area of concern remains the manifestation of rules related to Muslim family law which the Councils apply, and the resultant impact on British Muslim women. These issues shall be considered further in later chapters.

Conclusion

This chapter has delved into the complexities surrounding the establishment of faith based ADR mechanisms tasked with providing dispute resolution responsibility with the application of Islamic laws. Globalisation has brought with it many challenges including the necessity for societies to adapt to meet the needs of their changing populations. Arguably, there is no greater right for each citizen than the provision of adequate recourse to justice where the need arises. This has brought Britain's monolithic legal culture into sharp question, with many theorists arguing that legal pluralism is already in play, that it does not require state sanctioning and is a reflection of the facts on the ground. In the case of Britain, this can be seen at the informal institutional level with the existence of the MAT and Shariah Councils.

The negotiation between the theoretical, legal and social perspectives on legal pluralism reveals that British Muslim communities are living a legal plural reality. Whether the 'laws' are imposed by informal bodies such as Shariah

¹⁴⁹ In June 2012, a Bill was presented to the House of Lords by Baroness Cox on the grounds that Shariah Law in Britain needed to be curbed. The Arbitration and Mediation Services (Equality) Bill claimed to tackle discrimination suffered by Muslim women under Shariah Law. An additional criticism levelled at Shariah Councils was that they purportedly misled disputants about their jurisdiction to hear civil and criminal law cases.

Councils, or self regulated through individual religious convictions, they are powerful rules which are potentially more coercive than state law. While Islamic law can be used as a normative base in bringing change to the state legal system, it is apparent that Muslim communities are instead using them to become, to some extent, self-regulating where family law issues are concerned. While this is a limited forum, it is an issue which one can expect will touch the lives of the majority of British Muslims in some form. An additional consideration of the human rights dimension also lends support to the argument that British Muslim communities may be entitled to dispute resolution forums which allow the expression of their faith.

In considering the multiculturalism project, however, it appears apparent that allowing the development of Shariah Councils is a move towards segregation which means the melting pot proposed by multiculturalism fails. This quagmire may be overcome by using state institutional frameworks to merge faith based ADR mechanisms with existing and accepted forms of dispute resolution. The Arbitration Act provides a structural framework which is being utilised by the MAT, and other forms of ADR are implemented by informal Shariah Councils. The result is complex and interwoven legal and quasi-legal dispute resolution forums which provide British Muslim citizens with a choice of laws and forums.

Chapter Two

Islamic Law: Early Theoretical Developments, Institutional Authority and the Law in Practice

Introduction

The question of ‘what is Islamic Law?’ is a complex one.¹⁵⁰ In order to understand the current construction, application and implementation of Islamic laws within British Muslim communities, one must look at the original legal theories and juridical developments within this complex system of ‘law’ and its interaction with both the followers of the faith and those governing them. At the outset it should be stated that there is no single framework that fits all, as there are a multitude of schools of thought and opinions constituting the Islamic legal traditions, each of which has an impact on how any given Muslim community is affected by the laws in the present day. Significantly, there has never historically been a single text which embodied all Islamic law in its varying forms.¹⁵¹

At the initial juncture, the term ‘law’ itself comes into question as the historic reality of Islamic laws and what we understand of the term law in the modern

¹⁵⁰ There are an abundance of texts available which present the basic construction of Islamic Law, including the following: H. Kamali, *Shari’ah Law, An Introduction* (2008) Oneworld; W. B. Hallaq, *An Introduction to Islamic Law* (2009) Cambridge University Press; H. H. Hassan, *An Introduction to the Study of Islamic Law* (2005) Adam Publishers; W. B. Hallaq, *The Origin and Evolution of Islamic Law* (2005); A.R. Doi, and A.S. Clarke, *Shari’ah, Islamic Law* (2008) Taha Publishers; A.A. Ajjola, *Introduction to Islamic Law* (2007) Adam Publishers; N.J. Coulson, *A History of Islamic Law* (2001) Edinburgh University Press, and for the leading Orientalist view, J. Schacht, *An Introduction to Islamic Law* (1964) Oxford University Press.

¹⁵¹ J. Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine*, (1998) University of California Press, at 12.

context represent two very different constructions.¹⁵² Concerning Islamic law, there remains a tendency to view its rules as being in the main merely speculative in terms of personal religious convictions. The Islamic laws which can carry a practical administrative workable function in a state legal system are few, although modern 'Islamic' theocracies assert that they are modelled on such rules of law, including Saudi Arabia and Iran to name but two. Significantly, at the time of the revelations, there was "no settled form of government"¹⁵³ within Arabia and leadership was largely the privilege of the nobility. Consequently, the degree to which revelation appeared to relate to and correlate with the actions of an Islamic state were muted. However, subsequent generations clearly embarked on the expansion of the Islamic empire with its built in mechanisms of central and localised government. The precedents set during those early periods have greatly influenced Islamic jurisprudence on the area and consequently shape modern understandings of the issues.

This chapter will chart the early stages in the development and formulation of Islamic Law by setting out the sources of law and the process of 'legislating' from the time of the death of the Prophet Muhammad (peace be upon him).¹⁵⁴ It will consider the complex process of formulating legal principles and the application of laws as part of state administered judicial systems. It will conclude with consideration of the transformative processes which have occurred leading to changes in jurisprudence, and the composition of the state

¹⁵² W. Hallaq, *Sharia'a, Theory, Practice, Transformations*, (2009) Cambridge University Press, pp 2-3.

¹⁵³ M.A. Abdur Rahim, *Muhammadan Jurisprudence*, (1911) Law Publishing Company, Lahore, (Reprinted in 1978), at 3. While this was the wider reality, however in Makkah itself, due to the presence of the Kabah, there existed more organised leadership.

¹⁵⁴ As a sign of respect to all prophets, the words 'peace be upon him' follow any reference to them. For the purposes of this chapter, this reference will only be made once.

and balance of powers during the Ottoman Empire and the period of British colonial rule over India; the impacts of which can still be seen today within the Muslim communities in Britain most of whom ethnically originate from the Indian Subcontinent.

Throughout the discourse, there is a running theme of the traditionalist/rationalist division where Islamic jurisprudence and its evolution are concerned. When applying the rules favoured by traditionalists, there is often a lacuna to be bridged between the 21st century reality of the nation state, law and equality of all citizens; and the notion of a clear demarcation between Muslim and non-Muslim jurisdiction which struggles to frame modern realities. The purpose of this chapter is to set out the Islamic legal framework within which faith based ADR mechanisms such as Shariah Councils exist and operate in Britain today and to question their professed mandate under principles of Islamic Law.

Distinguishing Islamic law and Muslim practice

One distinction which is to be made from the outset and will prove to be a running theme throughout this thesis is the premise that there is a separation between what can legitimately be termed 'Islamic law' and what is in actual fact Muslim practice. The former can be found in the established principles developed with a consensus of agreement from religious scholars and leaders, using established jurisprudential methodology, although the principles may have evolved through the centuries. Muslim practices on the other hand are the traditions of Muslim-majority jurisdictions which do not necessarily conform to the principles set out in Islamic jurisprudence, or are the results of innovations within the prevalent cultures of the Muslim majority jurisdictions which have

little or no basis in Islamic doctrines. Zafrulla Khan stated that “Muslim rulers have not uniformly given full effect to the safeguards designed to secure the dignity and worth of the human person, with which Islamic jurisprudence abounds; and Muslim society has had to endure tyranny at the hands of rulers who usurped and exercised authority for selfish ends.”¹⁵⁵ Thus, although there are modern nation states that claim to be Islamic theocracies, when the link between established Islamic laws and the state’s practices is scrutinised, it is questionable whether the latter conforms to the former on a number of fronts including most notably their penal codes.¹⁵⁶

A fitting example here would be the law in Pakistan concerning allegations of rape. In order to secure a conviction, the law required either a confession from the perpetrator or four witnesses to the act to testify for a case of rape to be proven.¹⁵⁷ This burden of proof can be found in the Islamic law related to adultery where a man and woman can only be accused if there are four witnesses to the actual illicit intercourse. In Pakistan, this was erroneously extended to cover rape, and the result is that a victim can only report a rape if there were four witnesses to testify. In the absence of this, a woman who reports a rape will herself be punished for adultery. This absurdity does not reflect the Islamic law position on the issue and clearly leads to injustice which the basic Islamic law principle of *Adl* (justice) opposes.¹⁵⁸ However, a nation

¹⁵⁵ M.C. Bassiouni, ‘Islam: Concept, Law and World Habeas Corpus’, (1969) 1 *Rutgers-Cam Law Journal*, pp 160-201. Forward by Sir M. Zafrulla Khan, at 161.

¹⁵⁶ This is by no means a failure that is limited to Muslim state leaders and history narrates such exploitations by leaders of an array of states and religions.

¹⁵⁷ S. Joseph, & A. Najmabadi, *Encyclopaedia of Women and Islamic Cultures: Family, Law and Politics*, (2005) Martinus Nijhoff Publishers (The Netherlands), at 703.

¹⁵⁸ See generally, S. S. Ali, ‘Interpretative Strategies for Women’s Human Rights in a Plural Legal Framework: Exploring Judicial and State Responses to Hudood laws in Pakistan’,

state professing to be 'Muslim' enforced it, thus exemplifying the distinction that can be drawn between Islamic law and Muslim practice.¹⁵⁹

This demonstrates the need to ensure that Muslim practices, are scrutinised to ensure that their mandates do indeed originate in established Islamic principles and practices, whether directly or in a transformative form. Thus, before considering the Shariah Councils in their modern form, there is a need to trace the transformative processes in the administration of justice within the Islamic legal traditions throughout Islamic history. It is clear that fourteen centuries of history and legal tradition cannot be covered in its entirety nor in great depth in a single chapter. Thus, the rudimentary elements shall be covered as an overview, with particular focus on the evolutionary frameworks which are significant for the present study.

The Revelation

The traditional Islamic religious belief is that the Qur'an was divinely revealed to the Prophet and the religious guidance was supplemented by the *sunna* (or actions of the Prophet) as recorded in the written collections of *hadith*. These formed the primary sources for Islamic jurisprudence. The idea of an Islamic state did not exist in the initial period of Prophet-hood and revelation, and it was largely for succeeding generations to resolve Islamic jurisprudence on the political administration of the Muslim state, and then the Islamic Empire which was formed within a relatively short period of time thereafter. By the end of the

(2006) A. Hellum, S.S. Ali, J. Stewart & A. Tsanga, (eds.) *Human Rights, Plural Legalities and Gendered Realities: Paths are Made by Walking*, Harare: Weaver Books, Chapter 15.

¹⁵⁹ Following heavy criticisms levelled against this evidential burden both in Pakistan and from around the world, the Protection of Women (Criminal Laws Amendment) Act 2006 was passed to remedy the situation.

first century after the death of the Prophet, the Islamic empire had spread across the whole of North Africa, parts of Europe, and Western Asia.¹⁶⁰ A system of law to govern this new empire and its subjects became a necessity but was not specifically provided during the Prophetic era.

Islamic law did not emanate from the state as modern law does¹⁶¹ and was not in codified form. The principles were interspersed throughout the expansive narratives within the Qur'an and *sunna*. As the development of Islamic law predates the notion of a nation state, the reading and understanding of its sources and its general advancement will not necessarily reflect the construction of modern law. Hallaq¹⁶² goes as far as stating that for the term 'Islamic law' to truly reflect what is meant by *Shariah*, "we would be required to effect so many additions, omissions and qualifications that would render the term itself largely, if not entirely, useless."¹⁶³ However, he concedes that the issue is one that is insoluble and therefore we must continue with the term 'Islamic law' while expounding the major differences between the latter term and the modern construction of 'law'. Consequently, the application of Islamic law covers both formal and informal systems and both private and public forms of religious 'regulation.' For the purposes of this thesis, the term Islamic law shall be construed as 'those rules and regulations of Islamic jurisprudence derived using established methodological principles, as understood and interpreted by generations of jurists and scholars of Islamic legal traditions.'

¹⁶⁰ A. Ajiola, *Introduction to Islamic Law*, (2007) New Delhi, Adam Publishers, at 2.

¹⁶¹ Hallaq (2009), *An Introduction to Islamic Law*, op. cit., at 8.

¹⁶² Hallaq (2009), *Sharia'a, Theory, Practice, Transformations*, op. cit.

¹⁶³ *Ibid*, at 3

Critical analysis of the development of Islamic jurisprudence abounds in academia. There are two very distinctive viewpoints in the discourse concerning the authenticity of the 'Islamic' laws which have been established since the death of the Prophet which will be discussed briefly below. However, as this research partly focuses on faith based ADR mechanisms such as Shariah Councils in Britain, wherein the traditionalist views of Islamic law are largely applied, most of the discussion here will focus on this latter formulation.

In considering the sources of law, only a minor percentage of the vast guidance found in the *Qur'an* and *hadith* can be interpreted as rules of law. In deriving the rules, Professor Nyazee¹⁶⁴ makes the astute observation that an "exact parallel for Islamic law does not exist in the modern legal system."¹⁶⁵ However, he likens Islamic Law most strongly to the English Common Law,¹⁶⁶ sometimes called the 'mother of the Common Law'.¹⁶⁷ The "principles are stated, expressly or impliedly,¹⁶⁸ in the *Qur'an* and the *sunna*,"¹⁶⁹ and it then fell to the 'judges' to apply these principles, which have been interpreted in different ways by different highly trained jurists or *Mujtahids* over time.

This juristic freedom to develop the law fluctuated over time and was influenced by an array of factors reflective of its nature as a dynamic law. The

¹⁶⁴ Ibn Rushd, (1994) *Bidayat al-Mujtahid wa Nibayat al-Muqtashid*, translated by I.A.K. Nyazee, *The Distinguished Jurists Primer*, Volume II, Garnet. Ibn Rushd was popularly known as Avveroes in the West. A brief biographical description of Ibn Rushd, who held the position of qadi as well as several other vocations, can be found here: Y. Dutton, (1994), 'The Introduction to Ibn Rushd's *Bidayat al-Mujtahid*', 1 *Islamic Law and Society*, pp 188-205, at 189-191.

¹⁶⁵ Ibn Rushd (1994), *ibid*, at xxxvi.

¹⁶⁶ The Common Law system is also seen in different forms in many jurisdictions including the USA, Canada, New Zealand, Australia, India and many states in the African continent.

¹⁶⁷ F. Bennion, *Understanding Common Law Legislation, Drafting and Interpretation*, (2009) Oxford University Press, pp 5-26.

¹⁶⁸ Where the rules are not express, the implied principles allowed the development of *ijma* and *qiyas*.

¹⁶⁹ Ibn Rushd (1994), at xxxvi.

dynamism may have been impacted upon by political considerations, cultural norms or social challenges, amongst other things. *Mujtahids* may have exercised their discretion in interpreting and applying the vast and rich sources of law in order to make compliance easier for the believers as is the spirit of the religion.¹⁷⁰ All of this epitomises the role of scriptural interpretations in providing for any and every eventuality that a believer may find themselves faced with. Flexibility has historically been the key component; however, in more recent times, this accommodating facet of Islamic law has faced intense challenges.

During the latter period of the Ottoman rule under increasing Imperial European influence and the Colonial rule throughout Muslim lands, Islamic juristic freedom was largely phased out. While the early period of Islamic civilisation saw a diverse range of juristic opinions emanating, they were all well-reasoned and based on scholarly discourse and most significantly, operated within the framework of a state or territorial entity with a Muslim leadership. When considering Muslim communities living within non-Muslim majority jurisdictions such as Britain today, any attempts at administration of justice in accordance with Islamic laws lacks, amongst other elements, state sanctioned legal authority. Thus, the current trends of informally established faith based ADR mechanisms gives rise to a range of issues in terms of their legitimacy under Islamic law, their jurisdiction or lack there-of, and their inability to enforce decisions. Another major question to be addressed is

¹⁷⁰ "Allah intends for you ease, and does not want to make things difficult for you", Surah 2, verse 185

whether these bodies can be considered a valid means for dispute resolution from an Islamic law perspective.

Reductionism and Critique of the Emergence of Islamic Jurisprudence

A cursory note is included here on the critique of Islamic jurisprudence which has existed over many centuries, concentrated in European scholarship. Donner¹⁷¹ describes the scholarship of an array of western writers who critique the early advent and development of Islam as a religion and its jurisprudential arm as being steeped in ideals of social reformation as opposed to religious reason.¹⁷² This reductionism was led by scholars such as Renan,¹⁷³ in the seventeenth century and has been expounded by others over time to the modern era.¹⁷⁴ Other leading Orientalists such as Schacht suggest that “Islamic law is to some extent content with mere theoretical acknowledgement: this is obvious from the existence of the two intermediate categories, recommended and reprehensible.”¹⁷⁵ He offers justification of this position on the basis that many decrees such as drinking alcohol and eating pork are proscribed yet no punishments are specified. Further to this, for those criminal acts drawing the *hadd* punishment; the specified punishment can be suspended in the case of ‘active repentance’ thus providing an overriding mechanism. His analysis of the inherent flexibility of Islamic law leads to the conclusion that “It might therefore seem as if it were not correct to speak of an Islamic law at all, as if the concept of

¹⁷¹ M. Donner, *Muhammad and the Believers: At the Origins of Islam*, (2010) Harvard University Press

¹⁷² *Ibid*, at xii.

¹⁷³ 1823-1892

¹⁷⁴ Donner (2010), *op. cit.*, lists: Caetani, C. H. Becker, B. Lewis, P. Crone, G. Bowersock, I. Lapidus, and S. Bashear.

¹⁷⁵ J. Schacht, *An Introduction to Islamic Law*, (1964) Clarendon Press, Oxford, at 199.

law did not exist in Islam. The term must indeed be used with the proviso that the Islamic law is part of a system of religious duties, blended with non-legal elements.”¹⁷⁶ However, this is only defensible if the sole construction of law one accepts is the modern codified version of rules and regulations most popularly associated with the term law. However, Islamic laws are derived from sources which are intended to be flexible in the interests of providing guidance for all time and all places, thus the principle spirit requires flexibility. The complexity of the categorisations of Islamic law is noted however, and this fact exemplifies the need for development of these laws to be restricted to experts in the field. Islamic law is complex and has over centuries been successfully translated at the state level. Such achievements cannot be dismissed simply as a response to its failure to conform to modern, mainly Western, legal standards.

Categories of Law and Islamic Jurisprudence

Islamic Laws followed by both traditionalists and rationalists, are divided into two main categories: the private (acts of worship) and the public (interaction with society).¹⁷⁷ Many scholars of Islamic law group its legal rulings/ jurisprudence (or *Fiqh*) under one of the following categories:¹⁷⁸

1. Rules of law relating to personal acts of worship, which usually cover the six headings; *Tahara* (cleanliness), *Salaah* (prayers); *Sawm* (fasting); *Hajj* (pilgrimage); *Zakah* (legal alms); and *Jihad* (holy struggle).

¹⁷⁶ Ibid, at 200-201.

¹⁷⁷ See for example, M. H. Kamali, *Shari’ah Law, An Introduction*, (2008) Oneworld Publications, Chapter 2, pp14-38; A. Ajjola, *Introduction to Islamic Law*, (2007) New Delhi, Adam Publishers, pp 9-15, wherein he describes the two strands as “Religious Observance” and “Transactions”.

¹⁷⁸ Kamali (2008), op. cit., at 42.

2. Rules of law relating to personal law, such as marriage, divorce, inheritance, etc.
3. Rules relating to the modern 'civil law' such as contractual relationships, commercial contracts, employment rights, etc.
4. Rules relating to the modern Constitutional and Administrative laws which seek to govern the relationship between state and citizen.
5. Rules of law relating to crime and punishment and maintaining public order.
6. Rules of law regulating international relations, including the concept of *Siyar* (the Law of Nations).
7. Rules of law relating to good conduct and public morality.

This categorisation confines private laws to a single matter of personal worship (in its varied forms), and allows for state legislated public laws to cover the remainder of the categories. This marks a crucial recognition of the various areas of Islamic laws which the faithful can expect to have regulated by the state in Muslim majority jurisdictions, which would necessarily impact on their expectations from the state where they live as citizens following a minority faith. Before considering this further, the nature of Islamic jurisprudence needs to be expounded.

The term Islamic Law should not be used synonymously with the concept of '*Shariah Law*' as the term '*Shariah*' is much broader and all encompassing. Clarke¹⁷⁹ describes the root word '*Shari*' as a road as opposed to the use of the term '*tariq*' which is a path. The Arabic language is very specific and here the

¹⁷⁹ A.R. Doi, and A. Clarke, *Shari'ah: Islamic Law*, (2nd Edition) (2008) (revised and expanded by Abdassamad Clarke), Taha Publishers, at 11.

term 'road' belies more expansive parameters for religious rules and guidelines which remain within the parameters of its edges. Piscatori goes so far as to suggest that the 'Qur'an itself encourages some degree of interpretation by planting doubts about the immutability of the revelation.... The Qur'an invites questioning.'¹⁸⁰ While this view challenges the traditionalist and even rationalist camps, it does serve to reflect the reality that some verses of the Qur'an were abrogated, exemplifying the fine balance which was struck between the unprecedented nature of the revelations and the ability of the new Muslims to adapt to the dictates of their religion instantaneously.¹⁸¹ However, it is widely accepted that this was limited to the time of the advent of Islam and concluded with the death of the Prophet, at which time the Qur'anic revelations came to an end and the holy book was considered complete.

There is no consensus between the Islamic religious scholars on how many verses of the Qur'an provide legal rulings, and the figures vary between 350¹⁸² and 500¹⁸³ verses, out of a total of 6235 verses. Kamali notes that the scholars differ due to individual differences in the "understanding of, and approach to, the contents of the Qur'an."¹⁸⁴ The specific issues which legal ruling in its strict sense are said to pertain to are: "marriage, polygyny, dower, maintenance,

¹⁸⁰ J. Piscatori, *Islam in a World of Nation States*, (1986) Cambridge University Press, at 3.

¹⁸¹ The Qur'an states: "And when we put a revelation in place of (another) revelation and Allah knows best what He reveals -- they say: you are just inventing it. Most of them do not know. Say: The Holy Spirit (Gibril) has revealed it from your hand with truth and as a guidance and good news for those who have surrendered (to God)". Chapter 16 (An Nahl): verses 101-102

¹⁸² Kamali (2008), op. cit., at 19

¹⁸³ J.A.D, Al-Suyuti, *al-Itqan Fi Ulum al-Quran*, (2008) as cited by Doi and Clarke (2008), at 29

¹⁸⁴ Kamali (2008), op. cit. at 20. One scholar may look at the history behind a certain passage which does not seem to imbue any legal ruling, but conclude that it does - based on the surrounding circumstances related to the revelation. There was clearly room for a difference of opinion, but only where the scholars were of extreme distinction.

rights and obligations of the spouses, divorce and various modes of dissolution of marriage, the period of retreat after divorce, fosterage, contracts, loans, deposits, weights and measures, removal of injury, oaths and vows, punishments for crimes, wills, inheritance, equity, fraternity, liberty, justice to all, principles of governance, fundamental human rights, laws of war and peace, judicial administration," etc.¹⁸⁵

Where enforcement of Islamic law is concerned, there are a number of players with a potential role: the *qadi* (judge), the *Mufti* (jurisconsult), the *Musannif* (author-jurist), the *Shaykh* (law professor), the *Shuruti* (the notary), and the *Katib* (court scribe).¹⁸⁶ The functions of these individuals differed according to the time era and the legal systems in operation.

The Qur'an and *sunna/hadith* are supplemented by *ijma* and *qiyas*. However, during the lifetime of the Prophet, only the Qur'an and the *sunna* were recognised as producing binding legal opinions.¹⁸⁷ *Ijma* refers to the consensus of opinion, and *Qiyas* is the judgement reached following analogy undertaken by trained jurists. Kamali states that Islamic law "originates in two major sources, namely divine revelation (*wahy*) and human reason (*aql*)"¹⁸⁸ and it is the latter which utilises *Ijma* and *Qiyas* in order to derive *Fiqh* rulings.

Abdur Rahim¹⁸⁹ sets out four periods of legal development within Islamic history. The legislative period took place between the 'Hijrah' or 'migration' of the Prophet from Makkah to Madina/Yathrib in 622CE and his death in 632CE.

¹⁸⁵ Doi and Clarke (2008), op. cit., at 29.

¹⁸⁶ Hallaq (2009), *Sharia'a, Theory, Practice, Transformations*, op. cit., at 16.

¹⁸⁷ S. Ramadan, *Islamic Law, Its Scope and Equity*, (1970) 2nd Edition, at 33.

¹⁸⁸ Kamali (2008), op. cit., at 40-42.

¹⁸⁹ Abdur Rahim (1911), op. cit., at 16-17.

The second stage was between 632CE and the founding of the four schools of Islamic juristic thought, during which the honored Companions of the Prophet and their successors led the state and interpreted and deliberated on laws. The third period saw the development of the “theoretical and scientific study of the law and religion”¹⁹⁰ wherein the four schools of juristic thought were developed. This proved to be the most influential development of law in practice in Islamic history. The fourth period, which Abdur Rahim suggests Muslims have persisted in since then, has witnessed no further independent expositions on Islamic laws, remaining instead within the boundaries established by the four schools of thought. While this position may have been accurate in 1911, the 21st century developments and challenges are indeed being met by the development of new theories and thought by modern scholars exercising *ijtihad*. These are in the main rejected by the traditionalist scholars that remain loyal in its entirety to the original schools of thought.

A crucial point to note here is that there has been a clear paradigm shift in the approach used by some contemporary Muslim scholars who are now embracing the idea of *Maqasid al-Shariah* which gives greater credence to the spirit of Islamic principles in the development of principles of law.¹⁹¹ New realities such as Muslims living as citizens within states where they are the minority and the ensuing responsibilities of citizenship this gives rise to, were not dealt with directly in the prophetic era nor in the immediate centuries following his death when most juristic schools of thought were established.

¹⁹⁰ Ibid, at 17.

¹⁹¹ This can be seen in the works of Muhammad Abu Zahra and Muhammad Hashim Kamali.

Critical Discourse Pertaining to the Compilation of the Prophetic Hadith

The Prophetic *hadith* were recorded in writing in part during the Prophet's lifetime, but in the main following his death - through trusted chains of narrations within the first two centuries, and recorded by trusted scholars.¹⁹² With reference to the *sunna*, as transmitted through the *hadith*¹⁹³, Hallaq¹⁹⁴ rounds up the elevated and veritable position of the Prophet:

“Outlined in the Qur'an, the Mission was to be propounded and articulated by the Prophet, who's conduct was so consistent with God's will that his sunna was sanctioned, *ab initio*, as an authoritative source of law. Despite its derivative nature, the Prophet's sunna came to be constituted as a force equal to the Qur'an, but offering a wealth of material barely matched by the concise, revealed text itself.”¹⁹⁵

The most reliable' narrations of *hadith* are contained in six collections which Muslims considered to be *sahih* or 'correct'.¹⁹⁶ In more recent history, theorists

¹⁹² A general overview of the science of *Hadith* compilation can be found in: M.H. Kamali, *A Textbook of Hadith Studies, Authenticity, Compilation, Classification and Criticism of Hadith*, (2005) The Islamic Foundation

¹⁹³ The role of the *Hadith* in the process of law making was crucial and consequently, the need for a precise formula for ascertaining what constituted authentic narrations of Hadith was critical. This was understood by the scholars in the first and second century after the Prophethood and as a result, sciences of *Hadith* (*Usul al-Hadith*) were formulated. A detailed analysis of the jurisprudence of Hadith is not necessary here, but can be found in texts such as Kamali (2005), *ibid*.

¹⁹⁴ W. Hallaq, (Ed) *The Formation of Islamic Law*, (1995) Ashgate Publishing

¹⁹⁵ *Ibid*, at xvi

¹⁹⁶ Imam Bukhari (810–870 AD), 'Sahih al-Bukhari', a collection of 7,275 Hadith. Muslim bin al-Hajjaj(817-874 AD), 'Sahih Muslim', a collection of 9,200 Hadith. Abu Dawud (818 – 888 AD), 'Sunnan Abu Dawud', a collection of 4,800 Hadith. Al-Nasa'i (829 – 915 AD), 'Sunnan an-Nasa'i', a collection of 5,270 Hadith. Al-Tirmidhi (824 – 892 AD), 'Jami al-Tirmidhi', a collection of hadith covering four categories. Ibn Majah (824 – 887 AD), 'Sunnan ibn Majah', a collection of over 4,000 hadith.

such as Goldziher¹⁹⁷ and Schacht¹⁹⁸ have questioned the authenticity of the *Sahih Hadith* and the formulation of laws by the *Mujtahid Imams* who led the four main schools of thought. Schacht concluded that “the real basis of legal doctrine in the ancient schools was not a body of traditions handed down from the Prophet or even from his companions, but the ‘living tradition’ of the school as expressed in the consensus of the scholars.”¹⁹⁹ Thus, they would argue that it reflected ‘Muslim practice’ as opposed to Islamic law. Donner,²⁰⁰ suggests that *hadith* accounts may actually reflect ‘legends’ about the Prophet, and not reliable accounts of his life.²⁰¹ However, such views refute the intricate sciences of *hadith* and the traditionalists view these theorists as ‘Orientalists’ with all the negative connotations associated with this.²⁰² The authenticity of the collections of *hadith* remain celebrated as a pivotal contribution to Islamic legal, social and intellectual history.²⁰³

At a rudimentary level, Muslims place their trust in the individual hadith collectors due to their individual characters and thus their conviction in the hadith may never in actual fact be tested scientifically but is a matter of pure

¹⁹⁷ Ignac Goldziher was a Hungarian academic who published numerous works in the late 19th and early 20th century detailing his view that the Hadith collections were not a true reflection of the sayings of the Prophet Muhammad, thus rejecting the scholarship of the Hadith Scholars.

¹⁹⁸ Following on from the theories of Goldziher, Joseph Schacht wrote a number of books in the mid 20th century advancing his theories.

¹⁹⁹ J. Schacht, *Origins of Muhammadan Jurisprudence*, (1950) Oxford University Press, at 98.

²⁰⁰ F. Donner, *Muhammad and the Believers, At the Origins of Islam*, (2010) Harvard University Press

²⁰¹ *Ibid*, at 51.

²⁰² Most famously captured by the late Edward Said in his book ‘Orientalism’. S. Said, *Orientalism*, (1978) Vintage Books

²⁰³ The example of the *Sahih* Bukhari collection provides a picture of a lifetimes work, taking the author 16 years to complete, requiring each hadith to be repeated by at least two separate trustworthy individuals with a chain of narration which led straight back to a contemporary of the prophet himself. Brief Biography of Imam Bukhari, available online at: <http://www.hadithcollection.com/biography-of-imam-bukhari.html> (last visited 13 November 2012)

faith. As noted by Piscatori,²⁰⁴ despite a marginal few early Muslims questioning the authenticity of many narrations of Prophetic hadith, the majority of Muslims then and through the ages, accept that they are authentic and reflect a dynamic and real living essence of Islam as a religion for all times.²⁰⁵ In the case of Imam Bukhari, his biography is an inspiration which has brought him fame across Muslim communities since the 9th century and few Muslims would question the authenticity of his collection based on his renowned pious character which makes him one who is guided by the Almighty Himself. Such discourse may well be beyond academic scope as it does not rely on reason, but rather focuses on faith. However, the level of flexibility Piscatori attributes to Islamic jurisprudence is perhaps a step too far, as frameworks have been established over the centuries which limit the scope of the majority of rulings within defined and established boundaries.

A useful analysis of the different positions taken by these scholars is provided by Hallaq who states that the “differences between the two viewpoints are neither negligible nor reconcilable, if anything, they are nothing short of staggering.”²⁰⁶ One considers the laws purely man-made while the other reveres them as divine. He describes the schism between the Orientalists and the ‘traditionalists’ as based on methodological and hermeneutical divisions, based largely on the Colonialist superiority exhibited by the former, and the defensive protectiveness of long accepted religious principles exhibited by the

²⁰⁴ J. Piscatori, *Islam in a World of Nation States*, (1986) Cambridge University Press

²⁰⁵ *Ibid*, at 4.

²⁰⁶ Hallaq (1995), *op. cit.*, at xiv

latter. This debate will no doubt continue on the academic field, however, its impact on the practical application of Islamic jurisprudence remains muted.²⁰⁷

The precise science of hadith is to be borne in mind when considering the role of faith based ADR mechanisms such as Shariah Councils in the formulation and application of principles of Islamic law. It necessitates a high degree of training in religious sciences. When dealing with Britain and the mix of ethnic backgrounds represented within the Muslim communities, in order to adequately respond to disputes concerning Islamic law, the mediator would be required to have an understanding of all major schools of thought and juristic opinion, and the sources of law from which these opinions were derived. If this is lacking, the integrity of that position is compromised.

The Lawmakers

The administration of justice is a fundamental function of every state and there is a symbiotic relationship between this and the formulation of laws. In Islamic history, the role of the *Mujtahid* scholars entrusted with the responsibility of jurisprudence was crucial in the years following the death of the Prophet due to the need to translate principles from the sources of Islamic law into workable practical rules of law. Imam Shafi'i²⁰⁸ held the position that *ijtihad* is a privilege and not a right, and required reference to the established orthodox schools of thought. Piscatori concludes that the needs of modern times have led Muslims to view *ijtihad* more as a right than a privilege, in light of the need to "make

²⁰⁷ This continuing debate can be seen in contemporary academic discourse, for example: Z. Maghen, 'Dead Tradition: Joseph Schacht and the Origins of "Popular Practice"', (2003) 10 *Islamic Law and Society*, pp 276-347, and M. Al-Azami, *On Schacht's Origins of Muhammadan Jurisprudence*, (1996) The Islamic Text Society

²⁰⁸ Piscatori (1986), op. cit., at 6.

Islam relevant to the modern world;"²⁰⁹ a viewpoint resisted by traditionalists. It is clear that the challenges presented by the modern world's nation state to Islamic juridical principles merely marks the tip of the proverbial iceberg; beneath the surface of which subsists an expansive array of uncertainties in the application of established rules in cultural climates which do not accommodate them. Practical and theological dichotomy exists which may determine whether Islamic law is able to survive and function within the modern non-Muslim majority jurisdictions of the world. Those who seek to throw open the doors of *ijtihad* would argue that this is the only way forward for Islam in the modern era. Thus, the traditionalist/rationalist divide is being played out.

It is clear that before one can embark on the road to *ijtihad*, he/she must be *Mujtahid* scholar,²¹⁰ and thus qualified to do so. According to Ibn Rushd, "A *Mujtahid* must define and declare all his principles of interpretation before he can attempt to interpret the law. Further, the system of interpretation he devises must be internally consistent, that is, one principle should not attempt to contradict or demolish the effect of another principle, as this would ultimately lead to an inconsistency in the derived law."²¹¹ Thus, the skills required by these jurists are considerable.

The need for *Mujtahid* scholars to formulate legal rulings continues to exist to this day, and the 12th century claim that the doors of *ijtihad* were closed only

²⁰⁹ Ibid, at 8.

²¹⁰ "One who exercises independent reasoning (*ijtihad*) in the interpretation of Islamic law. Qualifications include training in recognised schools of Islamic law and extensive knowledge of the Qur'an and hadith." J.L. Esposito, *Oxford Dictionary of Islam*, (2003) Oxford University Press Inc. *Oxford Reference Online*. Oxford University Press. University of Warwick. 23 September 2010 <<http://0-www.oxfordreference.com.pugwash.lib.warwick.ac.uk/views/ENTRY.html?subview=Main&entry=t125.e1596>>

²¹¹ Ibn Rushd, (1994) *Bidayat al-Mujtahid wa Nibayat al-Muqtashid*, translated by Nyazee, I.A.K, *The Distinguished Jurists Primer*, Volume II, Garnet, at xxviii.

creates room for stagnation and decline for Muslim societies. There are arguments for²¹² and against this claim, and Hallaq²¹³ takes the position that there are forms of *ijtihad* which need to be differentiated – independent *ijtihad* and affiliated *ijtihad*. The latter is considered acceptable only when affiliated with a school of thought. An Nawawi is another scholar who also sought to distinguish types of *ijtihad*²¹⁴. It seems clear that the precondition for a person exercising any form of *ijtihad* is the stringent qualifications required to become a *Mujtahid* scholar as this ensure that only those who truly understand the religious texts and sources are engaged in this arduous task. Secondly, the need for *ijtihad* would only arise in very limited circumstances to address questions such as the permissibility or otherwise of organ donations, citizenship responsibilities and rights in non-Muslim majority jurisdictions, etc. Yusuf Qaradawi's *Fiqh al-Aqalliyah* (Fiqh of Muslim Minorities) which shall be considered later is one example of such *ijtihad*.

These safeguards will ensure that established clear principles are not compromised and if they are diverted from, then it is only done by those who are able to base their judgements on sound doctrine and reasoning. In the context of Shariah Councils, where decisions are made in individual circumstances, they are referred to as '*Fatwa*'²¹⁵ based on the facts of the case. However, the danger here, much like the Common Law, is that weak

²¹² Propounded by scholars like Joseph Schachs.

²¹³ W. Hallaq, 'Was the Gate of Ijtihad Closed?', (1984) 16 *International Journal of Middle Eastern Studies*, pp 3-41.

²¹⁴ N. Calder, 'Al-Nawawi's Typology of Muftis and its Significance for a General Theory of Islamic Law', (1996) 3:2 *Islamic Law and Society*, pp 137-164, at 155.

²¹⁵ A Fatwa in this context is a 'non-binding opinion' given in response to specific facts/questions. See S. Ali, 'Resurrecting *Siyar* through *Fatwas*? (Re) Constructing 'Islamic International Law' in a Post-(Iraq) Invasion World', (2009) 14:1 *Journal of Conflict and Security Law*, pp 115-144, at 121-122.

derogations can set a precedent which is then followed until it is treated as an established rule. With no regulation, this becomes established at the social/community level and history shows that these are often the most powerful and coercive cultural norms adopted in the name of religion, regardless of their origins. One can place the issue of exclusion of Muslim women from the mosques within certain communities in Britain squarely within this domain.

On the other hand, if *ijtihad* is used in the correct way by adequately trained jurists it contributes towards the development of Islamic law, as can be seen innumerable times throughout history. Tucker²¹⁶ presents one such example citing Ibn Rushd's interjection in a case in 12th century Cordoba, which contradicted established legal positions concerning the rights of the victim's family in murder cases, which was subsequently adopted as part of the corpus of Maliki jurisprudence. However, it is fair to say that not many present day scholars compare to Ibn Rushd.

The methodological structured system of Islamic law emerged when the four main schools of Islamic juristic thought appeared, spearheaded by the *Mujtahid* scholars, Imam Abu Hanifa, Imam Malik, Imam al-Shafi'i and Imam Ahmad Ibn Hanbal. Of these four, Imam Shafi'i was the most acclaimed for his development of *Usul al-Fiqh* (methodology of law) although later scholars suggested that his position as the founder of *Usul al-Fiqh* was in fact a later creation²¹⁷ and not the

²¹⁶ Tucker (1998), op. cit., at 15-16.

²¹⁷ W. Hallaq, 'Was Al-Shafi'i the Master Architect of Islamic Jurisprudence?', (1993) 25 *International Journal of Middle Eastern Studies*, pp587-605, at 588.

case when he wrote his *Risala*²¹⁸ setting out clear principles for the development and structure of Islamic jurisprudence. While the works of the early scholars are considered to be established, some contemporary scholars advocate the need for interaction with the established jurisprudence and perhaps even the methodology, as 12 centuries later, there are a number of challenges on the social and ideological grounds now being posed.²¹⁹

The theoretical development of Islamic law occurred simultaneously with its implementation within judicial systems. The major difference is that this administration of justice required an accessible service which could change over time according to social needs.

Qadis – God’s Judges on Earth

The function of implementing Islamic law was principally fulfilled by the *qadis* or judges. Parallels can be drawn between the role of a Muslim *qadi* and the conventional judge, with the significant distinction that the *qadis* are required to act as God’s judges on Earth, interpreting and implementing the laws set in the Shari’ah. Khadduri²²⁰ states that the purpose of the *qadi* is to mediate and conciliate, which may not necessarily mean the same as vindicating individual rights or regulating the possible conflicts of interests between the parties. However, the overarching obligation of someone implementing God’s laws would be to enforce justice and thus, the role requires some vindication of legal and/or religious rights. For the purposes of this research, the transformative

²¹⁸ A translation of this is available: M. Kadduri, *Al-Shafi'i's, Risala : Treatise on the Foundations of Islamic Jurisprudence*, (1993) The Islamic Text Society

²¹⁹ Tariq Ramadan is one scholar, and his theories are imbued in many writings, but most clearly in *Radical Reform, Islamic Ethics and Liberation*, (2009) Oxford University Press

²²⁰ M. Khadduri, 'Nature and Sources of Islamic Law', (1953) 22 *George Washington Law Review*, pp 1-37, at 9.

role of the *qadi* over the centuries will be considered in order to comparatively review the current role of faith based ADR mechanisms such as Shariah Councils which seek to mediate between parties in a similar way. They clearly share some basic characteristics, namely as forums for the resolution of disputes. However, there are significant differences and if the latter is modeled on the former, which would provide it with legitimacy, then there are certain standards which must be met.

During the period of Prophethood, the Prophet appointed his companions Mu'adh ibn Jabal, Abu Musa al-Ash'aari and Ali ibn Abu Talib with judicial responsibilities.²²¹ This demonstrates the fact that the role of the *qadi* dates back to the advent of Islam, although it was not necessarily identified by that name. During the period of Prophethood and the rule of the four rightly guided caliphs²²² there was also no absolute separation of powers as the executive and judicial functions of the state were carried out by the caliphs,²²³ although elements of the judicial function were delegated. During the era of Abu Bakr as-Siddique, he appointed Umar Ibn Al Khattab as *qadi*.²²⁴ During the latter's rule as Caliph, he commenced some separation between the powers by appointing a judiciary as he believed that the law should be supreme over and above the political leadership²²⁵ and this was also in the interests of expediency. This was instigated without a prophetic precedence and the implication here is that there

²²¹ M. Azad, *Judicial System of Islam*, (1994) Kitab Bhavan, New Delhi, at 52.

²²² Abu Bakr As Siddique, Umar Ibn Al Khattab, Uthman bin Affan and Ali ibn Abi Talib.

²²³ P. Crone, *God's Caliph, Religious Authority in the First Century of Islam*, (1986) Cambridge University Press, at 1-3.

²²⁴ Abdur Rahim (1911), *op. cit.*, at 21.

²²⁵ *Ibid.*

is a great deal of scope for practical developments in the administration of justice within Muslim communities, with the correct application of *ijtihad*.²²⁶

Despite the evidences, Schacht²²⁷ casts doubts by arguing that this system for the administration of justice was in fact not evident during this early period of the Islamic empire, citing evidential discrepancies. Instead Schacht traces the institution of the *qadis* to the Umayyad period. Other scholars ascribing to the Orientalist opinion also concur.²²⁸ However, it is clear that the growing empire required a form of administration of justice and the narrations which can be attributed to the relevant time periods seem to support the existence of the *qadi*. Azad confirms this by stating that the jurists are of the view that appointing *qadis* is an obligation under Islamic law.²²⁹ These historic examples reinforce the judicial office of the *qadi* and its role in implementing Islamic law and guiding the Muslim communities as being integral and necessary. Thus, in the present day, if there is no official office of the *qadi* within a Muslim community, one can expect that there would be an alternative office intended to fulfil a similar role. In the British context, the state judiciary functions to uphold the law of the land which Muslim communities can take benefit from. However, the national courts have no jurisdiction, form or capacity to provide religious guidance to any faith group. For those faith groups who require this added institutional mechanism, the lacuna can be filled by informal bodies outside of

²²⁶ An in depth discussion about the positive role and interactions of the leader of the state (or the Emir) with those administering the law in the early periods of Islam, with specific reference to the Abbasid Empire can be found here: M.Q. Zaman, 'The Caliphs, the Ulama, and the Law: Defining the Role and Function of the Caliph in the Early Abbasid Period', (1997) 4 *Islamic Law and Society*, pp 1-36.

²²⁷ Schacht (1964), op. cit., at 24-26.

²²⁸ For example C. Snouk Hurgronje and Fazlur Rahman.

²²⁹ Azad (1994), op. cit., at 63.

the state's jurisdiction. The question arises of what powers and capacity such bodies would require to be considered effective for this role, while being limited by the state legal system which will override any conflicting laws?

It should be noted that while the position of the *qadi* requires significant knowledge of Islamic laws, the primary function being fulfilled is a state initiated judicial role. He is required to administer justice using religious sources of law; however, his role by definition is not a spiritual one but rather an administrative one. In many Muslim-majority jurisdictions, the role of the *qadi* can be seen as a principle state institution. Thus, it is a public office and a role which can be openly scrutinised. This facet of the role of the *qadi* is essential on numerous fronts, including the development of the law and the setting of precedents. Where Shariah Councils are concerned, they appear to perform a private role²³⁰ which lacks similar transparency and this is one of a number of major failings. The MAT conversely endeavors to be open to scrutiny.

As expected, the qualifications required to be a *qadi* are not specified in the Qur'an or *hadith* and Muslim scholars have propounded varied opinions on the prerequisites over the centuries. The all encompassing role of a *qadi* requires "his judgement... to be just in a social sense, true in a religious sense and correct in a formal sense."²³¹ It was accepted across the four schools of thought that a *qadi* would be expected to be a *Mujtahid*, however, the four schools differed on other qualifications they deemed necessary, with the basic being *al-ilm*

²³⁰ Shariah Councils do offer *fatwas* openly, however, their role in resolving marital disputes is a private function.

²³¹ U. Rebstock, 'A qadi's Errors', (1999) 6 *Islamic Law and Society*, pp1-37, at 2.

(learning/ knowledge) and *al-Wara* (piety).²³² Within the varied criteria which have been propounded over time, one consistent prerequisite has emerged and this is the requirement that the *qadi* be of the '*ahl al adl*'²³³ or people of justice/ righteousness.

The most important measure for the purposes of Muslims in Britain today is whether the *qadi* has to be a Muslim for his judgments to be legitimate. If the *qadi* could be a non-Muslim, this would mean that the decisions of judges in the British legal system could be sufficient for the resolution of Muslim family law issues and thus the Shariah Councils would not be necessary. Although Imam Abu Hanifa held the opinion that a non-Muslim is not eligible to hold the office of a *qadi*,²³⁴ some Hanafi scholars have suggested that the qualifications set out are preferable but not compulsory²³⁵ thus allowing for the possibility of *ijtihad* to permit a non-Muslim to hold the position of *qadi*. There is no concurrence of this position from any of the other three Schools of juristic thought however, all of whom firmly rule out a non-Muslim acting as a judge implementing *Shariah*.²³⁶ This position is understood in light of the responsibilities of a *qadi* as 'God's judge on Earth' which includes the issuance of *Fatwas* and, understandably, such tasks can only be undertaken by those who follow the faith.

²³² Quoted by Azad (1994), op. cit., at 37.

²³³ Ibid at 5

²³⁴ Imam Abu Hanifah, *The Hedaya*, (1979), Kitab Bhavan, New Delhi. Translated by Charles Hamilton, at 334

²³⁵ Azad (1994), op. cit., at 11.

²³⁶ "Ibn Qudamah a Hanbali scholar of the twelfth century, the Shafiites and the Shia Jurist are of the firm view that only a mujtahid is competent for the office of the qadi and the jahil [non-Muslim] is by no way eligible for the post. Imam Malik is of the view that a qadi must be a faqih." Ibid, at 24. Al-Mawradi - a Shafi scholar from the eleventh century considers it impermissible for a non-Muslim to be a qadi: A. Al-Mawradi, *Adab al qadi* (Arabic), (1973) 1 Matba'ah al-Ani, Baghdad, pp 631-633 (Translated)

A further tenet of the *qadi's* role could include referral to a '*Shura*' (group of jurisconsults) for expert advice and opinion to assist in the formulation of a decision in any given case. In the example of Cordoba where this was implemented, the *Shura* would issue a *Fatwa* or edict on the decision to be reached in the cases referred to them by the *qadi*²³⁷ thus providing expert guidance. This vital role ensured that the power of the *qadi* did not become absolute and that there was a process of consultation with those possessing the requisite 'expert' knowledge before difficult decisions were reached. For any modern Shariah Council to accomplish the office of the *qadi*, the guidance and advice of a *Shura* would create greater accountability and therefore acceptability. Although they are not formulating legally binding decisions as the *qadis* were, their judgments are still likely to attract some social conformity and therefore will have consequences beyond the case at hand. At present, the mediators within well-established Shariah Councils do work in tandem and joint decision making can be seen as operational. However, the question of qualification and contextual knowledge and experience still arise.

The role of the *qadi* is not to be taken lightly nor is it easily emulated. It operated within the structural framework of a state which ensured accountability, progression and development. It can certainly be argued that this takes it out of the remit of the current Shariah Councils, not least because *some* individuals presiding over them *may* fall short of the requisite qualifications²³⁸ but more significantly because there is no higher authority to

²³⁷ C. Muller, 'Judging with God's Law on Earth: Judicial Powers of the qadi Al-Jama'a of Cordoba in the Fith/Eleventh Century', (2000) *Islamic Law and Society*, pp159-186, at 164.

²³⁸ As the mediators are not appointed using a public process, there can be no public scrutiny of their suitability for the role and no institutional accountability.

oversee them. Where Islamic law is concerned, for justice to be achieved there must be enforcement powers and Shariah Councils lack this crucial element. The office of the *qadi* was never an informal one and crucially the implementation of their decisions was by virtue of their state authority.

Other deficiencies include the lack of remit for applicants to challenge or appeal judgements. Where such a mechanism is missing, as is the case with Shariah councils, there is clearly a fundamental flaw in the service that they seek to provide. Additionally, Shariah Councils have no jurisdiction in compelling 'defendants' to attend the hearing. This power has prevailed historically within Muslim-majority jurisdictions and this was most famously codified by the Ottomans in the 19th century when the *Mejelle* Civil Code²³⁹ was drafted.²⁴⁰

As Muslim Empires rose and fell, at times the role of the *qadi* was compromised for political reasons such as during the later periods of the Ottoman Empire. In the 19th century, the jurist Al Shami²⁴¹ stated that any king, regardless of his character or religion, could appoint a *qadi*. The political reality at that time was that Andalucía was no longer ruled by Muslims and thus, the appointment of the *qadi* could no longer be made by a Muslim leader. It is clear that the jurists here considered the office of the *qadi* to be vital and thus, its issuance required continuation. This example scarcely scratches the surface of transformative processes within the Islamic legal traditions affecting the judicial role which

²³⁹ The *Mejelle* was established in 1877 and repealed in 1926. "The *Mejelle* had great influence on the laws of other Muslim countries." M. Hidayatullah and A. Hidayatullah, *Mulla's Principles of Mahomedan Law*, (19th edition, 1st edition 1906), (1990), at xxvii.

²⁴⁰ F. Ziadeh, 'Compelling Defendant's Appearance at Court in Islamic Law', (1996) 3:3 *Islamic Law and Society*, pp 305-315, at 311.

²⁴¹ Ibn Abidin Al Shami, *Raddul Muhtar ala Addurrul Mukhtar* (Arabic), (1994) Darul Kutub al Ilmiyah, Beirut, at 38

have occurred over the centuries. However, they serve to portray dynamic institutions which were considered pivotal to the functioning of Muslim communities, with basic safeguards in place regarding those who may engage in the judicial role, and the powers they would hold.

The example of Andalusia exposes the quandary faced repeatedly by Muslim populations from the 19th century onwards and yet no consensus has thus far been reached on the Islamic law position regarding the appointment of a *qadi* within majority non-Muslim jurisdictions. Al Shami's position has not been instigated by Muslim communities living as citizens following a minority faith in modern nationhood states. This is perhaps a direct consequence of the ethnic diversity of the Muslim communities in places like Britain and their historic experiences suggest that agreement on such a methodology is unlikely.

Al Shami also stated that 'if there is no king and neither is there such a person who can appoint a *qadi* then it will be compulsory upon the Muslims to agree upon one from amongst them who they should appoint a leader who in turn will appoint a *qadi* who will judge amongst them'.²⁴² Faith based ADR mechanisms in the Muslim communities can perhaps be seen as the product of such transformative processes; with major shortcomings as they have not been appointed by the people but are self-formulating, however well intentioned. The appointment process for members of a Shariah Council is obscure. Little information about the process is within the public domain, and the Islamic Shariah Council in London merely states on the homepage of its website that 'The council is made up of members from all of the major schools of Islamic

²⁴² Ibid

legal thought...'. The Birmingham Central Mosque website states that "The Shariah Council is made up of elders who are well versed in the science of Islamic jurisprudence and Islamic matters and rulings."²⁴³ Questions arise regarding whether the process of appointment may be arbitrary based on the particular views and beliefs of those who already enjoy positions of authority at the Mosque. Bano²⁴⁴ states that the committee is usually 'independent' and responsible for the appointment of various roles, including that of the imam and one assumes, the Members of any affiliated Shariah Council. However, the process of appointment of the committee seems to vary within mosques, with some being elected and at others, being appointed.²⁴⁵

Thus, the appointment of members of Shariah councils can be considered arbitrary and based on attributed religious knowledge, however with an absence of a verified democratic process.²⁴⁶

This is a fundamental flaw as it removes legitimacy and falls outside of the parameters of Al Shami's framework. As a result, faith based ADR mechanisms such as Shariah Councils cannot claim to be representative of the Muslims they serve.

²⁴³ Available at: <http://www.centralmosque.org.uk/1/services/personal> (last visited 20 May 2013).

²⁴⁴ S. Bano, 'An exploratory study of Shariah councils in England with respect to family law', 2012, available online at: http://www.reading.ac.uk/web/FILES/law/An_exploratory_study_of_Shariah_councils_in_England_with_respect_to_family_law_.pdf, (Last visited 20 May 2013)

²⁴⁵ Trustees (or founders) of the mosques are self-appointing, and are legally responsible for the property of the mosque. The role of trustee is also to oversee the appointment of the committee, and a trustee and committee member may overlap. Evidence for this was provided anecdotally upon investigation of the practices of several local mosques in Leicester; an investigation necessary in the absence of any relevant literature. It was also revealed in this investigation that in many mosques, committees are not elected but rather appointed by trustees.

²⁴⁶ It should be noted that the unelected board of trustees can wield great influence within the mosque.

The analysis presented here strongly supports the contention that Shariah Councils lack legitimacy under Islamic law as a mechanism for dispensing justice utilising the *qadi* framework. However, this does not negate other possible frameworks such as the office of the *Mufti*.

The Mufti

Another key role that complemented the *qadi* was the *Mufti*²⁴⁷ who was usually a non-state actor qualified to issue non-binding *fatwas*. Tucker makes the point that the role of the *Mufti* in issuing *Fatwas* interacts with the function of a *qadi*. She suggests that in some regions of Ottoman rule, away from the key Ottoman influenced cities, the *Mufti's* role included issuing legal opinions to individuals who perhaps wished to 'avoid the courts altogether'.²⁴⁸ Although the *qadi* and *Mufti* are very distinct – the former being separated from the latter in the main by state sanctioning and therefore the ability to enforce decisions, the *mufti* and the *qadi* fulfilled distinct 'legal' functions in society. Tucker describes the role of the *Mufti* "as purveyors of justice and enlightenment to their communities. Their knowledge of the law and their ability to engage in active, relevant interpretation were the attributes that made them worthy of the *mufti's* mantle."²⁴⁹

The *Muftis* fulfilled an unofficial judicial role by virtue of their expertise, knowledge and character which formed the pivotal basis on which they were approached by communities to adjudicate or opine on specific concerns or

²⁴⁷ The role of *Mufti* is complex and there are several sub-categories to which one can belong. An Nawawi identified 3 types of *Muftis*: The independent *Mufti*, the affiliated *Mufti* and the deficient *Mufti*. Further details of these categories can be found here: Calder (1996), op. cit., at 143-149.

²⁴⁸ Tucker (1998), op. cit., at 21.

²⁴⁹ Ibid at 36.

disagreements.²⁵⁰ They considered issues of religion that would ordinarily fall outside of the *qadis* remit in the context of a courthouse, including sensitive and personal issues which the parties would not wish to air in public in a formal legal process. As the *qadis* roles were limited to the courthouse, the *Muftis* had a considerable remit in dealing with social and community issues. Thus, where family law is concerned, in Muslim communities, there was (and remains) a need for and provision of, both informal and formal dispute resolution mechanisms. The question arising in the modern context is – if the British courts are considered the formal dispute resolution mechanisms: what structure should the Shariah councils take in order to be an adequate informal dispute resolution mechanism? Furthermore, is there a need or desire to give them legal enforcement powers? We shall consider this in detail later, after charting the history of the development of Muslim societies and Islamic law.

As an extension of the consideration of the *Mufti's role*, on a separate front, mention should be made of another possible framework for Shariah Councils based on the informal arbitration system utilising the *Hakim*. Here, the parties would appoint a 'judge' to mediate the dispute between them.²⁵¹ The 'judge' would not be fulfilling a legal role, but rather, have a high standing in the community with a reputation for knowledge, wisdom and truthfulness.²⁵² Their social position and authority would compel the parties to attend the informal 'hearing' and abide by the 'judgement'. The system of the *Hakim* may have continued to exist socially following the advent of the *qadi* whose office was

²⁵⁰ Ibid, at 181.

²⁵¹ Some writers have used the terms 'qadi' and 'Hakim' interchangeably; however this is inaccurate and misleading. The Hakim or Hakam do not fulfil official judicial roles which are accompanied by enforcement powers.

²⁵² Ziadeh (1996), op. cit., at 306.

state instigated. No questions of authority or jurisdiction arose here, as the proceedings were entirely voluntary and relied on community wide coercive factors. However, it is clear that the many shortcomings of such a methodology for dispute resolution resulted in transformative processes which resulted in a far superior formative ordering.

Transformative Processes in the Islamic Legal Traditions

From the time of the Prophet to the modern day, a number of critical events have shaped the development and application of Islamic law. During the lifetime of the Prophet, however, Islamic law is said to have emerged only during the final 10 years and even then, only in so far as it was necessary to “conduct the nascent *ummah* affairs in Medina.”²⁵³ On the passing away of the Prophet, the era of the ‘Rightly Guided Caliphs’ began, which spanned 30 years during which major challenges were faced including the rapid expansion of the land under Muslim rule and the inclusion of non-Arab cultures and people within the loosely termed ‘Islamic Empire’. Necessary expansion of Islamic law took place during this period and the varied challenges of governing the different regions of the expanding empire resulted even at this very elementary stage, in differences in interpretation of rules emerging.²⁵⁴

Where the application of Islamic law was concerned, the different Arab provinces and the spread of Islam gave rise to immediate challenges due to differing circumstances, customs and practices in the various regions which needed to be tackled and contextualised. Thus, the need for formulating *ijtihad* became more pronounced - where there was no precedent in the Qur'an or

²⁵³ Hallaq (1995), op. cit., at xvi.

²⁵⁴ Ibid.

sunna for a given scenario or situation. It was also at this juncture that the differences in opinion between the jurists started to arise.²⁵⁵ This was the first time Muslim rulers encountered ‘subjects’ whom they were ruling over who maintained their religion and did not convert to Islam. In the absence of guidance on this from the *Qur’an* or the *sunna* rules of law based on *ijtihad* were formulated which remained true to the spirit of the laws already revealed.

As discursively set out above, Islamic laws and their application to Muslim citizens have evolved in various forms throughout the centuries. For the purposes of this chapter, the focus shall be on the period of Ottoman rule and the changes which occurred under Colonial rule in pre-Partition India as these are the most relevant time periods in order to conceptualise the modern phenomenon of Islamic law and Muslim practice being employed within British Muslim communities.

The Last Muslim Caliphate – The Ottoman Empire

The Ottoman Empire was remarkable in the length of time for which it was in power and the expanse of land over which it ruled. Arabia and North Africa were part of the Ottoman territories, but so were Eastern European provinces. Hallaq states that “Ottoman judicial innovations, brought about during the sixteenth and seventeenth centuries, proved to be instrumental to the fundamental modern transformations effected during the nineteenth century and thereafter.”²⁵⁶ The Ottomans instituted many changes and the most significant were perhaps the decisions to adopt the Hanafi School of juristic thought as the official law of the empire, and also awarding the *qadi* or judge

²⁵⁵ Hassan (2005), op. cit., at 34.

²⁵⁶ Hallaq (2009), *An Introduction to Islamic Law*, op. cit., at 72

with the power to hear legal and administrative cases, and thus, oversee the law and the state.²⁵⁷ They ruled according to the '*siyasa shar'iyya*' principle, which can be defined as political rule according to the principles of the *Shariah*.²⁵⁸

The Ottoman Empire also saw the development of *qanun* or edicts and decrees from the sultan. This supplementary law allowed the Empire to accommodate the regional differences that were present²⁵⁹ thus it was a necessary innovation to allow effective rule of such a vast terrain within which differing schools of thought were being followed in practice. In addition, they were also the first in the Muslim Empires to allocate a 'courtroom' for the hearing of cases.²⁶⁰ Prior to this, most rulings were made in the informal settings of the Mosques, public courtyards or even the homes of the *qadis*, rather like informal Shariah Councils in Britain today. Thus, this is a display of transformative processes undertaken within Islamic legal frameworks for the progression of the administration of justice.

The Empire went into decline and military defeats were coupled with a loss of control over the various provinces which were previously ruled by officials loyal to the Empire and Istanbul.²⁶¹ This had a dramatic impact on law and order as the strict system of legal accountability was lost. "Towards the end of the eighteenth century, governors, who were not trained judges, began to adjudicate civil cases, hitherto the distinct purview of the Shari'a court."²⁶²

Thus, that time period witnessed the emergence of self declared jurists falling

²⁵⁷ Ibid, at 74-75

²⁵⁸ Bassiouni (1969), op. cit., at 175-176.

²⁵⁹ Ibid, at 79

²⁶⁰ Ibid, at 81

²⁶¹ R. Horowitz, 'International Law and state transformation in China, Siam and the Ottoman Empire during the Nineteenth Century', (2004) 15:4 *Journal of World History*, pp. 445-486, at 459.

²⁶² Hallaq (2009), *An Introduction to Islamic Law*, op. cit., at 94.

far short of the required qualifications for making legal rulings. The ensuing chaos was the result of the lack of a centralised regulatory body. Again, parallels can be drawn to the Shariah Councils in Britain where there is a lack of clear authority and certainly very little regulation apart from the exceptional cases which shall be discussed further in Chapter Five.

The final century of the Ottoman Empire saw radical reforms as the Sultan attempted to acquire European backing for conflicts with other neighbours,²⁶³ and this in turn affected the judiciary and the legal profession across the Empire. A separation of powers began to take place between the judiciary and the executive, and the judicial and legal posts became salaried. This was largely the culmination of the European Imperialist influence as a result of which by the early twentieth century the remaining vestibules of the Empire began to resemble the European model of a nation state²⁶⁴ with its linear and well-defined boundaries.²⁶⁵ For the Ottoman Empire, where the judges previously had the power to hold the rulers to account in accordance with Shariah principles, the new system vested greater power in the bureaucratic officials at the executive level. With this transition, the historic accountability of the rulers was lost and this ushered in the new era of nationhood states for which religion was a *prima facie* reality, however, not the force with which they necessarily ruled.

²⁶³ Piscatori (1986), *op. cit.*, at 52.

²⁶⁴ Horowitz (2004), *op. cit.*, at 448.

²⁶⁵ *Ibid*, at 475.

The Ottoman rule can be viewed in light of other Imperial powers which have risen and fallen over the centuries.²⁶⁶ Although it began as an empire seeking to spread benevolent Islamic rule, it ended its days under the rule of an Imperial monarch. This perhaps provides an explanation for the significant changes which occurred at the state level before the collapse of the Empire.

Colonial Rule over India

Although Colonialist Britain's interest in India was primarily economic, the impact on the rule of law was immense. In order to make colonisation the most financially rewarding and to sustain long-term domination, using the rule of law instead of brute force was the most advantageous. At the start of the colonial project, Islamic laws were still enforced by the state.²⁶⁷ However, this was gradually phased out. Under the 'Hastings Plan' in 1772, British judges were at the top of the multi-tiered judicial system which at the bottom rung still allowed local *qadis* to administer basic personal/civil laws.²⁶⁸ The latter laws were open to a diverse range of interpretations according to the differing juristic schools of thought which were being followed.²⁶⁹ This meant that the application of law at this level was often unpredictable and verdict rarely foreseeable. In a bid to counter this, Sir William Jones made the recommendation that Shariah law be codified producing one set of principles in the English language which would make, for the first time, the 'Shariah' accessible to English judges in the colonies.

²⁶⁶ For an interesting contrasting analysis on British Colonialism and Ottoman Imperialism, see: C. Bayly, 'Distorted Development: The Ottoman Empire and British India, circa 1780–1916', (2007) 27:2 *Comparative Studies of South Asia, Africa and the Middle East*, pp. 332-344

²⁶⁷ Abdur Rahim (1911), *op. cit.*, at 37.

²⁶⁸ This was limited to marriage, divorce, maintenance, guardianship, inheritance and waqf property.

²⁶⁹ This right to follow different interpretations of Islamic law was reinforced by the Privy Council in the *Raja Deedar Hussain Case* [2 Moo. I. A. 411]

In the late 18th century, this became a reality and the impact on Islamic law in these regions was seismic with far-reaching effects still felt today. One of the major issues of concern in the conversion process was that “it is not always possible for a person translating the ideas of Arab jurists into English to find words which will convey the exact legal significance of many technical Arab expressions.”²⁷⁰ Thus, some of the nuances of the laws were lost in translation.

This was the first codification of Islamic law in the region resulting in the intransigence of a previously fluid and flexible system of law, necessary to accommodate changing needs in changing times and the specifics of individual circumstances. Hallaq²⁷¹ aptly states that “the *very act* of translation uprooted Islamic law from its interpretive-linguistic soil, and, at one and the same time, from the native social matrix in which it was embedded, and on which its successful operation depended.” While Islamic law was intended to be a pliable set of laws, this reality needed to be changed for the hard rule of law of the Colonial power to be implemented. By the time Colonial rule came to an end, the only principles of Islamic law which survived the imposition of British law was what the colonialists termed ‘Muslim Personal Law’ but even this was being enforced by British judges with inadequate training in the area and without conviction in its principles. Thus derogations were the norm. The Muslim Personal Law (Shariat) Application Act 1937 was enacted following pressure from Muslim groups which provided that in cases where the parties were Muslims they could use Muslim Personal Law or ‘Shariat’ to resolve disputes.²⁷²

²⁷⁰ Abdur Rahim (1911), op. cit., at 41.

²⁷¹ Hallaq (2009), *An Introduction to Islamic Law*, op. cit., at 87.

²⁷² The areas of law which were covered by Muslim Personal law were: intestate succession, special property of females (whether inherited, contracted, gifted, etc),

Some 60 years later, the effects can still be seen, and states like India, Bangladesh and Pakistan apply local renderings of 'Islamic' law where family law is concerned, to a greater or lesser degree, while all other spheres of law still bear the imprint of colonialist rule. The idea that family law issues were irrefutable while all other Islamic laws could be abrogated from by the state was an indoctrinated mindset resulting from colonialist policies.

Moving forward in time to the Muslims in Britain, a large portion of whom arrived as economic migrants from the former colonies following the Second World War and then in the 1960's and 1970's; the impact of the changes in Islamic law became apparent. While all other branches of British state law were accepted, the issue of family law continued to be a stumbling block. The migrants, their descendents and other Muslims from the population have shown an unexplained propensity towards Muslim family law over and above the state law governing these areas. This can perhaps be explained as the result of the mindset of the colonised subject resulting from the norms under colonialism which their societies failed to shake off in subsequent decades. This is further compounded by reliance on religious scholars trained in the subcontinent arriving in Britain and holding key positions in local mosques²⁷³ and inculcating these social norms in the British Muslim population. The palpable result has been an interpretation of Islamic family law within British Muslim communities which largely coincides with the practices in the Indian

marriage, dissolution of marriage (including *talaq, ila, lian, khula and mubara'at*), maintenance, guardianship, gifts, trusts, and waqfs. Further discussions about these points of law can be found in Hidayatullah and Hidayatullah (1990), *op. cit.*, at 2-4.

²⁷³ In 2005, Lord Ahmed stated that of the 2,000 imams in Britain only 300 were born here. A. Travis, 'British Imams to tackle radicals in mosques', (2005) *The Guardian*, 23 September 2005

subcontinent. The Shariah Councils are perhaps the clearest example of this, set up to provide some form of informal guidance on relevant issues arising.

Conclusion

From the onset of revelation to the current presence of Muslims living as citizens with equal rights in non-Muslim majority jurisdictions, the past fourteen centuries have witnessed massive upheaval, progression and accommodation resulting in persistent transformative processes within the Islamic legal traditions. As a religion, historically Islam has by its very nature allowed and encouraged a plurality of acceptable and enforceable opinions and Islamic jurisprudence developed in a manner which accommodated differing social contexts. The early theoretical frameworks and apparatus for the development of Islamic law have continually evolved. With the passage of time and modern challenges, there has been a greater need for interpretive thinking and development of the law and this challenge has been met by some jurists.

The traditionalist viewpoint seeks to adhere to the established principles of the *Mujtahid* scholars and in the main consider the doors of *ijtihad*, in the traditional sense, to be closed. The modernist discourse on the other hand proposes radical theories for reform, not only in the state implementation of Islamic law, but the very ideas of what constitutes an Islamic state.

The greatest challenge to the traditional manifestations of Islamic laws which allowed and encouraged plurality came in the form of colonial rule and European influences which resulted in the codification of Islamic law. While it can be argued that this is simply the process of modernisation and need for certainty in the law; the resultant rigidity is alien to Islamic jurisprudential

history. One of the most damaging results of this has been to disengage Islamic law from the idea of *adl* or justice which it was intended to uphold. Islamic laws are now presented as strict and rigid rules of law which are sometimes adhered to without the interjection of human compassion which does not reflect the prophetic traditions. Consequently, laws such as that relating to rape in Pakistan were allowed to develop and branded 'Islamic' when their derivation from sources of Islamic law were highly questionable. It is clear that many of the rules and principles being applied within Islamic theocracies can no longer be called 'Islamic law' and should take the term 'Muslim law'.

A pragmatic approach to scriptural dicta is necessary in order to allow Islamic laws to fairly and adequately regulate Muslim communities and societies. This needs to be coupled with an adequate judicial institution which can intervene and implement rules of law. The office of the *qadi* evolved over the centuries and its equivalent can be seen today in many jurisdictions. However, as the nature and premise of the state has evolved and changed, the role of the *qadi* with reference to the implementation of Islamic laws has in some cases become compromised. The *Mufti* appears to be the only position which has not been compromised, and this informal role is still being discharged in most Muslim communities. The question which arises is whether and how the informal role of the *Mufti* can influence and interact with the formal role of the courts in non-Muslim majority jurisdictions like Britain.

For the purposes of this research, the conclusion that can be drawn is that there is no single Muslim community and no single set of Islamic laws either theoretically or practically. In the context of faith based ADR mechanisms such

as Shariah Councils, their operational performance does not comply with the *qadi* system as it fails on a number of grounds including independent appointment of 'judges' (or 'mediators' as is more correct in the ADR setting), verification of scholarly training, implementation of decisions in order to achieve *adl*, the provision of a right to appeal, and transparency in their decision making processes. A more appropriate model may be that of the informal *Hakim* system, or simply performing the role of a Mufti in executing a mediatory role, but within an institutional framework. However, its construction remains weak as it has limited powers to compel parties to participate in proceedings or oblige by its findings. Thus, it can be said that the theoretical basis is weak and their operational capabilities are questionable. However, they continue to function providing a quasi-legal religious solution to certain family law disputes. Faith based ADR mechanisms will be explored in greater detail in Chapter Five in order to ascertain the theoretical and social frameworks in which they operate in Britain today.

Chapter Three

The Juristic Development of *Siyar* and Modern Challenges: Compatibility, Complexities, Frameworks and the Legal System

Introduction

The relevance of *Siyar* or 'Islamic International Law' to Muslims living as citizens within majority non-Muslim jurisdictions cannot be understated. As Islamic jurisprudence developed in early centuries, principles of *Siyar* were formulated to regulate contact and conflict between the Islamic empires and the rest of the world. These principles which set out the parameters for engagement between Muslims and non-Muslims have faced robust challenges during the last 14 centuries and have undergone transformative processes which render them beyond recognition, as shall be traced within this chapter. Consideration of these evolving principles is an essential component of this thesis as it validates the very existence of 'British Muslims', with allegiances to the sovereign non-Muslim state; and sets the theoretical parameters for their interaction with the state.²⁷⁴ This will enable conceptualisation of the parameters of citizenship of Muslims, extending to explore the modern phenomena termed '*Fiqh al-Aqaliyyah*' or jurisprudence of minorities. The discourse will engage with cultural relativism in the advancement of international law, and the development of Islamic legal theory with specific reference to the *European Council of Fatwa and Research*. Finally, this chapter will conclude with

²⁷⁴ Needless to say, there are likely to be many British Muslims who do not look to religious guidelines for defining frameworks for their interaction with the state. Thus, the term 'theoretical' is employed.

consideration of Muslims living in Britain and the promotion of their rights and responsibilities as citizens within the Islamic law framework.

International law in the modern era can be traced back to Hugo Grotius (1583-1645) whose original formulation has been adapted over the centuries to the present framework.²⁷⁵ Eight centuries earlier under Islamic law, Muhammad Shaybani (750-805)²⁷⁶ developed the principles of *Siyar* and his distinguished works '*Kitabus-Siyar*' which loosely translates to '*the book of the Islamic laws of nations*'; is the earliest and most renowned work on the subject. *Siyar* regulated the relationship between the Muslim Empires and the rest of the world, setting out the rules of engagement both in war and peace. In the modern age, *Siyar* is relied on by religious scholars to provide guidelines for the exercise of religious doctrine by Muslims living all over the world, in Muslim and non-Muslim majority jurisdictions.²⁷⁷ The historic development of this system should be regarded in the context of it being one of the principle legal systems within the global community over the past 14 centuries which contains rules of law "that are relevant to most of the issues covered by modern international law."²⁷⁸ However, some have labelled it as 'imperial' rather than international law due to the partial nature of the laws.²⁷⁹ The contextual setting in which the original principles were derived lends support to this assertion; however, its evolution

²⁷⁵ In the early stages it was the 'Law of Nations'. The term 'International Law' was coined in the 1780's by Jeremy Bentham.

²⁷⁶ Shaybani was a distinguished scholar who was taught by Imam Abu Hanifa for 2 years before the latter passed away, and one of his own students was the eminent Imam Shafi'i. Biographical details of Shaybani can be found in the *Encyclopaedia of Islam* (2nd Edition) (2002), Brill Publishers

²⁷⁷ A detailed description of the development of *Siyar* generally can be found in A. Bouzenita, 'The *Siyar* – An Islamic Law of Nations', (2007) 35 *Asian Journal of Social Science*, pp 19-46.

²⁷⁸ M.A. Baderin, *International Law and Islamic Law*, (2008) Ashgate Publishing, at xvii.

²⁷⁹ Q. Wright, 'Book Review, The Islamic Law of Nations, Shaybani's *Siyar*', (1968) in *The American Journal of International Law*, Vol. 62, pp521-523, at 522.

to cater for the demands of changing times has propelled it vastly beyond this historic root.

In considering the implications of *Siyar*, it must be noted that the religious doctrines of the Islamic faith are holistic and they result in the formation of a society fostered around its tenets. Thus, references of 'Islamic laws' infers a normative regulatory framework for the enforcement of religious guidelines wherever the individual resides.

The Necessity of Siyar and the Paradigmatic Ideals of Islam

The normative influence of Islamic laws on Muslims should not be underestimated and Armstrong elaborates: "A Muslim had to redeem history and that meant that state affairs were not a distraction from spirituality but the stuff of religion itself. The political wellbeing of the Muslim community was a matter of supreme importance."²⁸⁰ There is a long established link between the state and religion within the Muslim empires. However, this tradition was challenged in the last century by the advent of the nationhood states defined by territorial sovereignty and not religious hegemony. This gave rise to a pertinent need for renewed juridical discourse as unilateralism was a very prominent feature of Islamic jurisprudence in this area,²⁸¹ which was no longer sufficient to accommodate the new political reality.

Historically, the Islamic faith could not be easily segmented into the public and private, or the individual and the state. Each of these spaces correlate, intersperse and burgeon throughout the Muslim societies. It is clear that there

²⁸⁰ K. Armstrong, *Islam, A Short History*, (2000) Weidenfeld and Nicolson - London, at xi.

²⁸¹ A. Zahid, and R. Shapiee, 'Customs as a Source of Siyar and International Law: A Comparison of the Qualifying Criteria', (2010) VIII:1 *International Journal of Civil Society Law*, pp 36-55, at 37.

has always been a necessity for the development of doctrines which regulate and direct the state as a very basic ideal of Islamic theology and it can be said that a distinction was always drawn between the cognitive religious beliefs and spiritual practices of Muslims; and the administration of the state and an enforceable system of 'Islamic' laws. Lewis²⁸² describes the dual character of the early Islamic community stating that it was a political society which at its dawn was a chieftaincy; before advancing to become a state and then finally an empire. Secondly, he recognised the fact that it was simultaneously a religious community and regulated as such.

Over fourteen centuries, there have been many transformations within the 'Islamic state'. Khadduri²⁸³ provides a useful chart of the stages of this evolution:

	Stage	Years (AD)
1.	City-state	622-632
2.	Imperial	632-750
3.	Universal	750-900
4.	'Decentralisation'	900-1500
5.	'Fragmentation'	1500-1918
6.	National	1918- present

'God's will' to spread Islam across the globe failed to materialize during the universal phase and this gave rise to a critical need for scholarly discourse on the rules of law which would monitor and regulate interaction between

²⁸² B. Lewis, 'Political and War', in J. Schacht, and C. Bosworth, (Eds) (2nd Edn) (1974), *The Legacy of Islam*, Oxford University Press, pp156-209, at 157.

²⁸³ M. Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, (1966) John Hopkins University Press, at 20.

jurisdictions. Significantly, the existence of plural Muslim empires also challenged theological debate on the issue of international relations.²⁸⁴ The early treatise on *Siyar* sought to regulate a precise division between the 'Muslim empire' and the rest of the world. In the modern era, it is proposed that its function must also focus on regulating the relationships between the Muslim majority nation states themselves, each of whom jealously guards its sovereignty despite the lack of Islamic demonstrative support for such governance.²⁸⁵

The jurisprudence relating to *Siyar* has always reflected a great degree of pragmatism and this has facilitated its development over time to meet the challenges of transforming societies presented by the advancement and modernisation of nations. Specifically, it tackled the changing nature of the 'state' and emergent issues of citizenship within a territorially defined entity as opposed to towards a religious ideology. However, Scholars such as An Na'im take the position that *Siyar* cannot be framed in terms of the interaction between modern territorial nation states,²⁸⁶ and this is certainly indicative of the limitations of the original treatises. Although Islamic laws are considered divine in nature, Shihata²⁸⁷ aptly describes the complexities it presents by postulating a hierarchical system of rules, "supported by the science of jurisprudence which guides the individual reasoning in reaching the Islamic

²⁸⁴ Zahid and Shapiee (2010), op. cit., at 37.

²⁸⁵ H. Ahamat, 'Modern Application of *Siyar* (Islamic Law of Nations): Some Preliminary Observations', (2011) 25:4 *Arab Law Quarterly*, pp423-439, at 429.

²⁸⁶ A. An-Na'im, 'Islamic Law and International Law', (2004), presented at the Joint AALS, American Society of Comparative Law and Law and Society Association Workshop on Islamic Law, available at <http://www.aals.org/am2004/islamiclaw/international.htm> (Last accessed 18 November 2012)

²⁸⁷ I. Shihata, 'Islamic Law and the World Community', (1962) 4 *Harvard International Law Club Journal*, pp 101-114

solution for the new problems.”²⁸⁸ Thus, juristic sciences are utilized to formulate new principles under the banner of Islamic law, and this need has not diminished over time. Where *Siyar* is concerned specifically, the need to accommodate and acclimatise has always been pronounced. In this regard, Hamidullah²⁸⁹ sets out three sources of law for the formulation of its principles: traditional Islamic law found in the Quran and *Sunnah* (and the methodology for jurisprudence emerging from them), custom (*urf*)²⁹⁰ and treaty. These diverse sources reflect Shaybani’s original treatise and the latter two sources have played a greater critical role in modern history. However, it should be noted that early jurists deliberated greatly on the applicability of custom and treaty within the remit of Islamic jurisprudence. In light of the modern challenges and dilemmas faced by Muslim communities, and the historic conduct of Muslim empires, it is clear that it is accepted now as a matter of course in certain areas of Islamic legal thought, extending to *siyar*.

With an estimated 23% of the world’s population, or approximately 1.5 billion people professing the Islamic faith, there is a clear need for interaction with Islamic law at the global as well as domestic levels. Islamic law continues to play a major role in many Muslim majority jurisdictions, especially where issues concerning family law are concerned.²⁹¹ At the inter-state level, there exists an array of Charters agreed between Muslim majority states, including the Charter

²⁸⁸ Ibid, at 104.

²⁸⁹ M. Hamidullah, *Islamic Worlds: Inter-state Relations*, (2001), (New Delhi, Anmol Publications), at 12.

²⁹⁰ Something can be considered customary if it is: Acceptable to people of sound nature, a frequent practice, prevalent, unwritten conditions which are widely known and accepted, compatible with established legal sources and law under the Shariah. See Zahid and Shapiee (2010), op. cit., at 44.

²⁹¹ Baderin (2008), op. cit., at xiv.

of the Organisation of Islamic Conference (OIC),²⁹² the Arab Charter on Human Rights²⁹³ and the OIC Covenant on the Right of the Child in Islam.²⁹⁴ The very existence of these charters advances the arguments that *Siyar* in practice has developed beyond recognition. For Muslim citizens in places like Britain, questions arise including: what does this permanence in residency mean for their Islamic identities and religious practice? How can a Muslim living as a citizen with equal rights in Britain reconcile their religious identities with a limitation on their rights to manifest their religious legal codes within the national framework? Esposito²⁹⁵ suggests religious pluralism is a stiff challenge for Muslims due to the historic status of the *Dhimmi* who were protected, but in actual fact treated as second class citizens falling short of modern standards on equality. Islamic law on the area does need to be revisited to take into account the change in custom within Muslim majority jurisdictions on this issue, and also the principle of reciprocity should be considered in light of the equality before the law extended to Muslims citizens in jurisdictions like Europe.

The Conceptual Framework of Siyar

In the 8th century, Shaybani was a highly regarded jurist and *Qadi* who advised the Caliph of the time, Harun al-Rashid and his juridical reasoning reflected that context. *Siyar* was conceived relatively early in the Islamic era and concurrent

²⁹² The Charter of the OIC was approved in a meeting between 30 member states in 1972 and sought to create and uphold shared common interests based on Islamic principles. The member states include: Afghanistan, Algeria, United Arab Emirates, Bahrain, Chad, Egypt, Republic of Guinea, Indonesia, Iran, Jordan, Kuwait, Lebanon, Libya, Malaysia, Mali, Mauritania, Morocco, Niger, Oman, Pakistan, Qatar, Saudi Arabia, Senegal, Sierra Leone, Somalia, the Sudan, Syria, Tunisia, Turkey, and Yemen. Article 3 of the Charter states that there are 57 Member states in total.

²⁹³ Revised and adopted in 2004, in force since 2008

²⁹⁴ Adopted in 2005

²⁹⁵ J. Esposito, 'The Future of Islam', (2001) 25:2 *The Fletcher Forum of World Affairs*, pp 19-32, at 30.

to the emergence of the Four Schools of Sunni jurisprudence. Shaybani himself was a student of Imam Abu Hanifa and Abu Yusuf.²⁹⁶ This contextual framework is demonstrative of the complex political and theological landscape in which the exposition was conceived. It clearly intended to provide answers for the pertinent questions of *that* specific time and thus, allowed for adaptation and reformulation in the face of new challenges in subsequent eras.

Some writers such as Hamidullah “see the origins of the contemporary law of nations in Islam.”²⁹⁷ Others such as Ford²⁹⁸ refute this, citing “discrepancies between international norms and principles grounded in *Siyar*.” One clear area of demarcation between modern international law and *Siyar* is the fact that the latter is a system of law which did not see the ‘other’ as an equal and equitable force or power, but rather, as one upon whom it was benevolently bestowing grace by virtue of its own principles. *Siyar* was the manifestation of the Islamic states’ “own interpretation of its political and religious interests.”²⁹⁹ While not reflective of the position of modern nation states, this does reflect the position of non-recognition or *de facto* recognition seen in modern international law.

The *Siyar* is a comprehensive system covering private and public international law, encompassing “rights of minorities, right to the environment, humanitarian

²⁹⁶ Abu Yusuf also produced his own treatise on *Siyar* called *Kitab al Kharaj and Al-Radd ala Siyar al-Awai*. There were numerous other scholars who were pivotal to the development of the rules of *Siyar* including Imam Abu Hanifah himself, al Sha’bi and Sufyan al-Thawri, but it was Shaybani who formulated the principles which were most widely accepted.

²⁹⁷ M. Hamidullah, ‘Rezension Kruse: “Islamic Volkerrechtslehre”’ (1955) 2 *The Islamic Quarterly*, pp 231-233. As cited by Bouzenita (2007), *op. cit.*, at 29.

²⁹⁸ C. Ford, ‘Siyar-ization and its Discontents: International Law and Islam’s Constitutional Crisis’, (2008) M. A. Baderin, (Ed), *International Law and Islamic Law*, Ashgate Publishing, pp 19-53, at 20.

²⁹⁹ M. Khaduri, ‘Islam and the Modern Law of Nations’, (1956) 50 *American Journal of International Law*, pp. 358-372, at 359.

law, laws of armed conflict, diplomacy and human rights.”³⁰⁰ All of these elements are covered in Shaybani’s treatise, of which the central pillar is the classification of all land within one of two categories; *Dar al Islam* or *Dar al Harb*.

Dar al Islam

Dar al Islam or the ‘land of Islam’³⁰¹ included all territory where Islamic sovereignty was accepted, inevitably encompassing Muslim lands but also non-Muslim lands which were at peace under the Islamic Empire through treaty. The latter category of people included the ‘people of the Book’ (Christians, Jews, etc) who were known as ‘*Dhimmi*’³⁰² and afforded certain rights and protection under the Muslim leadership.³⁰³ The *Dhimmi* communities were given the right to legislate and dispense their own codes of law where personal status was concerned. They were also given access to Islamic courts to resolve their

³⁰⁰ S. Ali, ‘The Twain Doth Meet! A Preliminary Exploration of the Theory and Practice of Siyar and International Law in the Contemporary World’, (2007) J. Rehman and S. Breau (Eds), *Religion, Human Rights and International Law, A Critical Examination of Islamic State Practices*, Martinus Nijhoff Publishers, pp.81-114, at 89.

³⁰¹ Abel, A. "Dār al- Islām." *Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman; , Th. Bianquis; , C.E. Bosworth; , E. van Donzel; and W.P. Heinrichs. Brill, 2010. Brill Online. UNIVERSITY OF WARWICK. 05 October 2010 <http://www.brillonline.nl/pugwash.lib.warwick.ac.uk/subscriber/entry?entry=islam_SIM-1703>

³⁰² During the early periods the Muslim communities remained true to the Islamic principles advocated by Prophet Muhammad wherein the *Dhimmi* were to be safeguarded and treated without persecution. In later periods, with the spread of Islam and the new cultures and peoples which it encompassed, many challenges were met, including the understanding of the rights owed to the *Dhimmi*. Some were persecuted, such as the Armenians. Currently, there are only four countries where the *Dhimmi* are officially treated as unequal minorities by the law, and these are: Saudi Arabia, the Sudan, Iran and Oman.

³⁰³ Khadduri (1966), op. cit., at 11. The tax was not an added burden over and above what the Muslim subjects paid, as the *Dhimmi* were exempt from Muslim taxes such as the annual *zakaat* where each Muslim is required to pay 2.5% of his wealth in charity. The principles surrounding and regulating the payment of *zakaat* are intricate and set out in numerous texts including: Y. Qaradawi, (Translated by Monzer, K.) *Fiqh Az Zakat: A Comparative Study: The Rules, Regulations and Philosophy of Zakat in the Light of the Quran and Sunna*, (1999) Dar al Taqwa Ltd

disputes if they so chose. Thus religious and legal pluralism was accepted within Muslim territory; nevertheless, it would be incorrect to assert that there was equal treatment. The exercise of fundamental Islamic principles of justice should have protected all *Dhimmi* groups, but over time, the practice of Muslim states may not have.

In Egypt, historically Jewish and Christian communities were treated as *Dhimmis* and allowed to self-regulate. However, Egypt then transformed its legal code in favour of a single regime of state law for all citizens, to the exclusion of only matters pertaining to marriage and divorce.³⁰⁴ The first laws affecting these changes were introduced in 1955 and followed European examples of 'public policy' considerations in dispensing the law of the land.³⁰⁵ As a result, *Dhimmis* in Egypt were no longer able to utilise their own legal system to deal with any cases beyond strict family law. This European influence ensured 'equality' in treatment of citizens before a unified legal system, however, the 'public policy' interest here was discernibly Islamic law or the Egyptian Muslim law normatively influenced by the former, and therefore, by its very nature more suitable to the Muslim citizens. Thus, paradoxically, the European influenced reorganisation of Egyptian state law is actually detrimental to its minority communities.

The status of the *Dhimmi* allowed the preservation of their religious order and legal code, and it is perhaps this experience that Muslim communities are attempting to replicate in reverse; within European jurisdictions.

³⁰⁴ M. Berger, 'Public Policy and Islamic Law: The Modern *Dhimmi* in Contemporary Egyptian Family Law', (2001) 8 *Islamic Law and Society*, pp 88-136.

³⁰⁵ *Ibid*, at 102. Public Policy is defined as 'norms and rules which are considered essential to the national legal order.'

The traditional conceptualisation of *Dar al Islam* changed over time, and when later jurists formulated further categories of land, the qualifications for *Dar al Islam* were “countries where the power lies with Muslims, where the rules of Islam are implemented and Islamic rituals are performed.”³⁰⁶ A fundamental challenge to this demarcation of *Dar al Islam* presents itself in the form of Muslim majority jurisdictions which do not implement Islamic laws, oppress their people through autocratic dictatorships, profess secularism and even prohibit some Islamic practices. How would such territories be identified? If the absence of Islamic governance strips away the title of *Dar al-Islam*, what obligations would be placed on the Muslim citizens *vis a vis* the state? These complex issues are a challenge of our times.

Dar al-Harb

The second category, *Dar al Harb*, refers to the ‘land of war.’³⁰⁷ All land not falling within the former (*Dar al Islam*) category was considered to be land with which to engage in war. Islam was intended to be a religion for the whole world and the early jurists fully expected that the rules of *Siyar* would be temporary and only applicable during the expansionist phase of the Empire. The assumption was that once the world was ruled with principles of Islamic justice, there would no longer be the need for *Siyar*. Badr termed this early period the ‘age of expansion’³⁰⁸ which lasted for approximately one century until it became

³⁰⁶ W. Al-Zuhili, ‘Islam and International law’, (2005)87:858 *International Review of the Red Cross*, pp 269-283, at 278.

³⁰⁷ Abel, A. "Dār al- Ḥarb." *Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman; , Th. Bianquis; , C.E. Bosworth; , E. van Donzel; and W.P. Heinrichs. Brill, 2010. Brill Online. UNIVERSITY OF WARWICK. 05 October 2010 <http://0-www.brillonline.nl.pugwash.lib.warwick.ac.uk/subscriber/entry?entry=islam_SIM-1700>

³⁰⁸ G. Badr, ‘A Survey of Islamic International Law’ (1982) 76 *American Society of International Law*, pp. 56-61, at 56-57.

apparent that spreading the message of Islam across the globe may not happen as quickly or as certainly as the early Muslims had hoped.

Consequently, a third category was coined which is perhaps more conducive to modern global cooperation. *Dar al-Sulh* (land of truce)³⁰⁹ or *Dar al-Adl* (land of covenant)³¹⁰ took into account the territories which were not under Muslim rule nor were they engaged in direct hostilities. Badr suggests that this tripartite division of the world by scholars was in response to the existence of territories which were not hostile to Islam although they did not want to come under its umbrella and these 'nations' did not qualify as *Dar al Harb*.³¹¹ Apart from the Shafi'i school of thought, the other scholars of the time did not distinguish this latter category from *Dar al Islam*, believing that by virtue of the treaty, the territory was under Muslim protection and therefore could be classified as the land of Islam.³¹² However, this dichotomy was an essential evolutionary step taking into account the faltering of Islam's original goal to take the word of God across the whole globe, which indicated that the parochial alternate states of war and peace were no longer sufficient to encapsulate international engagement. Some scholars have questioned the premise that there was ever a stage of perpetual war against non-Muslims and maintain that peace is the original position of interstate relations according to Islamic legal traditions, as that relationship is merely an extension of personal

³⁰⁹ MacDonald, D.B. "Dar al-Şulh." *Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman et al Brill, 2010.

³¹⁰ İnalçık, H. "Dār al- Ahd." *Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman et al. Brill, 2010.

³¹¹ Badr (1982), op. cit., at 57.

³¹² Khadduri (1966), op. cit., at 13.

relationships.³¹³ Where war is concerned, Armstrong quotes verses of the Quran to support the assertion that “war is such a catastrophe that Muslims must use every method in their power to restore peace and normality in the shortest possible time.”³¹⁴

The ‘age of interaction’³¹⁵ lasted until the 16th century, when the ‘age of coexistence’³¹⁶ was ushered in and remains to this day. As Ali and Rehman note, “Islamic doctrine of war changed course in keeping with imperatives of time and circumstances.”³¹⁷ A point to note is that the start of the age of coexistence also saw the beginnings of the formative development of international law according to the European model still in existence today. Darling³¹⁸ further surmises that this point in history witnessed the transformation of Muslim Empires from decentralised powers into the modern centralised model of governance; far from that being an exclusive European transformation, only seized by the nations emerging from the former Muslim Empires in the 20th century. However, this is challenged by other historians.

The treaties of peace between Muslim and non-Muslim lands gave rise to obligations which Muslim subjects of the Caliph were expected to fulfil, such as respecting the law of the non-Muslim territory when travelling through or visiting it, for purposes such as trade. Such obligations signalled the beginnings of the development of *Siyar* where personal non-enforceable (in the legal sense)

³¹³ S. Reza, ‘The Changing Role of Islam in International Relations’, (2008) 15:2 *Journal of International & Area Studies*, p. 55-68, at 57.

³¹⁴ Armstrong (2000), op. cit., at 19.

³¹⁵ Ibid, at 57.

³¹⁶ Ibid.

³¹⁷ S.S. Ali and J. Rehman, ‘The Concept of *Jihad* in Islamic International Law’, (2005) 10:3 *Journal of Conflict and Security Law*, pp. 321-343, at 333.

³¹⁸ L. Darling, ‘Political Change and Political Discourse in the Early Modern Mediterranean World’, (2008) 38:4 *Journal of Interdisciplinary History*, pp. 505-531, at 506.

Islamic laws were encouraged of Muslims visiting non-Muslim jurisdictions. These regulations continue to be significant today.

The powers exerted by Muslim empires varied over time, and its leadership evolved from a central Caliphate with decentralised powers, to fragmented nationalist powers spread across vast terrain. The principle of reciprocity prevailed which allowed the subjects from both lands to move freely between each without being treated as a hostile enemy. An added dimension to the development of the principles of *Siyar* was intra-Muslim conflict exposed by the emergence of Muslim Empires which were divergent in their Islamic codes, namely the Ottoman and Persian Empires. Khadduri notes that it was only following European influences that the Empires began to “learn the principles of individual allegiance based on territorial rather than religious affiliation.”³¹⁹

This approach was consolidated by the shift away from the ‘state of war’ mindset, to the state of peace, exemplified by Sultan Sulayman’s Peace Treaty in 1535 with the King of France where they established peace, and provided for reciprocal rights of their citizens within each others’ territories. This Treaty was the starting point of equitable relations between the Ottoman Caliphate and Europe. The revolutionary occurrence here concerned the duration the treaty was to subsist – the lifetime of Sultan Sulayman. This was a clear detraction from the established 10 year limit on peace treaties provided for under the traditional *Siyar* doctrine based on the Treaty of Hudaibiya, and the longer periods of truce became the norm. However, Lewis suggests that the impact of the treaty was largely imaginary within Europe as for the Ottomans it was

³¹⁹ Khadduri (1966), op. cit., at 62

merely a “tactical cooperation” in the circumstances,³²⁰ concurred largely due to political and economic concerns of the Empire at the time. This belays the underlying pragmatism in digressing from a previously accepted principle where *Siyar* was concerned.

During the Ottoman rule, a number of further derogations were witnessed, including the relaxation of rules which required all Muslims to be tried by Islamic laws. In treaties concluded during the 18th century legal proceedings between a Muslim and a non-Muslim were permitted to be heard before ‘foreign consulates’.³²¹ Moving forward to the present time, it is clear that these changes in philosophy were essential as they provided the Islamic legal framework for Muslim jurisdictions to play a role in the emerging global community of nation states, whether they profess to be secular or Islamic theocracies. This also has an impact on the position of Muslims living in non-Muslim jurisdictions as citizens. As Islam continued to spread through non-Muslim lands by exposure and trade between its peoples and the Muslims, the first model of Muslims living as minorities in non-Muslim jurisdictions emerged which can provide a framework for the conceptual analysis of Muslims living in Britain in the present day as citizens of the state. However, one major distinction existed in the form of the lack of an international order which was equally applicable to all people regulating such residency.

³²⁰ Lewis (1974), op. cit., at 206.

³²¹ Khadduri (1966), op. cit. at 64-65

The Juristic Development of Siyar, and Modern Challenges

Islamic law has been described as the 'jurist's law'³²² and this is noticeable most starkly with *Siyar* which relied heavily on the jurists opinions and determination due to the absence of clear and irrefutable rulings in the *Quran* and *sunnah* and the changing political realities faced by Muslims. The sources of law used to formulate *Siyar* were far more diverse than any other area of Islamic law. Ali and Rehman³²³ set out eight sources which were utilised in addition to the *Quran* and *sunnah*: the practices of the early caliphs; practices of other Muslim rulers not subsequently repudiated by juris-consults; the *ijma* and *qiyas* of celebrated jurists; arbitral awards; treaties, pacts and other conventions; official instructions issued to commanders, admirals, ambassadors and other state officials; internal legislation for conduct regarding foreigners and foreign relations; and customs and usage.³²⁴ All of these sources were expounded by Jurists to formulate principles of *Siyar* using the method of *qiyas* and *istihsan* (juristic reasoning).³²⁵ This reflects the highly contemporaneous nature of *Siyar* and as a result, the Islamic law of nations has a great degree of flexibility in terms of adapting to changing circumstances, as in itself; it represents an adaptation to facilitate administration of the Muslim Empire. Throughout Islamic history, various empires and elite rulers have utilised variant forms of these principles or else dispensed with them completely, such as during the latter stages of Ottoman rule.

³²² Badr (1982), op. cit., at 56.

³²³ Ali and Rehman (2005), op. cit.

³²⁴ Ibid, at 324, as derived from M. Hamidullah, (1977), *Muslim Conduct of State: Being a Treatise on Siyar, that is Islamic notion of public international law, consisting of the laws of peace, war and neutrality, together with precedents from Orthodox practices and precedent by a historic and general introduction*

³²⁵ Khadduri (1966), op. cit., at 8-9.

In the modern context of Muslims living as citizens in non-Muslim jurisdictions entitled to equal rights means that much of these original doctrines have become obsolete. It is now almost impossible to identify *Dar al Harb* and *Dar al Islam* as the latter has developed into simple nation states with majority Muslim populations implementing derivatives of Islamic legal traditions. In addition, the presence of Muslims as citizens within non-Muslim jurisdictions, not just in thousands but in millions, compounds the complexity. Muslims living in such jurisdictions are still theologically obliged to follow religious teachings where they practice their faith, and they are also legally obliged to follow the law of the land.³²⁶

The relevance of *Siyar* through history and in the present day in terms of instructing Muslim citizens of their religious obligations while living in non-Muslim majority jurisdictions remains pertinent as Islamic law and religious beliefs will for a portion of Muslims inevitably play a role in dictating the degree and nature of their interaction with the state. However, it is probable that there is a lack of recognition of Islamic law in practice at the state level *vis a vis* the more prevalent spiritual manifestations of religious doctrines in many Muslim communities in Britain. There can be no blanket rule applied to all Muslims, nevertheless, the interaction between personal spiritual beliefs and its manifestation at an administrative level within majority non-Muslim jurisdictions is a living reality and faith based ADR mechanisms such as the Shariah Councils are a reflection of this.

³²⁶ M. Rafeek, *Fiqh al Aqalliyyät (Jurisprudence for Minorities) and the Problems of Contemporary Muslim Minorities of Britain from the Perspective of Islamic Jurisprudence*, (2012) PhD Thesis, University of Portsmouth and Markfield Institute of Higher Education, at 18.

Principles of Siyar: Compatibility and Complexity in the Modern Context

By the beginning of the 12th century, *Mujtahid* Islamic scholars such as Imam Muhammad Ghazali (1058-1111)³²⁷ were advocating a separation of powers between religious leadership and political leadership.³²⁸ While advocates for change challenged corruption at the highest levels within Muslim empires, Islamic history did not witness the extent of the turmoil in Christian/ European history in terms of war and bloodshed, and there has been no full scale Renaissance or Enlightenment in Islam.³²⁹ However, Mallat³³⁰ suggests that since the mid 20th century, a renaissance of sorts has been witnessed in the Muslim world on economic and constitutional issues. It is clear that over time, there has been a failure in juridical thought to conceptualise Islamic legal principles in light of changing norms. Allawi aptly postulates that “Muslims would not quite abandon the past, nor quite embrace the future.”³³¹ On the other hand, Bulliet took the position that much of the change witnessed in the 19th and 20th centuries were the result of internal debates and digressions within the Muslim Empire, and far from being stagnant, there was a great deal of dynamism at play.³³²

In the last century, there has also been a transference of Islamic laws from the remit of the jurists to the institutional authority of the state, which in Schacht’s view led to restrictions in the “field in which the sacred law is applied in

³²⁷ A. Rahnema, (Ed) *Pioneers of Islamic Revival*, (1994) Zed Books, at 5-6.

³²⁸ Ford (2008), *op. cit.*, at 28.

³²⁹ A.A. Allawi, *The Crisis of Islamic Civilisation*, (2009) Yale University Press, at 20.

³³⁰ C. Mallat, *The renewal of Islamic law: Muhammad Baqer Sadr, Najaf, and the Shi'i International*, (1993) Cambridge University Press, at 4.

³³¹ *Ibid*, at 21.

³³² As quoted by E. Thompson, ‘The Gendered Edge of Islam’, (2004) Yavari et al (Eds), *Views from the Edge, Essays in Honor of Richard W. Bulliet*, Columbia University Press, pp. 304, 321, at 314.

practice”,³³³ and even further he eludes that the law itself has morphed out from its traditional form. This is a clear reflection of varying cultural influences on the formulation and application of Islamic laws. The depth and intensity of transformation witnessed at the political level within Muslim territories in the 20th century was unprecedented, and the impact on juridical reasoning was clear and expected. Accepted and established principles such as *Siyar* came under intense pressure and custom and ‘*urf* slowly adjusted to take into account the new state of affairs. However, the philosophical position of Islamic laws was never compromised, and the nation state was still, as far as practically and institutionally possible, modelled on Islamic principles and regulated by them.³³⁴

However, there are clearly juridical principles within Islamic law which can be reconciled with modern international law. The pivotal principle on which Islamic law and international law coincide is the notion of *pacta sunt servanda* – ‘agreements must be kept’. The duty on Muslims to ensure that they are faithful to their word, whether engaging with a Muslim or non-Muslim is carried in various points in the Quran, including:

“You who have Iman [faith]! Fulfill your contracts”³³⁵

Surah Al-Ma’ida, verse 1

“Be true to Allah’s contract when you have agreed to it, and do not break your oaths once they are confirmed and you have made Allah your guarantee. Allah knows what you do.”³³⁶

³³³ Schacht (1974), op. cit., at 393.

³³⁴ Ibid, at 394.

³³⁵ Translation of the Quran from A. Bewley & A. Bewley *The Noble Quran: A New Rendering of its Meaning in English*, (1999) Bookwork, Madinah Press, at 93.

Surah An Nahl, verse 91

In specific reference to treaties between the Muslims and the non-Muslims, the Quran states:

“Give the [non-believers] news of a painful punishment – except those amongst the[m] you have treaties with, who have not broken their treaties with you in any way, not granted assistance to anyone against you. Honour their treaties until their time runs out. Allah loves those who have [fear of him].”³³⁷

Surah At-Tawba, verse 4

These verses of the Quran make the duty of honouring the terms of treaties and contracts a religious obligation for Muslims at the personal and state levels. Similarly, international law requires the same from nation states.

Within decades of the collapse of the Ottoman Empire, mass migrations between lands were being witnessed, taking Muslims in large numbers out of established *Dar al-Islam* and into jurisdictions where the majority of inhabitants were non-Muslim, to be termed *Dar al-Suhl*. It was at this juncture that Islamic law of *Siyar* was challenged most intensely and the *Mujtahid* scholars needed to respond by formulating new principles or amending existing ones to ensure that such Muslims were guided on religious obligations applicable in their new settings. Some have sought to remain faithful to the traditional doctrines despite the lack of contextual relevance.³³⁸ Others, such as Yusuf Qaradawi,

³³⁶ Ibid, at 259.

³³⁷ Ibid, at 171. The words in bracket are the writers translation of words kept in Arabic by the authors.

³³⁸ Muhammad Khalid Masud states “These jurists are obviously restrained by their methodology as well as the world view of the old laws; to the extent that they still use the term ‘enemy countries’ for the abode of the Muslim minorities.” Quoted by L. Larson,

undertook *Ijtihad* in order to guide Muslims living in this new reality.³³⁹ Thus, a new set of principles was espoused to deal with every day challenges such as interfaith inheritance and interfaith marriages, termed *Fiqh al Aqqaliya*. Ali³⁴⁰ holds the view that “The practice of Muslim governments, communities and the Muslim Diaspora, or *‘urf*, also forms an important indicator of the current norms of *Siyar*.”³⁴¹ Thus, the issue of faith based dispute resolution with the application of Islamic laws has remained contested with a diversity of opinions coming forth, but this no doubt goes some way towards exemplifying the norms of *Siyar* in the modern context.

The juncture reached now is one in which Muslim states are fully cooperating in a global community. Tepas³⁴² points out that under *Siyar*, if Muslim lands are challenged by stronger forces which overtake them, a truce should be negotiated to ensure the survival of the Muslim community. She suggests that perhaps this is the only reason that Muslim leaders negotiate and participate on the international stage. This is a narrow and unrealistic reflection on the development of *Siyar* and the transformative process that traditional Islamic legal principles have experienced since Shaybani’s thesis was first propounded. *Siyar* transformed from being a temporary doctrine, to a permanent one when

‘Islamic Jurisprudence and Transnational Flows: Exploring the European Council for *Fatwa* and Research’, (2011) A. Hellum, *et al* (Eds), *From Transnational Relations to Transnational Laws (Law, Justice and Power)*, Ashgate, pp 147-171, at 159. Footnote reference to internet source no longer valid.

³³⁹ Y. Al-Qaradawi, *Fiqh of Muslim Minorities: Contentious Issues and Recommended Solutions* (Translation) (2003), Al Falah Foundation for Translation

³⁴⁰ S. Ali, ‘Resurrecting *Siyar* through *Fatwas*? (Re) Constructing ‘Islamic International Law’ in a Post–(Iraq) Invasion World’, (2009) 14:1 *Journal of Conflict and Security Law*, pp. 115-144, at 125.

³⁴¹ *Ibid*.

³⁴² M. Tepas, ‘A Look at Traditional Islam’s General Discord with a Permanent System of Global Cooperation’, (2009) 16:2 *Indiana Journal of Global Legal Studies*, pp. 681-701, at 695.

global Islam failed to materialise centuries ago. Its need to continually undergo transformative processes has never diminished and appears more pronounced in the modern era.

International Law: Regionally Developed, Globally Exported

Several commentators such as Ford assert that *Siyar* does not conform to current standards of international law.³⁴³ However, An-Na'im points out that the genesis of modern international law lies in European ideals which although successfully extended to the world, "does not make it truly international."³⁴⁴ Discussions about the Charters of the United Nations and International Court of Justice and their representative nature are not within the remit of this study; however, suffice it to say that many states globally perceive international law as the European rule of law which has been exported to the world by the political weight of the proprietors.

Where sources of law are concerned, the Statute of the International Court of Justice at Article 38(1) provides for an array of sources including "international custom, as evidence of a general practice accepted as law", and clause (2) provides: "This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto." Khadduri takes the view that sources grouped under the general headings of "custom, authority, agreement and reason"³⁴⁵ can be linked directly to Islamic sources of law. Ford is highly critical of what he terms "this loose analogising" which he believes "may overstate the degree to which Islamic law can genuinely be reconciled with

³⁴³ Ford (2008), op. cit., pp 19-53.

³⁴⁴ A. An-Na'im, 'Islam and International Law: Toward a Positive Mutual Engagement to Realise Shared Ideals', (2008) M.A. Baderin, (ed), *International Law and Islamic Law*, Ashgate Publishing, pp 71-78.

³⁴⁵ Khadduri (1966), op. cit., at 9.

modern international jurisprudence.”³⁴⁶ It is clear that the ICJ is setting out what has become accepted as the international law which governs all nations, whereas *Siyar* is doctrinally limited to Muslim jurisdictions and the normative framework only apply to Islamic laws thus taking it outside of the remit of the global community. There is perhaps remit for the inclusion of *Siyar* in the application of Article 38(2) if the parties are in agreement and the judges are qualified to utilise principles of *Siyar* in their decisions.

Siyar is arguably one of the most adaptable areas of Islamic law on the basis of its very origins in custom and practice. It should be noted at this point that even Grotius “advocated discriminatory treatment against non-Christian states”³⁴⁷ when he coined the Law of Nations. Thus, this precedent from both *Siyar* and European history is likely to be a simple reflection of the religio-cultural norms of the respective communities at the time that the theories were first advocated. These have obviously evolved with time.

What is clearly lacking today however is *Siyar* as a complete doctrine applicable in the globalised world of the twenty-first century. Advances on the principles would need to be far more expansive than any transformative processes thus far undertaken.

Development of Islamic Legal Theory and the Public Interest Argument

By the eleventh century, a *maslaha* or ‘public interest doctrine’ of sorts was recognised within Islamic legal theory.³⁴⁸ Famed Scholars such as al-Ghazali³⁴⁹

³⁴⁶ Ford (2008), op. cit., at 38.

³⁴⁷ Khadduri (1956), op. cit., at 362.

³⁴⁸ Ford (2008), op. cit., at 35.

accepted *maslaha* as representing “the ultimate purpose of the Sharia, which is to maintain religion, life, offspring, reason and property.”³⁵⁰ This was developed and extended to allow administrative/governing authorities to deviate from strict Shariah principles where public interest required it.³⁵¹ The concept of public interest has been used to pave the way for the development of *Siyar* today, fulfilling its objectives to ensure principles of Islamic law did not prevent Islam from being a living religion capable of adaptation and change, even in contradiction to some established doctrines. This dynamism has been required since the mid-twentieth century more so than ever before. The development of specific guidelines for Muslims living as equal citizens following a minority faith within countries in Europe provides an array of challenges which require Islamic scholarly interjection and guidance in order to off-set one of two extremes. The first extreme has seen Muslim communities failing to integrate at all as a result of confusion about their role within these societies, their religious obligations and freedoms pertaining to their citizenship, and their very basic sense of belonging. The other extreme is the lack of religious guidance which has led to complete assimilation and a total rejection of Islamic doctrines due to the false belief that Islamic doctrines do not allow a dual mutually exclusive identity. Thus, the latter category of people is forced, overtly or stealthily, to abandon their religious beliefs thus impinging on their religious freedoms.

³⁴⁹ Al-Ghazali subdivided *maslaha* into three categories, namely *al-darurat* (necessities, *al-hajiyat* (needs) and *al-tahsinat* (improvements), and advocated their use wherever necessary in order to further the higher aims.

³⁵⁰ S. Fishman, ‘Fiqh al-Aqalliyat: a Legal Theory for Muslim Minorities’, (2006) *Research Monographs on the Muslim World*, Series No 1, Paper No 2, Washington Centre on Islam, Democracy and the Future of the Muslim World, Hudson Institute, at 9.

³⁵¹ N. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, (1969) Chicago University Press, at 68.

In order to combat both of these extremes, there needs to be clear scholarship from those learned in religious sciences, which provides Muslim citizens living in majority non-Muslim jurisdictions with a framework within which their faith and citizenship responsibilities are compatible. This reformation movement has begun to take shape within Europe and has drawn Islamic juristic scholarship from all over the world.

The European Council of Fatwa and Research: The Latest Frontier in Islamic Jurisprudence?

Badr holds the opinion that there is “very little that is rigid and immutable in Islamic law”³⁵² and this perception was widely conceded amongst the early generations of scholars, but perhaps forgotten in later centuries, especially in light of the codification of Muslim laws which produced greater rigidity. Arguably, such rigidity was necessary to preserve sanctified principles, however, it has meant a great loss to the flexibility and adaptable nature of Islamic law and as such it has perhaps compromised its ability of positive evolution.

In the European context, the European Council of *Fatwa* and Research (ECFR) was established in 1997³⁵³ to serve ‘Muslims in Europe’. This was a landmark moment in the development and contextualisation of Islamic law in the European jurisdiction wherein Islamic laws are being applied openly and citizens’ rights to exercise religious freedom is guaranteed (within reason), thus arguably bringing the land under the remit of *Dar al-Islam*.³⁵⁴ Directed by

³⁵² Badr (1982), op. cit., at 56.

³⁵³ See Appendix II for Aims, Objectives and Structure of the European Council of *Fatwa* and Research from its inaugural meeting, and the list of Members as at March 2011.

³⁵⁴ Fishman (2006), op. cit., at 5.

Shaykh Yusuf Qaradawi,³⁵⁵ *Ijtihad* is being undertaken within this institution in order to guide Muslims living in this new reality unprecedented in Islamic history. The objectives are to “unite legal injunctions on various issues, thus providing both legal injunctions suitable for Muslims in Europe and research for general, public *fatwas*.”³⁵⁶ Thus, this body’s prime objective is to make Islam a religion which can be adhered to in the European context with its multi-faceted claims on the loyalty of its citizens which may on the surface appear to contradict the traditional principles of Islamic laws on the area. There is a recognition that Muslims have the freedom to live in Europe as citizens and have obligations and responsibilities to their nation states.

The contrast between the objectives of the ECFR and the original *Siyar* doctrines are stark. Shaybani’s *Siyar* makes mention of Muslims choosing to live in *Dar al-Harb* and states that this was disapproved of.³⁵⁷ Furthermore, Muslims living in *Dar al-Islam* would be expected to emigrate should the territory go to war and be lost to non-Muslims.³⁵⁸ This was challenged during the Spanish conflict when Andalusia was lost from Muslim rule, yet the Spanish Muslims chose to stay in their home territory under the jurisdiction of the new Christian rulers.³⁵⁹ The Hanafi and Maliki jurists rigorously opposed this, on the basis that Muslims would not be able to manifest their religious beliefs under such rules, while failing to detail what manifestations were being referred to.³⁶⁰ Shafi’i jurists on

³⁵⁵ Lena Larson provides a useful analysis of Yusuf Qaradawi’s role. Larson (2011), op. cit.

³⁵⁶ M. W. Dien, *Islamic Law, From Historical Foundations to Contemporary Practice*, (1994) Edinburgh University Press, at 146.

³⁵⁷ Khadduri (1966), op. cit., at 187

³⁵⁸ Fishman (2006), op. cit., at 4.

³⁵⁹ Rafeek (2012), op. cit., at 208.

³⁶⁰ *Ibid*, at 209.

the other hand contended that the Muslims could remain resident in those lands provided their faith was not compromised.³⁶¹

In the modern context where Muslims are living as citizens in countries like Britain, questions about war and peace remain relevant. Would they be expected by *Siyar* to renounce their British citizenship and fight against the state if they were involved in a war against a Muslim country, such as Afghanistan, wherein they captured women and children? How is this reconciled with International laws which protect prisoners of war and guarantee their safety from enslavement which *Siyar* principles sought to frustrate? Clearly, the Muslim jurists who continue to espouse the strict divisions between *Dar al Harb* and *Dar al Islam* would take the view that British Muslim would need to renounce their citizenship and fight for the 'Muslim' cause. However, the more prevalent view is that this division is no longer the sole means for ascertaining loyalties, and the *Dar al-Suhl* is the most prevalent form of contract and engagement. Thus, the obligations are no longer specific, and conceptual space is created for the establishment of new legal traditions to deal with these points. Where the direct issue of a Muslim fighting in the British or American army in Afghanistan is concerned, the ECFR undertook complex deliberations and concluded that the soldier would need to objectively ascertain his/her own situation and make a decision that did not compromise the integrity of the entire Muslim communities within these jurisdictions. Thus, if he were able to participate in the war in an administrative manner without taking up arms, that would be considered acceptable participation. However, while the *Fatwa* stopped short of providing a blanket affirmative or negative

³⁶¹ Ibid.

response to the question, it reiterated the inalienable rule within Islamic jurisprudence that a Muslim cannot take the life of another Muslim without ‘judicial indictment’ against them (individually or as a nation).³⁶² The deliberations here evidence the fine distinctions that must be drawn when balancing out the needs and challenges faced by Muslim citizens within majority non-Muslim jurisdictions.

Another classification of land was propounded by Alwani who argued that the territory can be described as *Dar al-Dawa* or the “land to which Muslims send their message”³⁶³ and the role of Muslim citizens under this banner is to teach people in all non- *Dar al-Islam* jurisdictions about Islam. On a separate note, Alwani also opined that *Dar al-Islam* can be extended to any territory in which a Muslim can worship freely.³⁶⁴ Thus, any jurisdiction which guarantees religious freedom could be termed *Dar al-Islam*. Thus, under the principles of Dar al-Suhl, Dar al-Dawa, or by a stretch, Dar al-Islam, Muslims can reside in majority non-Muslim jurisdictions as citizens. Such residence would naturally draw allegiances to the state.

The ECFR was set up to deal with such issues, namely *Fiqh al-Aqalliyah* or the ‘jurisprudence of minorities’, a coin termed in 1994 by Dr. Taha Jabir al-Alwani in the USA.³⁶⁵ The idea of jurisprudence directed principally to minorities was further developed Shaykh Yusuf Qaradawi under the auspices of the ECFR. Fishman sets out the fundamental premise of this jurisprudence as being based on:

³⁶² The Fatwa originally appeared on Islamonline.net but is currently unavailable. However, it is on-file with the writer.

³⁶³ Alwani, *Maqasid al-Sharia*, at 55-58, as quoted by Fishman (2006), *op. cit.*, at 5-6.

³⁶⁴ Fishman (2006), *op. cit.*, at 5.

³⁶⁵ *Ibid*, at 1

“The territorial principle of *‘alamiyyat al-Islam* (Islam as a global religion) and the juristic principle of *Maqasid al-Shari’ah* (ruling according to the intentions of Islamic law). The first provides the rationale for permitting the very existence of permanent Muslim communities in non-Islamic lands. The latter enables the jurists of *fiqh al-aqalliyat* to adapt the law to the necessities of Muslim communities in the West, which in practice means allowing legal leniencies so that these communities are able to develop.”³⁶⁶

The methodology used to derive this new jurisprudence included the widely accepted sources of law: the Quran, the *Hadith*, *Qiyas* and *Ijma*; but also the lesser ascribed sources of public interest (*maslaha mursala*) and *urf* (custom).

The purposes of prescribing juridical reasoning for Muslim minorities precisely are many-fold. The foremost reason is to preserve their Islamic identities and help them to lead their lives in a manner which is compatible with Islamic norms while addressing the peculiar challenges they face in the European contexts. Shaykh Qaradawi goes on to specify that these Muslim minorities should not become isolated, and “they should interact with their communities positively, providing them with the best ideas and vice versa. Accordingly, they achieve the delicate balance, i.e. open conversation and integration without assimilation.”³⁶⁷ The guidelines are intended to promote religious observances by making them more feasible and less ‘extravagant’. Alwani focuses attention on creating a framework for interaction of Muslims at the political and social

³⁶⁶ Ibid, at 2.

³⁶⁷ Al-Qaradawi (2003), op. cit., at 6.

levels within the jurisdictions of which they are citizens, both inter and intra-community.

The specific remit of the ECFR means that it is not duplicating the work of other *Fiqh* bodies already in existence, as its sole geographic area of concern is Europe.³⁶⁸ Its objectives and methodology are clear and the aims include 'attempting to unify the jurisprudential views between them with regard to the main *Fiqh* issues.'³⁶⁹ Considering the diverse backgrounds of the Muslims residing within Europe, and the divisions created by ethnicities, languages (of origin and in the European context), cultures, and adherence to specific juristic schools of thought, makes this a highly complex mission. However, as the ECFR intends to provide guidelines to 'European Muslims' one can argue that this would result in a new paradigm in which developing Islamic juridical principles would apply equally to all of those living in this new context regardless of their culture of origin. As such, it can be expected that a level of European integration is being expected and even encouraged by the ECFR for which it is catering.

Despite admirable purposes, shortcomings are apparent. Primarily, the religious scholars who form the Council's membership are not all, or even mostly, European based. Yusuf Qaradawi himself, an eminent juristic scholar, was born in Egypt and has spent his considerable years in the Arab world. While this does not necessarily exclude him from understanding the European context to which he has dedicated five decades of his life, it nonetheless reflects a lack of European influence within the Council. Of its 38 members, 16 are non-

³⁶⁸ Larson (2011), op. cit., at 151.

³⁶⁹ Ibid.

European³⁷⁰ and of those who are European based, they are in the main not European born.

Larsen suggests that this participation could “imply an attempt to control the development of Islamic thought on European soil,”³⁷¹ however; there are other more plausible explanations. There have been no studies considering how this membership base may limit the effectiveness of the ECFR, however it is apparent that for one to obtain the title of *Mujtahid* scholar (and thus be in a position to issue such *Fatwas*) there is a definitive element of experience which is necessary. Thus, it is entirely foreseeable that within a relatively young European Muslim population, such scholarship is yet to surface and thus, the need for international interjection is explicable and provides the requisite legitimacy to the Council. However, this must necessarily be a short term measure until there are sufficiently qualified European Muslims to undertake the roles.

The Council has issued numerous *Fatwas* involving matters such as marriage between Muslims and non-Muslims and other issues which arise due to the new multi-cultural reality that Muslims find themselves a part of within Europe. Some scholars argue that the impact of the Council is negligible as the majority of British Muslim are of South Asian origin and look to their own scholars and religious institutions for guidance. Although there is a great deal of legitimacy in this assertion, it does not rule out the institutional framework and foresight provided by the ECFR for the future development of Islamic law in Europe for

³⁷⁰ Spanning Arab, African, an American, a Canadian, and a Pakistani religious scholar(s).

³⁷¹ Larson (2011), op. cit., at 152.

its Muslim citizens. Also noteworthy is the fact that a similar institution exists in North America, the *Fiqh* Council of North America, with a similar remit.

On the issue of *Fiqh al-Aqaliyya* specifically, critics have called it an innovation against established Islamic jurisprudence and have deemed the ruling such as the allowances of mortgages despite the involvement of interest, and adoption involving the change of name of the adopted child, both of which go against classical teachings, to be antithesis to accepted rules of Islamic law.³⁷² However, it is clear that Muslims in Britain are adhering to these new principles in practice, although they may not identify the source of Islamic law. Many have mortgages and adoption is on the rise. This raises the question of whether the practices are a response to the *fatwas*, or whether the *fatwas* are in fact a response to the innovative practices?

Traditional scholars such as Abdullah Ibn Bāz and Ibn Uthaymin,³⁷³ both of whom are of Saudi origin, share the position that the preservation of the tenets of the Islamic faith are more important than the adjustment of Islamic jurisprudence to accommodate needs of Muslims living in the Western context. Thus, this classical position concludes that those who cannot earn a living according to Islamic laws should migrate to a Muslim majority jurisdiction. Thus, positing preservation of established religious principles above the idea of *dawa* and inviting others to the religion. Thus, they refute the idea of *Fiqh al-Aqaliyyah*.

Rafeek concludes that Muslims in Britain are now adding a greater burden to the discourse where *Fiqh al-Aqaliyyah* is concerned, as they are self-identifying

³⁷² Fishman (2006), op. cit., at 12-13.

³⁷³ I. Baz and I. Uthaymin, (1998) *Muslim minorities: fatawas regarding Muslims living as minorities*, Message of Islam Publication, as quoted by Rafeek (2012), op. cit., at 24.

as 'British Muslims' and calling on Islamic jurisprudence for permanent solutions in light of their changing positionality within Western societies. They are now "stake holders who need broad guidelines in order for them not only to integrate in their respective non-Muslim societies but also to contribute to them."³⁷⁴ The present research project tests this assertion from the socio-legal perspective.

Implementing Muslim Laws in a Multicultural Society

Any discussions about a multicultural society must necessarily begin with the question of what this term refers to.³⁷⁵ Is multiculturalism a concept which can be measured in empirical terms or is it a social expression reflecting a demographic reality and seeking to mask the divisions which a multitude of cultures can give rise to in any given society? The widely prevalent use of the term suggests that this is a theoretical question, however, when considered in the context of informal laws which influence the behaviour of some sections of a community to the exclusion of others; it takes on deeper social and potentially legal significance. The conclusion then is that 'multiculturalism' can be very different to the demographic fact of cultural diversity.

In response to Britain's diversity; the potential implementation of a limited number of 'Islamic laws' is an idea which has been espoused by some powerful individuals. In 2008, the Archbishop of Canterbury, Dr Rowan Williams³⁷⁶ and

³⁷⁴ Rafeek (2012), op. cit., at 29.

³⁷⁵ An array of writing on this issue exists, considering the elements from distinct and varied perspectives. Useful readings include: T. Modood, *Multiculturalism*, (2007) Polity Press; B. Parekh, *Rethinking Multiculturalism, Cultural Diversity and Political Theory*, 2000) Palgrave.

³⁷⁶ R. Williams, "Civil and Religious Law in England: A Religious Perspective" (Archbishop of Canterbury, Lecture at the Royal Courts of Justice, 7 February 2008) <<http://www.archbishopofcanterbury.org/1575>> last accessed 18 June 2010

Lord Chief Justice, Lord Phillips of Worth Matravers,³⁷⁷ both demonstrated recognition of the fact that aspects of ‘Shariah Law’ are already a reality in the lives of some British Muslims. While the media and political response was negative (mainly due to conflated stereotypes about the nature of ‘Shariah’ law), the statements were merely reflecting what many would accept to be the living reality of Islamic laws in Britain, which are voluntarily adhered to by many Muslims.

Faith based ADR mechanisms such as the Shariah Councils are directly relevant to Islamic family laws being implemented personally and informally, without state advocacy, recognition, or jurisdiction. As a result, the informal Shariah Councils are one of the limited forums available to Muslims in order to alleviate conflict in the application of family law. The ECFR has intervened in this process as part of its mission to provide specific guidelines which would permeate across the transnational barriers between Muslim citizens within Europe, and one *Fatwa* imparted, related to the acceptability of decisions reached by non-Muslim judges in divorce proceedings.³⁷⁸ The ECFR passed the decree as a response to the perceived need for Muslim judges to adjudicate between parties where divorce was concerned. The Council stated that “due to the absence of an Islamic judicial system in non-Muslim countries, it is imperative that a Muslim, who conducted his marriage by virtue of those countries’ respective laws, complies with the rulings of a non-Muslim judge in the event of divorce.”³⁷⁹ Thus, the right to pronounce divorce is effectively delegated to the judge,

³⁷⁷ Lord Phillips, “Equality Before the Law” (Lord Chief Justice, Speech at the East London Muslim Centre, 3 July 2008) <http://www.matribunal.com/downloads/LCJ_speech.pdf> last accessed 21 June 2010.

³⁷⁸ Larson (2011), op. cit., at 166-167.

³⁷⁹ Ibid.

whether he is a Muslim or not. Larson explains that this ruling is not intended to contradict the traditional Islamic jurisprudence which requires referral to a Muslim judge in the case of conflict in divorce.³⁸⁰ It is limited to the context of a marriage that is entered into in accordance with the laws of the state, which is accepted by the ECFR to also form a valid Islamic marriage. Thus, where only an Islamic *nikkah* contract has been entered, one presumes that a Muslim judge or equivalent is still required, and consequently the Shariah Councils and similar bodies may be legitimately engaged, albeit without any official authority.

The *fatwas* from the ECFR seem to advocate a new Euro-Muslim culture which is a fusion of European identities and that of the culture of origin, with the degree of the fusion possibly being dependent on the proximity in terms of time since migration. The evolution in the approach to disputes and dispute resolution reflects this reality. The law in Britain for example allows contracts to be concluded between private individuals with an agreement that the contract shall be governed by any set of laws, not necessarily English law. Thus, this allows for Muslims to enter valid contracts in the UK which are to be governed by Islamic law without these laws needing to be implemented or recognised at state level. This reality allows for a greater fusion between British Muslims and their religious and national identities.

Conclusion

This chapter demonstrated that transformative processes in the Islamic legal traditions pertaining to the principles of *Siyar* espoused by Shaybani are greatly removed from Muslim state practice of today. It has outlined the development of the Islamic law of nations and the challenges faced since the end of the

³⁸⁰ *Ibid*, at 166.

'universal' phase of the Islamic Empires. The early jurisprudence ceased to be adequate in dealing with new global realities and through the course of Islamic history, Muslim state practice moved away from these established principles and expanded the remit of acceptable conduct and agreement between *Dar al-Islam* and *Dar al-Harb*. A development in terminology and classification also saw the emergence of the *Dar al-Suhl* which is now accepted as covering the majority of the global terrain today and allowing for Muslims to be active citizens in jurisdictions which are not Muslim-majority. There remains a clear need for the development of *Siyar* for the twenty-first century, with global input from highly trained jurists, and although this may necessitate the abandonment of some established norms and principles, this development does not go against the grain of Islamic jurisprudence on the area as it is historically heavily imputed to custom which is indeed expected to progress and change over time. If this process advances, Islamic laws will be capable of playing a far greater role in the global stage where the development of international law is concerned. As stated by Badr, "Islam today should have no difficulty in pursuing, together with the rest of the world, the progressive development of international law through treaty and custom and should be able to make its own positive contributions to this common task of elaborating a renovated international law based not on expediency, or a precarious balance between antagonistic interests, but on the twin pillars of justice and concern for others."³⁸¹

Islamic religious scholars in recent generations have taken a more pro-active approach to jurisprudence, towards "a greater freedom of independent

³⁸¹ Badr (1982), op. cit., at 59.

enquiry”³⁸² in ascertaining religious law, as opposed to exclusively seeking all answers in manuals written centuries ago without contextualising them. The ECFR is an example of this and the issues which it has ‘legislated’ on are diverse and Euro-centric. It is clear that the rights and responsibilities of Muslims living permanently in non-Muslims jurisdictions need to be enshrined in *Siyar* so that adequate guidance is provided to ensure the highest levels of participation and contribution to their societies. It is also clear that this challenge has not as yet been adequately met by Muslim jurists.

Finally, the adherence of European Muslims to Islamic family law does not negate their citizenship rights or responsibilities within countries like Europe. The lack of official recognition of these religious laws however has led to the development of faith based ADR mechanisms such as Shariah Councils. In order to overcome the many criticisms faced by these councils, there is a need for greater interaction between the state and these informal bodies. The guidelines being issued by the ECFR in the form of *Fiqh al Aqaliyyah* need to be cross-fertilised with Islamic law in action provided by faith based ADR, in order to advance a framework for the development of Islamic law and British Muslim culture which meet the needs of British Muslim communities. The level of state interaction within this process remains uncertain. However, in order to advance this, the scholarly credentials of the ECFR need to be approved and trusted by the majority South-Asian British Muslim communities.

³⁸² Coulson (1969), op. cit., at 56.

Part II

Part II of this thesis encompasses Chapters Four to Eight and details the research methodology undertaken during this study. It traces engagement within the field followed by the presentation of the research data and findings attained utilising Grounded Theory. Chapter Four is simply titled 'Research Methodologies' and presents the multiple strands of quantitative and qualitative research undertaken in this multi-disciplinary study. It details the objectives behind employing the 'reverse' methodology of Grounded Theory as the most appropriate approach based on the overall aims of the research project which seeks to critically engage with data to formulate theories in the absence of a hypothesis.

Chapter Five is titled "Negotiating Faith Based ADR Mechanisms: Conceptual Frameworks, Religious Theology and a Plural Legal System" and examines the emergence of faith based ADR mechanisms in the form of Shariah Councils and the Muslim Arbitration Tribunal. It advances discussions regarding the process of 'formalisation' of such bodies in light of the socio-legal issues faced by Muslims seeking to implement Islamic family law in Britain. This Chapter considers the critical discourse relating to Shariah Councils arising from evidences detailing discrimination against women, and responds by suggesting the need for a change in the agents acting within the institutions.

Chapters Six and Seven are titled "Interaction, understanding and experience: British Muslims, the British Legal System and Islamic Law" and is divided into parts I and II. And Chapter Eight is titled "British Muslims and the Approaches

to Islamic Law and the State Legal System". These final three chapters present the research data obtained during this extensive empirical research study, incorporating statistical analysis and the formulation of Grounded Theory based on the findings. Chapter Eight is dedicated to evaluation of the data utilising the Grounded Theory methodology of 'coding' to identify recurring common themes. This analytical process culminates in the grouping of common themes and the formulation of descriptive categorisations for the views expressed by the sample group on Islamic law, faith based ADR mechanisms and the British legal system. Finally, Chapter Nine provides the conclusion to this study.

Chapter Four

Research Methodology

Introducing the Research Methods

In designing this socio-legal research project, thought was given to a range of alternative research methodologies, including the ethnographic approaches,³⁸³ phenomenology³⁸⁴, interpretive phenomenological analysis³⁸⁵ and Grounded Theory. Ethnography was rejected as this form of socio-cultural anthropology was insufficient to meet the aims of this research project. The data collected for the current research is both qualitative and quantitative and not limited to observing behaviour; it also seeks to actively engage the participants in order to access their ideas and thought patterns. Similarly, Phenomenology is limited in its applicability to experiential fields of specific human beings and cannot be extrapolated, although it does provide for the emergence of theory and findings which is critical to this study. However, the aim of this research is to formulate theory which has the capacity to engage the whole subject group, or identifiable portions of it. Interpretive phenomenological analysis again focuses on individual and not group experiences; it would therefore limit findings and is more suited to sciences such as psychology where the individual is under scrutiny.

³⁸³ See for example, M. Hemmersley & P. Atkinson, *Ethnography, Principles in Practice*, (2007) Routledge,

³⁸⁴ As founded by Edmund Husserl, and critiqued by numerous academics including: D. Moran, *Edmund Husserl; founder of phenomenology*, (2005) Polity Press (Oxford)

³⁸⁵ K. Reid, P. Flowers, and M. Larkin, 'Exploring Lived Experience', (2005) 18:1 *The Psychologist*, pp.20-23.

The analysis supported the Grounded Theory approach developed by Glaser and Strauss³⁸⁶ as being the most suitable, not least because this accounts for “the most influential and widely used modes of carrying out qualitative research when generating theory is the researcher’s principles aim.”³⁸⁷ This ‘reverse’ methodology was the most appropriate approach as the project seeks to critically engage with data to formulate theories in the absence of a hypothesis. Grounded Theory allows for conceptualising choices of dispute resolution mechanisms employed within the British Muslim communities using empirical data to generate concepts. Furthermore, Grounded Theory supports the accumulation of data comprising a wide array of variables during the research stage, while facilitating the analysis for broad based conclusions to be drawn. Most significantly, it allows for data collated using both qualitative and quantitative research methods, both of which are being employed within this research.

The particulars of the Grounded Theory which will be applied to this research follow Strauss’s theoretical developments, in conjunction with Corbin, in particular, the coding paradigm presented.³⁸⁸ There will be an emphasis on theoretical formulation and the range of data will require “multiple comparisons done for theoretical purposes.”³⁸⁹ Thus, Grounded Theory provides an exciting methodology for the development of a range of theoretical concepts.

³⁸⁶ B. Glaser & A. Strauss, *The discovery of Grounded Theory: strategies for qualitative research*, (1967) Aldine de Gruyter, New York

³⁸⁷ A. Strauss & J. Corbin (Eds) *Grounded Theory in Practice*, (1997) SAGE Publications, at vii.

³⁸⁸ A. Strauss & J. Corbin, *Basics of Qualitative Research*, (Second Edition), (1998) SAGE Publications

³⁸⁹ Strauss & Corbin (1997), Commentary to: C. Charmaz, ‘Identity Dilemmas of Chronically Ill Men’ in, *Grounded Theory in Practice*, SAGE Publications, pp 35-62, at 36.

This research project aims to identify the interplay between law, culture and religion in choices of dispute resolution mechanisms employed by the British Muslim Diaspora with specific references to the faith based ADR mechanisms. The research methods ensure that a wide range of variables are accounted for in the process of compiling data to facilitate the conceptualisation of factors compounding the preferred forums for dispute resolution. In generating Grounded Theories, there is a need to develop “conceptual categories of their properties from evidence; then the evidence from which the category emerged is used to illustrate the concept.”³⁹⁰ Thus, the research methods must produce a variety of data which can be scrutinised and tested.

Methodology Considerations

As qualitative research does not have a distinct set of methods,³⁹¹ this allows for a wide variety of potential approaches and techniques. When considering methods for carrying out this research, a great deal of thought was given to the philosophical considerations behind social sciences research as interaction with the subject matter was a pivotal requirement of this study. Burton³⁹² points out that “methodological debates in the social sciences cannot be understood without reference to the wider cultural setting in which those discussions take place.” This is especially relevant where British Muslims and dispute resolution is concerned. Thus, the discussions here will entail a consideration of the context of the research.

³⁹⁰ Glaser & Strauss (1967), *op. cit.*, at 23.

³⁹¹ N. Denzin & Y. Lincoln, *The Sage Handbook of Qualitative Research*, (Third Edition), (2005) SAGE Publications, at 7.

³⁹² D. Burton (Ed) *Research Training for Social Scientists*, (2000) SAGE Publications, London, at 1.

An added element was my own readily identifiable positionality where the subject matter was concerned. As I am an 'insider'³⁹³ in terms of the target subject group, my own experiences would be expected to influence the types of questions which were pursued as past experiences allowed me to narrow down the issues of concern based on my previous interactions with the group. Furthermore, my positionality impacted upon the individuals and communities who were engaged due to the points of access to the field which were available to me. While this offered challenges such as conflicting demands between the research and the subject group, on the whole it has provided for a depth of research which would otherwise have taken a longer period of time to achieve. It certainly facilitated a positive interplay between my role as a social-scientist and the concerns of the social group being researched³⁹⁴ giving rise to greater frankness in the expression of opinions and openness with questionnaire responses. Access to the subject group was also facilitated by my positionality. Thus, on the whole I found that my role as a socio-legal researcher was facilitated by my identification with the group. The issue of positionality was also a factor within the analysis stage and utilising Strauss and Corbin's 'waving the red flag'³⁹⁵ technique was a crucial tool for remaining an objective analyser. This counteracts the common assumption that an 'insider' may be influenced by

³⁹³ See for example, R. McCutcheon, *The Insider/Outsider Problem in the Study of Religion, a Reader*, (1999) Continuum Publishing, for a collection of essays detailing the complexities of positionality of scholars.

³⁹⁴ See for example, S. Holdaway, 'Theory and Method in Qualitative Research', (2000) in D. Burton (Ed), *Research Training for Social Scientists*, SAGE Publications, London, 156-166, at 165.

³⁹⁵ A. Strauss, & J. Corbin, *Basics of Qualitative Research*, (Second Edition), (1998) SAGE Publications, at 97-99.

inherent biases and acknowledges the 'diversity and complexity' which counter assumes 'homogeneity' including factors such as age and education.³⁹⁶

The discussions on emerging cultures which affect the subject group will be considered in the analysis stage and will not be limited to social scientific understanding, but also necessarily draw in the popular discourses on the issue which can be found in mainstream media, politics and general society. Theorists such as Geertz³⁹⁷ recognised that increasingly over time, some discourses have been removed from the academic realm and become popularised. Where the subject group of this research is concerned, mainstream discourses present issues of obvious concern, especially where the discourse is often negative and prejudiced. Bearing this in mind, I explored the idea of participatory research³⁹⁸ which would allow the subject group greater control of the research in order to challenge their (real or perceived) marginalised status.³⁹⁹ However, after careful consideration, I decided that gathering data from a large number of respondents would provide a wider range of data for analysis and allow for some extrapolation of findings. This was of greater appeal and thus the level of participatory research engaged in was reduced.

³⁹⁶ R. Bishop, 'Freeing Ourselves from Neocolonial Domination in Research, A Kaupapa Maori Approach to Creating Knowledge', (2005) in N. Denzin & Y. Lincoln (Eds) *The Sage Handbook of Qualitative Research*, (Third Edition), SAGE Publications, pp 109-138, at 111.

³⁹⁷ C. Geertz, *The Interpretation of Cultures*, (1973) Basic Books, New York

³⁹⁸ See W. T. Bernard, 'Participatory Research as Emancipatory Method: Challenges and Opportunities', (2000) in D. Burton (Ed), *Research Training for Social Scientists*, SAGE Publications, London, for an overview of Participatory Research, pp 167– 185.

³⁹⁹ P. Maquire, *Doing Participatory Research: A Feminist Approach*, (1987) University of Massachusetts Press, at 29.

Engaging the Research Group

This research required a significant level of interaction with the subject group – British Muslims. Although the participants were all expected to be British citizens, it was highly probable that many would have multi-state connections and multi-cultural backgrounds. This produces numerous challenges for the British legal system as the official courts may need to recognise these variances when considering cases before them. In ascertaining the legal character of British Muslims and the legal ‘space’ which they occupy, one fundamental dimension to the issue is their experiences of, and personal perceptions regarding, dispute resolution mechanisms and the national courts. The possible obstacles to justice for British Muslims, especially where there is a perceived disconnection between the British courts and the needs of British Muslim citizens, would require conceptualisation.

A significant issue presents itself in the form of inter-generational differences where British Muslims are concerned. Thus, while first generation Muslims in Britain may have carried certain attitudes towards the British establishment, in the main due to a lack of understanding of the principles and institutional processes, this is less likely to be the case for second and subsequent generations. The latter would be expected to have greater experience and interaction with the state and society, namely through the education system; their resultant expectations of the legal system are likely to be on par with all other native British citizens. As a result, the discourse taking place at present is between citizens who are either aware or well versed in their rights who have particular needs due to the religious doctrines to which they ascribe, and an establishment which may be either unequipped for, or incapable of, meeting

their demands. This research will seek to clarify whether and to what extent the subject group is desirous of state intervention where its religious laws are concerned.

Strands of Research Methods

In deciding on the research methods, much thought was given to the manners and means of engaging the subject matter. British Muslims are living in every major UK city and they are engaging in society at many different echelons. One of the aims of the research was to engage with a cross-section of such Muslims, which required a medium which allowed for engagement without being physically present with the participants, which financial constraints determined. Thus, the primary research was conducted using a survey in the form of a questionnaire which could be circulated via email as well as posted to different cities for respondents to complete and post back. Every respondent was provided with the option of contacting me for clarification on questions.

To allow greater interaction with the participants and depth in discussion, focus groups were conducted in four major British cities: London, Leicester, Birmingham and Glasgow. These involved eight participants from each city who discussed a number of questions in depth, interacting with each other's responses in a setting which duplicates the social interactions expected in everyday life. This provided the opportunity to draw out individual opinions and also to observe the dynamics in discussions where participants disagreed with opinions being expressed. This was a fascinating opportunity to record the critical discourses undertaken between British Muslims at a social level, with a focus on Islamic laws and dispute resolution.

The final strand of the research methodology involved a set of interviews which were conducted with three experts on the issues of Shariah Councils, tribunals and British Muslims. The interviewees were Professor Tariq Ramadan from the University of Oxford, Shaykh Faiz ul-Aqtab Siddiqi from the MAT and Shaykh Sohaib Hasan from the Shariah Council in Leytonstone, East London. These interviews provided some background information about the dispute resolution forums used by Muslims in Britain, the need for them and the general considerations which give rise to referral to these informal bodies.

The total number of participants engaged in this research project utilising these three strands of research techniques was approximately 280. The level of participation in the research was clearly prompted by the participants' trust in me as the researcher, as there was no worry of exploitation of either the research or their participation. There also remained a clear interest in the research with many awaiting the 'findings'.

Research Questionnaires

The questionnaire intended to extract data in a standardised manner. This would allow observation of possible correlations between variables, permitting analysis of possible accidental or causal correlations. This method was chosen as it allowed for a large number of individuals from the subject group to be engaged and their views and perceptions gathered.⁴⁰⁰ The questions were a combination of open ended and directed questions as detailed below.

This stage of the research methodology sought to ascertain the following:

⁴⁰⁰ M. Stroh, 'Qualitative Interviewing', (2000) in D. Burton (Ed), *Research Training for Social Scientists*, SAGE Publications, London, pp 196-214, at 197.

1. What socio-demographic factors impacted on the participants' knowledge of Muslim family law?
2. What were the choices of dispute resolution mechanisms employed by the subjects?
3. What socio-demographic factors impacted on the subjects' choices of dispute resolution mechanisms?
4. To what extent have the subjects encountered disputes pertaining to Muslim family law in the UK?
5. What are the subjects' perceptions relating to the national legal system?

Defining the Research Questions and Data Compilation

The questionnaire was sent out to approximately 350 participants and contained 23 questions. In compiling the questionnaire, and conducting sample responses, it became apparent that the questionnaire was very long spanning 5 pages initially and then being reduced to 3 pages in landscape and across two columns per page. Although the feedback received was that a shorter questionnaire was required, the questions were simply made shorter but the contents remained the same to ensure that the depth of the research was maintained and the data compiled would allow for numerous variables to be considered, such as education, employment and family background. As the questionnaires would be sent across the country, this was an opportunity to make the most out of engaging such a large number of participants.

The questionnaires were divided into three sections, each dealing with different areas. The full questionnaire is available to view at Appendix I.

Section 1

This section sought to provide static socio-demographic information about each respondent in order to allow a comparator for the research questions posed in sections 2 and 3. The focus in this section was the personal backgrounds of each respondent and their subjective views on personal religious practice. The information gathered related to:

Gender, age, occupation, city/town of residence, highest educational qualification, country of birth, ethnic origin, first language, Muslim by birth or conversion, description of religious practice, personal family situation, and finally, what role (if any) Islamic law played in their lives as British citizens.

The gender and age variables specify the basic information about the demographic profile of the respondents. All respondents were required to be between the ages of 18 and 45, in order to take into account one generation of British Muslims. Although this allows for an age bracket of 27 years instead of the usual 20 years reflecting a generation, allowing for a lower limit of 18 admitted the perceptions of younger adult British Muslims who are of university age and therefore likely to provide data which can be extrapolated to the next generation. Allowing for respondents up to the age of 45 included the upper tier of the generation whose experiences are likely to be more diverse and thus provide more data for analysis.

Respondents were asked to specify their current occupation and also their highest educational qualifications. This enabled examination of whether their educational attainments impacted on their understanding of Islamic laws and

dispute resolution in Britain, and to what degree. This provided the opportunity to extrapolate the data from the research to Muslim communities in Britain in order to gauge the conditions which permeate within communities and potentially influence the choice of dispute resolution mechanisms which are employed.

Respondents were asked to specify city or town of residence in order to assess whether an adequate cross section of the country had been covered and also, to enable consideration of location in light of dispute resolution experiences and decisions.

Country of birth, first language and ethnic origin are potential factors which may impact upon understanding of Islamic law and dispute resolution mechanisms and forums, and mapping this will facilitate understanding of the variables which potentially impact upon decisions pertaining to preferred dispute resolution forums. Respondents were further asked to specify whether they were born into Muslims families or converted to the faith, and about their current family situation. The responses here allowed for further consideration of this potential variable.

Finally, questions 10 and 12 in Section 1 required the respondents to subjectively describe their own religious practice and the role they believe Islamic law plays in their lives as British citizens. These questions were intended to ascertain the respondents' understanding of Islamic law and practice of the Islamic faith. Some would argue that practising the Islamic faith is an essential part of being a Muslim and thus, one cannot describe oneself as a

'non-practising' Muslim.⁴⁰¹ Others hold the view that accepting the tenets of belief enables a person to declare that they are Muslim while not practising any or all elements of the faith.⁴⁰² The term 'practising' was also intentionally imprecise to allow the respondents to formulate their own view on what it means. This was then compared to the responses received for question 12, and the role of Islamic law, in order to ascertain whether there is a correlation between the two or whether British Muslims view Islamic law as removed from their lives due to a lack of state recognition. This can be further explored by considering the definition of Islamic law for the lay Muslim. A further mapping exercise can be undertaken here which allows the respondent's opinion on the role of Islamic law in their lives to be compared with their choices for dispute resolution mechanisms in Section 3 of the questionnaire.

Overall, the data collected within Section 1 was intended to be used as comparators when considering the responses to the remainder of the questionnaire. Thus, it allowed for a mapping exercise where the choices and opinions of British Muslims relating to dispute resolution mechanisms are concerned.

⁴⁰¹ It is reported in a Hadith that the Prophet Muhammad (peace be upon him) made seeking religious knowledge incumbent on all Muslims: "Seeking Knowledge is obligatory upon every Muslim." (Related by Ibn 'Adiyy, Al-Bayhaqi & Al-Tabarani). Some religious scholars set out between seven and nine 'prerequisites' to being a Muslim, including having knowledge about Islam and complying with its commands. They cite the verse from the Quran which states: "But nay, by your Lord, they will not truly believe until they make you [the Messenger of Allaah] judge of what is in dispute between them and find within themselves no dislike of which you decide, and submit with full submission" (Surah al-Nisa, verse 65)

⁴⁰² Those Muslims who literally understand the statement of the Prophet Muhammad (peace be upon him): "There is no slave who says Laa ilaaha ill-Allaah [There is no God but Allah] then dies believing in that but he will enter Paradise."

Section 2

Section 2 focussed on the respondents' individual knowledge about certain aspects of Islamic law. The areas of focus were:

1. How to conduct a marriage contract;
2. How a male can obtain a divorce;
3. How a female can obtain a divorce;
4. Who is entitled to inherit under Islamic law (with two alternatives: where the husband dies leaving a wife, and where the wife dies leaving a husband); and
5. How to enter into a commercial contractual agreement which relates to money.

The responses to these questions provided qualitative data reflecting on the degree of knowledge which exists in a general British Muslim population (taking into account the possible shortcomings in the sample of participants engaged within this study as detailed in the Introduction under 'Limitations of Study'), where these potential areas of dispute are concerned.

The topics of Muslim family law and commercial agreements were picked specifically as these are the issues which are usually brought before faith based ADR mechanisms such as Shariah Councils for adjudication and they are issues which the state allows a degree of autonomy over.⁴⁰³

Section 3

Section 3 sought to provide further quantitative and qualitative data on experience of disputes and the forums which the respondents would approach

⁴⁰³ Where marriage is concerned, the civil procedure is regulated by the state, however, this does not impinge on the ability of individuals to enter into religious ceremonies of marriage which are not recognised by the state.

in order to resolve problems surrounding Muslim marriage, divorce and inheritance issues. The options for consultation were:

1. Approach family;
2. Approach the local imam or a knowledgeable person;
3. Consult a Shariah Council;
4. Consult the courts or a lawyer; or
5. Other (specified or unspecified).

A further question involved the respondents' experiences with dispute resolution where marriage, divorce and inheritance are concerned. This experience could be either personal or relating to a third party. Details of the dispute, the forum and mechanisms used to resolve it and its success or shortcomings were all sought. The data gathered allows mapping of the frequency of disputes, the forums used for resolution and their successes and/or failures. This also permits conclusions to be drawn about the prevalence of disputes and the need for formal and informal mechanisms which can resolve them.

Question 8 in Section 3 sought to gather data on the perceptions of the respondents where the British national courts and Shariah Councils were concerned. The respondents were asked to rate each as 'competent, satisfactory, incompetent,' or they could be 'unsure'. This enabled data to be gathered on the general perceptions of British Muslims where these forums are concerned on matters pertaining to marriage, divorce and inheritance. This further allowed the mapping of perceptions based on experiences of disputes

described in this section of the questionnaire. Alternatively, responses may have reflected individual perceptions and this can be explored further.

The final question in Section 3 sought to gather data on the perceptions of the respondents where the ability and permissibility of using the national courts and the Shariah Councils was concerned, in accordance with Islamic law. They were asked:

1. Does Islamic law allow you to use the national courts to resolve disputes?;
2. Does Islamic law require you to use the Shariah Councils to resolve disputes?;
3. Is there any pressure from the Muslim community to use Shariah Councils instead of going to the national courts?;
4. Is the British legal system adequate for Muslims to resolve family law issues?; and
5. Is the British legal system Muslim friendly?

These questions were intended to draw out popular conceptions or misconceptions about the principles of Islamic law which regulate Muslims where dispute resolution is concerned and also, their attitude towards the national legal system. This provided valuable data for mapping the mindset of a generation of British Muslims and the factors which precipitate decisions pertaining to dispute resolution.

Entering the Field

Entering the field commenced with a draft questionnaire used as a test with a sample of 10 respondents drawn from across the UK. Five male and five female

respondents were asked to complete the questionnaire and provide critical feedback. This proved to be significant. The issues which became apparent included that the introduction to the questionnaire was insufficient and as a result the test group was consulting materials in order to provide the 'correct' answers to the questions in Section 2. Further, some of the questions needed clarification in order to simplify them. Another point made by most of the test group was that the questionnaire was too long and too 'difficult' because they were issues which many had not thought about previously. On this latter point, I did not make any changes; in order to ensure that the research findings would be a deep and meaningful contribution to the field of study, the depth of the questionnaire was something I was not willing to compromise on. However, in response to the feedback I simplified the language used and reduced the number of words.

Once the sample was complete, I began distributing the questionnaires by email to contacts in various UK cities. These contacts then forwarded the questionnaires at random to individuals whom they knew who were British Muslims between the ages of 18-45, who followed the *Sunni* school of thought. These were the only restriction imposed. However, within a month, it became apparent that this method was unsuccessful; few questionnaires were emailed back and most of them were ignored. This required a change in approach. Within my locality, I used hard copies of the questionnaires and distributed them at random. I found that this resulted in a much higher rate of return, with 3 in 4 being completed and returned. Thus, I began to post out hard copies of the questionnaire to contacts across the country who then randomly distributed

them to potential respondents. The instructions included an option to contact me for clarification on the questions.

A total of 350 questionnaires were distributed of which approximately 280 were returned. However, 30 were discarded as they were substantially incomplete or the respondents were above the age of 45, and inclusion of these would only serve to distort the results. Thus, in total, 250 questionnaires were completed to the degree required for them to provide adequate data for the study and these were then analysed to conceptualise the research findings.

One factor which became obvious was that the number of male respondents was less than the number of female respondents. This may have been a result of the length of the questionnaire and the access to male respondents. The feedback from a number of male respondents (and a lesser number of female respondents) was that the questionnaire was so long, that they would return it 'later'. This never materialised. In addition, although taking constructive steps to ensure that male and female respondents were engaged in all localities, there was a slight bias towards females in those to whom the questionnaire was sent for distribution. This may have impacted on gender distribution of respondents. An added dimension may have been the issues which were under discussion, and the possibility that for British Muslim women, the points of research are of greater significance and therefore they were more convinced of the merits of the questionnaire and the possible findings. However, this has not been tested. As a result of the disproportionate sampling of females, the data will additionally be weighed and analysed based on gender differentiation.

Focus Groups

The use of focus groups⁴⁰⁴ has traditionally been seen as part of ‘market research’ strategies and they are a relatively new phenomenon in social research.⁴⁰⁵ While in market research it is largely employed as a tool that seeks to ‘extract’ “information from participants to figure out how to manipulate them more effectively,”⁴⁰⁶ for social science purposes, they can provide the medium for collective enquiry. This method of inquiry was crucial to this research as it provided a medium for testing knowledge, as well as the gender differentiation where views on Muslim family laws were concerned. Krueger and Casey⁴⁰⁷ defined focus groups as “carefully planned series of discussions designed to obtain perceptions on a defined area of interest in a permissive, non-threatening environment.” One of the key aspects of focus groups which this research seeks to draw out is the “explicit use of the group interaction as research data”.⁴⁰⁸

Bernard⁴⁰⁹ sets out some of the limitations and shortcomings of focus groups including: the lack of a natural setting; participants may influence each others’ decisions and opinions; there may be domination by one or more members of the group over the discussion; and the potential of limited input from the

⁴⁰⁴ For an in-depth discussion about focus groups, see Morgan, D.L. (1997) *Focus Groups as Qualitative Research (Vol 16, Second Edition)*, SAGE Publications

⁴⁰⁵ Burton (2000), op. cit., at 153-154.

⁴⁰⁶ G. Kamberelis & G. Dimitriadis, ‘Focus Groups, Strategic Articulations of Pedagogy, Politics, and Enquiry’, (2005) in N. Denzin & Y. Lincoln (Eds), *The Sage Handbook of Qualitative Research*, (Third Edition), SAGE Publications, pp 887-907, at 889.

⁴⁰⁷ R. Krueger & M. A. Casey, *Focus Groups, A Practical Guide for Applied Research* (3rd Edition), (2000) SAGE Publications, at 5.

⁴⁰⁸ J. Kitzinger, ‘The Methodology of Focus Groups, the Importance of Interaction Between Research Participants’, (1994) 16:1 *Sociology of Health and Illness*, pp 103-121, at 103.

⁴⁰⁹ W. T. Bernard, ‘Participatory Research as Emancipatory Method: Challenges and Opportunities’, (2000) in D. Burton (Ed) *Research Training for Social Scientists*, SAGE Publications, London, pp 167-185, at 175.

researcher. I found that in the field, these issues could be overcome by taking an active role in steering the discussions and drawing in participants who were slower to participate. However, theorists such as Morgan⁴¹⁰ would suggest this level of management within focus groups exhibits the very characteristics of artificiality from which focus groups suffer. However, the level of positive contribution possible from focus groups easily offsets the negative, as “focus groups often produce data that is seldom produced through individual interviewing and observation and that results in especially powerful interpretive insights. In particular, the synergy and dynamism generated within homogenous collectives often reveal unarticulated norms and normative assumptions.”⁴¹¹

The focus groups were conducted in four British cities in order to provide greater depth and concentration on the focal points of the questionnaires. They produced both quantitative and qualitative data as the participants were all asked to complete the questionnaire first, and the discussion followed. The location of each focus group was different. In Leicester, London and Glasgow, rooms were hired out in public venues. This provided a new setting for all participants. In Birmingham, a large open plan flat was used which belonged to one of the participants. This helped save costs, and it was a familiar environment for two of the participants only.

This research method was undertaken in order to draw out some of the reasoning behind the responses received from participants to the enquiries within the questionnaires. The focus groups allowed the views and opinions of

⁴¹⁰ D. Morgan, *Focus Groups as Qualitative Research (Vol 16, Second Edition)*, (1997) SAGE Publications, at 8.

⁴¹¹ Kamberelis & Dimitriadis (2005), *op. cit.*, at 903.

the participants to be articulated with the added dimension of the interaction and input of the other participants. As these were conducted after the questionnaires were completed and returned, it allowed me to focus the discussion on areas of particular relevance where the questionnaires did not allow further exploration. The focus groups also allowed for the testing of some of the research data, in order to investigate the possible thought patterns which seemed to emerge. It also provided a medium for 'thinking aloud' and there were some participants who openly verbalised their thought processes while they re-formulated opinions based on new information and challenges from other participants.

Three focus groups contained eight participants, and one contained seven. One of the major elements at play is the gender differentiation within the Muslim communities; in order to account for the potential variances in response, two of the focus groups were conducted only with female participants and the remaining two were mixed gender. The all-female focus groups were in Leicester and Glasgow. This provided the focus groups with an added dimension of the feminist approach. Hall and Hall⁴¹² define such research as structured in a way that places women at the centre of the social investigation, and that was intended during these two focus groups in order to allow differentiation between the discussion involving only women and those which included men. This will allow discussion on the findings based on just the female perspective and then the dual male and female perspectives. The findings here may produce an element of gender dichotomy.

⁴¹² D. Hall & I. Hall, *Practical Social Research, Project Work in the Community*, (1996) Macmillan, Basingstoke

Studying British Muslim women brings an added dimension to traditional feminist research.⁴¹³ Where certain Muslim family laws are concerned, there is a perceived inequality between the genders. Thus, the research underway must take into account the possible divergence between the public and private spheres. Here, public means society and the laws of Britain, which ensure equality between the genders, and the private here is the informal application of what is termed 'Muslim family laws' which may not provide the same equality in practice. However, gender will not be used as a theoretical category here, but rather as a variable.

The participants were selected randomly and I utilised one personal contact in each city and requested that they randomly draw in participants. They emailed and sent SMS messages to their contacts who then forwarded them on to others until enough participants were gathered for the focus groups. Thus, some within the group knew each other previously while others did not. The only restrictions in place were that the participants were British Muslims aged 18-45. In Leicester and Glasgow, they were also required to be Female.

The focus groups were not precipitated by a Sample Group due to financial constraints as each focus group required the hiring of a venue in the given city and the provision of refreshments. However, as the discourse was maintained at an informal level with no time constraints, this allowed for each question to be adequately explored and any off-shoot issues to also be discussed.

⁴¹³ A full investigation on the feminist perspective will not be undertaken in this thesis as it is beyond the scope of the study and cannot be completed adequately within the spatial limit imposed.

Defining the Research Questions and Data Compilation

Each focus group commenced with a discussion on the questionnaires which the participants had completed. This was used both as an ice-breaker and also to warm up the discussion. Following this, a set of questions were posed in order, while allowing for the discussion to branch out where different issues were brought up.

The questions tackled within the focus groups were as follows:

1. Do British Muslims need to know the answers to the questions (in Section 2 of the Questionnaire) or is it more a case of a need to know basis?
2. If you have a *nikkah* contract, women are given rights and protection, but there is no authority in Britain who can enforce those rights. Is it fair and just from an Islamic Law perspective for this situation to continue?
3. What are your thoughts on the idea of the state recognising the *nikkah* contract as a contract of marriage and thus being in a position to enforce rights and obligations under it?
4. Would your opinion be affected if the *nikkah* contract became a valid civil contract which is recognised in its own right and singularly thus excluding polygamy?
5. Every Muslim majority jurisdiction around the world has mechanisms for recognising marriage contracts and they play an administrative role in registering them and upholding them. If Britain recognised the *nikkah* contract, would the state simply be fulfilling the same role? (Bear in mind that religion as a personal faith system and religion as a state system are two different things.)
6. What are your views on Shariah Councils?
7. Limping marriages compel women to go to Shariah Councils. How can this issue be resolved?
8. What is the Islamic legal basis for Shariah Councils?
9. Is there a need for Shariah Councils to exist in Britain today based on the particular needs of the Muslim communities?

10. Is the British legal system sufficient for Muslims and their legal issues?

Each focus group brought in different peripheral issues and points of discussion depending on the sensitivities, sensibilities and experiences of the participants. These discussions provided greater insight into the many and varied concerns around the issues raised.

Entering the Field

The first focus group was conducted in Leicester with eight British Muslim women. As the first focus group to be held, issues such as timing and attendance proved to be drawbacks and obstructions. The ideal number of people in a focus group should number between 8-12,⁴¹⁴ thus 20 randomly selected women were invited of whom 12 women confirmed attendance, of whom only 8 in fact attended. This provided a smaller group than I had hoped for, but once the discussion commenced; it became apparent that any greater numbers would have impeded the depth of the discussion. A group of 8 allowed every participant to express their opinion or lack of it. As a result, the following focus groups were conducted with 8 participants, with Glasgow drawing only 7 due to a last minute cancellation. The discussions provided rich data for analysis.

Expert Interviews

The final element of research methodology involved qualitative interviews with three renowned experts in the area of Shariah Councils; dispute resolution and Muslim communities and integration. This methodology was chosen as it allowed for an exploration of the area with 'elites' who would have a great deal

⁴¹⁴ D. W. Stewart, P.N. Shamdasani & D.W. Rook, *Focus Groups, Theory and Practice*, (Second Edition), (2007) SAGE Publications, at 37.

more depth to offer with their answers and thus, it would allow exploration of the issues.⁴¹⁵ This methodological approach allowed me to explore issues which arose from the focus group discussions and some of the general data collected from the questionnaires. This added dimension is intended to facilitate the wider discourse around the research findings where British Muslim communities and dispute resolution is concerned.

Faith based ADR in the form of Shariah Councils and the MAT were the focal points of discussions on dispute resolution and Islamic family law; however, the more generic issues which overarch these discussions focus on integration, citizenship and the relationship between Muslim citizens and the British state. The Expert Interviews provide background and insight into some elements which arose through the course of the first two strands of the primary research. The interviews were conducted with Shaykh Suhaib Hasan, Shaykh Faiz ul-Aqtab Siddiqi and Professor Tariq Ramadan.

Shaykh Sohaib Hasan is the Secretary of the Islamic Shariah Council of Great Britain, based in Leytonstone, London. He was born in India, educated in Pakistan and Saudi Arabia and has lived in Britain since 1976. As well as working under the auspices of the Shariah Council, he is also chairman of a British mosque. He is an expert in Shariah Law and Islamic Studies, and completed a doctorate at the Islamic University of Madinah, Saudi Arabia. He is informally viewed as one of the most eminent scholars of religion in Britain today.

⁴¹⁵ M. Stroh, 'Qualitative Interviewing', (2000) in D. Burton (Ed) *Research Training for Social Scientists*, SAGE Publications, London, pp 196-214, at 198-199.

Shaykh Faiz ul-Aqtab Siddiqi is a barrister and member of Lincoln's Inn. He is also considered to be a trained Islamic jurist, and studied at the Al-Azhar University in Cairo. He founded the MAT and sits as an adjudicator. He has participated in discourse within the academic legal sphere as well as the Islamic scholarly sphere providing a useful dual analysis.

Professor Tariq Ramadhan is world renowned as one of the greatest Muslim thinkers and academics of our times. He has written a series of books dealing with Muslims living as minority citizens in the West.⁴¹⁶ He is recognised as a leading authority on issues of integration and citizenship where Muslim minorities are concerned. He has also trained as a religious scholar at the Al-Azhar University in Cairo.

Defining the Research Questions

In defining the questions for the experts, thought was given to the general and specific points which each expert could contribute to the research on. As a result, the questions were slightly varied. The expert opinions allow a discourse to be built which critically reflects on and engages with the research findings. Thus, questions were posed such as what practical impediments to dispute resolution are the British Muslims dealing with? What factors may have confounded these new informal institutions? How does the issue of dispute resolution forums impact on the wider concerns surrounding citizenship, belonging and participation? How can institutions such as Shariah Councils evolve to bridge the gap between the state legal system and the informal ones?

⁴¹⁶ These are titled: *To Be a European Muslim* (1999), The Islamic Foundation; *Islam, the West and Challenges of Modernity* (2003), The Islamic Foundation; *Western Muslims and the Future of Islam* (2005), Oxford University Press, USA; *Radical Reform, Islamic Ethics and Liberation* (2009), Oxford University Press, USA

Professor Tariq Ramadan

1. What are your views on the ability to enforce Islamic family law in Britain – both formally (by the state) and informally (by the Muslim communities)?
2. What are your views on Shariah councils in Britain which operate as alternative dispute resolution mechanisms?
3. Is there a precedent in Islamic history for Shariah Councils or have they been developed to meet the needs of new Muslim communities living as citizens with equal rights in majority non-Muslim jurisdictions?
4. Early Shariah Councils were set up in the 1970's. Do you think the Muslim communities in Britain still need them or should they have evolved away from these informal mechanisms in favour of the state legal system?
5. What are your views on the proposal that the *nikkah* (marriage) contract should be recognised by the British courts?
6. Why do you think Shariah Councils are seeing an increase in their case load? (From the perspective of multi-culturalism and integration debates)
7. Do you think Shariah Councils are adequately regulated? If not, what regulatory frameworks are needed?
8. The MAT was set up in 2007 in accordance with the Arbitration Act 1996. What are your views on the development of this body?

Shaykh Suhaib Hasan

1. What is the background and history of Shariah Councils in Britain?
2. Were they set up to meet any particular need of the British Muslim community?
3. Have the demands and needs of the Muslim communities changed since the early Shariah councils were set up in the 1970s?
4. What areas of Islamic law do the cases you hear focus on?

5. What is the general background of those who oversee the Shariah councils and pass 'judgements'? What training are they required to undertake? Is there scope for legal and well as religious advice?
6. Is there a precedent in Islamic history for Shariah councils or have they been developed to meet the needs of new Muslim communities in majority non-Muslim jurisdictions?
7. Why do you think Shariah Councils are seeing an increase in their case load? (From the perspective of multiculturalism and integration debates)
8. Do you think Shariah Councils are adequately regulated?
9. How easy is it for a person to access the Shariah councils?

Shaykh Faiz ul-Aqtab Siddiqi

1. How is Muslim Arbitration Tribunal (MAT) different from the Shariah Councils?
2. When you consider issues like Muslim Family Law, how are these enforceable in light of the state legislation which would override any principles of Islamic law? For example, divorce, custody?
3. Is there a precedent from Islamic history for Shariah Councils? For example, what about the Qadis in Islamic history and Muftis?
4. Do you think Shariah Councils can be traced back to colonial India where tribal councils were given authority to resolve family law issues?
5. The system of codification (during colonialism) had a huge impact on what came to be known as Islamic law. What are the ramifications of that for us here in Britain today?
6. What is your view on the assertion that the Muslim communities in majority non-Muslim jurisdictions need Shariah Councils as a forum for advice and guidance on religious matters?
7. Can you provide some details and statistics about the cases MAT hears and how many decisions have been enforced through the High Court?
8. Are lawyers present in the tribunals held by MAT?
9. Are all MAT judges Muslim or can non-Muslims act as judges?

10. What obstacles do you think exist (if any) within the British legal system which prevents Muslims obtaining justice?
11. The Family Law Act allows for the Jewish *Beth Din* proceedings to be taken into account by the British Family Court. Do we need something similar between the British Courts and the Shariah Councils to prevent 'limping marriages'?

Entering the Field - Conducting Interviews

This phase of the empirical research was the most challenging, engaging and rewarding. It was an opportunity to discuss the issues brought up within this research with experts working within the field whose experiences and opinions added greatly to the depth of the research data. Understanding the operative background to the Shariah Council and the MAT was a tremendous opportunity to engage with 'Islamic law in action' in Britain. Being present within the rooms where cases are heard and hearing firsthand how these institutions have developed provided authentic encounters which helped to place the research in context.

Each interview presented its own challenges. Levels and depth of engagement were varied, with the greatest depth coming from Faiz ul-Aqtab Siddiqi and some limitations on engagement from Sohaib Hasan. I felt this reflected their respective engagement with the state legal system in Britain. Professor Tariq Ramadan on the other hand provided philosophical food for thought from a practical perspective.

Challenges, limitations, and complexities within the Research

As with any socio-legal research project, this study comes with its limitations. Primarily, one major limitation arose from the sampling. Although diverse in terms of ethnic backgrounds, cultures of origin and gender; access to the lay

public required drawing on personal contacts from various cities across the country. Although wide samples were then obtained within each locality, this sample potentially omitted certain sections of the Muslim communities in Britain. This was a purely speculative limitation at the start of the study, which was then proven to be accurate as shall be further specified in the data analysis stage. The respondents were found to be largely university educated British Muslims with a large percentage describing their manifestation of religious beliefs as 'practising', which is no doubt a reflection of my own social group. There was no attempt to monitor the background of the respondents and they were drawn at random. Thus, while the research was not intended to monitor the opinions of Muslims from a certain educational background, its findings may be limited to them in order to enable extrapolation across a specific segment of British Muslims without imbuing the findings to those who do not conform to the same socio-demographic profile.

An added limitation as stated previously was the failure to draw in more responses from male respondents. However, the number of responses received is sufficient to enable analysis of the data and conclusions to be drawn based on gender weighing. An ideal follow up to the research would have entailed further focus groups where the data from the questionnaires were presented and discussed however; this was not possible due to financial constraints.

Analysing the Research Data

Upon completion of the three strands of empirical research, analysing the research data began. As stated previously, Grounded Theory methods are being used. However, the first step in assessing the data required extracting the

responses from the questionnaires. I considered the different mechanisms available for collecting the qualitative and quantitative data, namely, manual or computer generated statistical methods for data analysis. With regards to the latter, I looked in detail at the SPSS program but decided that manual collation using computer based spreadsheets which were specifically generated for my data was the preferred option in order to advance the Grounded Theory. This decision was prompted by a range of factors including the complexity and depth of the research questions and the range of methods being employed. Manual data analysis would allow for greater ease in using the coding process.

The data collation involved numerous detailed 'excel' spreadsheets which facilitated the processing of the questionnaire data and the categorisation of the responses. These were then used to generate pie charts and bar graphs depicting the statistics for responses to each category. These were then used in the final data analysis stage.

Parts of the questionnaire, the focus group discussions and Expert Interviews required a different approach. The discussions were first transcribed from the recordings or collated from questionnaires and this was followed by coding⁴¹⁷ for which I followed the technique used by Orona⁴¹⁸ who describes "line-by-line coding, first quickly to get impressions and then, once again but this time slowly to test my impressions and to raise each impression to a higher conceptual level." I compiled themes and patterns between the responses being collated on a tailored spreadsheet which allowed the contrasting strands of thoughts and

⁴¹⁷ Glaser & Strauss (1967), op. cit.

⁴¹⁸ C. Orona, 'Temporality and Identity Loss Due to Alzheimer's Disease', (1997) in A. Strauss & J. Corbin (Eds), *Grounded Theory in Practice*, SAGE Publications, pp. 171-196, at 179.

ideas to be recorded in close proximity to each other for ease of analysis. Thus, my 'memos' were in electronic form. This method was repeated for the parts of the questionnaires which posed open ended questions.

This method of analysis is still the most popular with social researchers⁴¹⁹ and for the purposes of this research, it is a necessary element of the analysis; the discussions involved many layers of subjective and objective opinion which required a specifically tailored method of analysis which I developed specifically to manage the many strands of data.

The analysis of the data collected then proceeded to the next stage, where Grounded Theory was performed and units of analysis were specified and comparative analysis undertaken.⁴²⁰ This detailed process then allowed for the generation of appropriate theory.⁴²¹ This took the form of substantive theory⁴²² in the first instance before developing into a Grounded Formal Theory.⁴²³

Thus, in conclusion, the steps in analysing the data were as follows:

1. Extract data from questionnaire responses;
2. Chart data using excel spreadsheets, pie charts and bar charts;
3. Analyse the results and draw out patterns for conceptual analysis, identify the key themes and comparators;
4. Study the transcripts from the focus groups and examine the reasoning behind choices in dispute resolution;

⁴¹⁹ M. Stroh, 'Computers and Qualitative Data Analysis: To Use or Not to Use...?' (2000) in D. Burton (Ed) *Research Training for Social Scientists*, SAGE Publications, London, pp 227-243.

⁴²⁰ Glaser & Strauss (1967), op. cit., at 22-26.

⁴²¹ Ibid, at 28-43.

⁴²² Ibid, at 32. Involving a 'substantive, or empirical' area of enquiry, such as patient care or professional education.

⁴²³ Ibid. A 'formal, or conceptual area' of social enquiry, such as stigma, or authority and power.

5. Develop and enhance the key themes from the questionnaires using the focus group data; and
6. Analyse the transcripts from the expert interviews to consolidate the analysis and formulate theory.

It is worth bearing in mind that “there is no single interpretive truth”⁴²⁴ and thus there is a need to keep an open mind to the existence of multiple interpretive practices.

Conclusion

The research methodology I undertook was multi-faceted and allowed a great deal of work in the field. I was also able to engage with a larger number of the subject group by using the questionnaire method and the results have provided a depth and breadth of valuable data. Due to the number of areas which were explored, the research findings are likely to provide valuable new insights into the British Muslim communities and their complex and multi-faceted negotiations between law, culture and religion. The absence of a hypothesis being tested in this study will facilitate the accomplishment of Grounded Theory.

Presentation of the research findings will commence with consideration of faith based ADR mechanisms which are operational within British Muslim communities, namely Shariah Councils and the MAT. Chapter Five engages with existing literature and studies on these ADR mechanisms, intertwined with the relevant aspects of discussion undertaken with the experts in these organisations.

⁴²⁴ Denzin & Lincoln (2005), op. cit., at 26.

Chapter Five

Negotiating Faith Based ADR Mechanisms: Conceptual Frameworks, Religious Theology and a Plural Legal System

Introduction⁴²⁵

This Chapter examines the emergence of faith based ADR mechanisms such as Shariah Councils and the process of ‘formalisation’ which they have undertaken in light of the socio-legal issues faced by Muslims seeking to implement Muslim family law in Britain. The Chapter also considers the challenges Britain faces as a multi-cultural society and the complexities Muslims face as citizens of the state *vis a vis* certain parameters of Islamic family law. The discourse presented here incorporates the survey of opinions undertaken utilising expert interviews during the empirical research stages of this study.

The jurisdiction of the British courts in civil dispute resolution has faced mounting challenges over numerous decades. The prohibitive costs and formality associated with the adversarial process has led to the development of numerous forms of ADR mechanisms intended to ease the process for litigants by allowing them to maintain control over the proceedings. ADRs are encouraged in order to ease the pressure on the courts and for the greater good of the disputants, to the extent that some form of negotiation is made

⁴²⁵ This Chapter draws upon a published article by the writer: R. Akhtar, ‘British Muslims and the Evolution of the Practice of Islamic Law with Particular Reference to Dispute Resolution’, (2010) 6:1 *Journal of Islamic State Practices in International Law*, pp 27-39

imperative in the litigation process with the possibility of punitive measures against those who fail to adhere to certain pre-action protocols.⁴²⁶

ADRs provide the quasi-legal space for dispute management where parties can agree on a resolution to their civil disputes, with some form of outsider management/intervention. The various forms and legal authority of ADR mechanisms were detailed in Chapter One. Here, the focus shall be on Shariah Councils and the Muslim Arbitration Tribunal (MAT) as forms of faith based ADR operational as a result of liberal multiculturalism,⁴²⁷ but which may lead to legal segregation of the Muslim communities in Britain. Termed in 2012 by Professor Malik as 'minority legal orders' (MLO),⁴²⁸ this form of faith based ADR has attracted a great deal of criticism and vital questions arise regarding their applicability within the British jurisdiction; the resultant impact on Britain's official monolithic legal tradition; the impact of their decisions on equality and anti-discrimination laws where women are concerned; the presence or absence of historic roots in Islamic theology and practice for such institutions; and the impact on multiculturalism and possible segregation from having separate quasi-legal institutions for British Muslims. This chapter will consider these fundamental issues while analysing the elemental need which gave rise to these informal institutions at the outset, and the issue of access to justice.

⁴²⁶ Civil Procedure Rules are updated regularly and guide solicitors on the protocols that need to be followed when legal action is being instigated. See V. McCloud, *Civil Procedure Handbook 2012/2013 (Ninth Edition)*, (2012) Oxford University Press

⁴²⁷ S. Bano, 'Islamic Family Arbitration, Justice and Human Rights in Britain', (2007) 1 *Law, Social Justice and Global Development Journal*, at 5.

⁴²⁸ M. Malik, *Minority Legal Orders in the UK, Minorities, Pluralism and the Law*, (2012) A Report for the British Academy Policy Centre, available online at: <http://www.britac.ac.uk/policy/Minority-legal-orders.cfm> (Last visited 15 December 2012)

This research engaged directly with the leading mediator within one of the well-established Shariah Councils in Britain⁴²⁹ and with the founder and chair of the MAT.⁴³⁰ This engagement provided valuable insights into the functional capacity, religiosity and quasi-legal process (Islamic and state) of these institutions; as well as the philosophical demarcations involved. This chapter is constructed around the major points of discussion undertaken within the interviews in order to provide some empirical basis for the analysis.⁴³¹

Faith Based Arbitration as Minority Legal Order

The British Muslim communities exemplify the existence of groups of citizens living in jurisdictions all over the world where they accede to a faith that is followed by a minority of the state's populace. This form of permanent citizenship has only been a reality on the present scale since the second half of the twentieth century.⁴³² The settlement of these communities revealed a *lacuna* within the legal system where accedence to religious 'laws' were concerned. Faith based ADR mechanisms such as Shariah Councils transpired to serve a need for authoritative religious adjudication, and have since become an institutional mechanism of the MLO within these communities. The perceived

⁴²⁹ Shaykh Shoaib Hasan at the Islamic Shariah Council, Leyton, London. According to the Councils website, www.islamic-sharia.org, "The Council considers itself to be a stabilising influence within the UK Muslim community. Outside of Muslim countries, Islamic institutions are essential for the survival of Muslim communities."

⁴³⁰ Shaykh Faiz al-Aqtab Siddiqi

⁴³¹ The extracts presented in this chapter are from in-depth interviews undertaken with Shaykh Hasan and Shaykh Siddiqi.

⁴³² S. Ali, 'Authority and Authenticity? Sharia Councils, Muslim Women's Rights, and the English Courts', (2012), (unpublished at time of writing, November 2012), at 4.

authoritativeness of these bodies has come under intense scrutiny in recent times, and this will be considered further below.⁴³³

The issue of faith based ADR is not new and certainly not limited to Muslim communities. A study in 2011 by Douglas *et al*⁴³⁴ at Cardiff University sought to gather information on the “role and practice of religious courts in England and Wales in order to contribute to debate concerning the extent to which English law should accommodate religious legal systems.”⁴³⁵ The study involved surveying three religious courts/tribunals which operate in the UK, the Shariah Council in Birmingham, the Jewish *Beth Din*⁴³⁶ in London and the Catholic National Tribunal for Wales in Cardiff⁴³⁷. This study revealed the extent of faith based ADR mechanisms which occupies quasi-legal space in England and Wales. The report outlines the extent to which the national courts will unusually intervene in religious matters, setting out the *Forbes v Eden*⁴³⁸ exception under

⁴³³ Critical analysis of the Shariah Councils’ functions and appropriate analysis of their operative context can be found in the studies conducted by: S. N. Shah-Kazemi, ‘Untying the Knot, Muslim Women, Divorce and the Shariah’, (2001) The Nuffield Foundation; S. Bano, *Complexity, Difference and ‘Muslim Personal Law’: Rethinking the Relationship between Shariah Councils and South Asian Muslim Women in Britain*, (2004) PhD Thesis, University of Warwick; M.M. Keshavjee, ‘Alternative Dispute Resolution in a Diasporic Muslim Community in the United Kingdom’, (2009) PhD Thesis, School of Oriental and African Studies, London University

⁴³⁴ G. Douglas, N. Doe, S. Gilliat-Ray, R. Sandberg, and A. Khan, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts*, (2011) Report of a Research Study funded by the AHRC, available online at:

http://www.religionandsociety.org.uk/uploads/docs/2011_07/1310467350_Social_Cohesion_and_Civil_Law_Full_Report.pdf (Last visited 12 December 2012)

⁴³⁵ *Ibid*, at 5.

⁴³⁶ The functions of the Jewish courts range from “regulation of slaughter and kosher food, conversions, arbitrating agreements, burial practices, determining personal status and a host of issues concerning marriage and divorce”, Douglas et al (2011), *op. cit.*, at 27.

⁴³⁷ “The Roman Catholic Church may issue dispensations”, dissolutions” and annulments.” Douglas et al (2011), *ibid*, at 40.

⁴³⁸ *Forbes v Eden* (1867) LR 1 Sc & Div 568

which the courts will “adjudicate on and recognise religious laws”⁴³⁹ in the interests of the disposal of property or other financial concern. However, the courts have unequivocally resisted being drawn into conflicts involving religious or spiritual functions.⁴⁴⁰ Douglas et al continue to set out other remits for court intervention on religious matters, listing:

“Religious law may enter the courtroom as part of the facts of the case, and religious law may be introduced into the courtroom by expert witnesses. Pieces of State law may give effect to provisions of religious law or, more typically, religious practices. For instance, there are special rules on slaughter for Muslims and Jews and concerning the Sikh turban. Financial provisions allow Islamic banks, Shariah-compliant mortgages and Islamic Bonds.”⁴⁴¹

This list is not exhaustive, and provides an outline of the scope of intervention. However, case law indicates that the courts will not intervene in matters where they are required to examine the issue of religious doctrine to its very core principles itself.⁴⁴² Issues of family law and/or contractual disputes have engaged Islamic law drawn in by expert opinions, seen recently in the *Uddin v Choudhury* case⁴⁴³ which exemplifies the court’s readiness to accept Islamic quasi-legal processes as a fact. Here, the courts accepted that the Shariah Councils were able to dissolve an Islamic marriage, which then triggered off contractual obligations under the *nikkah* contract for the payment of the *mahr*.

⁴³⁹ Douglas et al (2011), op. cit., at 11.

⁴⁴⁰ *R v Chief Rabbi, ex parte Wachmann*, [1992] 1 WLR 1036

⁴⁴¹ Ibid, at 11-12.

⁴⁴² *Blake v Associated Newspapers* [2003] EWHC 1960.

⁴⁴³ [2009], EWCA (Civ) 1205

The study by Douglas et al provides grounding for the further consideration of MLOs. Malik defines the term minority legal order as rotating around two key features:

“First, by its distinct cultural or religious norms; second, by some ‘systemic’ features that allows us to say that there is a distinct institutional system for the identification, interpretation and enforcement of these norms.”⁴⁴⁴

She crucially notes further that “whether or not a community has a MLO may be a matter of degree rather than a clear cut issue.”⁴⁴⁵ This is a crucial statement which reflects the subjective nature of MLOs which are formed by social, religious and cultural norms within certain groups of citizens, over which varying degrees of control are exercised by individuals from within the group. This feeds into the discourse concerning semi-autonomous social fields as coined by Moore.⁴⁴⁶ Consequently, rights which are guaranteed by the state have the potential of being breached within such informal legal orderings, over which the state cannot exercise authority. For example, non-discrimination is guaranteed by the law, yet a MLO may allow for forms of discrimination to occur which do not breach state laws *per se*, however, go against the spirit of it, while upholding the traditions of the minority group. This produces a legal quagmire, which some have sought to overcome by partial elimination⁴⁴⁷ while others argue for a balanced narrative where a minority groups’ dispute

⁴⁴⁴ Malik (2012), *op. cit.*, at 5.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ S. F. Moore, ‘Law and Social Change: The Semi-Autonomous Social Field as an appropriate Subject of Study’, (1973) 7 *Law and Society Review*, pp719-746

⁴⁴⁷ Baroness Cox introduced the Arbitration and Mediation Services (Equality) Bill (HL Bill 7) 2012 which sought to tackle issues of perceived discrimination in Arbitration proceedings, as a direct response to Shariah Councils and the Muslim Arbitration Tribunal.

resolution needs are still met, while conflicts are reconciled without further infringing on religious freedoms.⁴⁴⁸ On the other hand, the state's approach to MLO's has been haphazard and over the decades, policies have altered to suit political interests of the day.⁴⁴⁹

MLO's are not solely religious in nature; cultural and social factors can always be expected to infringe upon religious doctrine for all and any religious group. An-Naim⁴⁵⁰ tackles this issue by stating that the premise on which rules under the 'Shariah' are claimed as state law by Islamic theocracies are erroneous as Shariah should only be used as a normative influence on the laws which are eventually adopted out of political expediency. This narrative is disputed by scholarly opinion and state practice all over the Muslim world, and certainly contradicts established principles of jurisprudence in the area.⁴⁵¹

The lack of a single comprehensive Islamic law for all conserves its dynamism across time and terrain; however state implementation becomes exceptionally complex. This fact contradicts any efforts to essentialise British Muslims, as "bounded, fixed and stable."⁴⁵² Shah⁴⁵³ suggests that claims of Islamic laws being 'universal' are inaccurate, as "Muslim law is a very localised

⁴⁴⁸ Malik (2012), op. cit.,

⁴⁴⁹ U. Khaliq, 'The Accommodation and Regulation of Islam and Muslim Practices in English Law', (2002) 6:31 *Ecclesiastical Law Journal*, pp 332-351, at 333.

⁴⁵⁰ A. A. An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a*, (2008) Harvard University Press

⁴⁵¹ "Those (Muslim rulers) who, if We give them power in the land, they establish prayer, enforce Zakat and they enjoin the good and forbid evil." Chapter 22, Surah Al-Hajj, Verse 41. This verse is believed to direct Muslim leaders and all those in authority to administer their powers using Islamic principles.

⁴⁵² Bano (2007), op. cit., at 4.

⁴⁵³ P. Shah, 'Between God and the Sultana? Legal Pluralism and the British Muslim Diaspora', (2010) J. Nielsen and L. Christoffersen, (Eds) *Shari'a As Discourse, Legal Traditions and the Encounter with Europe*, Ashgate, pp. 117-139

phenomenon.”⁴⁵⁴ This is certainly reflected in the various schools of thought which are adhered to and the range of juristic opinions which can exist on a single matter. Thus perhaps a more accurate statement would be that Islamic laws have universal normative influence on the development of Muslim laws. On the issue of family law specifically, the unwillingness to relinquish adherence was described by Mezghani as “a site of conservation” within ‘Islamic’ countries.⁴⁵⁵ Regardless of the historic basis for this current position, the fact of the matter necessitates state intervention or, in the very least, acknowledgement of a normative if not minority legal ordering, where Muslim citizens permanently reside in the state’s territory.

MLO’s epitomised by Shariah Councils are seen in many guises all over the world; not always without controversy. The government of Canada banned faith based arbitration in 2005 for fear that ‘fundamentalist Muslims’ would use it to introduce Shariah law against “vulnerable Muslim women”.⁴⁵⁶ The debate in Canada resulted in ‘The Boyd Report’ which noted that Canada had a history of ‘separate but equal’ legal regimes,⁴⁵⁷ and “values of tolerance, accommodation and individual autonomy”.⁴⁵⁸ However, Canada nevertheless went on to exclude faith based arbitration from that very same tradition against the Report’s

⁴⁵⁴ Ibid, at 127

⁴⁵⁵ Ali Mezghani as quoted by, M. Rohe, ‘The Migration and Settlement of Muslims: The Challenges for European Legal Systems’, (2006) P. Shah and W. Menski (Eds) *Migration, Diasporas and Legal Systems in Europe*, Routledge-Cavendish, pp.57-72, at 60.

⁴⁵⁶ S. Razack, ‘Between a Rock and a Hard Place: Canadian Muslim Women’s Responses to Faith-Based Arbitration’, (2008) R. Medhi *et al*, *Law and Religion in Multicultural Societies*, DJØF Publishing Copenhagen, pp83-94, at 83.

⁴⁵⁷ J. Redding, ‘Institutional v. Liberal Contexts for Contemporary non-state, Muslim Civil Dispute Resolution Systems’, (2010) 6:1 *Journal of Islamic State Practice in International Law*, pp. 2-26, at 9.

⁴⁵⁸ The Boyd Report, at p. 89. Available online at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf> (Last accessed 30 November 2012)

recommendations. Shachar takes the view that this decision was not in the best interests of the potential users of the system, and would engender an 'underground' system in its place where no state protection can be offered.⁴⁵⁹

In Britain, the issue has been approached with equal wariness, with the term 'Shariah' and its mainstream persona leading the multi-layered public discourse on the issue. Much of the negative publicity stems from reports from women who have used the system and been failed by it. However, it remains to be seen what proportion of the users of these institutions these women represent. Following her empirical research, Bano⁴⁶⁰ advanced the need for 'caution' where Shariah Councils and 'Shariah law' in Britain are concerned, but Shah-Kazemi⁴⁶¹ suggested that women were not coerced into utilising this forum but instead chose to approach the institution for the fulfilment of their own personal needs. It is highly probable that plural narratives exist where Shariah Councils are concerned. One of the key questions engaged in this research includes the experiences of British Muslims with faith based ADR, and the attitudes and perceptions held by them in relation to these organisations. This will assist in the formulation of a coherent and factually authentic narrative about the position of faith based ADR such as Shariah Councils in dispute resolution for British Muslims who match the socio-demographic profile of the respondents to this study, where aspects of family law are concerned. Before such considerations, it is necessary to begin by charting the historic instigation

⁴⁵⁹ A. Shachar, 'Privatising Diversity: A Cautionary Tale from Religious Arbitration in Family Law', (2008) *Theoretical Inquiries in Law*, Volume 9, No. 2, June, pp. 573-608, at 579.

⁴⁶⁰ S. Bano, 'In Pursuit of religious and legal diversity: a Response to the Archbishop of Canterbury and the "Sharia Debate" in Britain', (2008) 10:3 *Ecclesiastical Law Journal*, pp 283-309

⁴⁶¹ Shah-Kazemi (2001), op. cit.

of these MLOs, and the complexities they present for negotiating law, culture and religion within the British Muslim communities.

The British Muslim Communities: Advent, Accommodation and Plurality

The historic presence of Muslims in Britain is thought to date back to at least the 8th century.⁴⁶² From the latter half of the twentieth century, an upsurge of immigration from former commonwealth countries was witnessed, with Muslim immigration from the Indian sub-continent concentrated between the 1950s and 1970s. These migrants were here to make a living within their new state and take back that benefit to their countries of origin. Menski points out that these minorities arrived “encumbered with the ‘baggage’ of their cultural and personal law,” and “face[d] and create[d] many complex legal challenges”.⁴⁶³ An additional challenge was presented by ‘operative’ Islamic law, a term coined by Ali⁴⁶⁴ in reference to the development of a version of Islamic law which is heavily imbued with cultural and customary practices which are superfluous to strict religious codes. This form of ‘cultural Islam’⁴⁶⁵ presented a challenge as it distorted the understanding within the British judiciary of the true remit and provisions of Islamic law, in favour of the practical manifestation of cultural traditions and behavior which was (and continues to be) erroneously attributed to Islamic law.

⁴⁶² H.A. Hellyer, ‘British Muslims: Past, Present and Future’, (2007) 97 *The Muslim World*, pp225-258, at 226-227.

⁴⁶³ Ibid, at 1.

⁴⁶⁴ S. Ali, *Gender and Human Rights in Islam and International Law, Equal before Allah, Unequal Before Man?*, (2000) The Hague, Kluwer Law International

⁴⁶⁵ Ibid.

Ballard⁴⁶⁶ went one step further and coined the term '*pardesh riwaj*'⁴⁶⁷ in reference to the practical implementation of what Muslim communities would term religious laws, but which in fact are 'customs' and practices of those communities around which they have since organised their lives in places like Britain. As a result of such entanglement, it is almost impossible for the outsider to differentiate between legitimate religious practices which are protected within certain frameworks, and customs which are mere privileges. Britain needed to adapt its legal system to meet the needs of these migrant communities, who often either did not understand the laws or brought multifaceted issues before the courts. These difficulties were by no means limited to Muslim migrants. Menski states that '[t]he responses of the judiciary show significant inconsistencies, judicial analysis in the cases tends to be shallow, and there is a notable lack of conceptual awareness to facilitate a comprehensive strategy for accommodating different norms and customs,'⁴⁶⁸. While judges are still adapting to the challenges of multi-culturalism, even recent examples show that the highest echelons of the judiciary are still mired by misunderstanding of Islamic laws or remain guilty of holding stereotypical views of what they represent.

In the case of *EM (Lebanon) v Secretary of State for the Home Department*⁴⁶⁹ in 2008, the Law Lords provoked outrage from some quarters of the Muslim community in Britain when Lord Hope stated "The appellant came to this

⁴⁶⁶ R. Ballard, 'Ethnic Diversity and the Delivery of Justice, the Challenge of Plurality', (2006) P. Shah and W. Menski (Eds), *Migration, Diasporas and Legal Systems in Europe*, Routledge-Cavendish, pp29-56

⁴⁶⁷ Ibid, at 51. Literally translating to 'Abroad traditions'

⁴⁶⁸ R. Jones, and G. Welhengama, *Ethnic Minorities in English Law*, (2002) Trentham Books, at 1.

⁴⁶⁹ [2008] 64 UKHL

country as a fugitive from Shari'a law".⁴⁷⁰ He went on to describe an arbitrary nature of awarding custody of children in a divorce to the father once the child reaches a certain age, regardless of the circumstances. The main issue of concern regarding these statements was the sheer erroneousness of Lord Hope's belief, shared by some academics such as Reiss.⁴⁷¹ There are, in fact, numerous factors that are taken into account by family courts upholding Islamic family laws, which would preclude unfair award of custody to any parent, with the interests of the child being the key consideration. Such misrepresentation of Islamic laws, and the lack of apparatus and/or expertise to deal with Muslim specific issues directly resulted in the first Shariah Councils in the late 1970s. This was in response to a need within the community to resolve family law matters within a framework where the issues and regulations were more clearly understood.⁴⁷²

Engaging with the Islamic Shariah Council and Muslim Arbitration Tribunal

I engaged with the Islamic Shariah Council (ISC) and the MAT during this research. The ISC was approached as it is one of the oldest Shariah Councils in Britain, established in 1982; forming an umbrella body encompassing a number of Muslim organisations as well as other Shariah Councils across the country, which in its own view, reflects its authoritativeness.

⁴⁷⁰ Ibid, Paragraph 5.

⁴⁷¹ Maria Reiss states that "where British custody law focuses on the best interests of the child, Shari'a law has no such emphasis." This is wholly incorrect, as under Islamic law, the guardianship of a child is set out as guidelines, all of which are dependent entirely on what the court deems to be in the best interests of the child taking account of all surrounding circumstances. M. Reiss, 'The Materialization of Legal Pluralism in Britain: Why Shari'a Council Decisions should be non-binding', (2009) 26:3 *Arizona Journal of International and Comparative Law*, pp 739-778.

⁴⁷² For details on procedure within Shariah Councils, see Bowen (2010), op. cit., at 418-421.

It further elaborates: “The scholars representing these centres represent all major schools of thought among the Sunnis. The Council is also widely accepted by the UK Muslim community and this is shown by the sheer volume of enquiries related to marital problems which it receives from the general UK public. Additionally, a significant number of solicitors who were able only to secure civil divorces for their clients have found recourse with the Council regarding also securing Islamic divorces for their clients.”⁴⁷³ This reveals the existence of a 30 year old institution which has become entrenched in certain Muslim communities, with the added dimension of hybrid legal processes being possible with the engagement of British trained lawyers. Thus, functionally, there appears to be a clear role for the ISC. Interestingly, the Council considers itself a “quasi-Islamic court”,⁴⁷⁴ expounding its own perception of a certain official capacity, albeit within a legal system that is unenforceable in the jurisdiction within which it operates. When statistics relating to caseload found on the ISC website are considered,⁴⁷⁵ an average annual caseload of 233 applications is revealed. At almost one case per working day, this is not a negligible figure.

During my interview at the MAT, Shaykh Siddiqi differentiated Shariah Councils from the MAT:

They are a completely different species. Shariah Councils mainly deal with marriage issues and divorces and issues between husband and wife. The MAT deals with a whole array of issues like commercial disputes..., civil

⁴⁷³ Ibid.

⁴⁷⁴ See <http://www.islamic-sharia.org/about-us/about-us-6.html> (Last visited 2 December 2012)

⁴⁷⁵ <http://www.islamic-sharia.org/about-us/about-us-9.html> (Last visited 2 December 2012)

matters, neighbourly disputes, mosque disputes, and regular family matters. A whole array of litigation that would otherwise be in the courts comes to us.

The second difference is that our decisions are binding because they are by way of the Arbitration Act 1996. The Shariah Councils decisions are not binding.

The Shariah Councils are not governed by a specific set of rules. They are devised by scholars who make things up as they go along. Not necessarily that they are chaotic, but they are ad hoc and they do not adhere to a defined transparent set of laws.

Whereas with MAT it is quite defined and it is clear what the rules are and parties know what they are entering into and we abide by the Wednesbury Principles of natural justice. I'm not saying Shariah Councils don't, but it is not clear.

A number of key distinctions are drawn here, including the remit of the work, but also the clear divergence between the two types of ADR forums. It is apparent that they consider themselves distinct from each other, and this is further advanced by the procedural rules employed by the MAT which clearly show greater legal acumen, which is fostered by the legal training of its personnel. The ISC on the other hand, focussed more on its underpinning constituent element as a religious mission, with Shaykh Hasan stating:

The objective behind it was to guide the Muslim community in all such matters as they are confronted with in their daily lives.

Secondly, to issue Fatwa on any issue which is presented to the Council, for example, at that time there was the burning question of Halaal meat. Other

questions included mortgages, and [we were] also [asked] to decide on matrimonial matters.

With the passage of time we realised that there was a great need for such a council to mediate amongst the spouses whenever there was a dispute. We give our rulings with regards to the dissolution of marriages.

Later, it became the major task of this Shariah Council to mediate on marriages and we give four days a week to hear mediation sessions between couples. If the mediation fails to resolve their issues, then a panel of scholars decides on the dissolution of the marriage. [The options are]:

- 1. Khula – when the man agrees to the demand of the woman to divorce.*
- 2. Or it is a dissolution initiated by the council.*
- 3. Or it is a divorce which is initiated by the man.*
- 4. Or is it tafweed, where the right of divorce is delegated to the woman right at the beginning of the marriage. That is acceptable in Pakistani marriages – it is a standard clause in Pakistani nikkah contracts which delegates the right of divorce to the woman.*

This frank disclosure provides an insight into an institution which was forged in response to a proven need within the community, which has since burgeoned, lending support to similar findings by Samia Bano.⁴⁷⁶ When asked about the specific male/female ratio in applicants, it was clear that women were the forerunner and a female instigated divorce was long and laborious.

⁴⁷⁶ S. Bano, 'An exploratory study of Shariah councils in England with respect to family law', 2012, available online at: http://www.reading.ac.uk/web/FILES/law/An_exploratory_study_of_Shariah_councils_in_England_with_respect_to_family_law_.pdf, (Last visited 25 December 2012)

As the right of divorce is given primarily to the man in Islam, it is easy for him to obtain a divorce. In this situation, we have to confirm that he has fulfilled his obligations, such as giving the woman her dower rights. The divorce remains invalid until the man has fulfilled his responsibilities.

The women usually come when they are after the khula. That takes a bit of time, from 6 months to a year.

The candid admission that procedurally, it is accepted by the ISC that the Muslim man has a greater right to divorce than a woman appears to confirm charges of discrimination. While Islamic jurisprudence does provide for a verbal divorce by the man without recourse to third parties, in practice within some Muslim majority jurisdictions in the present day, both male and female instigated divorces must be taken before the national family courts.⁴⁷⁷ This reflects the transformative process within Islamic law where practical manifestation of these principles is concerned. Shaykh Hasan did recognise that Muslim women can have the right to divorce enshrined within their *nikkah* contract, under the auspices of the '*Faskh*' principle. However, the lack of discourse offered against the statement '*as the right of divorce is given primarily to the man in Islam, it is easy for him to obtain a divorce,*' suggest that no engagement is taking place in order to provide greater equity in processes. Thus, possible differences of scholarly opinions are left unexplored.

For a divorce instigated by the woman to take up to a year to complete, rather than the three monthly cycles for one instigated by the man, suggests that

⁴⁷⁷ The Moroccan Family Code, The Moudawana, requires court procedures regardless of which spouse instigates the divorce. This development still accounts for the differing rights and remits for divorce under Islamic jurisprudence, but specifies the procedures to be followed which protect both spouses.

women are heavily disadvantaged by the process. On the practical level, a range of problems can no doubt arise for women who are awaiting divorce, the minimum of which is that they cannot remarry.

We have representatives in different cities. We try not to ask women to travel to the London office if possible. They can be interviewed in their local mosque if we have representatives there. The reports are then sent to us. These reports are then taken to monthly sessions which we hold where they are considered.

We have a 10 member panel which reaches decisions in the monthly sessions. These include some representatives from Birmingham, Bradford, and Manchester.

But other places which are not so populated by Muslims, there are about 10-12 representatives.

There was clear cognisance of the difficulties some women may face in travelling and if they reside in one of the areas where the ISC has personnel, they will be dealt with locally. However, a monthly session for the consideration of decisions seems inadequate, as this can extend the waiting period for women. When such a large fee (£400) has been charged, it is not inconceivable that weekly sessions might be held. Logistics in gathering people from numerous cities no doubt plays a part. A further cause for concern is the all-male membership of the panel, not least because it appears to reinforce the patriarchal administration of justice seen in so many Muslim majority jurisdictions, which are accused of anti-female bias.

We are [also] approached for fatwas, and this can be up to 60 requests a week so it is a large amount. We have one person dedicated to working singularly on the fatwas.

This added dimension to the work of the ISC reflects its dual role in providing religious guidance and opinion on a whole range of matters which are brought before it. For those who accept the scholarly credentials of the members of the Council, this is no doubt a valuable service, and reflective of a key service provided by *Muftis* within Muslim jurisdictions. The need for such guidance is possibly more pertinent in the time and place the British Muslims find themselves. However, the next statement reveals the potential of major limitations of this service:

Normally, all those who sit on the panel have graduated from either Islamic universities or the religious seminaries in Pakistan, Bangladesh, etc, or Al-Azhar for example. They are all graduates in Shariah. That is the main qualification needed.

But we have advisors from amongst barristers who are aware of the British laws. So they act as advisors and they do attend some of the sessions.

This admittance of scholars trained in jurisdictions other than the British context exposes a major weakness in the service provided to the Muslim communities. It is apparent that the challenges faced by Muslims in places like Pakistan and Bangladesh, especially *vis a vis* the positionality of women, is likely to be wholly distinct. Where the primary users of the service appear to be women, this is not a negligible factor and perhaps goes some way to explaining

the disconcerting experiences reported by women in previous empirical research carried out in this area. The social positioning of women in Britain, especially outside of the home, is distinctly dissimilar to cultural norms in the South Asian context. However, this is not an insurmountable problem and now identified, steps can be taken to rectify the lack of representation from British trained Islamic religious scholars. The interview with Shaykh Sohaib Hasan provided valuable insight into the workings of the ISC. They will be contextualised further below.

Functional Performance of 'Shariah' Councils in Britain

Current estimates suggest approximately 85 Shariah Councils exist,⁴⁷⁸ however the numbers which operate in practice without self-identifying as such are likely to be much higher. A number of areas of concern have been raised about the operational framework, functional performance and accessibility of Shariah Councils for its main users - Muslim females. The lack of regulation, a clear set of procedural rules of operation, accountability, and enforcement authority all appear to demonstrate limited capacity. A further point of contention arises from the lack of trained legal personnel within the institutions, which potentially results in intervention where there is no jurisdiction for faith based ADR mechanisms.⁴⁷⁹ In order to ascertain the significance of these shortcomings, it is necessary to investigate the functional performance of these institutions and the 'cases' they preside over.

⁴⁷⁸ Estimate from Civitas.

⁴⁷⁹ An issue raised by Bano, as evidenced during a Shariah Council hearing which she observed. In the case, the wife had a Court Order which precluded the husband from accessing their daughter, yet within the discussions, the mediators attempted to convince the wife to allow contact at the Mosque. Bano (2004), op. cit at 168-169.

In an exploratory study, Samia Bano⁴⁸⁰ examined the working practices of 22 Shariah Councils detailing the process of engagement with them. Her study revealed organisations which seek solely to serve the needs of their communities; they face external censure and negative publicity and are consequently reluctant to engage in academic studies for fear of the enquirer's motives. With the empirical research undertaken in the present study, I experienced a similar wariness during my time in the field and my contact with the Shariah Council was very cautiously received. Conversely the MAT was happy to engage, suggesting greater ease with formal research based no doubt on confidence in their operational system.

Bano's study revealed that Shariah Councils are usually affiliated to mosques and are formed as a response to one pressing need - Muslim women who are seeking divorce under Islamic laws.⁴⁸¹ Thus, their establishment is 'user led' and demand is sometimes not being met due to various resource constraints.⁴⁸² However, the pivotal issue of women seeking an Islamic divorce should not of itself present scope for conflict of laws or jurisdictional difficulties. Under widely accepted principles, a Muslim woman seeking a divorce from a marriage contracted under *nikkah* is required to approach an imam or other equivalent third party to obtain a *khula* or *faskh* divorce.⁴⁸³ A male instigated divorce does not require the same procedures. Thus, many Shariah Councils will consider their work to be vital for the welfare of the female congregations of the mosque

⁴⁸⁰ Bano (2012), op. cit.

⁴⁸¹ Bano (2004), op. cit., at 127.

⁴⁸² Ibid, at 6.

⁴⁸³ The features of such divorces is explained by Doi. A. R. Doi, *Shari'ah. Islamic Law*, (2008) Ta Ha Publishers Ltd, 269-271.

to which they are affiliated, and their functional performance is essentially limited to this.

Shariah Councils have been described as ‘internal regulatory framework[s] to settle disputes’ which have developed as a result of ‘the state’s hesitations to recognise Muslim identities in terms of law’.⁴⁸⁴ They purport to uphold ‘the moral authority of the Muslim community’, despite the absence of legal authority.⁴⁸⁵ Yilmaz⁴⁸⁶ rationalises the development of the unofficial system; citing failures within the official state system; that the ‘secular Western system’ may be perceived by Muslims as lacking the requisite moral standing to deal with these issues; the desire to maintain family privacy which official legal action may compromise; and finally, the lack of recognition of and response from the official legal system to Muslim specific issues.⁴⁸⁷ However, there have been some distinct efforts made by the British judiciary to respond to criticism and engage more with cultural differences.⁴⁸⁸

Reports such as that by Civitas in 2009⁴⁸⁹ served to raise suspicions about Shariah Councils as systems which seek to challenge the national legal system.

⁴⁸⁴ I. Yilmaz, ‘Law as Chameleon: The Question of Incorporation of Muslim Personal Law into the English Law’, (2001) 21:2 *Journal of Muslim Minority Affairs*, pp. 297-308, at 298. Also described as ‘internal regulatory framework’ by D. Pearl, and W. Menski, *Muslim Family Law*, (1998) Sweet and Maxwell, at 396.

⁴⁸⁵ J. Wilson, ‘The Sharia Debate in Britain: Sharia Councils and the Oppression of Muslim Women’, (2010) *Aberdeen Student Law Review*, pp 46-65, at 48.

⁴⁸⁶ I. Yilmaz, ‘Muslim Law in Britain: Reflections in the Socio-Legal Sphere and Different Legal Treatment’, (2000) 20:2 *Journal of Muslim Minority Affairs*, pp. 353-360

⁴⁸⁷ *Ibid.*

⁴⁸⁸ D. Pearl, (Judge) ‘The 1995 Noel Coulson Memorial Lecture: The Application of Islamic Law in the English Courts’, (1997) 12:2 *Arab Law Quarterly*, pp 211-219.

⁴⁸⁹ D. MacEoin *et al*, *Sharia Law or ‘One Law For All’?* (2009), available online at: <http://www.civitas.org.uk/pdf/ShariaLawOrOneLawForAll.pdf> (Last accessed 20 December 2012)

However, Bano⁴⁹⁰ concluded that the Shariah Councils were simply offering a civic function based on the needs of their communities which was exemplified by the very fact that they were often linked to a mosque. Those interviewed generally rebutted assertions that they were a challenge to the state legal system, and ruled out state recognition or sponsorship as they suspected both would undermine the trust of the Muslim communities they served. Thus, in order to fulfill their role as independent and religious adjudicatory bodies, they needed to operate outside of the official legal system.

From the perspective of the Shariah Councils themselves, Bano describes the 'uneasy' relationship between what the Councils perceive as their role in advising women in accordance with the sources of Islamic law – the Quran and *sunnah*, and what the women themselves desire from the Councils.⁴⁹¹ It is highly probable that by the time a Muslim woman has reached the Shariah Council and paid the fee, she is determined to end the marriage. However, she is still required, much in the spirit of Islamic family law, to attempt reconciliation. This appears to be a significant part of the proceedings which some may find helpful, and equally, some may find senseless based on their individual circumstances.

The internal plurality which exists where Muslim faith based ADR are concerned was apparent during my interview with Shaykh Siddiqi from the MAT. He opined:

⁴⁹⁰ Bano (2012), *op. cit.*, at 20.

⁴⁹¹ S. Bano, 'In Pursuit of religious and legal diversity: a Response to the Archbishop of Canterbury and the "Sharia Debate" in Britain', (2008) 10:3 *Ecclesiastical Law Journal*, pp 283-309, at 297.

I don't think Shariah Councils are a forum for advice and guidance. They are khula councils basically. I don't think they could offer anything else. If people need advice, etc., they should go to their local imam. But a lot of people are growing up without that confidence in the local mosque. They don't have confidence in their imams, especially if he can't even speak their language.

Most people in the Shariah Councils don't speak English either, well not very well.

So when you go and speak to them, no one is going to ask for guidance on their lives. There isn't great confidence.

A further challenge within well-established Muslim communities in Britain is the merger between cultural and religious traditions which need to be deciphered.⁴⁹² This is complicated by the emergence of relatively large numbers of converts to the faith, estimated at about 100,000,⁴⁹³ whose practice is expected to adhere more strictly to scriptural dictates than cultural norms. In addition, second and subsequent generations of British Muslims are likely to be less imbued with cultural practices as their association with the country of origin diminishes. These factors provide a complex picture of the contextual framework within which Shariah Councils operate.

⁴⁹² S.S. Ali, 'Religious Pluralism, Human Rights and Muslim Citizenship in Europe: Some Preliminary Reflections on an Evolving Methodology for Consensus', (2007) T. Leonon, and J. Goldschmidt, (Eds.) *Religious Pluralism and Human Rights in Europe*, Antwerp: Intersentia, pp 57-79, at 74.

⁴⁹³ The Inter-faith group 'Faith Matters' estimated 100,000 converts, of whom two-thirds are women, with an average age of 27. See <http://faith-matters.org/press/223-surge-in-britons-converting-to-islam>) Last visited 25 November 2012. A more conservative estimate of 10,000 was presented in 2003 by Anwar and Bakhsh: M. Anwar, and Q. Bakhsh, *British Muslims and State Policy*, (2003) Centre for Research in Ethnic Relations, University of Warwick.

The challenge posed to state legal systems by Muslims in Britain is not unlike other faith groups “hostile to any external influences that challenged the religious and social values of local communities.”⁴⁹⁴ Roberts and Palmer depict the North American Protestants in the 18th century as a group utilising separatist dispute resolution forums in order to preserve their own religion and culture. In contemporary Britain, the Jewish *Beth Din* courts have existed for over two centuries and still continue today.⁴⁹⁵ The manifestation of such alternative forums is the result of needs arising from social and religious differences within certain communities, wherein dispute resolution requires forums deemed to be religiously sanctioned, with expertise in religious jurisprudence and personnel who ascribe to the faith.

During the research interview conducted with Shaykh Sohaib Hasan, discussion points included the structural framework of the ISC, and he opined:

Shariah Councils is the name which we have given this body but the real name was known as the qadi courts. These are still operating in former British colonies like Kenya, Mauritius, and even in India. These are recognised in these territories.

The emulation of the *Qadi* courts was a frank admission. However, as extensively detailed in Chapter Two, Shariah Councils fail to conform to the fundamental basis of the institution of the *Qadi* seen historically throughout

⁴⁹⁴ S. Roberts, and M. Palmer, *Dispute Processes, ADR and the Primary Forums of Decision Making*, (2005) Cambridge University Press, at 18.

⁴⁹⁵ *The Beth Din: Jewish Courts in the UK*, A Report by the Centre for Social Cohesion, 2009, available online: http://www.socialcohesion.co.uk/files/1236789702_1.pdf (Last visited 17 October 2012.)

Muslim empires.⁴⁹⁶ The role, authority, state sanctioning and legal remit of the *Qadi* courts have been detailed extensively, defining the status and operative framework of a judicial system with all the safeguards and guarantees of modern legal systems, albeit within varied and variously constructed territorial jurisdictions. In contrast, Shariah Councils have major failings which include the lack of authority, jurisdiction and enforceability; thus placing them firmly outside of the *Qadi* court remit. Shaykh Siddiqi from the MAT stated that in his opinion, Shariah Councils could not be equated with the *Qadi* Courts.

In contemporary settings in jurisdictions where Muslims are the majority, or in states exercising plural legal systems such as India, the *Qadis* are still a functioning institutional arm of the state dispensing justice and resolving disputes. While it is accepted that many of those involved in the Shariah Councils hold noble intentions⁴⁹⁷ and seek to assist in remedying the indeterminate state that numerous Muslim women find themselves in when they seek a divorce, the bodies must be understood more accurately as informal socio-religious institutions, providing or fulfilling a community function and not occupying a 'legal' space. The perceived flaws in their operative functions appear to be in part the result of differences in cultural behaviour.⁴⁹⁸

⁴⁹⁶ Bano noted in her study of Shariah Councils that the religious scholars making decisions "described themselves variously as 'Registrar', 'Imam', 'Sheikh', 'Maulana' or 'Qadi'". Bano (2008), *op. cit.*, at 298.

⁴⁹⁷ Bano found that Shariah Councils appeared to generally be run on a volunteer basis. Bano (2012), *op. cit.* at 5. Bano's research also identified an underlying aim of Shariah Councils to help officiate disputes between people as based on Islamic values. *Ibid*, at 7.

⁴⁹⁸ Some of the case studies reported by Samia Bano in her empirical research seemed to reflect a system entrenched in cultural beliefs about the roles of men and women. However, as this research was carried out in 2001-2002, a decade later it is possible that these predispositions may have changed.

The advent of the MAT in 2007⁴⁹⁹ provided a greater complexity on the issue of Muslim faith based ADR, and it was a leap towards indirect state endorsement of bodies officiating according to Islamic laws. While the state may refute this, in practical terms, a legitimate legal space has been provided for the MAT's operation, and coupled with the freedom to enter into contracts utilising any form of law, the outcome is a system under which Islamic laws in their various derivative forms covering a limited range of issues, can be implemented in Britain.

The Muslim Arbitration Tribunal

The MAT was established to counter the popular negative conceptions associated with the Shariah Councils already in existence and it places special emphasis on procedural rules governing its conduct. Shachar places MATs in the arena of 'privatised diversity'⁵⁰⁰ wherein individuals contract out from the state legal institutions and opt for a private (faith based) dispute resolution mechanism.⁵⁰¹ Bano⁵⁰² presents this paradigm as a "model in which to achieve and possibly separate the secular from the religious in the public space, in effect encouraging individuals to contract out of state involvement and into traditional non-state forums when resolving family disputes."⁵⁰³ The result is a

⁴⁹⁹ The Tribunals operate under the umbrella of the MAT in Nuneaton, and currently operate in London, Birmingham, Bradford and Manchester. See Muslim Arbitration Tribunal – Report – 'Liberation from Forced Marriages', available online at <http://www.matribunal.com/downloads/MAT%20Forced%20Marriage%20Report.pdf> at 19. (Last visited 3 December 2012)

⁵⁰⁰ Shachar (2008), op. cit., at 573

⁵⁰¹ Ibid, at 580-581.

⁵⁰² S. Bano, 'The Practice of law making and the problem of forced marriage: What is the role of the Muslim Arbitration Tribunal?', (2011) A. Gill, and S. Anitha, (Eds) *Forced Marriage; Introducing a Social Justice and Human Rights Perspective*, Zed Books, pp. 177-199

⁵⁰³ Ibid, at 179.

separation which essentially produces a public/private dichotomy in the lives of (predominantly) Muslim women where family law disputes are concerned. This is more pronounced with MATs than the traditional Shariah Councils as the MAT has been structured in a way that ensures it abides by the Arbitration Act 1996, and thus complies with the legal framework which allows its decisions to be enforceable through the traditional civil courts. The Arbitration Act allows for disputes to be determined in accordance with rules that the parties consent to,⁵⁰⁴ and therefore, as long as the parties agree that Islamic law will be used to settle their dispute,⁵⁰⁵ the MAT can be used. The MAT does not have jurisdiction to hear cases which involve overarching state laws such as civil marriage contracts, child custody and criminal matters.⁵⁰⁶ Similarly, if a decision reached by the MAT is considered to contradict English law, then it will not be upheld by the courts.⁵⁰⁷ Where an Islamically recognised divorce is concerned, no enforcement is necessary as all that the disputants require is a certificate pronouncing the *nikkah* contract as terminated.

The idea of private diversity feeds into arguments about the increasing segregation of communities who ascribe to it, as it provides 'alternatives' to the

⁵⁰⁴ Section 1(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.

⁵⁰⁵ Section 46: The arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute.

⁵⁰⁶ MATs cannot arbitrate on Family Law issues which are within the jurisdiction of the Family law courts, such as contested custody and maintenance, unless both parties decide to use the MAT as a means to achieving private agreement. Where this is contested by either disputant, the jurisdiction of the issue lies solely with the family courts. Where an agreement is reached, it still needs to be drafted as a consent order which the national courts can scrutinise. See Bano, (2011), *op. cit.*, at 186.

⁵⁰⁷ R. Blackett, 'The Status of "Religious Courts" in English Law', (2009) *Decisions, Decisions: Dispute Resolution & International Arbitration Newsletter*, pp. 11-22, at 13, as quoted by Bano (2011), *op. cit.*, at 185-186.

institutions provided by the state.⁵⁰⁸ This can be contrasted with countries such as India where these institutions are state regulated and thus provide for inclusion within the state's legal and institutional parameters. This is no doubt the best mechanism for ensuring the rules and regulations enforced by these institutions do not contravene state laws. Where the dispute resolution mechanisms are kept within the remit of the state's institutions, however peripheral, it is possible to scrutinise those appointed to administer the process, both in terms of their qualifications for the post and their decisions. Shachar undertakes a critique of faith based ADR which she states have developed from positive law's conception of 'private ordering', in which she grounds her analysis on a "commitment towards respecting women's identity and membership interests as well as their dignity and equality."⁵⁰⁹

Shaykh Faiz ul Aqtab Siddiqi set up the MAT in 2007 to formalise what his institution had already been engaged in for years. The MAT deals with a range of disputes, and Interviewing Shaykh Siddiqi provided the opportunity to delve further into the workings and philosophy of Britain's first Arbitration Tribunal officiating in accordance with Islamic jurisprudence. He was unequivocal about the nature of the MAT as being distinct from the notion of a 'court' as it was not constituted as such. With regards to the types of cases the MAT hears, he revealed a breadth of disputes from formal commercial agreements to disputes between neighbours and families. Crucially, he also revealed that non-Muslims also approach the MAT for dispute resolution.

⁵⁰⁸ Shachar (2008), op. cit., at 581.

⁵⁰⁹ Ibid, at 578.

The use of the MAT by non-Muslim disputants means it is providing a service to the wider British populace as well as the British Muslim communities. It allows and encourages legal representation for those who wish, bringing an added legitimacy to the process by ensuring all avenues of support for the parties involved are open. In selecting the adjudicators for the tribunal the MAT employs a panel of two, consisting of a recognised Islamic jurist and a member who is specifically required to have three years post qualification experience as a solicitor or a barrister registered to practice in England and Wales. 40% of the arbitrators are also women, adding a diverse composition to the 'bench' plainly lacking in Shariah Councils. Thus, the constitution of the panel ensures that matters pertaining to religion are being decided by those adequately trained to do so, with the assistance of legally qualified arbiters to ensure that no conflict with state law arise.

The MAT has a detailed set of Procedural Rules,⁵¹⁰ providing a framework for fair tribunals and crucially, follows open procedures so that their decisions are transparent to all. All MAT decisions can be followed with applications for judicial review with permission from the High Court, and thus, there is a system of appeal. The MAT system is operating in the legal mainstream yet applying Islamic laws in the decision making process. This is a clear step towards the integration of Islamic law within a recognised dispute resolution forum in Britain. However, as stated by Mr Siddiqi, enforcement of the MAT's decision has not yet been tested:

⁵¹⁰ These are transparent and available on the official MAT web-site.

No [decisions] have gone to the High court in the 4 years or so we have been operating. When we give decisions the parties have always adhered to it.

The MAT's provision of a valuable dispute resolution service has come under scrutiny due to perceptions about the nature of the laws being upheld and concerns about motives of disputants in selecting this forum. Shachar opines that "individuals and families should not be forced to choose between the rights of citizenship and group membership: instead, they should be afforded the opportunity to express their commitment to both."⁵¹¹ She suggests that "regulated interaction between religious and secular sources of law"⁵¹² may provide a better model, with the rights of citizenship being non-derogable. Coercion can clearly take a number of forms, including covert coercion via community pressure on individuals. However, as long as the British legal system remains inadequate for dealing with Muslim specific family laws, it is likely that these types of institutions will continue to grow and prosper. Ultimately, choice is a subjective notion in any social setting.

Despite the concerns raised by numerous scholars, it is clear that the MAT provides a service which can be scrutinised and thus, as far as faith based tribunals are concerned, represents the preferred model. If such institutions were delegitimised, it would only serve to push them underground as the need for them will remain undiminished.

⁵¹¹ Shachar (2008), op. cit., at 574.

⁵¹² Ibid, at 575.

The Formal/Informal Dichotomy of Faith Based ADR

The establishment of the MAT necessarily raises questions about unofficial legal pluralism and the likely consequences of increasing referral to Muslim arbiters to officiate disputes amongst Muslims in Britain. Where institutions operating under the Arbitration Act 1996 are concerned, there is no conflict with the state legal system which in fact facilitates them. The state also allows autonomy over the form of law that parties choose to be regulated by where commercial agreements are concerned, and thus no conflict arises here either. Thus, if parties choose Islamic law, then they only do so as they are empowered by state law to do so. This creates a certain paradox, but the factual analysis reflects a position where state law is safeguarded as ADR is a mechanism it has created and has control over. The MAT is not a formal arm of the state's dispute resolution mechanisms, although it is managed by legislation. In contrast, Shariah Councils certainly occupy an informal space, with the added dissociation of not being recognised by the state's legal apparatus at all.

Shariah Councils themselves have reservations about how desirable formal recognition by state law may be; as Ali states, "Shariah Councils argue that were they to be formally recognised as part of the English legal system, it would be tantamount to co-optation and to losing their Islamic nature."⁵¹³ This was corroborated by Bano, who concluded that "Shariah councils did not seek formal recognition as alternative mechanisms of dispute resolution, and did not seek to replace civil law in matters of family law."⁵¹⁴ They preferred instead to remain in the community, responding to its varied social and spiritual needs.

⁵¹³ Ali (2012) (unpublished at time of writing, November 2012), op. cit., at 17.

⁵¹⁴ Bano (2012), op. cit., at 26.

It is clear that retaining an informal operative framework would be deemed in Shariah Councils' best interests, however, this raises questions about the contextual framework of operation and perspectives on Muslims living as permanent citizens within non-Muslim jurisdictions. Such informality in an institution which claims to play such a pivotal role in the lives of Muslims in Britain only serves to create distance between Muslims and the rest of the British public. Allawi provides a further perspective on the lack of desire for recognition, stating that "The inner dimension of Islam no longer has the significance or power to affect the outer world in which most Muslims live."⁵¹⁵ Perhaps this statement is an indication of the lack of authoritative jurisprudential power wielded by Muslims within the jurisdictions where they form a minority.

Refuting formal recognition suggests that Shariah Councils espouse separatism and believe that the enforcement of Islamic law cannot come within the arena of state legal institutions. On the other hand, scholars such as Bano who have directly engaged in empirical research with women who have utilised Shariah Councils state that Muslim women, at least, are extremely "cautious of initiatives to accommodate Shariah into English Law."⁵¹⁶ The Archbishop suggested that Shariah law is already a lived reality in Britain and the state must recognise that. Yet, during interview, Shaykh Hasan from the ISC stated: "We don't want enforcement power because we don't have the necessary personnel for that. If our decisions are upheld by the British courts, we are satisfied with that." This is a curious position to take, as it means the ISC is

⁵¹⁵ A.A. Allawi, *The Crisis of Islamic Civilisation*, (2009) Yale University Press, at xvi

⁵¹⁶ Bano (2008), *op. cit.*, at 309.

satisfied with stopping one step short of implementing justice according to Islamic laws. If this is the case, then their decisions become nothing more than loose guidance for British Muslims, with no legal merit whatsoever which is exacerbated in circumstances where the husband does not acquiesce to the process. Practical considerations aside, for an institution to truly serve the needs of the British Muslims where Islamic law is concerned, they need to approach it with a view to holistic implementation in theory at the very least. This raises questions about the desirability of pluralism within the law.

Issues of Legal Pluralism and Religious Pluralism

The theoretical framework for issues of legal pluralism and normative pluralism were considered in detail in Chapter One. The present discussion focusses on operational context rather than just abstract rules.⁵¹⁷ Legal pluralism is a complex premise where theory and practical reality may be disengaged. The implementation of Islamic laws in Britain clearly falls within the remit of 'strong' legal pluralism, not dependent on the state for recognition. However, opposition to faith based ADR mechanisms has been keenly expressed in many settings, more recently, in 2012, by a House of Lords peer. Baroness Cox proposed the Arbitration and Mediation Services (Equality) Bill⁵¹⁸ which seeks changes to the Equality Act 2010, the Arbitration Act 1996, the Family Law Act 1996, the Criminal Justice and Public Order Act 1994, and the Courts and Legal Services Act 1990; in the interests of upholding equality legislations and protecting victims of domestic abuse. Section 1 seeks to amend section 29 of the

⁵¹⁷ A useful discussion relating to Legal Pluralism and Islamic law in Britain is provided by Bano, (2004), op. cit., at 26-36.

⁵¹⁸ Available online at http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0007/lbill_2012-20130007_en_2.htm#pt2-l1g3 (Last visited 26 November 2012).

Equalities Act by including two further subsections which prohibit sex discrimination in arbitration, specifically referring to the weight of evidence from females *vis a vis* male witnesses and the unequal distribution of assets between male and female children upon intestacy. The Arbitration Act 1996 also attracts similar amendments. The Bill further specifies requirements for advising polygamous households and those only entering religious marriage ceremonies of the limited legal protection available, and expressly provides that criminal and family law matters in the jurisdiction of the state cannot be resolved with arbitration. It recommends amendments to the Family Law Act 1996 to give courts greater discretion in setting aside negotiated settlements, including allowing individuals other than the parties themselves to lodge an application. Further recommendations include criminalising any interference with victims of domestic violence in the same way as interfering with a juror is treated. Finally, it criminalises any false claims for jurisdiction with potential penalty of five years imprisonment.

Despite the lack of direct reference being made, it is clear that the Bill is directed against Shariah Councils and the MAT in order to weaken the premise on which they operate and the types of cases over which they can mediate/arbitrate. The specific provisions of the Bill aim to tackle perceived discriminatory policies against women in relation to giving evidence, the division of an estate on intestacy, and unequal property rights.⁵¹⁹ Thus, they seek to avoid conflict of laws in these areas by prescriptively prohibiting any law which conflicts with state law.

⁵¹⁹ Part 1, Section 1, (2) (1.2) (a), (b) and (c)

The academic response to the Bill has been vociferous.⁵²⁰ Malik⁵²¹ considered the aims of this legislation and made a number of observations including the need for further research in to the usage of MLOs and thus the need for caution before embarking on legislation intended to curb their use.⁵²² One central point relates to the religious autonomy provided by MLOs such as Shariah Councils to their female users, who employ these forums in order to satisfy their own faith based need for validation of their divorce in the eyes of God.⁵²³ This adds another dimension to an already complex scenario; MLOs meet a specific religious need and are therefore the manifestation of Article 9's religious freedom right within the European Convention on Human Rights, especially it would seem, where Muslim women are concerned.

However, the fact is that English law would allow principles of Islamic law to be adhered to and upheld indirectly (as is the case with the laws of other religious groups, most notably those of the Jewish faith), and there is little doubt that politicians are aware of this. For example, the issue of the *mahr* payment under the *nikkah* contract has come before the courts⁵²⁴ and using ancillary relief proceedings, dowry payments have been taken into account by the courts under Section 25 of the Matrimonial Causes Act 1973. In the current climate, it would seem appropriate to conclude that any official recognition of Islamic laws is highly unlikely. The majority of legal scholars and general public opinion appear to reject the possibility of official incorporation of specific aspects of Islamic

⁵²⁰ A great deal of debate has taken place between scholars on an informal mailing list of the Pluri-Legal group. www.jiscmail.ac.uk/PLURI-LEGAL (Last visited 25 November 2012)

⁵²¹ Malik (2012), op. cit.

⁵²² Ibid, at 53.

⁵²³ Ibid, at 29.

⁵²⁴ *Uddin v Choudhury & Ors* [2009] EWCA Civ 1205

family law into the British legal system for a variety of reasons, including the lack of uniformity within Islamic law itself in the formulation of its legal principles. The frequently recurring theme is the perceived treatment of women under Islamic law⁵²⁵ and some scholars have interjected that allowing Muslim family law to operate in Britain would risk the rights of women being violated due to discrimination.⁵²⁶

However, there is already recognition of the impact of cultural factors on interactions between people⁵²⁷ where judges have shown a willingness to take these factors into account and recognise the multi-cultural society in which we live. However, the subtle nuances of Islamic laws and issues such as religiously recognised divorces will by their very nature fall outside this remit and therefore cultural awareness training for judges can only solve part of the problem.

The increasing British Muslim population indicates that issues between Islamic laws and the British legal system are set to rise and recur. The 2001 national census revealed that Muslims as a faith group constitute the youngest demographic profile⁵²⁸ and the 2011 census revealed an increase in the Muslim population from 1.8 to 2.6 million in the ten years between the two census'. The greatest opposition to adopting legal pluralism formally hinges on concerns that this may create ingrained separation between the people of Britain and create tiers in society which the 'one law for all' principle intended to prevent.

⁵²⁵ See for example, R. Wilson, 'Privatizing Family Law in the Name of Religion', (2009-2010) 18 *William and Mary Bill of Rights Journal*, pp 925-932.

⁵²⁶ S. Poulter, 'The Claim to a Separate Islamic System of Personal Law of British Muslims', (1990) C. Mallat and J. Connors (Eds). *Islamic Family Law*, pp 147-166.

⁵²⁷ For example *Khan v Khan* [2008] Bus LR D73.

⁵²⁸ S. Hussein, *Muslims in the Map, A National Survey of Social Trends in Britain*, (2008) I B Tauris Academic Studies, at 42.

Where the courts are concerned, numerous cases dating back to the 1960's display the conflict of laws that interaction between Islamic law and state laws displays. The courts attempt to settle disputes by accepting principles which can be reconciled with state law, such as the question of *Mahr* which has been treated as a contractual obligation independent of the context of the *nikkah* agreement.⁵²⁹ Ali contends that the actions of the courts results in a subtle inhibition against the "inclusion of Muslims in to mainstream British life."⁵³⁰ By failing to recognise the *nikkah* contract, the state is failing Muslim women by protecting their spouses from the legal safeguards and guarantees given to recognised married couples. That recognition need not compromise the position of civil marriages, and can merely represent recognition of the contractual obligations which a *nikkah* agreement gives rise to, and impose the same rights that spouses would be ensured under the relevant family law provisions. Bowen⁵³¹ suggests that Britain is closest to recognising Islamic law compared with its counterparts in Europe and North America, citing the example of the MAT utilising the Arbitration Act to enforce Islamic laws concerning, for example, commercial agreements.⁵³² The recognition of religious marriages would merely be an extension of rights granted to other communities, such as Quakers and Jews, as early as the 19th century.⁵³³

⁵²⁹ *Ali v Ali* [1968] P 564.

⁵³⁰ Ali (2012) (unpublished at time of writing, November 2012), op. cit., at 20.

⁵³¹ J. Bowen, 'How Could English Courts Recognise Sharia?', (2010) 7:3 *University of St. Thomas Law Journal*, pp. 411-435, at 411.

⁵³² *Ibid*, at 412.

⁵³³ *Ibid*, at 416.

Implementing Muslim Laws in a Multi-Cultural Society

The impact of a multicultural discourse on citizenship has been vast. Shachar⁵³⁴ describes the just society as one which protects basic rights for all citizens, and states that “in certain cases justice also requires the recognition of traditions and unique ways of life for members of non-dominant cultural minorities.”⁵³⁵ This can translate to jurisdictional autonomy over certain fields, such as family law; which has been manifested within Muslim and Jewish communities in Britain, to name but two. However, Shachar aptly points out that such implementations may not be to the advantage of all group members. She asserts that multiculturalism gives rise to a triad: “the group, the state and the individual”⁵³⁶ of which the individual is central and must deal with the complexities which arise from their membership of both the state and the group which may at times have competing interests. The result of this dynamism for Muslim citizens is a complex negotiation between state law, religious law, and individual needs. Shariah Councils would argue that they serve two out of three of these requirements, by ensuring observation of religious laws and thus fulfilling the individual’s needs. However, if arguments of discrimination are accurate, the question arises of whether they are fulfilling either of these functions.

An ICM survey conducted in February 2006 found that 40% of the respondents supported the introduction of ‘Shariah Law’ in areas of Britain which were

⁵³⁴ S. Schachar, *Multicultural Jurisdictions, Cultural Differences and Women’s Rights*, (2001) Cambridge University Press

⁵³⁵ *Ibid*, at 3.

⁵³⁶ *Ibid*, at 5.

predominantly Muslim.⁵³⁷ Such statistics serve to separate Muslims into the proverbial 'other', however, apart from questions surrounding the nature of the specific enquiry made, there is also a pressing need to consider the probability and possibility that there is a large grey area between integrated Muslims and segregated Muslims; which is occupied by the bulwark of the British Muslim communities for whom the discourse is a daily occurrence. It is highly likely that many of Britain's Muslims have no clear cut ideas about what Shariah law means to them, or whether or not they wish to be regulated by derivatives of it. This reflects a multi-layered discourse within Muslim communities, which is disparate from the essentialist labelling from the outside. Thus, it is fair to state that there is pluralism at play at many levels within the Muslim communities themselves.

The success of the MAT questions the need for a plural legal system that recognises Islamic laws, which at present seems to present greater division than cohesion. The evolution in the approach to disputes and dispute resolution reflects the emergence and evolution of new socio-legal cultures within the British Muslim communities. Access to plurality is offered by the state law in certain frameworks, including contractual agreements which can be governed by a choice of law. This appears to now be understood by growing segments of Britain's Muslims. In light of these consideration, critical discourse surrounding Shariah Councils shall now be considered.

⁵³⁷ ICM Poll undertaken by the Sunday Telegraph. 500 Muslims were polled, with equal gender distribution. All were above the age of 18; 50 per cent were working while 14 per cent were students and the remainder were not working or retired, and 2 per cent refused to respond to that question. 62 per cent had their own home; 94 per cent were from England, 3 per cent from Scotland and 1 per cent from Wales. Available online at: http://www.icmresearch.com/pdfs/2006_february_sunday_telegraph_muslims_poll.pdf (Last visited 29 May 2013)

Critical Discourse Pertaining to Shariah Councils

There is a great deal of criticism leveled towards Shariah Councils which have ultimately resulted in the drafting of the Arbitration and Mediation Services (Equality) Bill. One of the researchers of the Bill, Charlotte Proudman,⁵³⁸ a barrister who has experience of dealing with Muslim women approaching Shariah Councils; has unequivocally stated that her opposition to Shariah Councils stems from their discrimination against women and the unfair financial burden placed on them.⁵³⁹ Shachar also sets out that gender-bias in the composition of Shariah Councils serves to subordinate women within these communities.⁵⁴⁰ While popular discourse would suggest that such discrimination is the norm, it is imperative to ascend beyond such imagery and assess the multiple layers of procedure and tradition which are in actual fact manifested by these institutions before rationalising the legal implications of their endeavors.

Informing this discourse is the dichotomy between Islamic law and Muslim practice and no issue draws as much controversy as that concerning the treatment of women. Ramadan⁵⁴¹ points out that there is nothing in the Quran which allows discrimination against women, yet within Muslim societies discrimination is prevalent.⁵⁴² The Quran provides that:

⁵³⁸ Ms Proudman approached me during the research stages of the Bill.

⁵³⁹ C. Proudman, 'Sex and Sharia: Muslim women punished for failed marriages', (2 April 2012) *The Independent*

⁵⁴⁰ Schachar (2001), op. cit., at 50.

⁵⁴¹ T. Ramadan, *Western Muslims and the Future of Islam*, (2004) Oxford University Press

⁵⁴² *Ibid*, at 138.

“Their Lord responds to them: ‘I will not let the deeds of any doer among you go to waste, male or female – you are both the same in that respect.”⁵⁴³

Historically, this verse has been translated in accordance with the context of the norms of the time and society in question. For this reason, today, many contemporary scholars view it as an unequivocal assertion of the equality of the genders. Conversely, an entire thesis focussed on the issue of the unequal administration of the Islamic penal code where the perpetrators are women, as compared with their male counterparts.⁵⁴⁴ The pivotal question which arises concerns the extent to which Islamic law should be penalised as a result of erroneous Muslim practices. Should those who abide by Islamic doctrines espousing equality and fairness in treatment be castigated because popular discourse and media attentions focus on those who discriminate?

Wilson⁵⁴⁵ argues that state recognition of Shariah Councils will allow regulation and thus these institutions can be compelled to adhere to laws requiring gender equality. She proceeds to suggest that on the other hand, “forcing Shariah Councils to abide by rules of gender equality could be considered an unjustifiable limitation of the right to religious freedom.”⁵⁴⁶ This latter point is untenable as gender equality is protected at the national⁵⁴⁷ and international⁵⁴⁸

⁵⁴³ Translation of the Quran from A. Bewley & A. Bewley *The Noble Quran: A New Rendering of its Meaning in English*, (1999) Bookwork, Madinah Press, at 67.

⁵⁴⁴ M. Abubakar, *Gender Justice a Recurring Decimal in the Islamic Laws of Homicide and Bodily Hurt of Nigeria and Pakistan: A Scholastic Neo-Traditionalist Approach*, (2012) PhD Thesis, University of Warwick

⁵⁴⁵ J. Wilson, ‘The Sharia Debate in Britain: Sharia Councils and the Oppression of Muslim Women’, (2010) *Aberdeen Student Law Review*, pp 46-65, at 51.

⁵⁴⁶ Ibid.

⁵⁴⁷ Equality Act 2010

levels and rightly so. Perhaps a more plausible argument would be to re-appraise Islamic laws which appear to allow gender discrimination and call for debate and discourse within Islamic legal and theological parameters in light of the reported injustices which are being perpetrated, in order to achieve the higher ordinances of the Shariah. Thus, there should be a call for reversion back to the spirit of Islamic laws contrary to some Muslim practices. Wilson also offers the contention that regulating Shariah Councils will inform these bodies about the expected standards in treatment of women and therefore advance a gradual progression towards standards in line with national and international norms.⁵⁴⁹ She aptly suggests that “A potential result of such cooperation between the Islamic arbitrators and the secular state is that future Islamic scholars will gradually interpret Islamic provisions in a way which is more consistent with gender equality concepts.”⁵⁵⁰

A key question is whether there are alternative forums to Shariah Councils which women can refer to for resolution of disputes, namely obtaining a religiously sanctioned divorce, which according to Shah-Kazemi’s study is the single pertinent issue which drives women to refer to Shariah Councils.⁵⁵¹ If users believe that methodologically, this is the only forum which offers them a solution, removing it will infringe on their religious freedoms, and crucially on their very freedom from an unwanted marriage. Those women who believe that their marriage is valid until they have obtained a religious divorce and who utilise a Shariah Council are referring to them out of religious conviction. Issues

⁵⁴⁸ The Convention on the Elimination of All Forms of Discrimination against Women 1979

⁵⁴⁹ Wilson (2010), *op. cit.*, at 54-55.

⁵⁵⁰ *Ibid* at 55.

⁵⁵¹ Shah-Kazemi (2001), *op. cit.*

concerning equality of treatment and process are merely peripheral concerns in this situation.

Bano sets out further concerns relating to the reconciliation process which Shariah Councils oblige disputants to undergo.⁵⁵² In pursuing a reconciliation, she opines the possibility that Muslim women's rights may be compromised, and some may face danger where their spouses are abusive or violent. From the interview transcripts presented by Bano, it is clear that each woman's circumstances are individual therefore generalisations should be avoided. However, notably, some women reported a lack of significance attributed to them personally and their 'side' of the story during the process; thus undermining their legal personality. This was the result of Shariah Council personnel attributing all Muslim women with traditional stereotypical characteristics such as having more patience than men and being more adept at compromise; and one suspects perhaps reinforcing the notion that these characteristics make them 'good Muslim women' as opposed to rebellious ones. Such condescending approaches may serve to remove from Muslim men liability for their actions, by effectively providing them with an Islamic juristic defense. It is clear that the spirit of Islam does provide that certain attributes are worthy of achieving in individuals for the greater good of their souls, and patience and compromise are certainly two key qualities. However, to infer that one gender *must* acquire them while accepting that the other cannot easily do so, and permitting the latter to use this as an adequate defense for their

⁵⁵² Bano (2008), op. cit., at 299-300.

behavior is tantamount to encouraging and empowering them to approach their spouses with obstinacy.

Perhaps the process of encouraging reconciliation is not the problem, as the idea is clearly in-keeping with the spirit of Islam. Perhaps the issue which needs addressing is – who are the agents participating in the process? Should it be male religious scholars who oversee the cases before Shariah Councils, or would the inclusion of women and trained counselors create an environment more conducive to equal treatment between the spouses, and provide a much improved attempt at resolving marital disputes and thus providing a real opportunity for reconciliation on equal and equitable terms? Of course, there will always be those marriages for which this process is merely procedural as the breakdown is irreversible. However, a dramatic shift in the actors within Shariah Councils may imbue them with greater credibility and enable them to provide their service in an enhanced way. Further to this, creating a rights based discourse at the social level in order to ensure that Muslim women are aware of rights such as *talaq-i-tafwid* (contractual delegation of the right to pronounce talaq from the husband to the wife)⁵⁵³ would pave a path forward which negates the need for referring to Shariah Councils.

Conclusion

Concerns about discrimination against women represent the critical mass of hostility against faith based ADR mechanisms in the form of Shariah Councils. This has resulted in legislative proposals to limit a number of religious

⁵⁵³ See generally: L. Carroll and H. Kapoor, *Talaq-i-Tafwid: The Muslim Woman's Contractual Access to Divorce: An Information Kit*, (1996), available online at: <http://www.wluml.org/sites/wluml.org/files/import/english/pubs/pdf/misc/talaq-i-tawfid-eng.pdf> (Last visited 25 December 2012)

freedoms in the interests of opposing any possibility of gender inequality. Others suggest that rights can be advanced and protected by the inclusion of religious laws within the state legal system to allow regulation of institutions such as Shariah Councils.⁵⁵⁴ However, this latter position is mired by a multitude of complexities including but by no means limited to the question of, whose Islamic law? The controversy with Shariah Councils appears to be the brand of law which they seek to uphold – a literalist and traditionalist form of Muslim law. It would be prudent to begin assessing Shariah Councils from their very foundations before considering their place in the British legal system. Second and subsequent generations of British Muslims are unlikely to persist in marrying the norms of their ethnic cultures and Islamic laws, and this gives rise to the opportunity to formulate principles of Islamic laws which are not culturally biased. This will provide the space for the transformative processes witnessed throughout Islamic history, allowing the formulation of Islamic laws that take into account the contextual framework of British Muslims. Such laws would acknowledge the diverse roles played by women in society, and their contributions to bringing up children and nurturing their families, as well as critical exposure in every professional and academic sphere of life.

The drawback with Shariah Councils is not, in my view, with the institution itself but rather, with the actors who facilitate its operations. The male-centric, traditional literalist observation within Shariah Councils is the real cause for concern. This problem can be overcome by altering the actors who participate in the dispute resolution process as a direct response to the needs of the users.

⁵⁵⁴ Wilson (2010), *op. cit.*, at 49.

One would question whether such issues of concern would be witnessed in a Shariah Council run by female religious scholars with the aid of professional family counselors and legally trained individuals. The service provided would be the same, and thus the needs they fulfill would still be met; however, they would provide a tailored socio-religious service including the scope for empathy in the process and professional assistance where needed. In the process of attempted reconciliation in particular, the professionalism provided by trained counselors would be invaluable, while ensuring that religious traditions are also upheld. Such an institution would be able to meet the needs of the users while simultaneously confronting the concerns raised by empirical research of the institutions. The first steps towards such a structure have been witnessed in the form of the MAT, which does allow for legal representation and also encourages the participation of women. However, it still remains male-dominated and in time the commitment to gender equitability, if not equality, shall become apparent.

This chapter has charted the course of the development of both informal (Shariah Councils) and formal (MATs) faith based ADR mechanisms operating within British Muslim communities. The complexity of Islamic jurisprudence set out in Chapter Two needs to be born in mind when considering the current attempts to implement Islamic law in the UK. The development of Islamic law was a highly skilled social science engaged in by only the most highly trained religious scholars. In order to ensure that this level of scholarship continues, there is a distinct lack of trust emanating from the traditionalist camp of attempts to reconceptualise laws to meet the needs of contemporary Muslim

communities. On the other hand, there is a small but significant number of academics who follow the Islamic faith who are proposing groundbreaking reforms. The resultant stalemate will only be challenged adequately by the passage of time and the practical steps taken by Muslims.

Although British Muslims represent a diverse ethnic mix, this does not seem to negate referral to Shariah councils. The development of the MAT has been a positive step towards utilising existing laws in order to implement a limited range of Islamic family laws in Britain. The arguments for a more cohesive society arising from the rule of one law for all are also compelling, but perhaps this concept represents an attempt to preserve a society that no longer exists; one in which all people share the same culture and understanding of the law. It can be stated factually that cultural and religious pluralism already exists in Britain⁵⁵⁵ and its impact on the plurality of law cannot be avoided. However, it is clear that Shariah Councils do not wish to operate as part of the state's institutions or be funded by it, as this would challenge their legitimacy in the eyes of the Muslim communities in Britain, who require independence in their religious organisations.

⁵⁵⁵ S. Bano, 'Muslim and South Asian Women: Customary Law and Citizenship in Britain', (1999) P. Werbner, and N. Yuval-Davis (Eds), *Women, Citizenship and Difference*, pp. 162-177, at 165.

Chapter Six

Interaction, understanding and experience – British Muslims, the British Legal System and Islamic Law: Part I

Introduction

The research methods outlined in Chapter Four allowed for a depth and breadth of enquiry which provided a great deal of data for analysis. Components of the data gathered during the empirical research was presented in Chapter Five, which detailed negotiating faith based ADR mechanisms and utilised the information gathered during the interview surveys with experts practically engaged in the field. This analysis will continue throughout the remainder of the chapters of this thesis utilising Grounded Theory methodology to formulate theories. The data collected from the questionnaire surveys were compiled utilising tailored spreadsheets to allow extraction of the information gathered. My analysis commenced with a general sweep of the data allowing for obvious themes to be drawn out. These were then reviewed with in-depth analysis of the variables and their impact on the views expressed by the participants. The purpose was to draw out any patterns in understanding, belief, conception and behaviours where dispute resolution was concerned.

Below, the general data from each section of the questionnaire is presented to provide the socio-demographic profiles of the respondents, followed by responses to the enquiries made in Sections 2 and 3 (as set out in detail in Chapter Four). The questionnaires produced 35 different answers per

Respondent.⁵⁵⁶ The data gathered here will provide evidence and statistics to facilitate further analysis in Chapters Seven and Eight.

Profile of respondents

The respondents to the questionnaire were: Muslims living in Britain and holding a British passport; aged between 18-45; who followed the *Sunni* school of thought. The group was restricted to this demographic profile in order to allow the findings of this study to be extrapolated across one generation of *Sunni* British Muslims (providing for the limitations in sampling detailed previously). This demographic limitation was also expected to engage a greater number of British born Muslims thus permitting a distinction to be drawn between the findings of this study ; and theories which already exist pertaining to those who primarily migrated between the 1950's to the end of the 1970's, about whom many scholars have hypothesised.⁵⁵⁷ This would allow the findings to reveal how interaction with the legal system have been impacted by transformative processes concerning the understanding and application of Islamic laws within entrenched British Muslim communities. No further restrictions were imposed on participants' profiles, and the questionnaires were posed to both male and female respondents. The sampling was random in order to utilise the "safest way to select a sample,"⁵⁵⁸ and personal contacts in various UK cities were contacted to administer the questionnaires. No attempt was made to target respondents from any particular socio-demographic background and none were excluded once the initial criteria were met.

⁵⁵⁶ Appendix I provides a copy of the Questionnaire.

⁵⁵⁷ For example, Menski's '*Angrezi Shariat*' and Ballard's '*Pardesh Riway*'.

⁵⁵⁸ E.B. Wilson, *An Introduction to Scientific Research*, (1991) Dover Publications, at 155.

Section 1

1. 77 respondents were male and 173 were female.

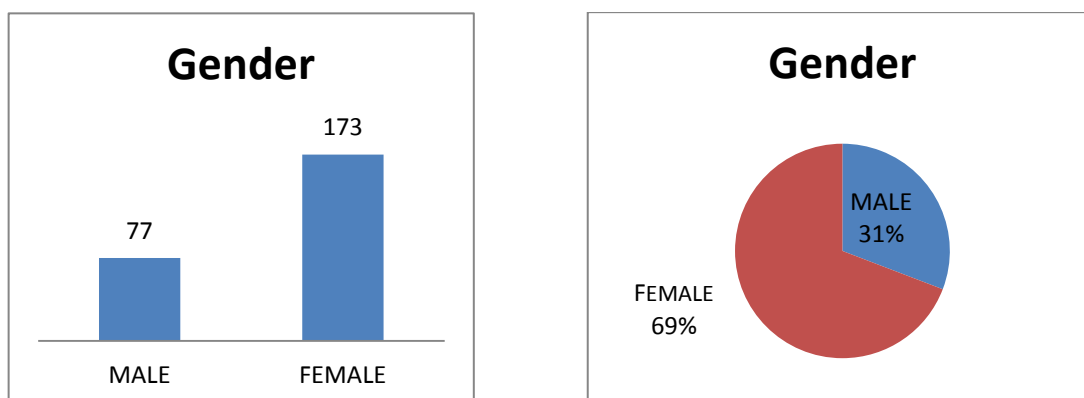


Fig. 1 Gender ratio of respondents

As detailed in Chapter Four, more female respondents completed the survey than male respondents. This could be attributed to a lack of interest in the nature of the questions being posed and perhaps a general lack of motivation to respond. During informal feedback discussions with respondents regarding the questionnaire, it was clear that Muslim women in particular had a keen interest in the issues raised, most notably the methodological procedure for women obtaining divorce and rights to inherit. It was apparent that most of the women I engaged with directly were confused about their rights under Islamic law and notably, felt that it was Muslim societies' cultural practices which were responsible for the popular conception that Muslim women's rights are usurped, rather than Islamic principles *per se*. They further explained that they wanted to participate in the study if it would help to expose myths about Islamic religious doctrine oppressing women. The imbalanced gender weighting is a factor which is scrutinised where appropriate in consideration of the findings.

2. The age profile of the respondents was divided in to five possible categories.

18-22

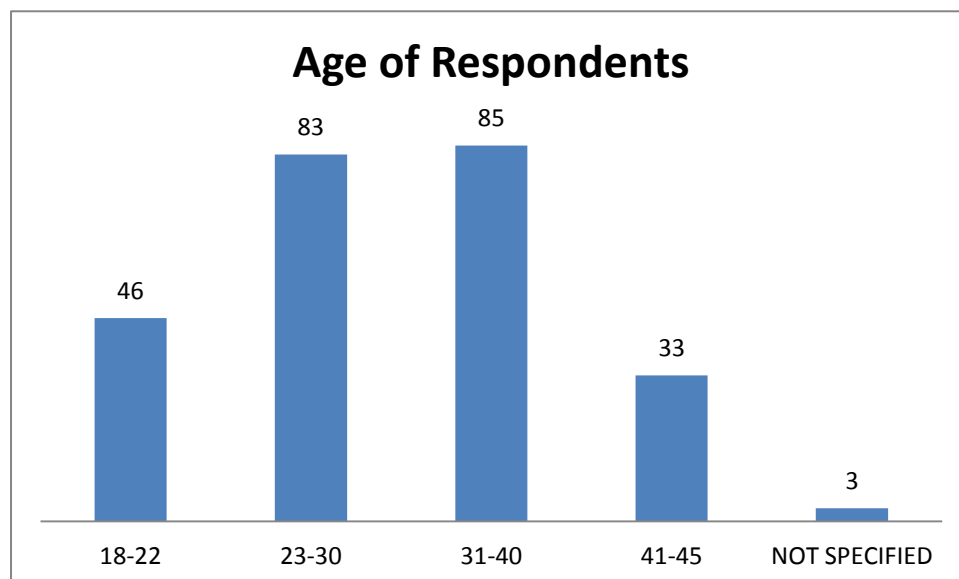
23-30

31-40

41-45

Not specified

These categories were used in order to keep the profile of the respondents within similar age categories together, simply for the purposes of analysing the data. A positive distribution of respondents within the age categories was revealed providing a sample with a good cross-section of age representation.



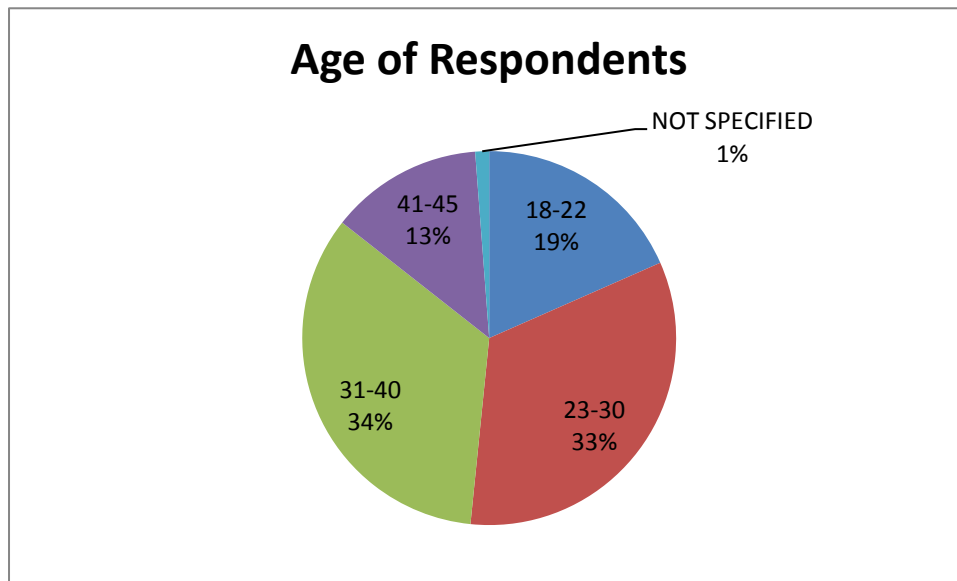


Fig 2. Age of respondents

3. The occupation of the respondents was divided into five possible categories:

Professional

Manual/unskilled/ administrative

Student

Homemaker

Not specified

Those grouped within the 'professional' category were those who were within professions such as teaching, medicine (as a doctor or nurse, etc), accounting, etc. Those who were within jobs which did not require a professional qualification, such as customer services, shop assistant, etc., were listed within the manual/ unskilled/administrative category. While the title of this latter category may not reflect their position, it is intended to group together those who are within a variety of jobs which did not require additional professional qualification, although they may well be university graduates. Respondents who

label themselves 'Students' are expected to be at university due to the minimal age of 18 for participation in the research.

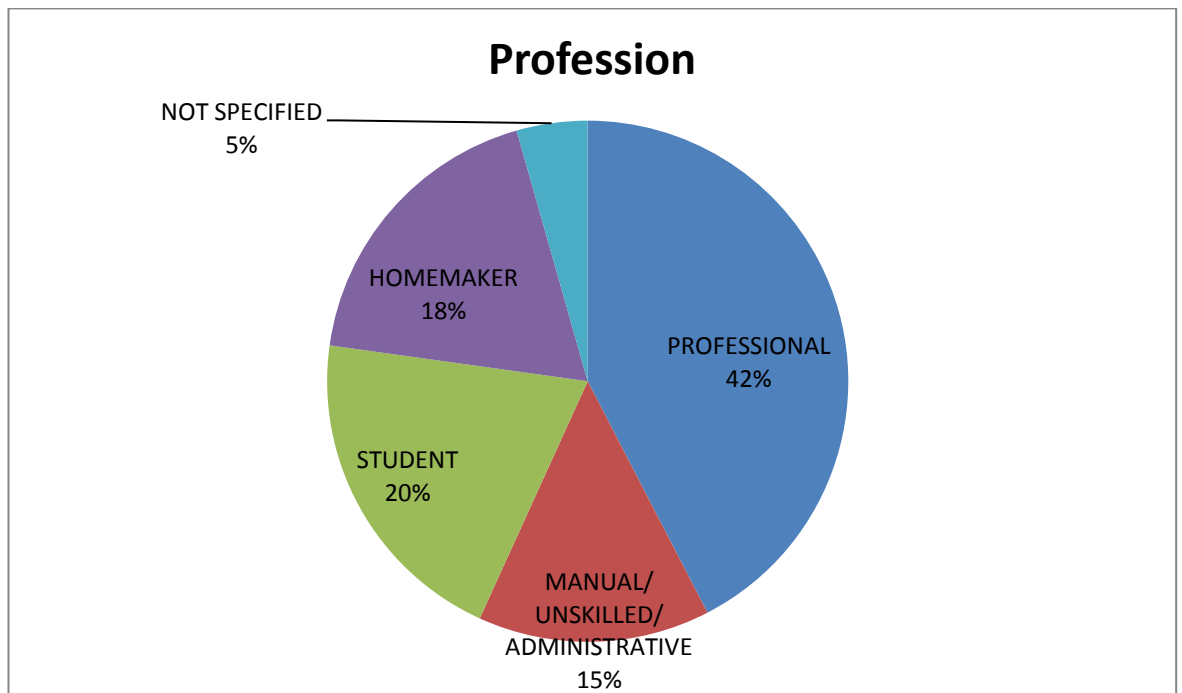
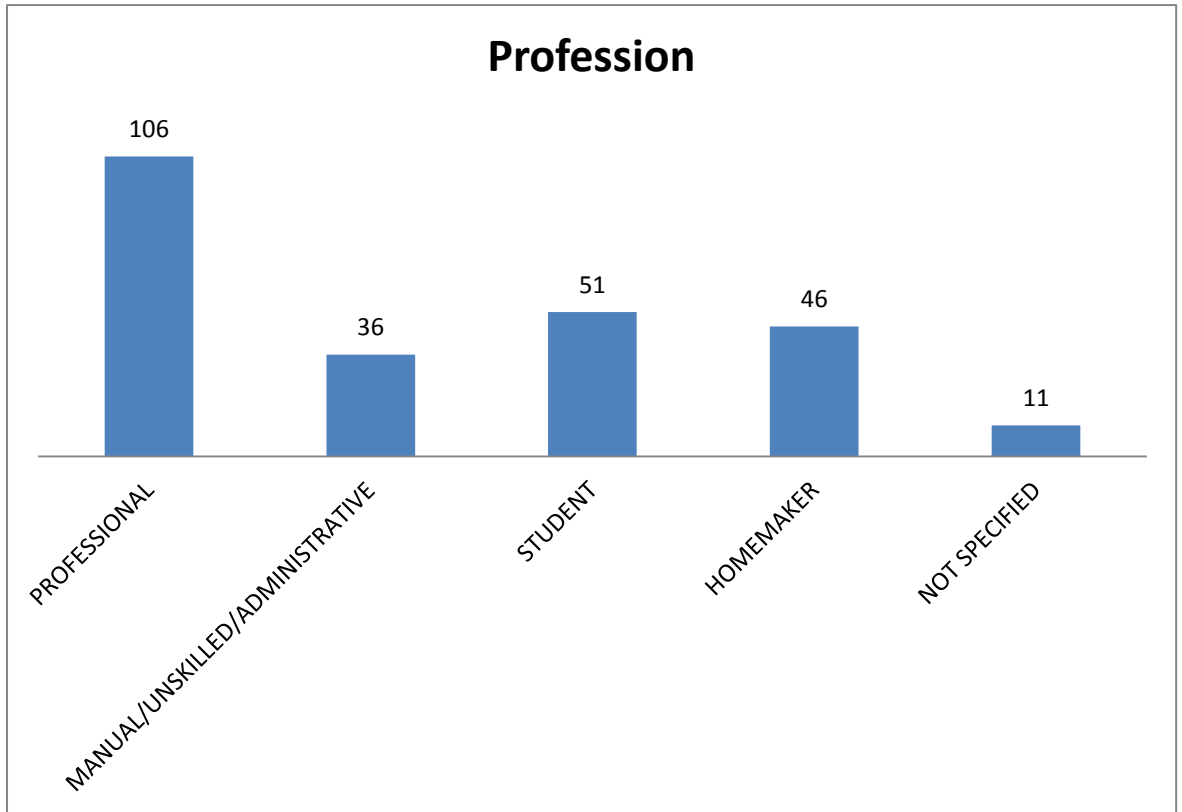


Fig. 3 Respondents' professions

A high percentage of the respondents were professionals (42 per cent) and if this is supplemented by the number of student (20 percent) respondents (who one can conclude are likely to go on and become professionals) it represents almost two-thirds of all respondents. This fact is highly significant and indicates that the data provided by this research focuses significantly on British Muslims who are educated, and thus the findings of this study need to be construed on these terms

4. City/ Town of Residence

The respondents were drawn from across the United Kingdom (excluding Northern Ireland). The sample was random and the data shows that the respondents' were drawn from 24 cities and towns as follows:

Town/City of residence	Number of Respondents
Birmingham	17
Blackburn	15
Bolton	1
Bradford	15
Cambridge	4
Coventry	9
Dewsbury	1
Dundee, Scotland	3
Glasgow, Scotland	24
Leeds	2
Leicester	50
Liverpool	5

London	49
Loughborough	7
Luton	4
Manchester	14
Nelson	1
Northampton	10
Nuneaton	4
Peterborough	2
Preston	2
Sheffield	6
Solihull	2
Walsall	1
None specified	2
Total	250

These figures reflect the breadth of coverage of British cities which respondents were drawn from. The respondents were randomly selected with the assistance of pre-existing contacts within some of the cities, and a snowballing technique ensued.⁵⁵⁹ The coverage reflects a diverse group of British Muslims and provides for a breadth in coverage of opinion from a spectrum of respondents.

5. Highest Educational Qualification

The respondents were asked to detail their highest educational qualifications at the time of completing the questionnaires.

⁵⁵⁹ Snowballing is a technique that can be used to access hard to reach populations. See R. Atkinson and J. Flint, 'Sampling, snowball: accessing hidden and hard-to-reach populations', *The A-Z of Social Sciences*, Dictionary Entry, Sage Research Methods, available online at: <http://srmo.sagepub.com/view/the-a-z-of-social-research/n94.xml> (Last visited 25 December 2012).

The responses were categorised as follows:

POST-GRADUATE QUALIFICATION

GRADUATE

A-LEVELS OR EQUIVALENT

GCSE'S

NOT SPECIFIED

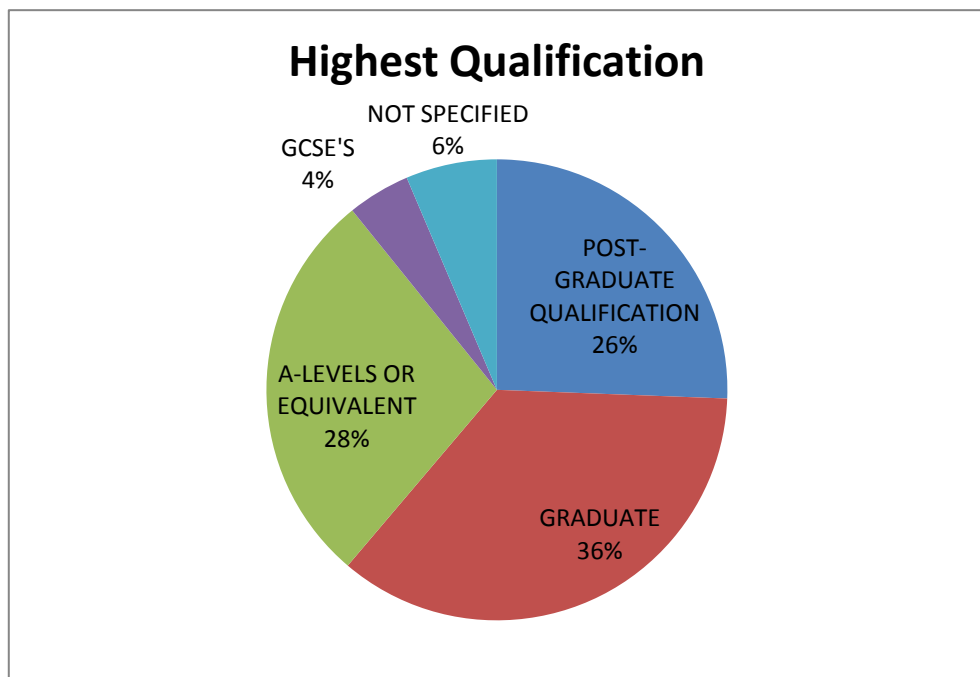
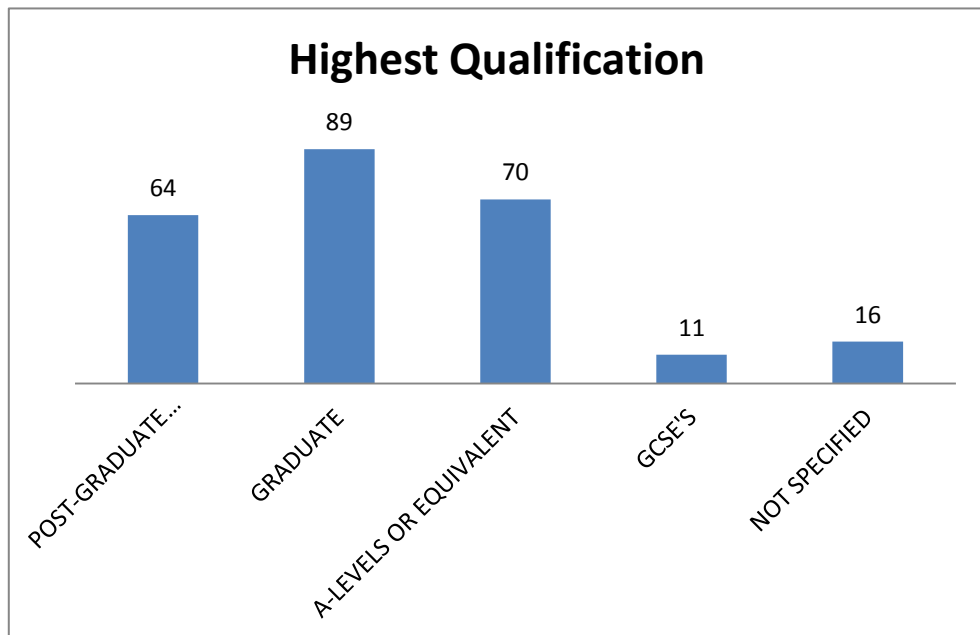


Fig. 4 Highest educational qualification

As with the Respondent's professions, these statistics reflect a disproportionate number of respondents who are graduates or hold post-graduate qualifications. 62 per cent of the respondents have been in education within universities, with a further potential 20 per cent who described themselves as a 'student' in question 3 which, if age is factored in, potentially places them at university at present. This takes the total number of respondents who may have experience of higher education up to 82 per cent which statistics would suggest is highly unlikely to reflect the British Muslim communities over all. It is difficult to ascertain what percentage of Muslims enter higher education as universities do not collect such data. In a report by the Department for Business Innovation and Skills in October 2011,⁵⁶⁰ the Muslim student population was said to be 167,763.⁵⁶¹ This figure represent 6 per cent of all British students, whereas as that time the Muslim population itself represented less that 2 per cent of the population. However, that figure included students between the ages of 16-18, and so not all were university students. FOSIS, a student body based on UK campuses put forward the figure of 90,000 Muslim students on campus in 2005.⁵⁶² As the British Muslim population has increased in the years since the 2001 census and since FOSIS' 2005 projection, it is expected to be much higher today, especially in light of the higher proportion of Muslims under the age of 16 which stands at one in three, compared with the one in five of the rest of the population.⁵⁶³ Taking these factors into account, there is a higher proportion of Muslims in university education as compared with the rest of the population.

⁵⁶⁰ BIS Research Paper Number 55, *Amplifying the Voice of Muslim Students: Findings from Literature Review*, October 2011

⁵⁶¹ Ibid, at 13.

⁵⁶² Quoted ibid, at 15.

⁵⁶³ P. Lewis, *Young, British and Muslim*, (2007), London: Continuum

With this trend continuing, at present and in the coming years, more and more British Muslims will be highly educated and falling within the professional class. Thus, the research findings become highly relevant in charting future trends within the British Muslim communities where faith based ADR and dispute resolution is concerned.

As the sample of respondents were uncontrolled for varying socio-demographic factors, the data yielded by the field was unpredictable. However, this discovery, further supplemented by the statistical data collected from the question relating to profession, provides the opportunity to differentiate the views, experiences and opinions of those who are university educated and those who are not, although the latter category provides a smaller sample group. This can be used as a variable to test the responses to Section 2 and 3 of the questionnaire. Thus, the Grounded Theory is being utilised and the data will be construed in accordance with the particulars discovered within the field.

6. County of Birth

The respondents were asked to detail their countries of birth although all of them are British citizens.

Country of Birth	Number of respondents
Algeria	1
Bangladesh	6
Dominica	1
Egypt	3
England/Scotland/UK	176
France	2
Guyana	1
India	4

Iran	1
Ireland	1
Jordan	1
Kenya	2
Khartoum	1
Kuwait	2
Malawi	4
Mauritius	1
New Zealand	1
Pakistan	23
Palestine	3
Saudi Arabia	3
Somalia	1
Sri Lanka	4
Sweden	2
Tunisia	1
USA	1
Yemen	1
Zambia	1
None Specified	2
Total	250

70 per cent of the respondents were born in Britain, 9 per cent were born in Pakistan and the remainder were British citizens born across 25 different countries.

7. Ethnic origin

Ethnic Origin	Number of respondents
African	3
Arab	17
Asian	2

Bangladeshi	29
British/Mixed	7
Egyptian	2
French	2
Indian	66
Iranian	1
Kashmiri	1
Mixed	7
Pakistani	94
Somali	1
Sri Lankan	4
White	6
Yemeni	2
None specified	6
Total	250

The ethnic origin of the respondents reflects a diverse spread with a large portion being of Pakistani ethnicity, reflecting this predominance within the British Muslim communities. The other ethnic groups represented by the respondents were of Indian, Bangladeshi and Arab origin, making up a total of 82 per cent of the respondents. The remaining 18 per cent were from a variety of ethnic backgrounds including African, European and other Asian. This provides a positive diverse mix which is reflective of British Muslim communities.

8. First Language

First Language	Number of Respondents
Arabic	11
Bengali	15
English	130
Mixed English/Other	11
Farsi	1
French	3
Gujarati	24
Hindi	1
Katchi	6
Malayalam	1
Mirpuri	1
Punjabi	12
Pushto	1
Sinhala	3
Somali	1
Swahili	1
Tamil	1
Urdu	26
None Specified	1
Total	250

The issue of language is a critical one as it can be deduced as reflecting the cultural alignment of the respondents. 52 per cent of the respondents stated that English was their first language, with a further 4 per cent stating that English and one other language were dually their first languages. Thus, despite the younger demographic profile, only 56 per cent spoke English as their first language. This was a surprising finding, however, it can possibly be explained by the inclusion of 30-45 year old respondents whose parents are likely to have migrated from their countries of origin and arrived in Britain not speaking the language. As a result, it can be fully expected that their children would have conversed in their native languages at first and then learnt English upon entering the education system. Thus, this statistic may potentially reflect a social reality rather than cultural alignment.

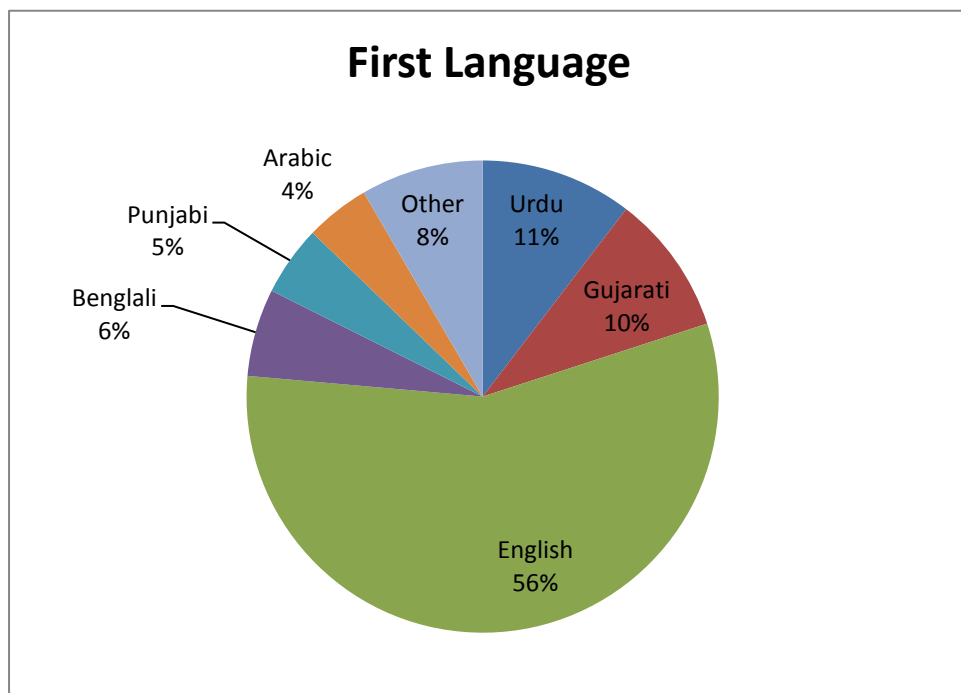


Fig. 5 First language of respondents

9. Muslim by Birth or Conversion

The respondents were overwhelmingly Muslim by birth with only 5 per cent being Muslim by conversion. This does perhaps reflect the overall British Muslim population but in the absence of accurate statistics over merely speculative calculations, it is difficult to estimate.

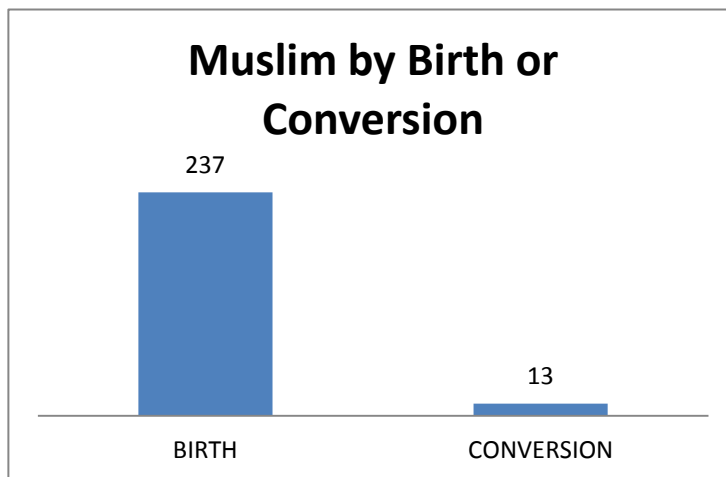
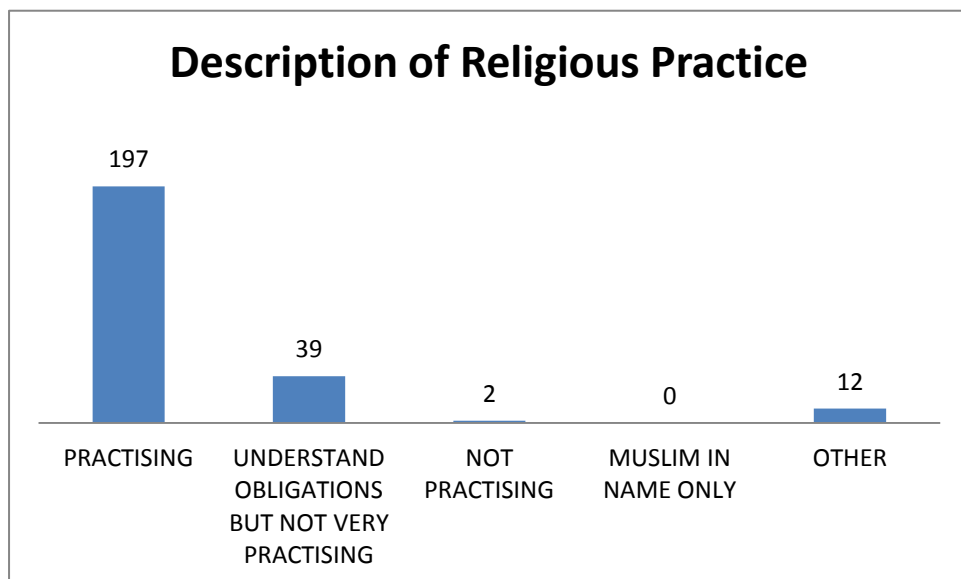


Fig. 6 Muslim by birth or conversion

10. Description of Religious Practice



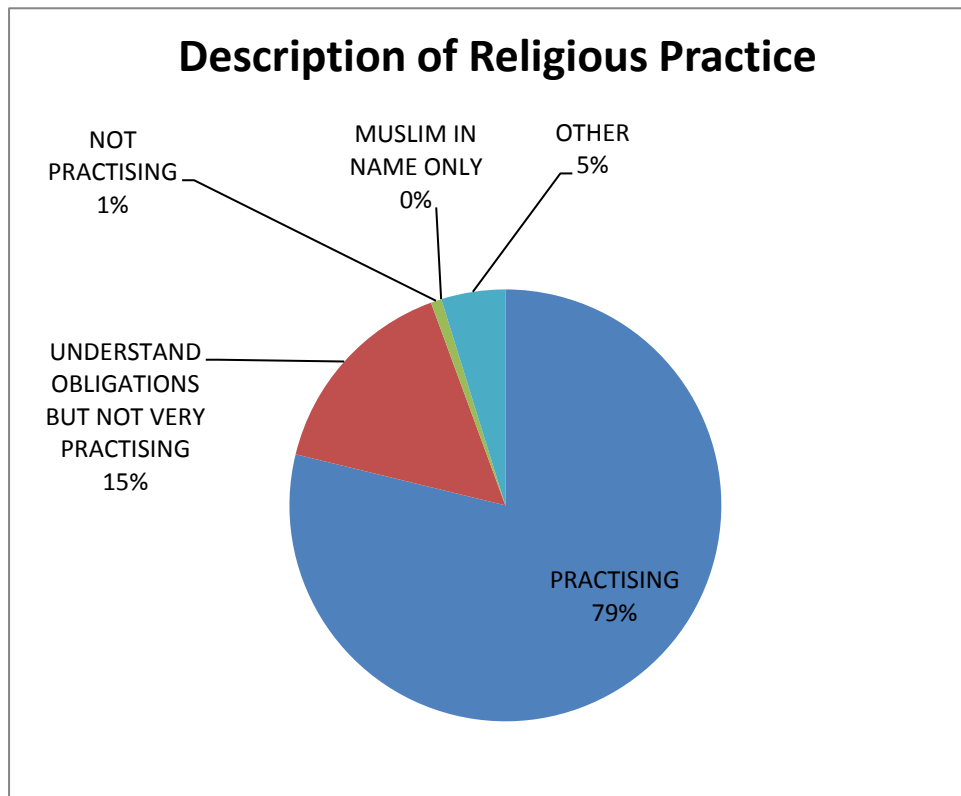


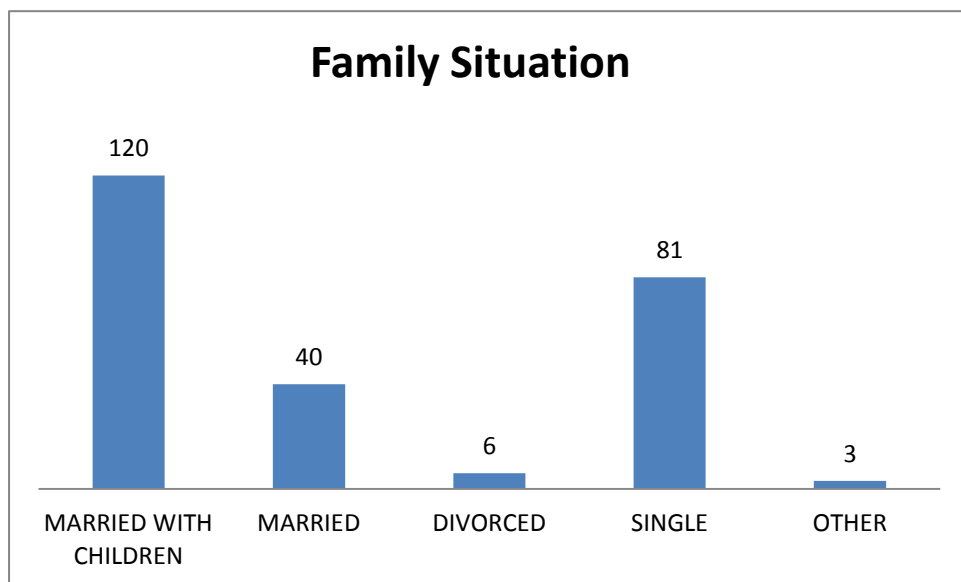
Fig. 7 Description of religious practice

This question required a subjective analysis from each respondent of their religious practice. While the most popular definition of a Muslim is someone who believes in one God, and that Muhammad was the last Prophet of God; this was not defined in the questionnaire. In jurisdictions like Pakistan, this simple definition has come under intense pressure due to social and political demands, especially *vis a vis* groups such as the Ahmadiya and Qadiani movements, whom mainstream Pakistani society wishes to ostracise as they consider them heretics who fall outside of the definition of 'Muslim'. However, such controversies are not relevant for the purposes of this study.

An overwhelming 72 per cent of respondents stated that they were practicing the Islamic faith, while 16 per cent stated that they understood the obligations but were not very practicing. Significantly, not a single respondent professed to be Muslim in name only. This latter factor suggests that the respondents,

although forming a cross section of Britain’s Muslim community, does not truly represent it. There are British Muslims who do not practice the faith and would classify themselves as ‘culturally Muslim’.⁵⁶⁴ This does impact on the findings, by focussing them on Muslims who understand the obligations of their religion who may or may not be practising the faith. This can then be combined with the fact that most of the respondents are university educated, to provide a unique category of: ‘British Muslims who understand the obligations of their faith and are university educated.’

11. Personal Family Situation



⁵⁶⁴ D. Shariatmadari, ‘Time for cultural Muslims to come out’, in *Comment is Free, the Guardian*, 26 March 2009, available online at <http://www.guardian.co.uk/commentisfree/belief/2009/mar/25/religion-muslims-community-identity> (Last visited 5 December 2012)

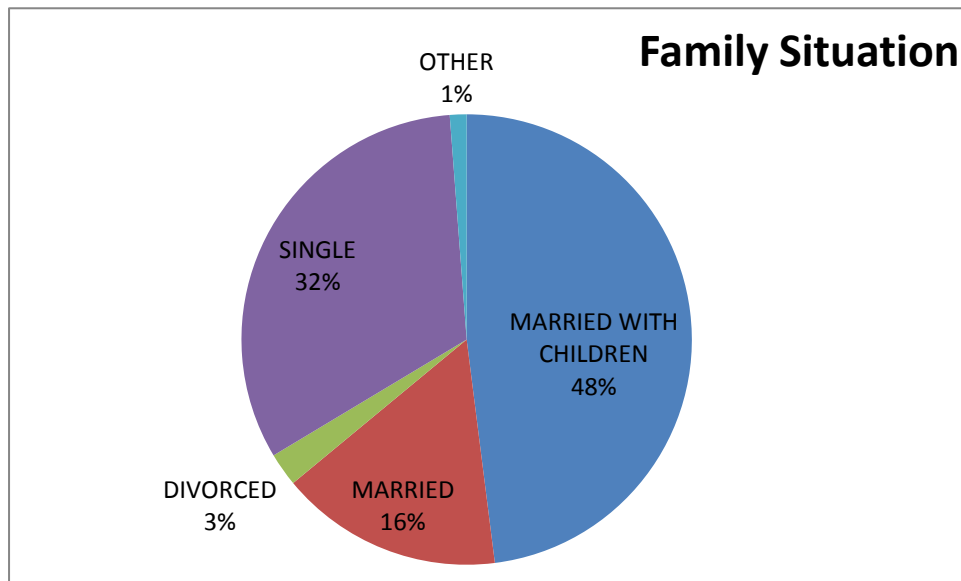


Fig. 8 Family situation

As the demographic profile of the respondents was limited to 18-45, the data here reveals an appropriate spread. Only 3 per cent of the respondents were divorced however, which appears to be lower than one would expect from the British Muslim communities. A study conducted into divorce in the USA by Ilyas Ba-Yunus revealed that between 1992 and 2002, the Muslim divorce rate stood at 32 per cent.⁵⁶⁵ In the absence of similar studies in the UK, one can extrapolate that in light of the similar socio-demographic profiles of Muslim communities across Europe and North America, this figure is indicative of what can be expected in Britain.

⁵⁶⁵ J. Macfarlane, *Islamic Divorce in North America, A Shari'a Path in Secular Society*, (2012) Oxford University Press, at 142.

12. What role, if any, does Islamic law play?

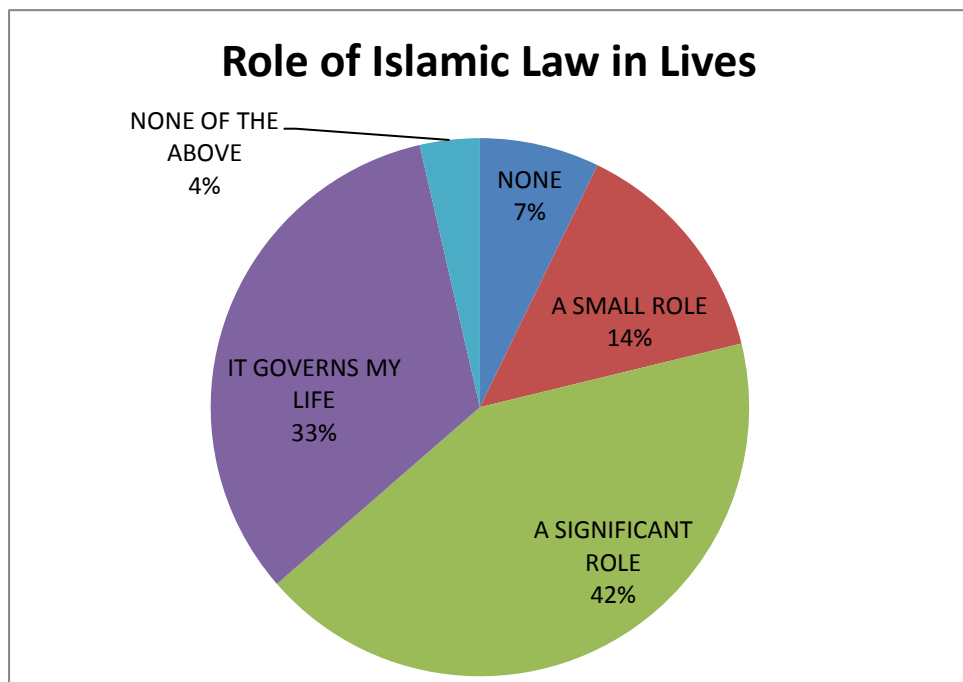
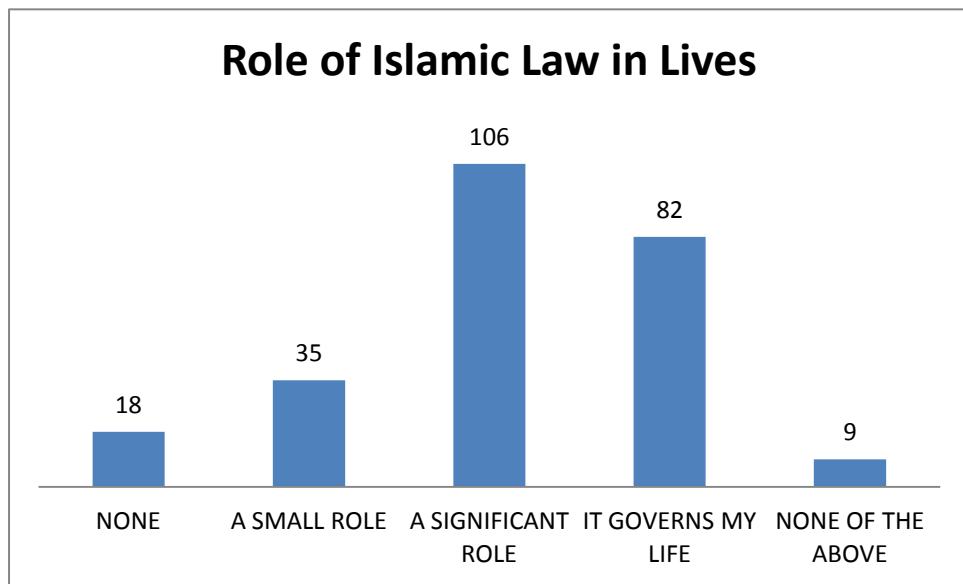


Fig. 9 Role of Islamic law in lives of Respondents

The question on the role of Islamic law within the lives of the respondents was a crucial one. The answer here allows the mapping of the respondents' affinity to the British legal system *vis a vis* purported 'Islamic' alternatives. 42 percent stated that Islamic law played a significant role, with a further 33 per cent

stating that it governed their lives. Thus, three-quarters of the respondents acknowledged a significant or higher role for Islamic law in their lives as British citizens. This data reflects the significance of Islamic law in the lives of British Muslims and suggests that within the sample group (with its limitations as outlined previously) it is far from negligible.

Section 1 Conclusions

The statistics set out above details the socio-demographic profiles of the sample group of participants who completed 250 questionnaires as part of the empirical research carried out for this study. A diverse mix of respondents were engaged from 24 British cities, from a diverse range of ethnic backgrounds and spoken languages, 70 per cent of whom were British born. It revealed a sample of British Muslims with a predilection towards being university educated and who understood the obligations of their faith. Analysis of the impact of the variables on their knowledge of Islamic law and their preferences and experiences of dispute resolution will be considered in greater detail in Chapters Seven and eight. Prior to this, the remainder of the statistics gathered from the questionnaires in sections 2 and 3 will be considered.

Section 2

In this section, respondents were asked to outline their understanding of specific areas of Islamic law, detailed further below.

Conducting a Marriage Contract:

The respondents were not prompted with possible answers. Those who listed two or more of the following were deemed to have textually accurate knowledge of a marriage contract: Witness, *Mahr*, Consent, a guardian/ *Wali*.

This is based on the Islamic jurisprudence related to the marriage or *nikkah* contract which is widely accepted within the Sunni Schools of Thought. It is imperative to note that a plurality of opinions exists on the constituent elements of a valid *nikkah*, and for the purposes of this data, a wide range of possibilities are accepted as textually accurate to take into account the diversity of views, including:

1. There are two witnesses. The gender of the witnesses can vary, and those who state two male, one male and two female, or two or four female would all be deemed acceptable.⁵⁶⁶ However, if gender is not specified, then the number of witnesses must be stated as two in order to be deemed textually accurate.
2. There is a gift of the *Mahr* which is presented by the groom to the bride, which she is entitled to decline.⁵⁶⁷
3. There is a guardian/ *Wali* who is responsible for the female. Within the Sunni jurisprudence, the Maliki, Shafi and Hanbali Schools of Thought make the permission of the wali compulsory, but within the Hanafi School of Thought, it is optional but recommended. Therefore those respondents who list the requirement of a *wali*, as well as those who either state it is not necessary or fail to mention it, will all be deemed textually accurate.

⁵⁶⁶ Allah's Messenger (upon him be peace) said, "There is no marriage except with a guardian and two trustworthy witnesses." Both Bayhaqi and Daraqutni related it on the authority of Ibn Abbas.

⁵⁶⁷ Qur'an, Chapter 4, verse 4: 'And give the women (on marriage) their dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, Take it and enjoy it with right good cheer.'

4. The contracting parties must be sane and mature. No age restriction would be imposed on this requirement.

Those who listed only one of these were deemed to have some knowledge as long as nothing was stated which contradicted any of the remaining three elements. Those who listed any of the following were deemed to have ‘some knowledge’: between people who are permitted to marry each other; just mentioning the term ‘nikkah’; stating the need for an imam. On the latter point, all schools of thought agree that an adult Muslim male and female may contract their own marriage with words entailing an offer for, and acceptance of, marriage. As long as two witnesses are present, this forms a valid *nikkah*. Thus, even the absence of an imam does not affect the validity of the *nikkah*.

Those who professed no knowledge or left the question blank were deemed to have no knowledge. There were only three respondents who were deemed to have incorrect knowledge as they stated: A ‘Shaykh’ needed and Shariah Law in a court; 3 witnesses and a ‘*moulana*’⁵⁶⁸ to conduct the ceremony; and a tongue in cheek response (Find a chick and get to ‘*moulvi*’⁵⁶⁹ and marry her’).

⁵⁶⁸ Loosely translated, this means religious scholar.

⁵⁶⁹ A slang/informal term for ‘*moulana*’.

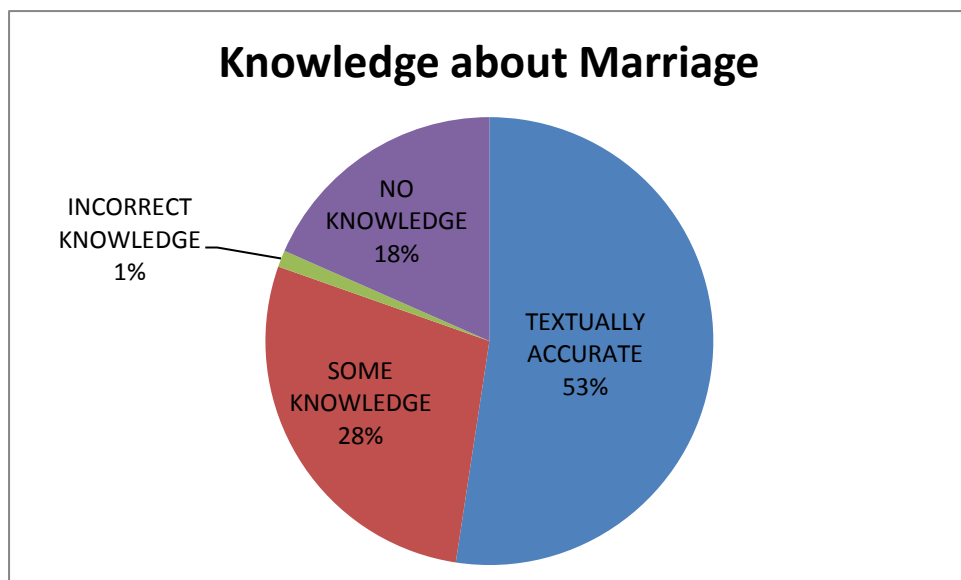
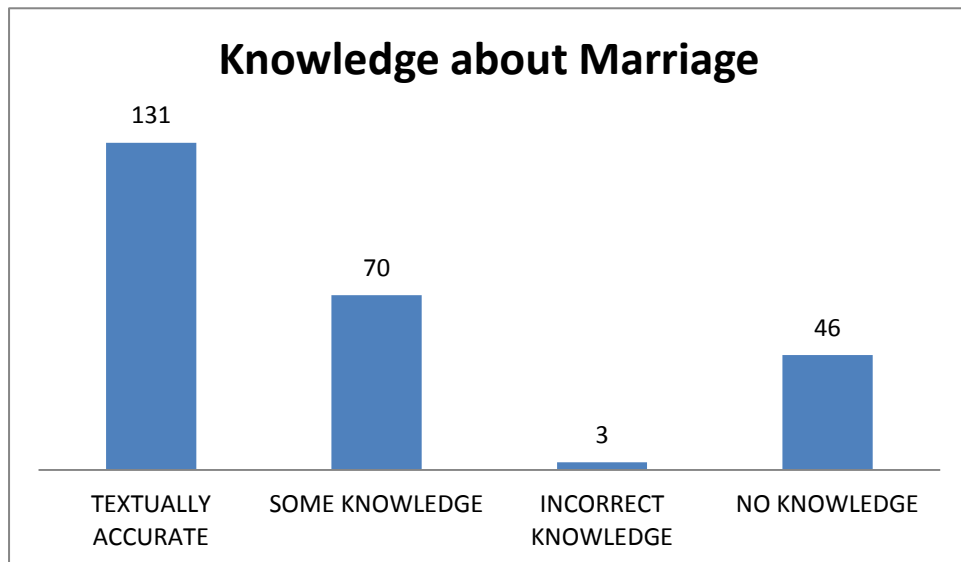


Fig. 10 Knowledge about Islamic marriage

The data revealed that over half of the respondents had textually accurate knowledge about conducting an Islamic marriage contract. 53 per cent were able to list correct elements, a total of 131 respondents. A further 28 per cent had some knowledge while only 1 per cent had incorrect knowledge. 18 per cent of the respondents had no knowledge on this, which amounted to 46 respondents in total. This is a surprisingly high statistic in light of the fact that the marriage ceremony is considered one of the foundational religious practices

which most Muslims, practicing or otherwise, still adhere to. With the sample group of respondents in this study, this is also perhaps a surprising finding as 79 per cent stated they were 'practicing' and this throws an interesting light on how the respondents decode the idea of being 'practicing'. This may signify that 'practicing' Islam is restricted in understanding to ritual acts of worship as opposed to social congregational acts.

How to obtain a divorce

The issue of divorce within the Islamic religious tradition is intricate and specific.⁵⁷⁰ The manner of conducting a divorce differs for men and women; and over time, Muslim men have come to occupy a position of greater ease where obtaining a divorce is concerned. This was reflected in a statement made by Shaykh Hasan at the Islamic Shariah Councils when he stated that "the right of divorce is given primarily to the man in Islam." Women are able to instigate divorce proceedings, using either the *Khula* or *Faskh* mechanisms, or they have a delegated right to divorce (*Talaq-i-tafwid*) if this is included as a term in their nikkah contracts.

In the absence of an expressly delegated right, Muslim women are expected to approach certain forums within the religious institutions of the community, such as a Shariah Council, in order to execute the divorce. This is in the absence of a recognised *Qadi*/ Muslim judge upholding Islamic laws, who would in traditional Muslim societies undertake this role. A marriage can be terminated

⁵⁷⁰ Many different Muslim institutions in Britain provide guidelines which are readily accessible on the internet.

by divorce or by annulment.⁵⁷¹ General knowledge about the avenues available to Muslim couples was being explored in this question.

Male Instigated

Where divorce instigated by the husband was concerned, those who correctly identified three talaqs (in its variety of forms) were deemed to have textually accurate knowledge.⁵⁷² Those who listed 'ila' and 'Li'an' either as a term or just outlined the circumstances were deemed to have knowledge.

Those who identified that a talaq would need to be given (without detailing the number of times or circumstances, etc), were deemed to have some knowledge. In addition, those who partially outlined the circumstances of a divorce without contradicting any of the correct rules were deemed to have some knowledge.

Those who described incorrect processes for obtaining a divorce were deemed to have incorrect knowledge and those who left the question blank or stated they did not know were deemed to have no knowledge.

⁵⁷¹ The manner and forms of divorce vary within the Four main Sunni schools of thought. Appendix III provides an extract from Abd ar-Rahman Doi detailing the various forms of divorce. A.R. Doi, *Shari'ah. Islamic Law*, (2008) Ta Ha Publishers Ltd, 269-271.

⁵⁷² This includes those who list the controversial 'triple talaq' which contravenes strict Quranic guidance on the issue of divorce, however, due to historic developments which allowed this practice to manifest and continue, it is now widely accepted to be a valid pronouncement of complete divorce. For a detailed discussion on the points, see N. Ahmad, 'A Critical Appraisal of 'Triple Divorce' in Islamic Law', (2009) 23 *International Journal of Law, Policy and the Family*, pp. 53-61.

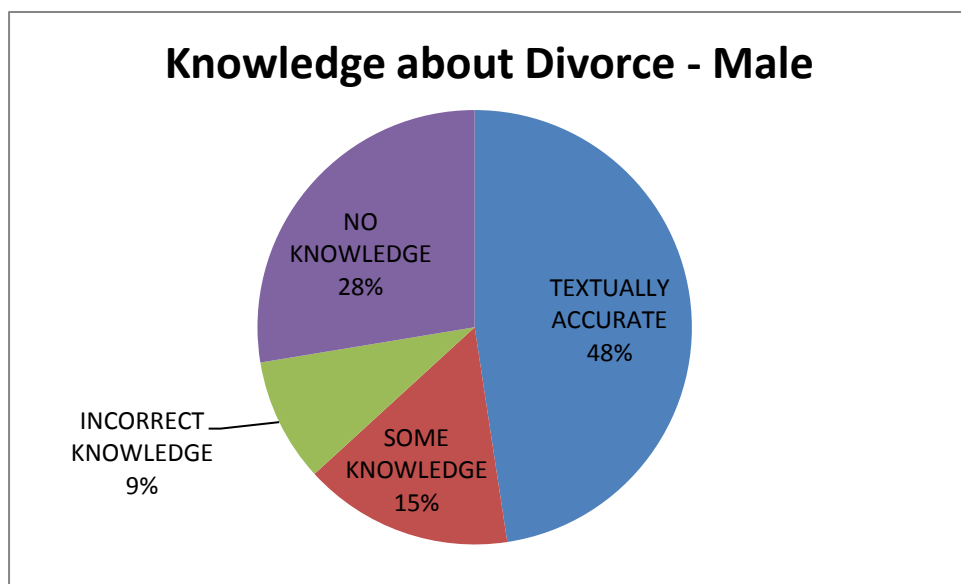
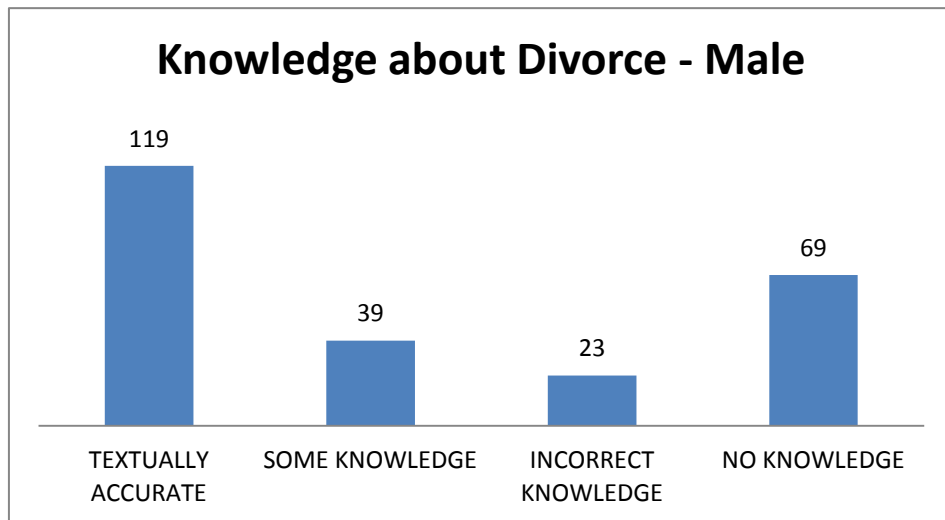


Fig. 11 Knowledge about male instigated divorce

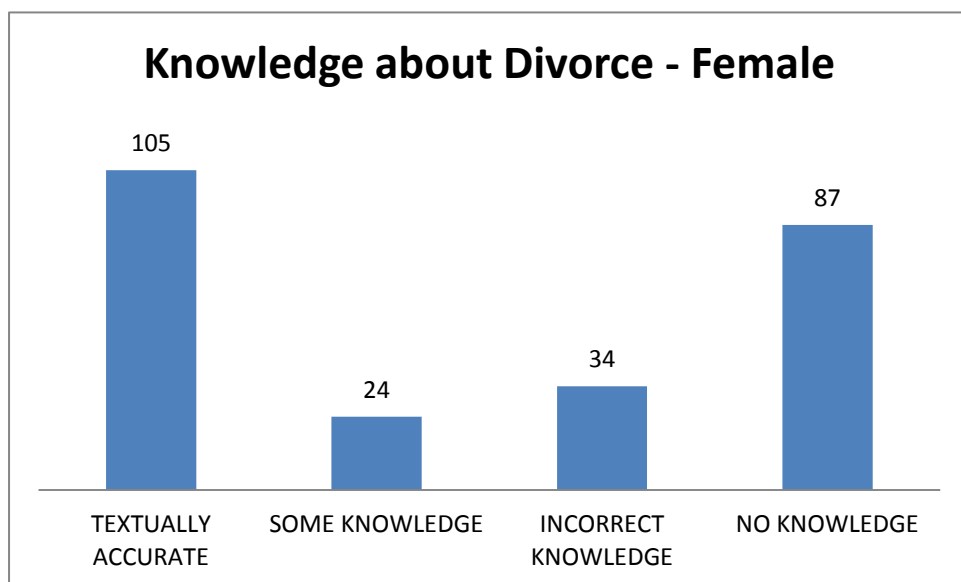
The high proportion of respondents with textually accurate knowledge where the male instigated divorce reflects the prevalence of this knowledge within the community. The possible reasons for this may simply be down to the prevalence of information and opinion on this process, which many in Western media and literature have focused on as an unfair practice.

Respondents who were deemed to have incorrect knowledge offered a wide range of answers to this question while some made a statement without answering the question accurately. Answers included the following:

Through the mosque or imam which a number of respondents listed; simply 'filing for a divorce' which although indicative of the man's intention, cannot be construed as the correct methodology of obtaining an Islamically valid divorce; talaq said three times over a three year period; both must consent; same process for both spouses; a number of respondents stated that a Shariah court or council would need to be approached; saying talaq just once; 'men can ask for a divorce'; and by approaching a 'registration' office.

Female Instigated

Respondents who referred to the *khula*, *Faskh*/annulment, approaching an *imam* or approaching the Shariah Council were deemed to have textually accurate knowledge about the process. If respondents described part of the *khula* process, they were deemed to have some knowledge.



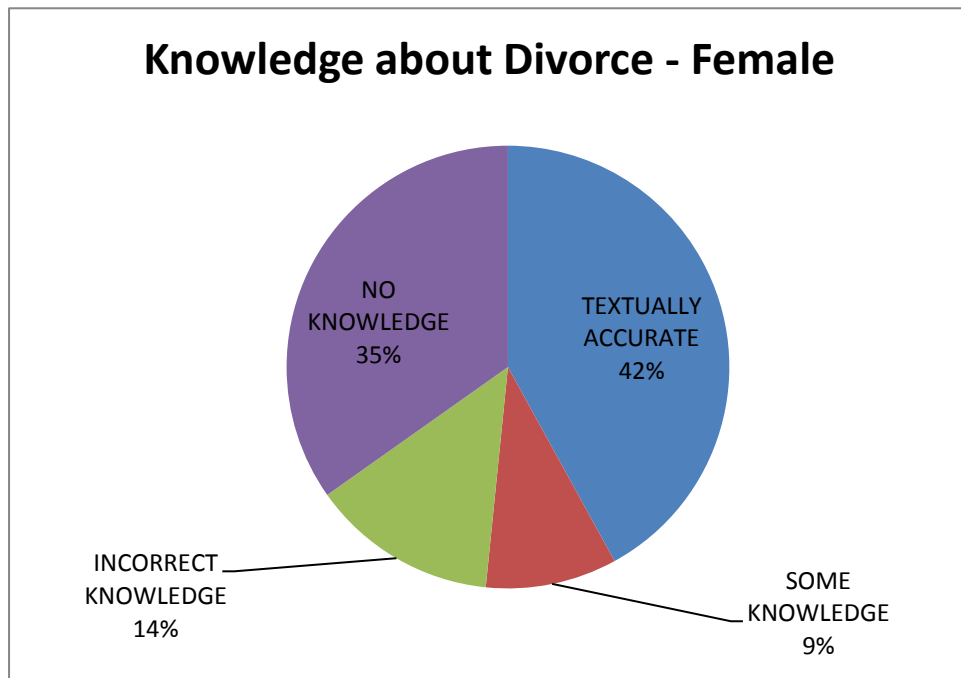


Fig. 12 Knowledge about male instigated divorce

These statistics reveal a similar level of knowledge where divorces instigated by either party are concerned; this is an interesting finding which reveals the prevalence of this knowledge in Muslim communities. The slightly higher percentage with textually accurate Knowledge for male instigated divorce (48 per cent) is not significant enough to conclude that it is a great deal more prevalent than divorce instigated by the female. Also, the 28 per cent and 35 per cent with no knowledge is not significant enough to indicate a lack of awareness of one above the other.

Respondents who were listed as having incorrect knowledge included those who offered the following answers:

Stating three *talaqs* was listed by a number of people (which would be accepted for a male instigated divorce only), with some adding the requirement for witnesses in addition; through their guardians; simply stating 'through shariah' without detail, approach family; a number of

participants said females cannot initiate divorce at all in any circumstances; three months separation with intention of divorce (which would be a valid indication of divorce if instigated by the male); a number of participants said the female can only get a divorce by asking the husband to grant one; *Mahr* returned after three *talaqs* given (this is a confusion of the *Khula* divorce and the male instigated simple '*talaq*' process).

Inheritance – when the husband dies, and the wife is still alive

The issue of inheritance is both forthright and complex simultaneously. There is direct reference to distribution and allocation of portions in various parts of the Qur'an.⁵⁷³ The injunctions are clear, and have given rise to a great deal of controversy due to inequality between the genders where allocation of some forms of inheritance is concerned. This can be defended on the basis of correlating rights to maintenance which Muslim women are entitled to, as men are imbued with greater financial responsibility where women in their families are concerned. Distribution of inheritance is unequal to compensate for the added financial responsibility placed on men which women are free of. This separation of property and wealth was revolutionary at the time and intended to protect women from exploitation while simultaneously for the first time providing them with a right to inherit. Thus, marriage did not automatically entitle a man to his wife's property and wealth.

⁵⁷³ The most detailed verses are contained within Surah An-Nisa, verses 11-12, and verse 176. Further guidance is provided as: Surah Baqarah, chapter 2 verse 180; Surah Baqarah, chapter 2 verse 240; Surah Nisa, chapter 4 verses 7-9; Surah Nisa, chapter 4 verse 19; Surah Nisa, chapter 4 verse 33 and; Surah Maidah, chapter 5 verses 106-108.

However, the reliance of women on male members of their family for support is no longer the norm in many parts of the developed world. Esposito opined that some Muslim jurisdictions took steps to “rectify injustices resulting from the application of certain rules that reflected and suited the extended family of traditional Islamic society, but no longer adequately met the needs of the modern world.”⁵⁷⁴ Practical examples from across a number of widely divergent Muslim majority jurisdictions⁵⁷⁵ demonstrates how at the state level, realignment is occurring towards a more equitable division through reformation legislation; reflecting a dynamic engagement with traditional rules of Islamic law. Adaptation has ensured that justice prevails in light of changing social norms. Some who argue against such reforms believe the problem lies in the failure of Muslim societies to uphold the rights of women to maintenance, which they believe should be tackled instead of altering jurisprudence developed from reliance directly upon verses of the Qur’an.⁵⁷⁶

Some Muslim communities, however, remain determined to preserve the literal text of the Qur’an where inheritance is concerned, despite the fact that this may be resulting in unjust enrichment where the rights of inheritance are upheld even in the absence of the responsibilities from inheritance being fulfilled. Cherif⁵⁷⁷ conducted a study relating to gender inequality in Muslim countries which she attributed to ‘Islamic culture’ and concluded that in order to address the imbalance, they must “undertake reforms that make them comparable to a

⁵⁷⁴ J. Esposito, *Women in Muslim Family Law*, 2nd Edition, (2001) Syracuse University Press, at 62.

⁵⁷⁵ *Ibid*, at 109-110.

⁵⁷⁶ This was opined by a number of traditionalist scholars whom I informally discussed the issue with.

⁵⁷⁷ F. Cherif, ‘Culture, Rights, and Norms: Women’s Rights Reform in Muslim Countries’, (2010) 72:4 *The Journal of Politics*, pp. 1144–1160.

developed country, by advancing women's core rights to optimal levels and developing democratic institutions," with the key being to foster "greater female education and labour force participation."⁵⁷⁸ The latter point is crucial as it indicates that Muslim women themselves will be the ones leading the change by becoming active members of society and increasing their own awareness. The majority of women engaged in the present study are university educated and this suggests that they are more likely to lead change or at least raise questions about practices which are inequitable.

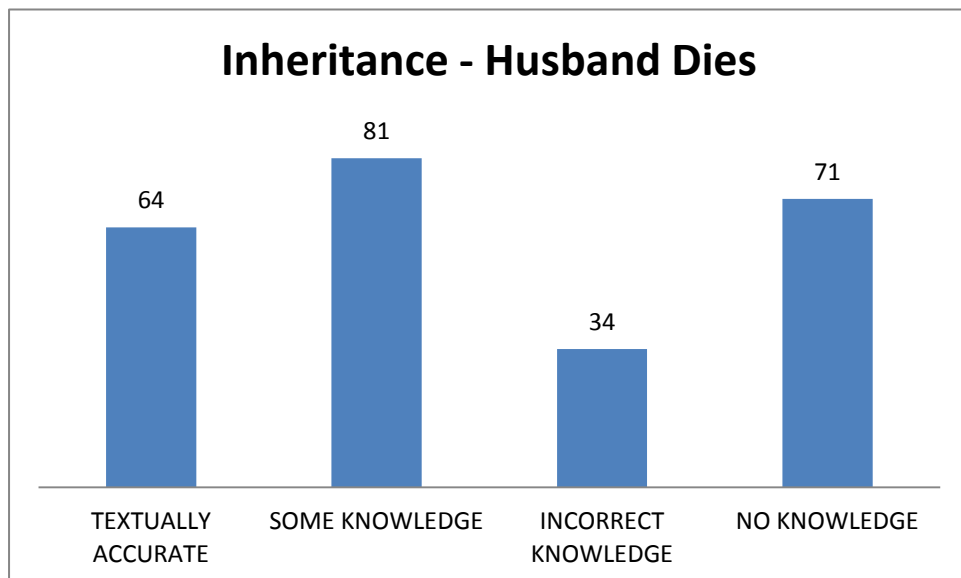
Modern thinkers such as Professor Tariq Ramadan take the view that the injustice that this unequal distribution of inheritance leads to is a betrayal of the teachings of Islam brought about by literalist implementations of Qur'anic injunctions.⁵⁷⁹ Discussions about the need for reform within the laws of inheritance have been ongoing for decades and can be seen across the various Islamic schools of thought. Thus, for example, the Ithna' Asharis within the Shia schools of thought had already modernised the laws of inheritance decades ago, allowing for a tiered approach to distribution which overcame the problems of the literalist interpretations.⁵⁸⁰

⁵⁷⁸ Ibid, at 1158

⁵⁷⁹ See for examples, an interview conducted with Professor Tariq Ramadan and carried in Prospect Magazine: "A confident, modern Islam must challenge the victim mentality of western Muslims and a crisis of authority across the faith, says Tariq Ramadan. But can you be a gay Muslim?" by E. Masood, D. Goodhart and A. Turner, 24 July 2006, available at <http://www.tariqramadan.com/A-confident-modern-Islam-must.html> (Last visited 5 December 2011).

⁵⁸⁰ J.N.D. Anderson, 'Recent Reforms in the Islamic law of Inheritance', (1965) 14 *International & Comparative Law Quarterly*, pp 349-365. Blood relatives are divided into 3 classes, with a tiered approach to the right to inherit. Thus, class one (immediate family), excludes class 2 (brothers, sisters, nephews, nieces,), etc.

The laws of inheritance within many Muslim majority jurisdictions saw changes in the 20th century which departed from the previously prevalent literalist translation. However, within some Sunni Muslim communities in Britain, there does appear to be an emphasis on the literalist approach, which is espoused in many spheres of religious teachings. The research findings relating to knowledge about inheritance will provide valuable data on the views and beliefs and basic understanding of British Muslims where this is concerned, and thus the need or otherwise for the British legal system to be conscious and sensitive to it.



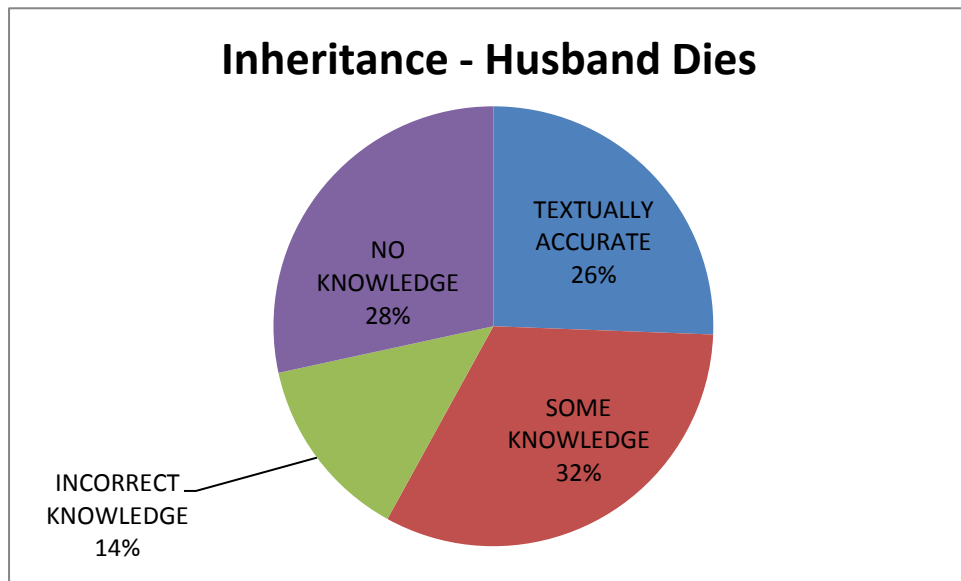


Fig. 13 Knowledge about inheritance where husband dies

The question relating to inheritance was deliberately vague to allow for any and all knowledge held by respondents to be drawn out. Inheritance shares are a complex area and any lead on the question would have negated the ability to draw out a generic representation of knowledge held by British Muslims on this area. The respondents were deemed to have textually accurate knowledge if they listed any of the following: Wife, children, parents, grandparents, grandchildren. If any of these were specifically excluded (i.e. a respondent stated ‘not the wife’), they were deemed to have incorrect knowledge. Other classes of heirs such as siblings could be listed as long as the primary heirs were also listed, to be deemed to have textually accurate knowledge.

Those who only included one of either the wife or the children were deemed to have some knowledge, as long as the other heirs were not specifically excluded. Information about other heirs, which did not contradict the wife and children’s right to inherit, would also amount to ‘some knowledge’. However, those who listed the correct heirs but with incorrect breakdowns would be deemed to have incorrect knowledge.

26 per cent of the respondents had textually accurate knowledge about inheritance, amounting to 64 of the respondents. At just over one-quarter, this is a relatively high number for this complex area of Islamic law. However, this should be considered in parallel to the 28 per cent who had no knowledge, a higher figure. A further 32 per cent had some knowledge, being able to identify at least one class of the heirs, while 14 per cent had incorrect knowledge.

Those who were deemed to have 'incorrect knowledge' offered a range of answers including:

Several respondents stated that the wife receives 100%; wife receives 80 per cent and the children the remainder; a blanket 20 per cent without giving variables; listing heirs which include categories such as 'neighbours'; listing heirs with various incorrect proportions; wife and children equally; 75 per cent for the wife; just the children inherit, with a number of participants saying it is evenly split between the children regardless of gender; and those who said it was limited to the wife and sons only.

Inheritance – when the wife dies and the husband is still alive

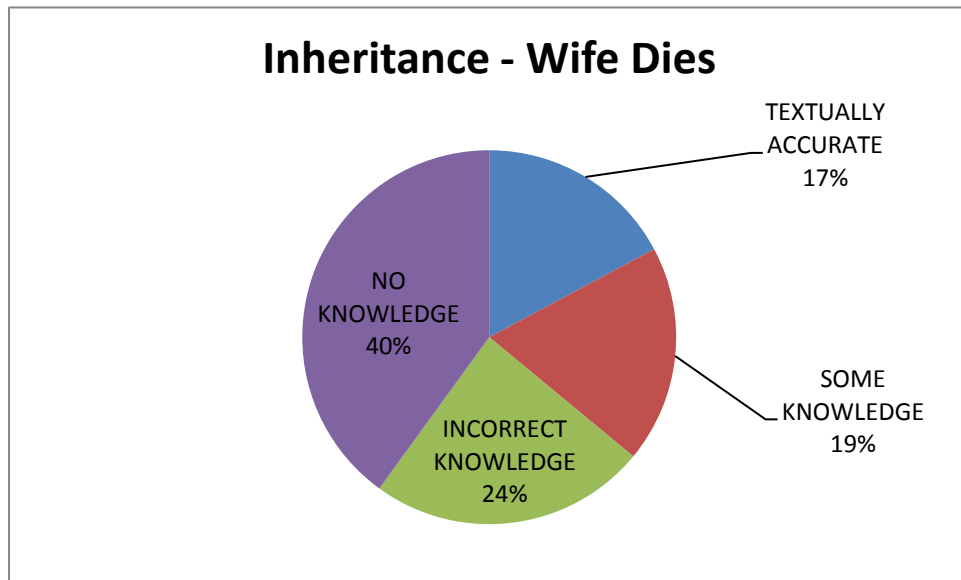
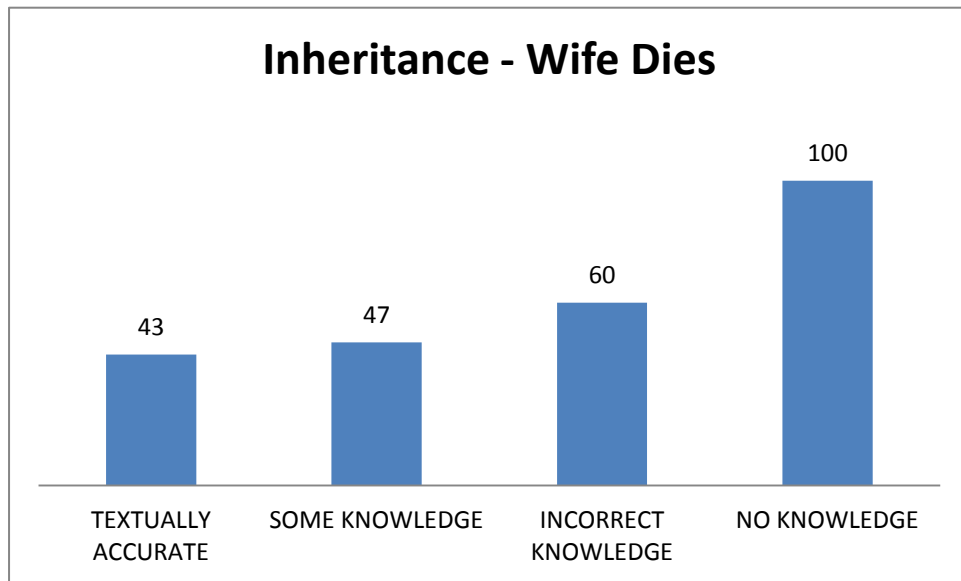


Fig. 14 Knowledge about inheritance where wife dies

Comparing these two sets of statistics provides some very interesting findings. Where the wife survives the husband, just over one-quarter were able to offer textually accurate responses, yet in reverse, only 17 per cent (8 per cent less) were accurate. 32 per cent had some knowledge and this dropped to 19 percent (13 per cent less). Incorrect knowledge rose from 14 per cent to 24 per cent (10 per cent rise), and no knowledge jumped from 18 per cent to 40 per cent.

Those who were deemed to have no knowledge offered a range of responses including:

Several stating the husband inherits everything; incorrect distribution such as one-third to charity; wife's parents only; it is up to the wife to specify (which may be factually accurate, however it does not set out the position in Islamic law); husband cannot benefit under the will; only the children; children receive 20 per cent and husband 80 per cent; just the son if he agrees to care for siblings; children and siblings only; wife's family receive everything; husband and children equally; children only.

The statistics revealed in both of these questions do appear to reflect confusion about this area of Islamic law, and the highest percentage at 40 per cent covered those with no knowledge where the wife dies. The second highest figure stands at less than a third (32 per cent) who had some knowledge where the husband dies and the wife survives him. This may be reflective of the perception that women should be protected and provided for by men as is the traditional Islamic position, and as a result, confusion about the rights a man would have over his wife's property. It is interesting to note that of those who made incorrect statements, a number said that the wife and husband receive 100 per cent of each other's property which would be the position under intestacy according to state law.

Entering a commercial contract involving money

This question was included in the questionnaire to allow for a comparator. The general focus of the questions are primarily Islamic family law, and a question

on transactions involving money would allow this research to test the prevalence of knowledge pertaining to Islamic law issues of a non-personal nature. Where commercial contracts involving money/a debt are concerned, Islamic law requires the agreement to be in written form and witnessed (except for circumstantial exceptions).⁵⁸¹

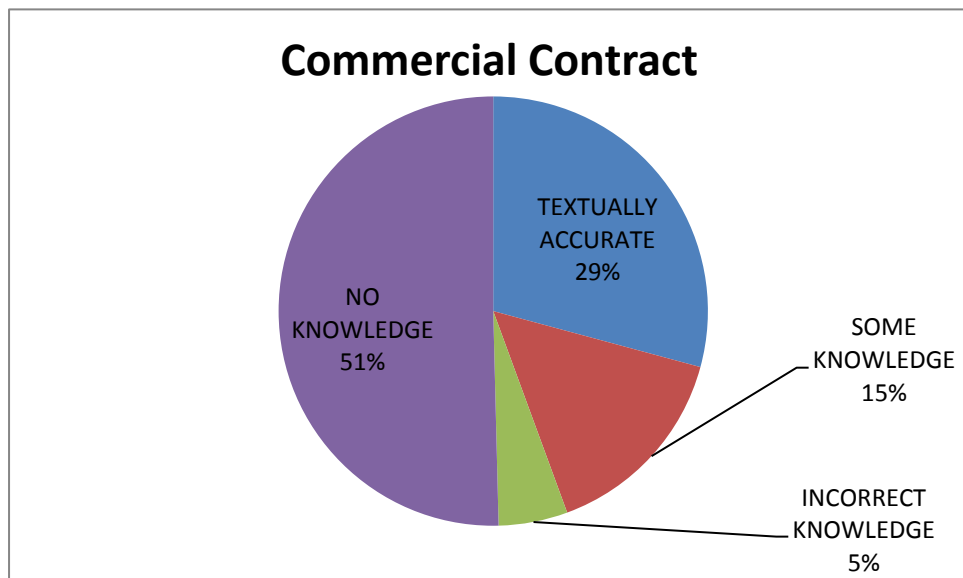
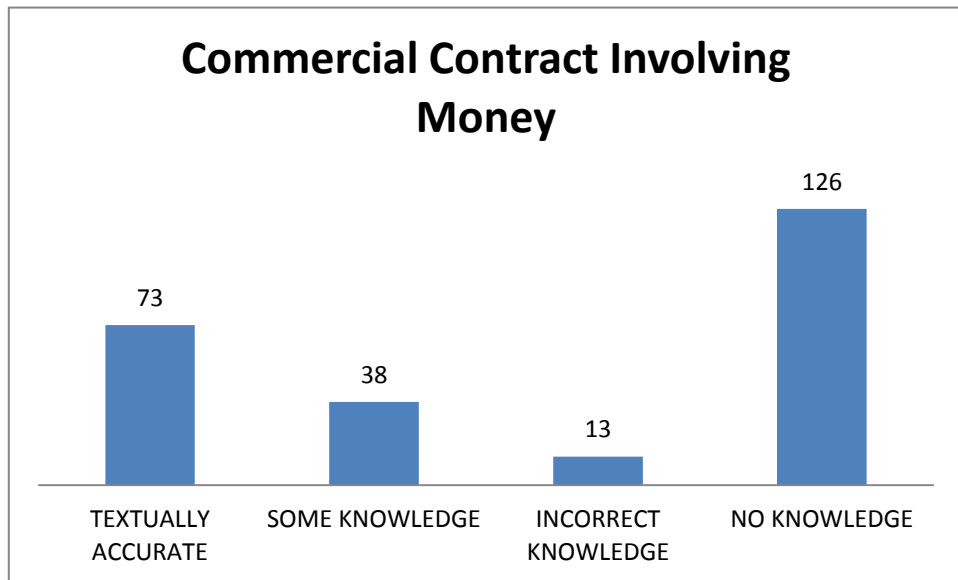


Fig. 15 Knowledge about commercial contract

⁵⁸¹ A. Hassan. *Sales and Contracts in Early Islamic Commercial Law*, (1994) Early Islamic research Institute, Pakistan, at 20.

Although this is a group of respondents who by a large majority classed themselves as either practising or at least understanding of their religious obligations, over half had no knowledge about the correct form of a commercial contract involving money (51 per cent). Less than one-third had textually accurate knowledge (29 per cent) and 15 per cent had some knowledge. Only 5 per cent had incorrect knowledge. The data was analysed using gender weighing to ascertain if this was a factor. This revealed that 94 out of the 126 respondents who stated they had no knowledge were female. The reason for this gendered difference is unclear as 56 of the 94 women were either students or professionals and thus one would expect that they would have exposure to commercial contracts. This fact suggests that lack of exposure may not be the cause. Therefore, it is probable that the reason for the lack of knowledge lies in the issue at hand – Islamic commercial agreements. For those who are practising British Muslims with understanding of their religious obligations, it appears knowledge may be limited in remit to those aspects of their lives which are deemed personal to them. A commercial contract can be entered in a range of situations including a simple loan of money, a mortgage, a sale agreement, to name but a few. The lack of knowledge suggests that the two issues are not being married up in the minds of many British Muslims.

27 out of 73 of those with textually accurate knowledge were male, which represents a proportionately higher margin of male respondents than female respondents, albeit marginally. 35 per cent of all male respondents had textually accurate knowledge compared with 26 per cent of the females.

Respondents displaying incorrect knowledge included statements such as the following:

A number of respondents stated that a verbal contract would be sufficient (and while it may be in certain situations, this specific question would only accept that as a textually accurate response if included with a statement saying a written contract is the norm); not necessary for it to be in writing at all; just 'agree' between them; no witnesses required; this issue falls outside of the remit of Islamic law; and four witnesses.

Section 3

This final section sought to draw out the respondents own experiences where disputes relating to marriage, divorce and inheritance were concerned. Respondents were also asked to rate in order of preference, their choice of forum for assistance with disputes in marriage, divorce and inheritance. The table presented was as follows:

How would you approach dispute resolution for the following family law issues (please rate them from 1-5 in the order in which you would approach them. 1 would be your first choice. Place 'x' where you would not consider approaching that medium at all).

		Marriage	Divorce	Inheritance
I	Approach family			
II	Approach the local imam/ knowledgeable person			
III	Consult a Shariah Council			
IV	Consult the courts/ a lawyer			
V	Other (please give details).....			

The results can be found below. In the graphs and charts, the following numerals refer to the following options for mediums which can be consulted for dispute resolution:

I – Approach family

II - Approach the local imam/ knowledgeable person

III - Consult a Shariah Council

IV - Consult the courts/ a lawyer

V - Other (details provided)

There are 5 sets of graphs and charts for each of the three areas of potential dispute reflecting the options outlined above. Therefore, the first graph and chart concentrates on the ‘approach family’ option and shows how many respondents conferred a ‘1’, ‘2’, ‘3’, ‘4’ or ‘5’ as the preferred option in using this medium to resolve disputes pertaining to marriage.

The second graph and chart concentrates on the ‘approach the local imam/ knowledgeable person’ option, and again shows the number of respondents who said they would approach this first, second, third, fourth or fifth where disputes concerning marriage are concerned.

The third, fourth and fifth charts continue with the responses relating to dispute resolution and marriage, covering the ‘consult a Shariah Council’, ‘consult the courts/ a lawyer’ and ‘other’ options.

These graphs and charts are then repeated again for the responses relating to divorce and inheritance related disputes. Organising the data in this manner allows for in-depth analysis of the dispute resolution mediums which the

respondents expressed preference for and simplifies the results allowing for them to be broken down into constituent elements and considered in turn.

Dispute Resolution – Marriage

I - Approach Family

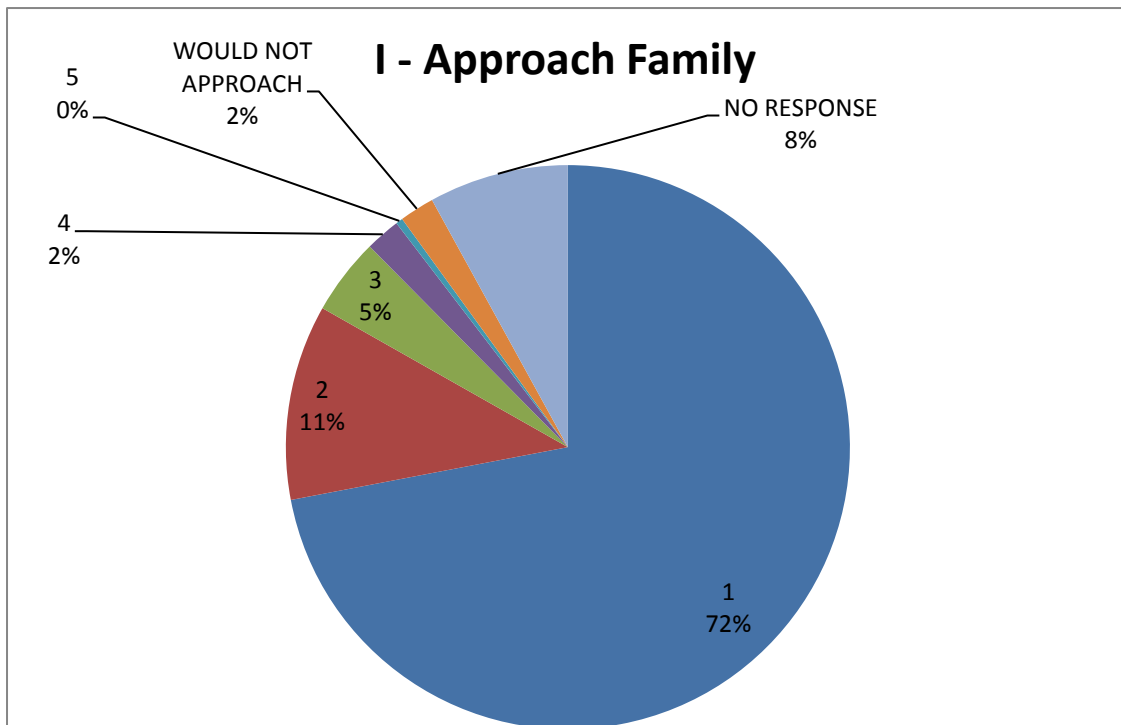
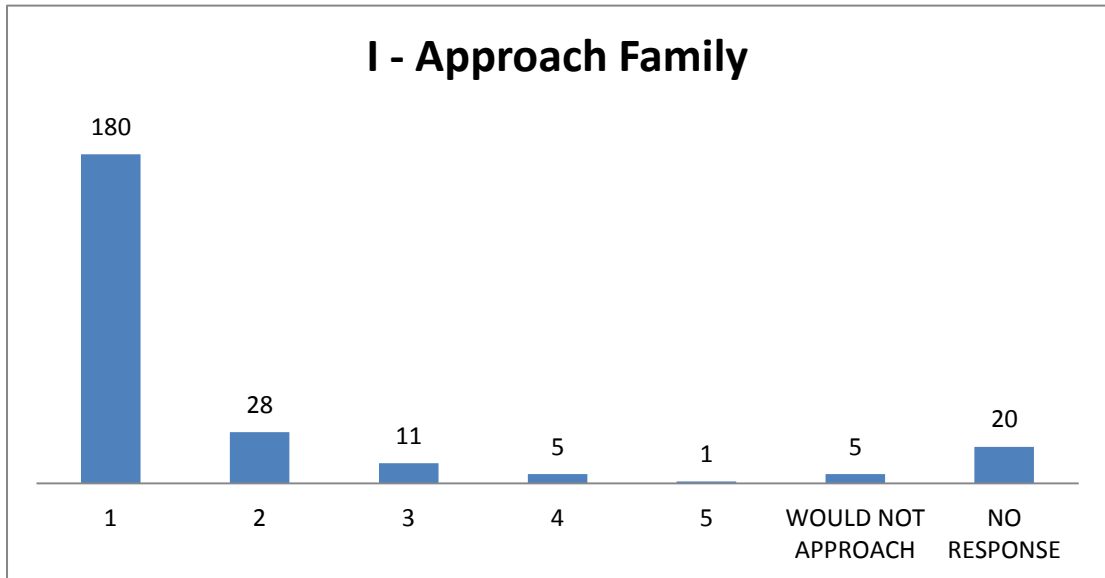


Fig. 16 Marriage: Dispute resolution option - approach family

The 72 per cent majority who would approach family first appears to reflect that British Muslims remain family centric in resolving their marriage related disputes. This is in line with Islamic teachings:⁵⁸²

“If you fear a breach between a couple, send an arbiter from his people and an arbiter from her people. If the couple desire to put things right, Allah will bring about a reconciliation between them. Allah is All-Knowing, All-Aware.”

Reference to the family also perhaps reflects the nature of the problem. Approaching family is unlikely to be something specific to the British Muslim community and it is possible that correlative statistics would emerge with other social and religious groups. Marriage is a union based on family values and generally involves more than just the two people in the union. Thus, the dispute resolution forum of the family is likely to be largely dependent on one’s general interactions with their families as opposed to being guided solely by religious norms.

⁵⁸² Surah An-Nisa, Verse 35, ⁵⁸² Translation of the Quran from A. Bewley & A. Bewley *The Noble Quran: A New Rendering of its Meaning in English*, (1999) Bookwork, Madinah Press

II - Approach the local imam/ knowledgeable person

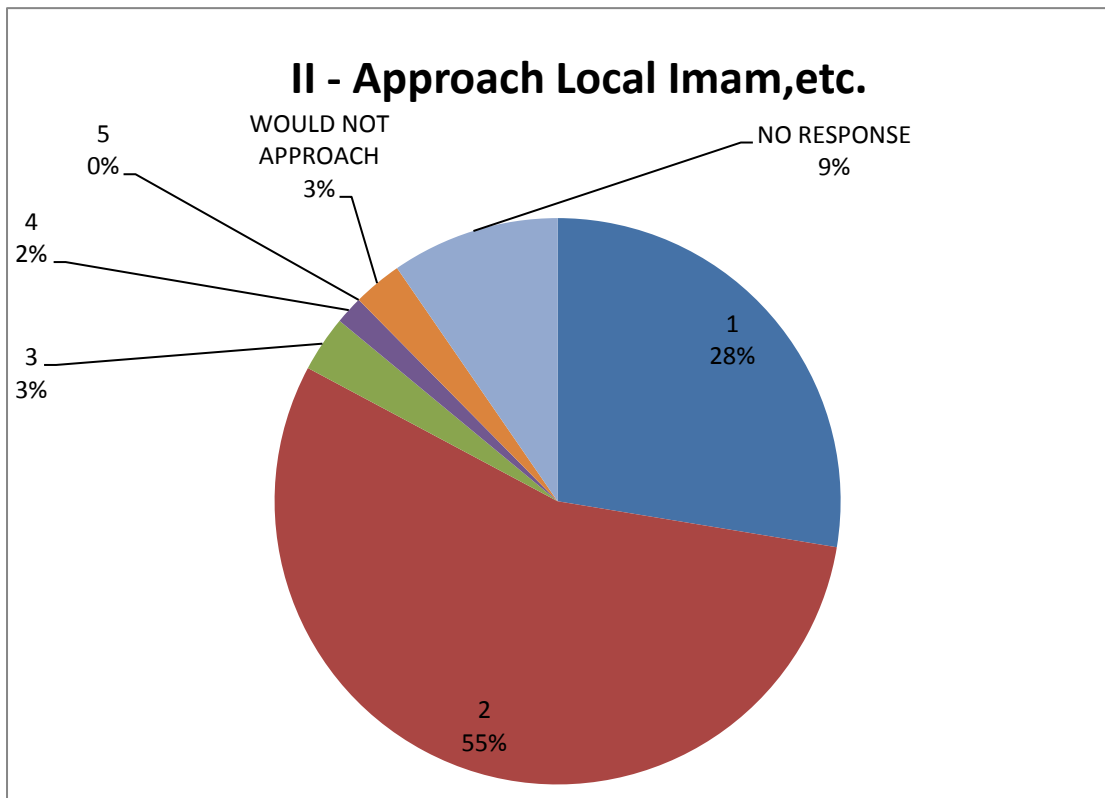
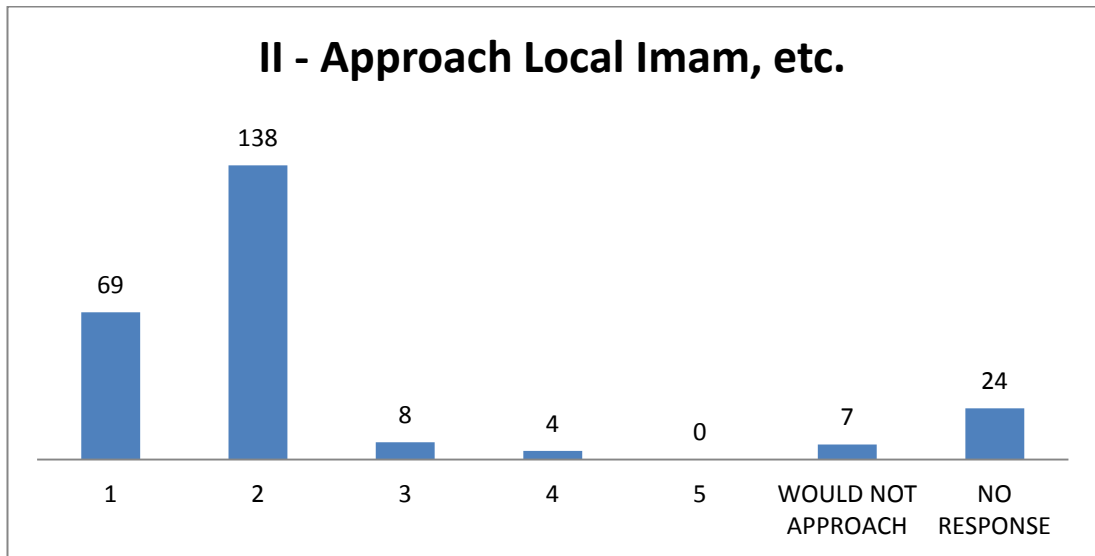


Fig. 17 Marriage: Dispute resolution option - approach local imam, etc

28 per cent of the respondents listed approaching the local imam or a knowledgeable person as the first port of call in marriage disputes, with almost double at 55 per cent listing it as the second forum they would approach. These

findings reveal that the referring to a 'local imam or knowledgeable person' comes second to consulting family where disputes within marriage are concerned. Once again one may conclude that this is unsurprising as a dispute within a marriage is a private matter which would limit the forums used to those who are trusted 'insiders'. However, the larger portion who listed this as the second forum, once the family option has been exhausted, shows that it is a highly valued dispute resolution resource.

III - Consult a Shariah Council

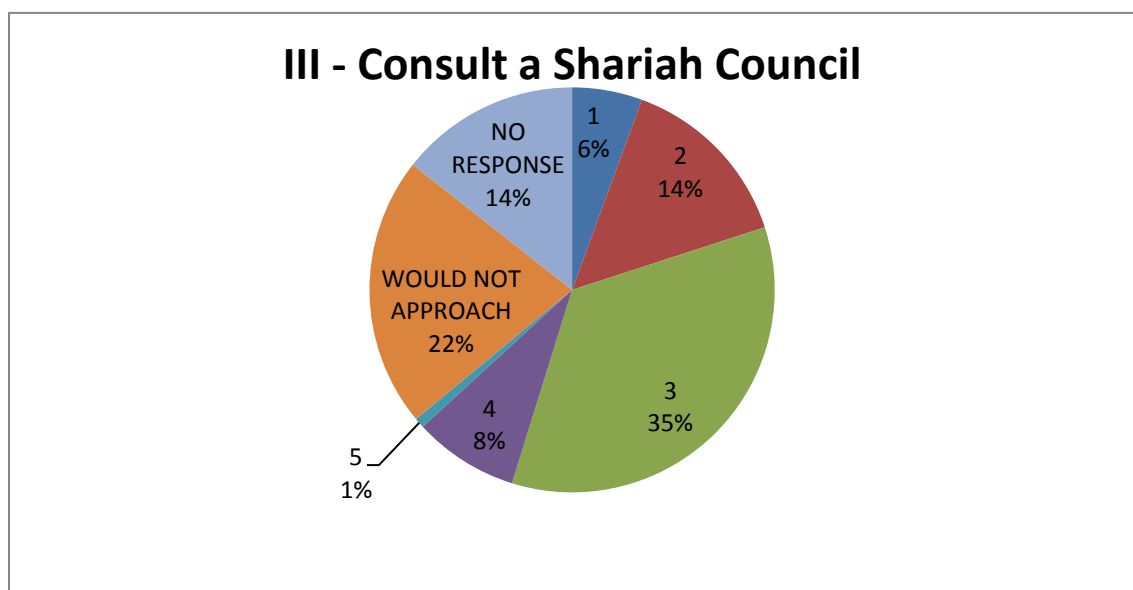
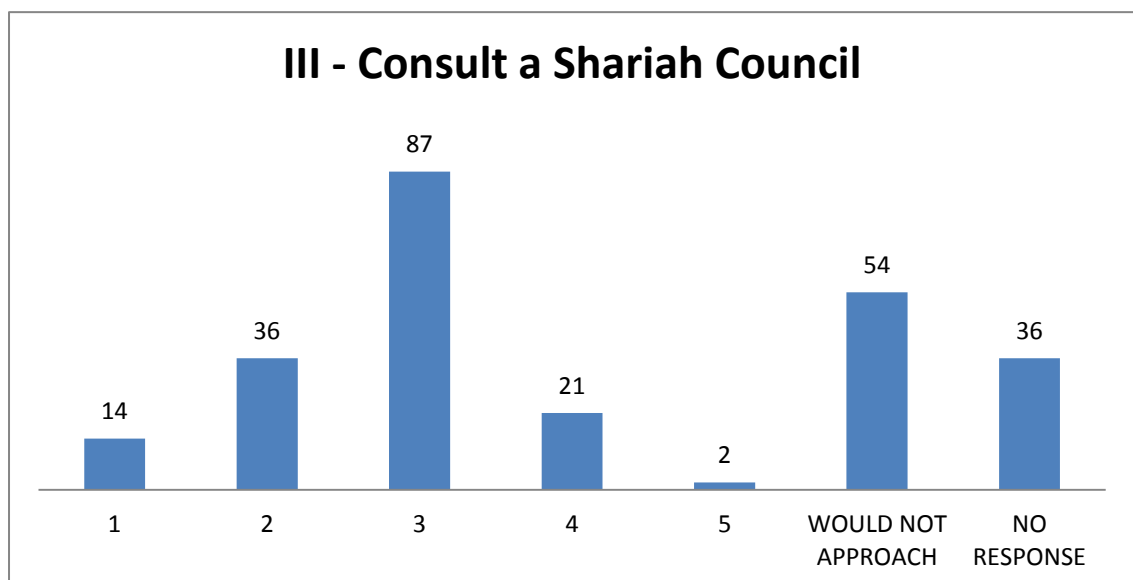
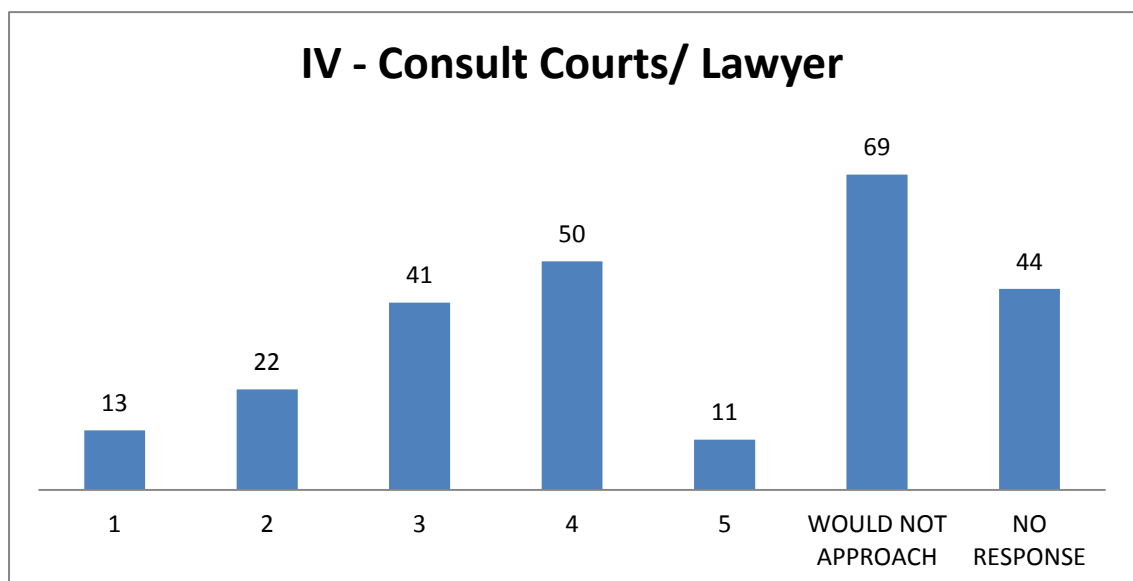


Fig. 18 Marriage: Dispute resolution option - consult Shariah Council

The results here were mixed, with 35 per cent listing this as their 3rd choice of dispute resolution forum. Only 6 per cent listed it as their first, and 12 per cent as their second choice. A sizeable 22 per cent said specifically that they would not approach this medium. This is an interesting statistic which reflects that almost a quarter of the respondents do not have faith in Shariah Councils to resolve their disputes within marriage. This may also reflect the belief that a marriage dispute should not be taken to a public forum so an element of avoiding ‘washing dirty laundry in public’ may be at play, however, it should be noted that in the previous 2 categories, 8/9 per cent did not respond respectively and in this category, 14 per cent did not respond. The reason for this could be the confusion about the role of Shariah Councils within Muslim communities. It may also indicate that a university educated group of respondents may consider other options such as official legal channels which they are aware of due to increased interaction with the mainstream.

IV - Consult the courts/ a lawyer



IV - Consult Courts/ Lawyer

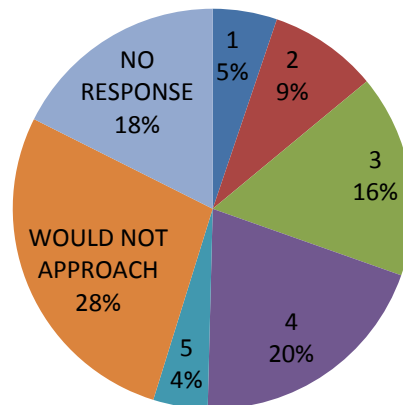


Fig. 19 Marriage: Dispute resolution option - consult courts/ lawyer

The largest percentage of those who would consult courts/ lawyers listed it as the forum they would consult fourth, at 20 per cent. A significant 28 per cent stated that they would not use this medium at all, comprising of 69 respondents in total. The findings here reveal that over a quarter of the respondents would not consult the British legal system. In light of the figures for the other dispute resolution forums, this is a sizeable proportion and outweighs those who would not approach the Shariah Councils by 6 per cent. The reason for this may be numerous, including appropriateness of approaching courts about a marriage dispute, costs, trust in the system, access to the system, and knowledge about the system to name but a few. The issue which will be considered at a later stage is whether there is a problem of access to justice for British Muslims.

V - Other (details provided)

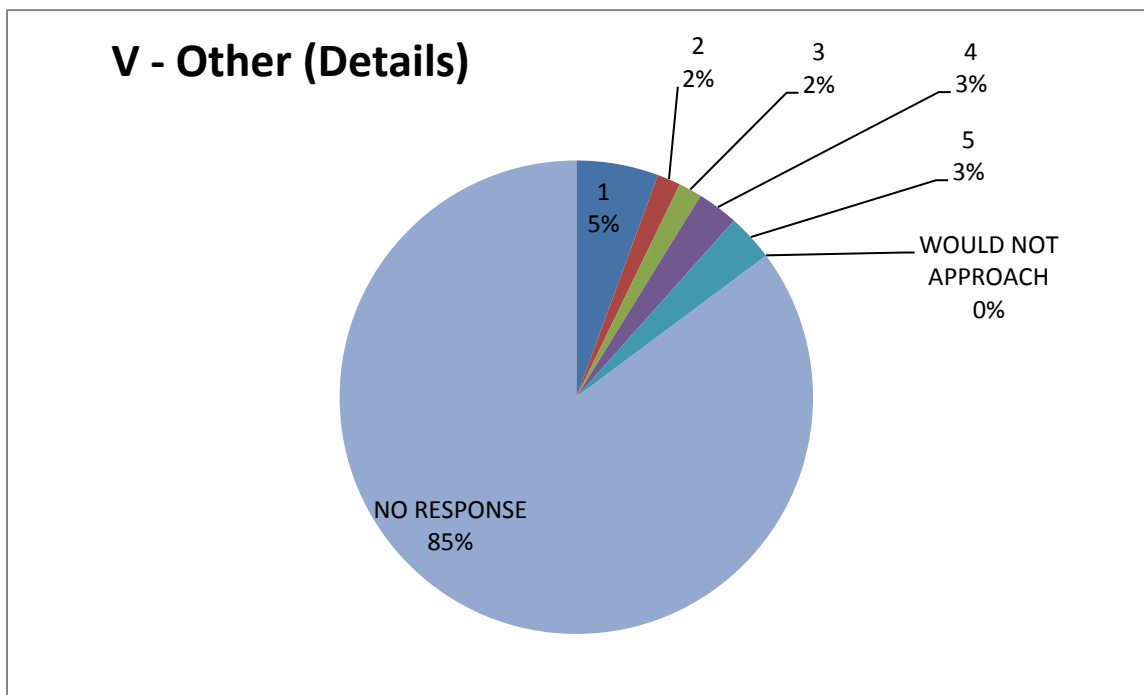
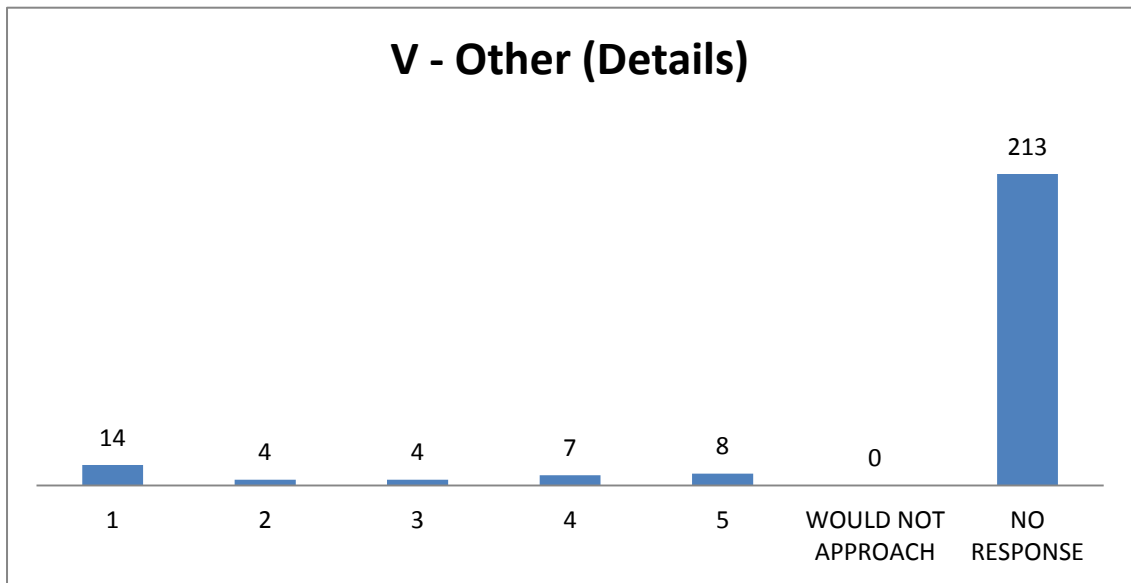


Fig. 20 Marriage: Dispute resolution option - other

The 'other' mediums listed were: a general mediator; 14 respondents said they would consult 'friends' or 'close friends'; the community; they would make prayers; approach the Muslim Arbitration Tribunal; the internet and other non-religious advisors.

Dispute Resolution – Divorce

I - Approach family

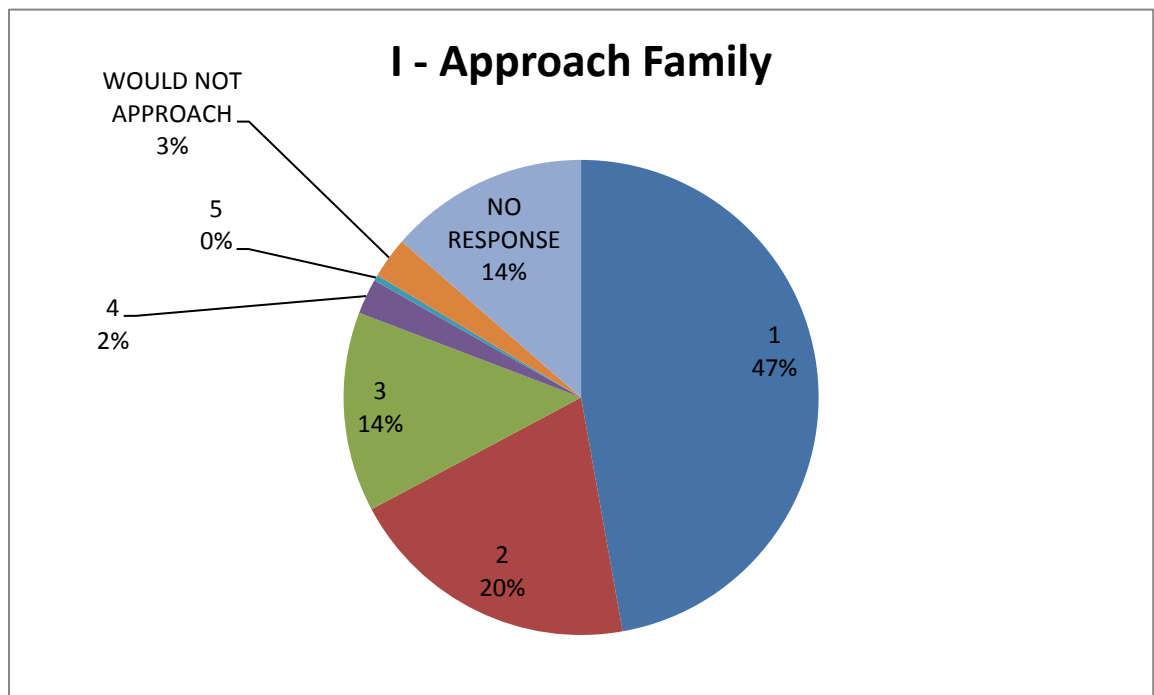
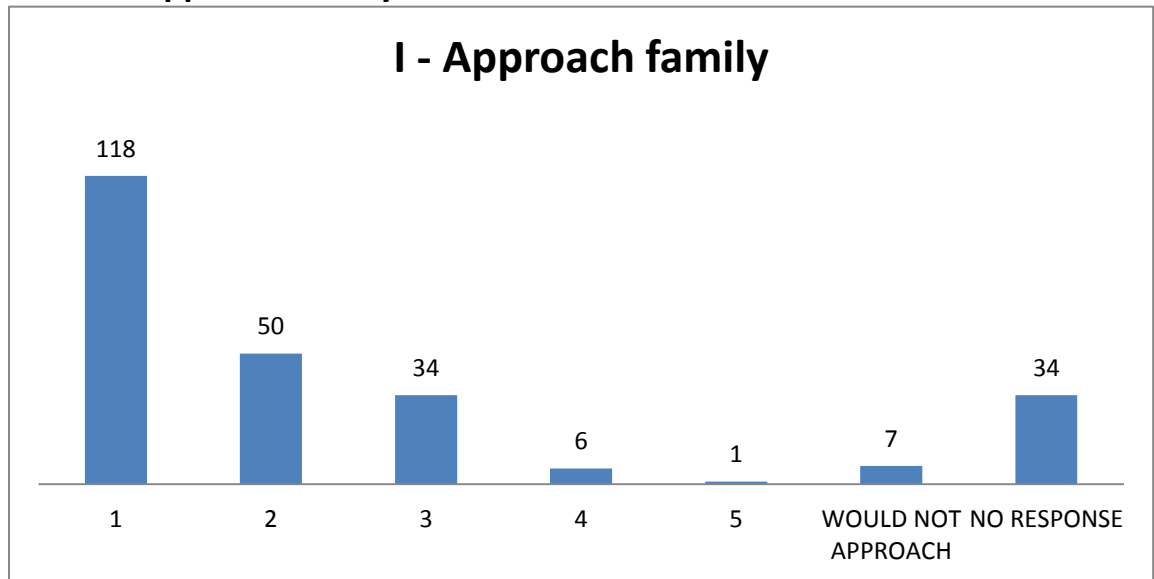


Fig. 21 Divorce: Dispute resolution option - approach family

These findings can be contrasted with the results for marriage disputes, where 72 per cent of the respondents listed family as their first choice of forum. This perhaps reflects the nature of divorce and by the time this permanent

separation is being considered, a portion of British Muslims appear to recognise that 'expert' advice would be needed, and thus the use of another more appropriate medium. The interesting point here is that almost half of the respondents still listed family although this medium is unlikely to provide legal advice, whether from an Islamic or state law perspective. Rather, they are more likely to provide social advice.

II - Approach the local imam/ knowledgeable person

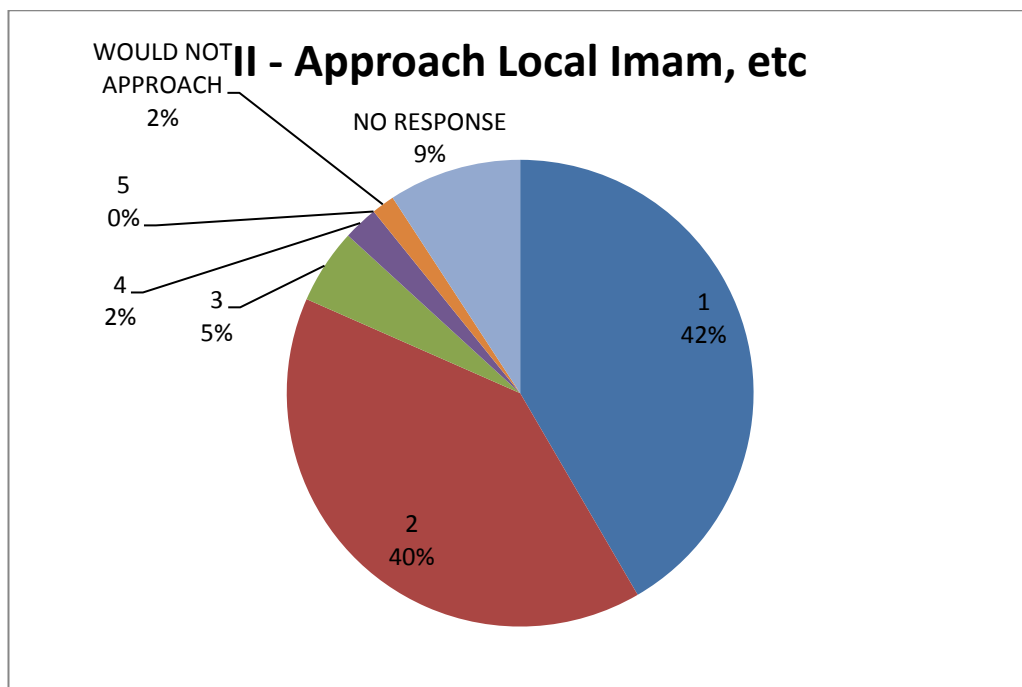
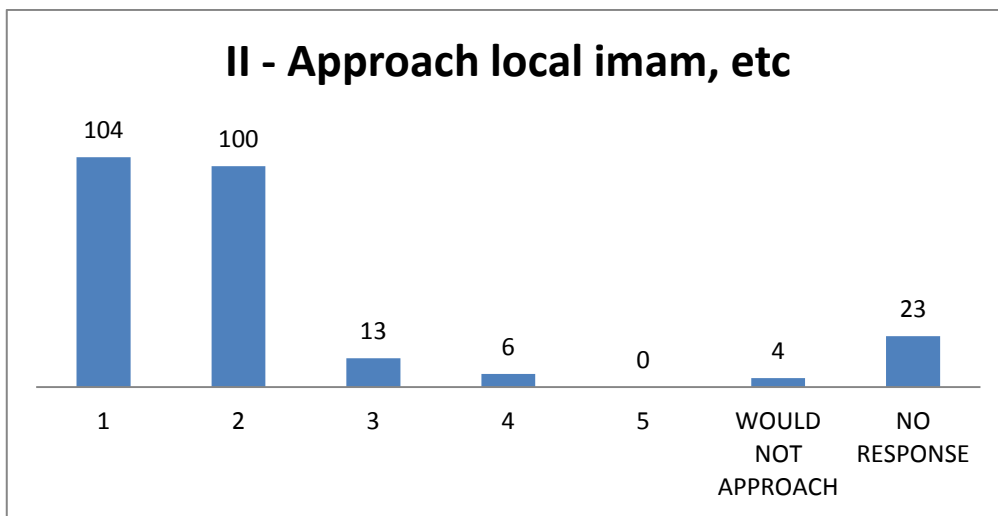


Fig. 22 Divorce: Dispute resolution option - approach local imam, etc.

Overall, 82 percent listed a knowledgeable person or a local imam as their first or second port of call. As this forum is unlikely to provide legal advice about state law, it is likely that this statistic reflects advice being sought about religious divorces or simply wishing to involve learned scholars on the issue before taking such an irrevocable step. Thus, it is probable that the overwhelming majority of respondents would be concerned with their religious obligations first, before considering their formal obligations before the state where divorce is concerned. This is reflective of a relationship which is entered into under religious auspices and ended in the same way. The civil divorce may be considered simply as a formality.

This statistic also appears to reveal the level of trust that is still imbued in the 'local imam' or a person of knowledge. Traditionally, the relationship between the imam and his congregation is one of religious as well as social consequence. He is there to guide and advise on any and all matters. In light of this socio-religious function, it is unsurprising that a large number of respondents have listed this as a forum that would be utilised as a first or second choice where divorce is concerned.

III - Consult a Shariah Council

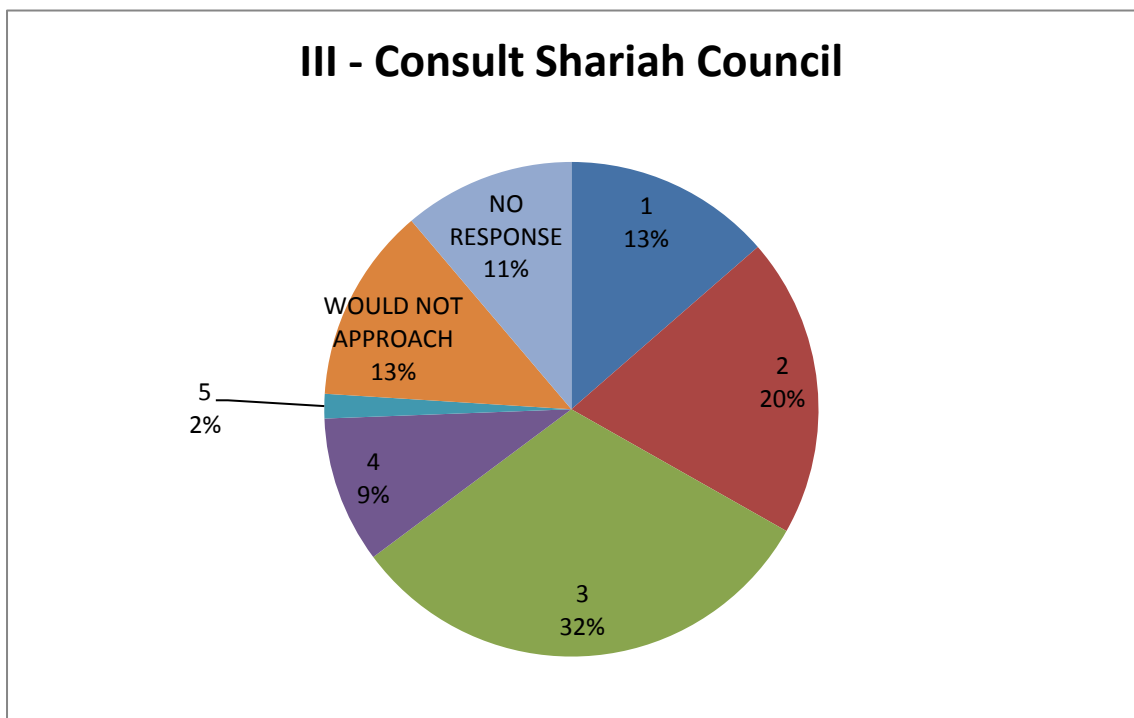
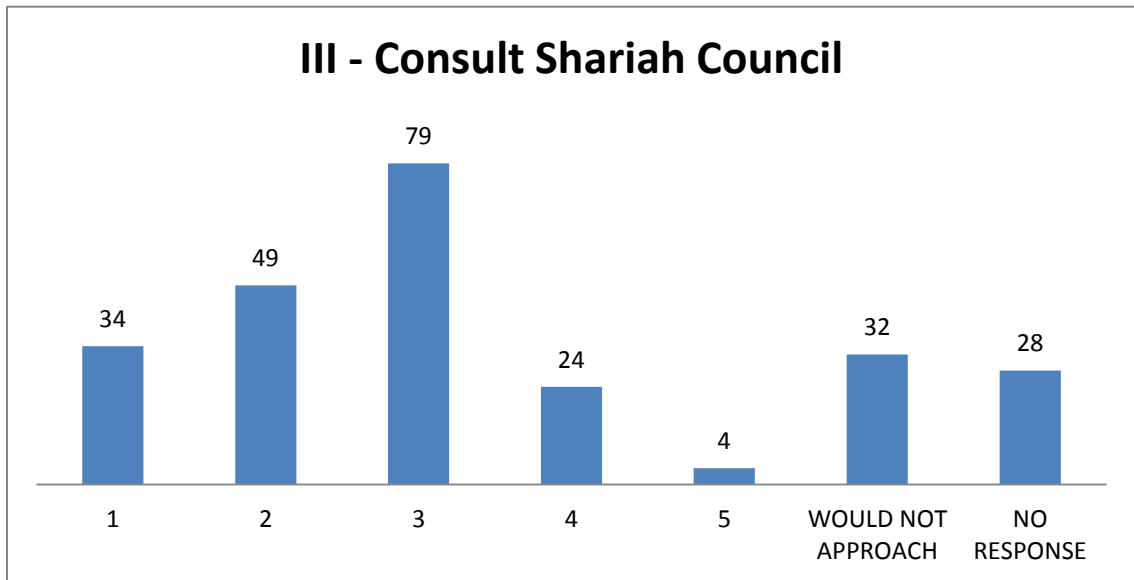


Fig. 23 Divorce: Dispute resolution option - consult Shariah Council

It is clear that the Shariah Council is not the first place a British Muslim pursuing a divorce would approach. However, as other options are exhausted, the percentage of referral increases, peaking at 32 per cent who would approach it third. This accounts for almost a third of the respondents. The

choice of forum then drops dramatically to just 9 per cent listing it as their fourth choice. It is interesting that despite the Focus Group negativity towards Shariah Councils, only 13 per cent of the respondents, amounting to 32 people in total, said they would not approach this medium at all for divorce disputes. These figures will be explored later in light of the Focus Group discussions.

IV - Consult the courts/ a lawyer

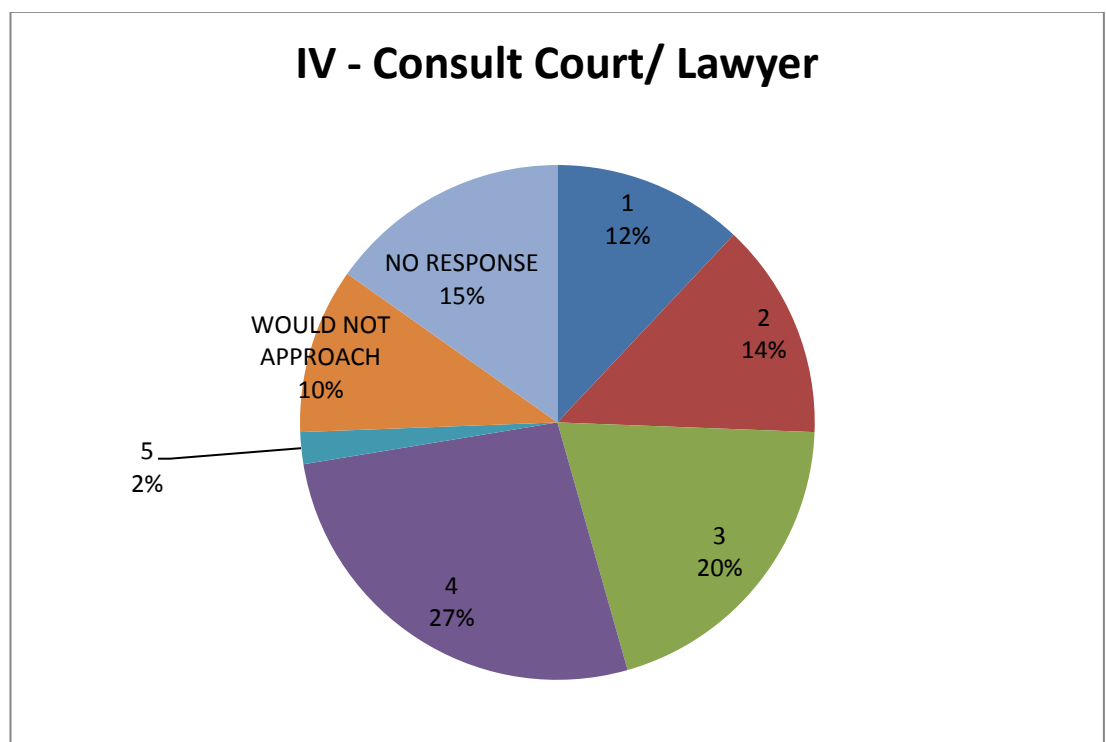
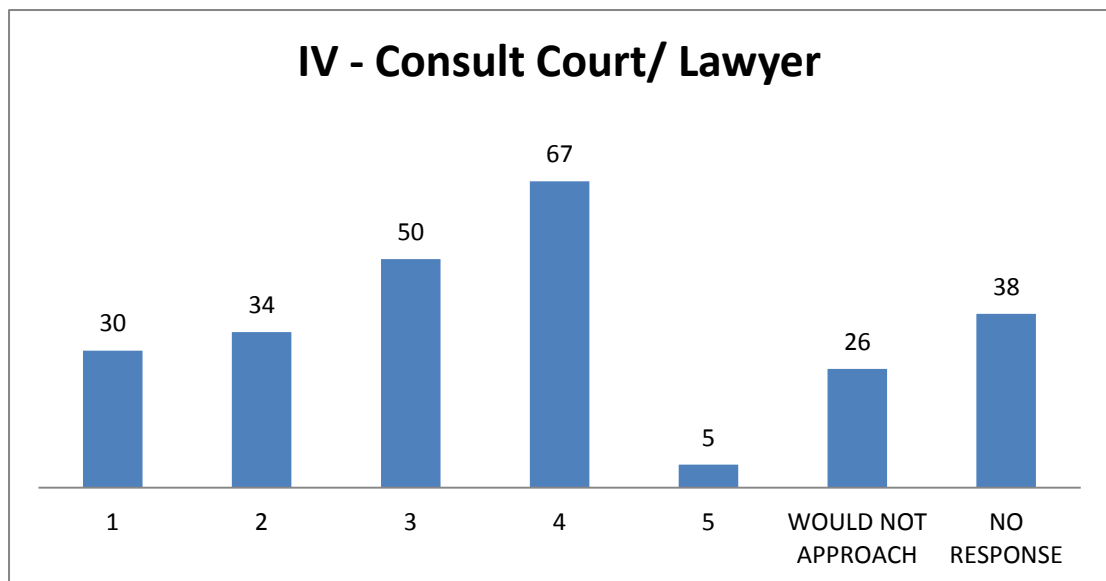
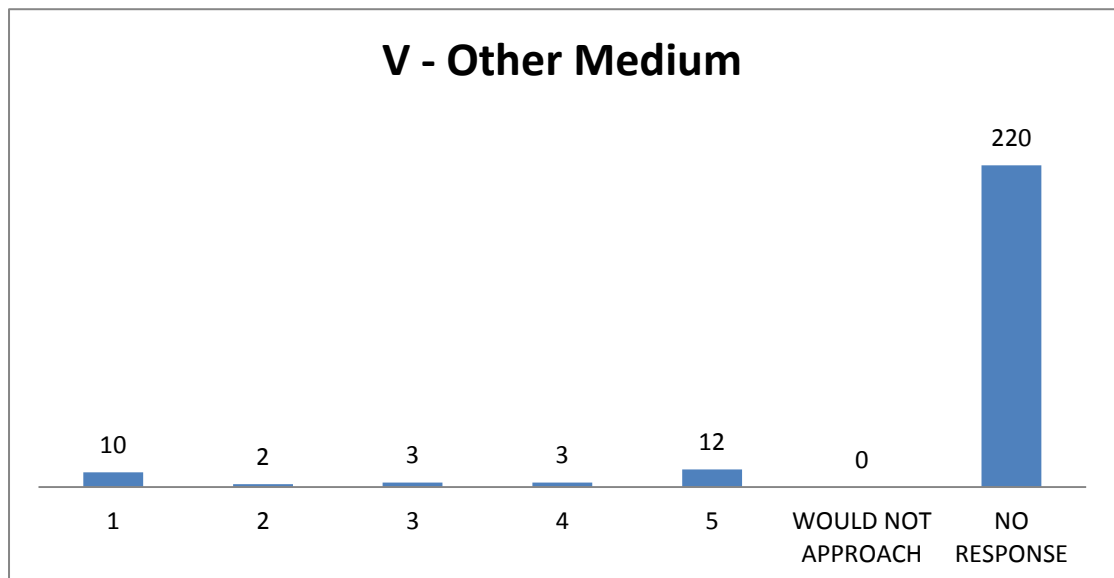


Fig. 24 Divorce: Dispute resolution option - consult court/lawyer

As with Shariah Councils, there was a gradual increase in the numbers of respondents who would approach the courts or a lawyer, as other options were exhausted. With Shariah Councils, the figures peaked at the third option. Here, they peak at the fourth option, but only to a high of 27 per cent. Thus, even at the highest point, consulting a court or lawyer would still be referred to 5 per cent less than the Shariah Council. It is clear that despite the need to approach this medium to obtain a divorce, there is certain ambiguity from British Muslims about it.

V - Other (details provided)



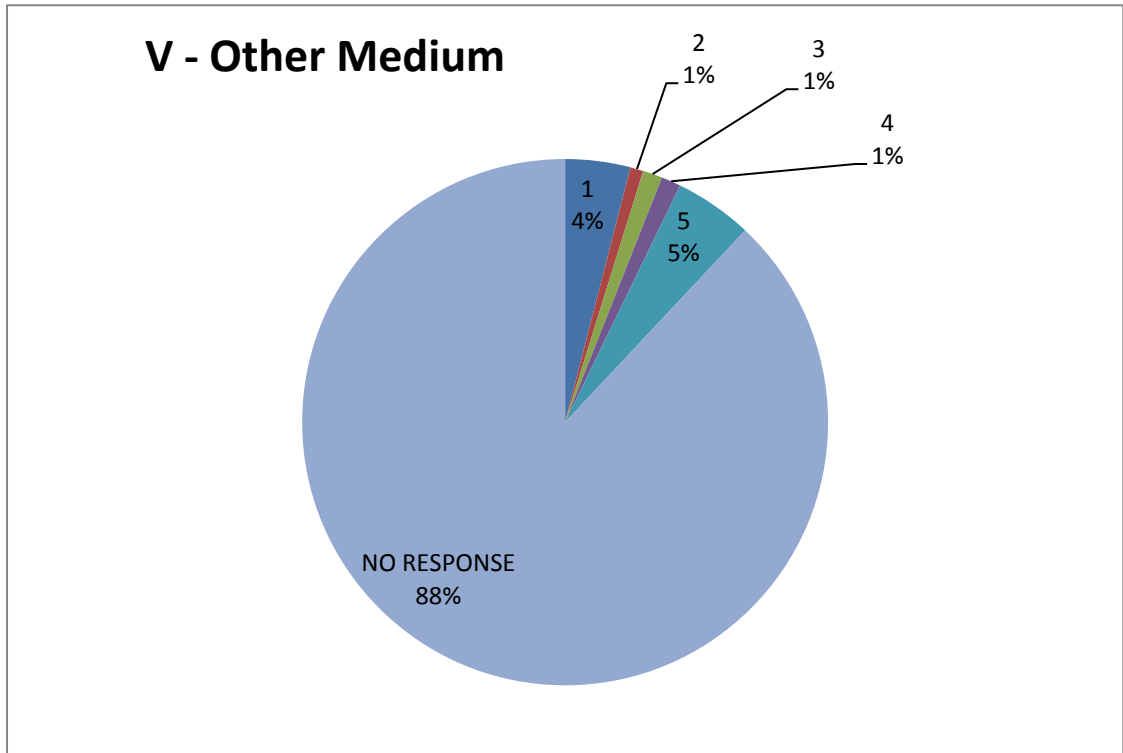
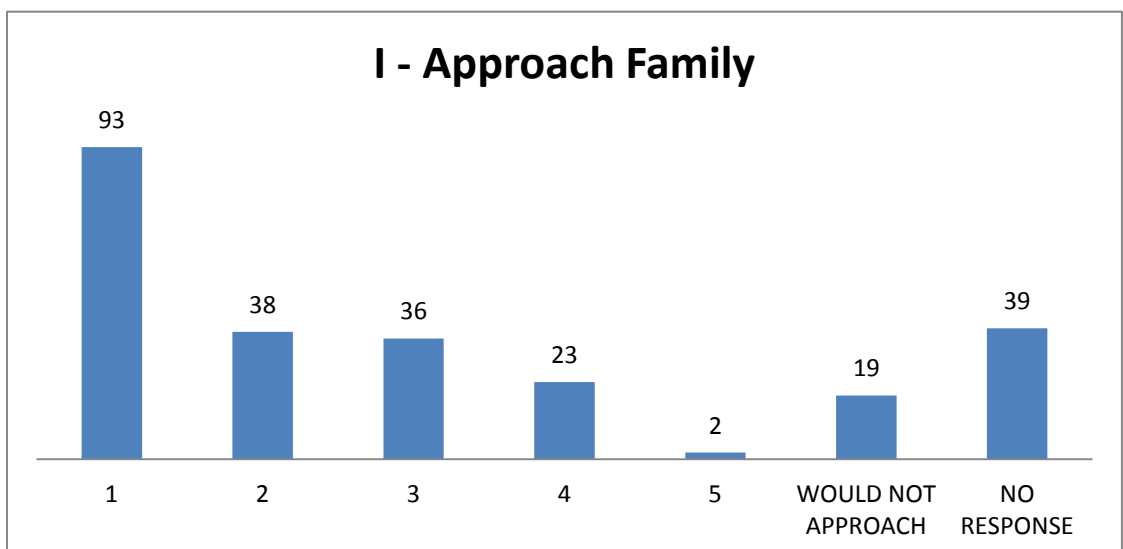


Fig. 25 Divorce: Dispute resolution option - other

The alternative forums detailed here included: other mediators; friends or close friends, the community or the Muslim Arbitration Tribunal. With the relatively low uptake on this option, it perhaps reflects individual sensibilities as opposed to demarking mass social trends within this group.

Dispute Resolution - Inheritance

I - Approach family



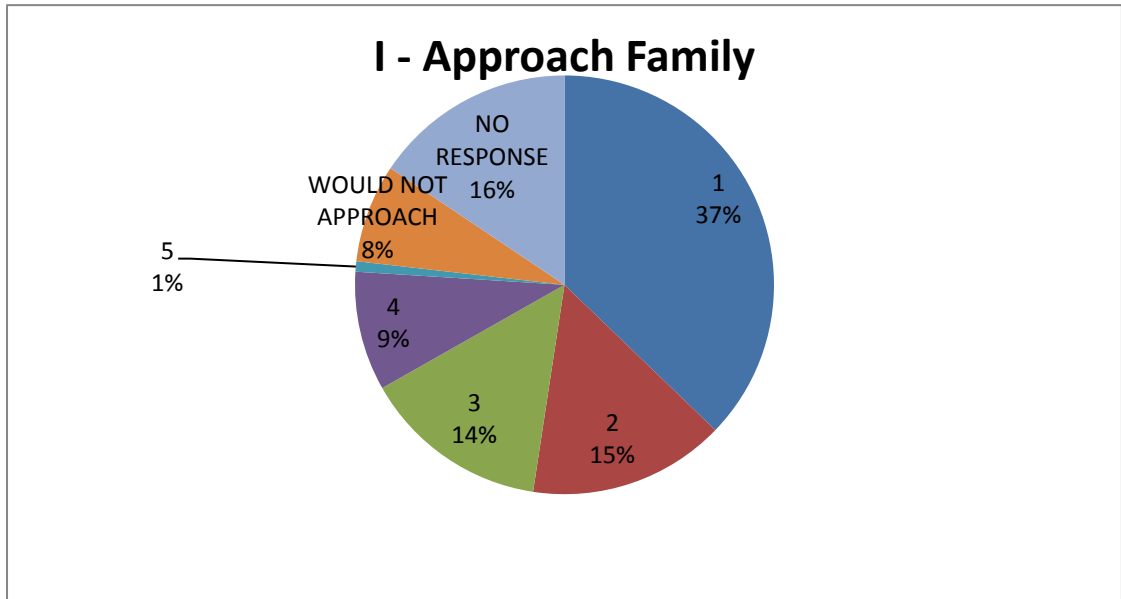
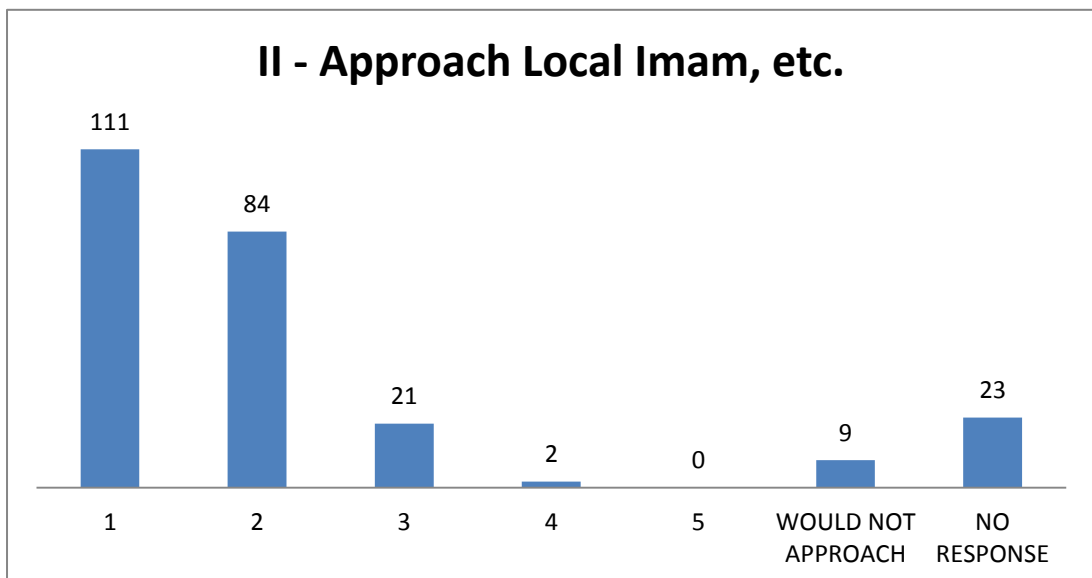


Fig. 26 Inheritance: Dispute resolution option - approach family

On an issue which clearly would involve family, it is not unusual to have a high rate of family interaction on the matter. This needs to be compared to the other options for dispute resolution forums in order to ascertain whether there is a greater or lesser preference for it.

II - Approach the local imam/ knowledgeable person



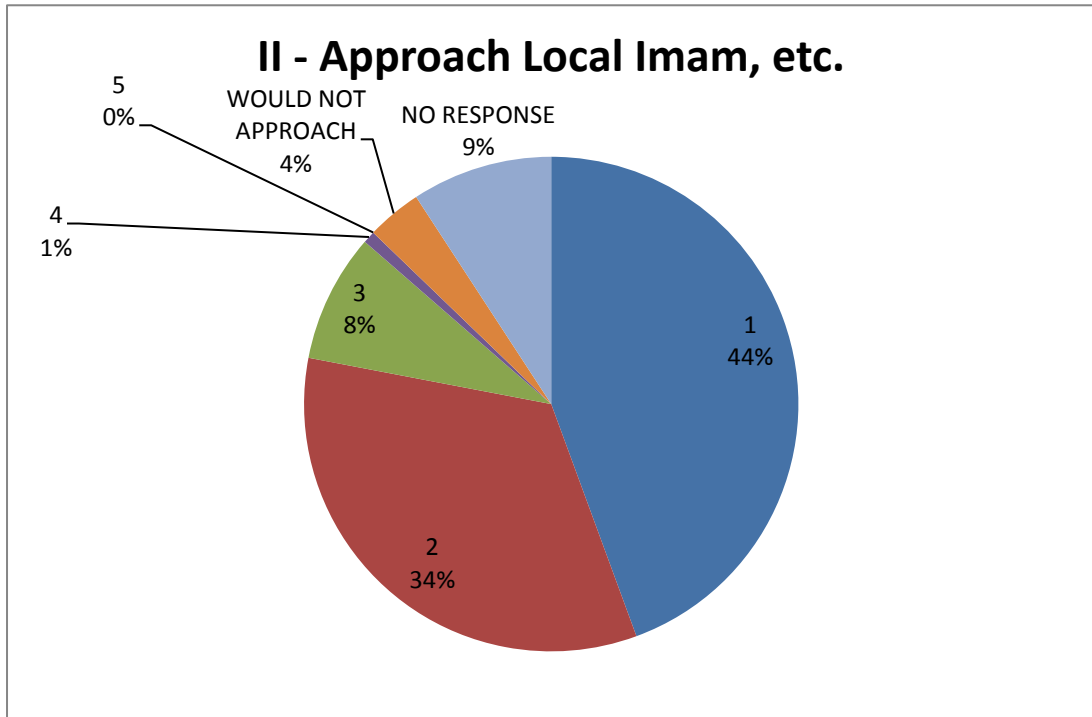


Fig. 27 Inheritance: Dispute resolution option - approach local imam, etc.

The percentage of respondents who would approach the Imam or knowledgeable person first was 7 per cent higher than those who chose family as the first forum. While reflecting a preference for ‘expert’ knowledge, the findings do not reflect an overwhelming majority. However, when added to the statistics for those who chose this as the second forum, at 78 per cent this is much higher than those who listed family first and second, which stood at 52 per cent.

III - Consult a Shariah Council

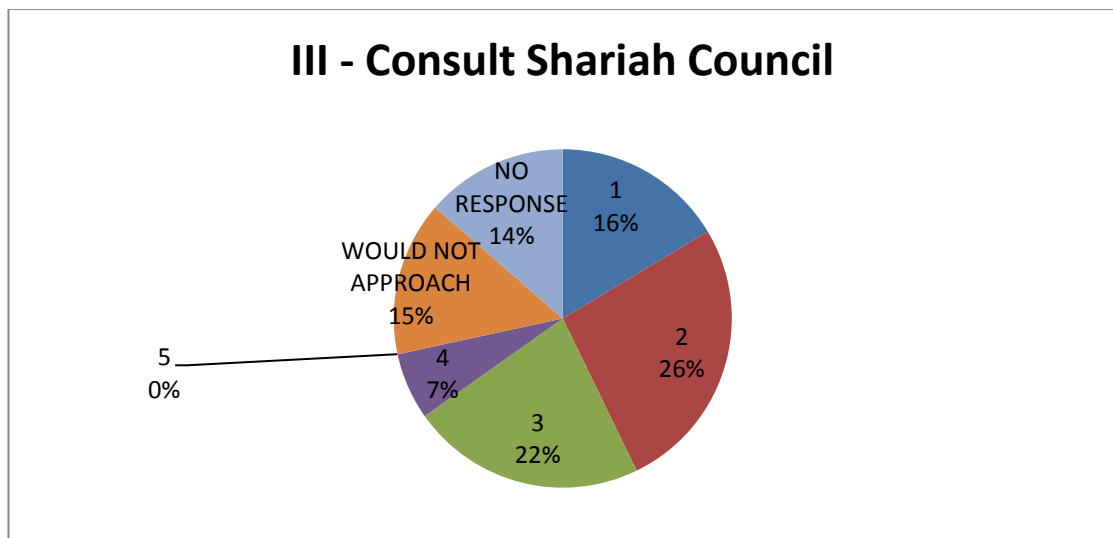
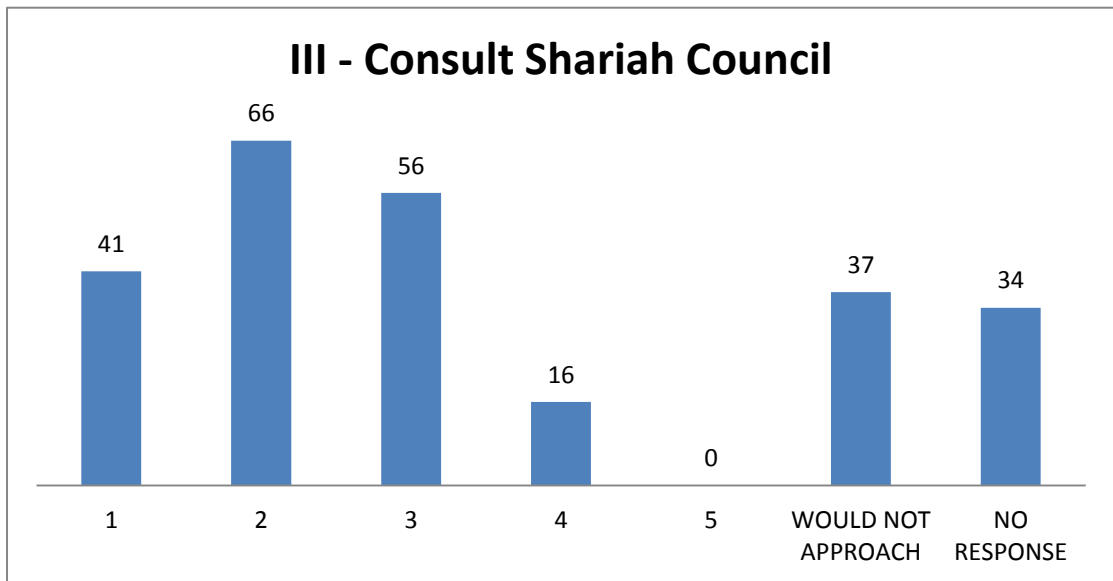


Fig. 28 Inheritance: Dispute resolution option - consult Shariah Council

It is interesting to note that a dispute concerning inheritance which one would expect to be the purview of the Shariah Council was not clearly preferred by the respondents. Only 16 per cent listed it as their first port of call, which was lower than those who would refer to it first in cases of divorce (20 per cent) but higher than those who would refer to it first for marriage disputes (6 per cent).

When the first, second and third choices are summed up, it only amounts to 64 per cent of the respondents, which shows that there is no clear preference for

this medium where inheritance is concerned. This may be the result of the Shariah Councils' reputations for resolving mainly divorce disputes, or it may reflect a lack of trust in this medium to mediate on inheritance law issues which are complex and in the British context, still evolving. In addition, inheritance is an issue concerning which the state does in fact have jurisdiction, compared with an Islamic divorce, over which it does not.

IV - Consult the Courts/ a Lawyer

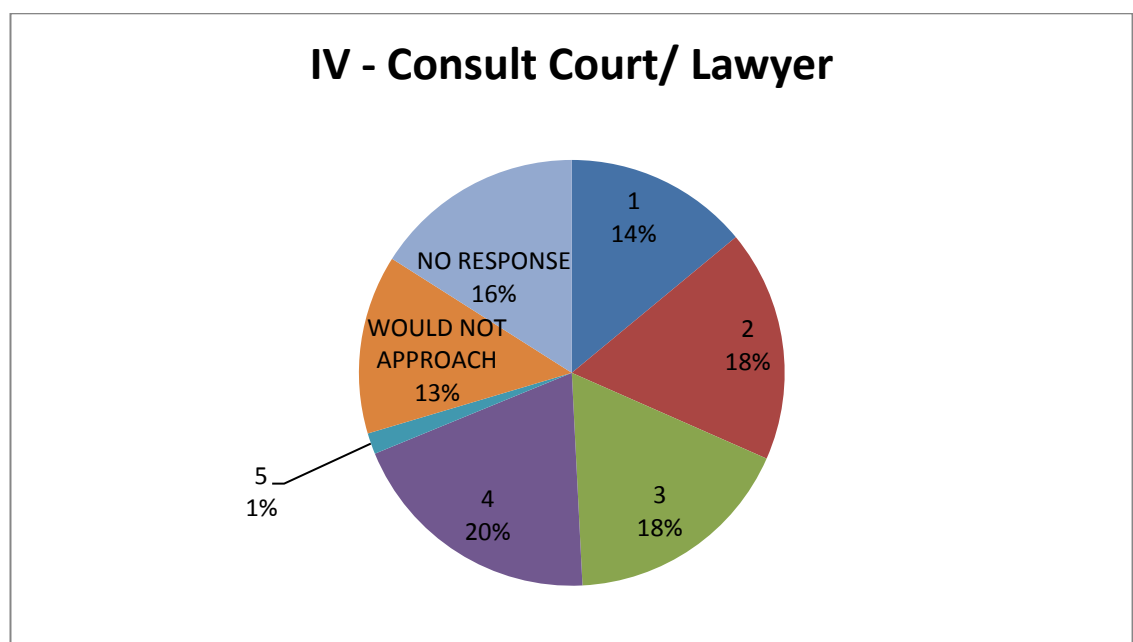
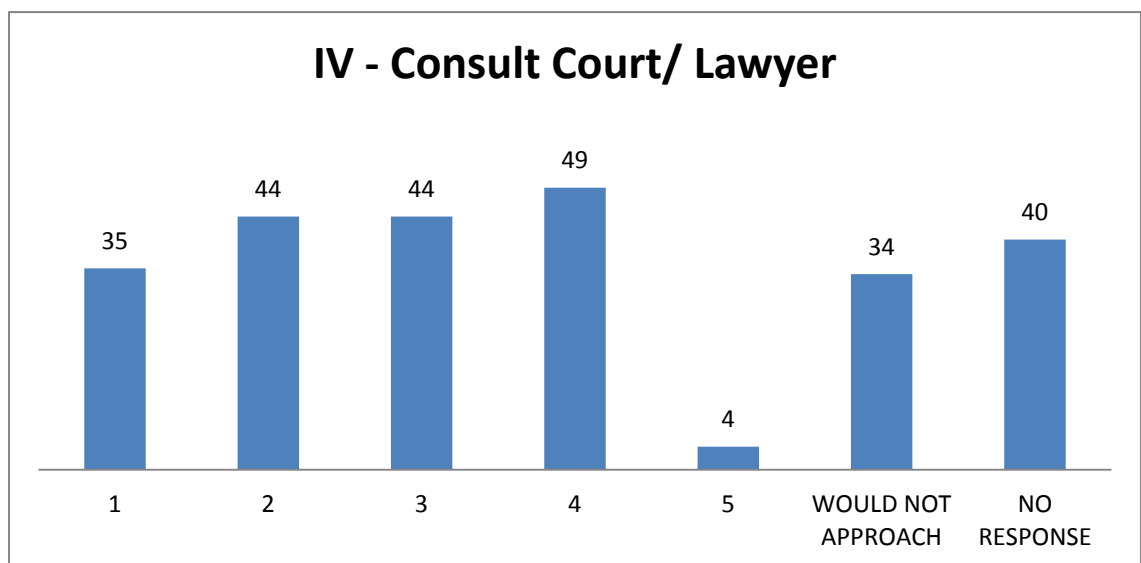
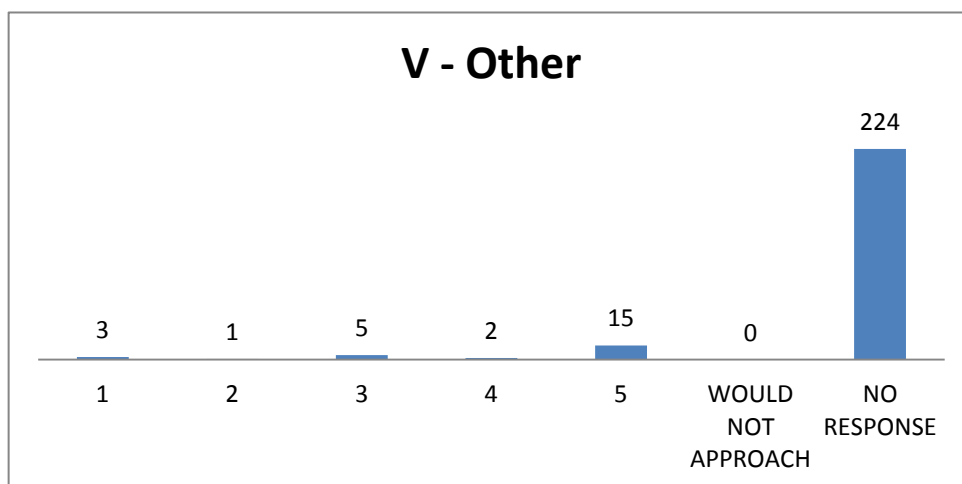


Fig. 29 Inheritance: Dispute resolution option - consult court/ lawyer

These statistics seem to reflect a reluctance to approach the state legal system, even where the issue is one which may necessarily require professional advice. The question asked did not specify that the inheritance issues concerned Islamic law, and while many may have inferred that it did, based on the nature of the questionnaire, there seems to be a lack of recognition of the state's overarching role in settling inheritance disputes. The courts/ lawyers fared worse than Shariah Councils, and only half of the respondents listed this as their first, second or third port of call. The highest rate of referral was 20 per cent, and this was as the fourth port of call, suggesting that respondents would exhaust other options before consulting this medium. The charting of these statistics reveals an even spread suggesting some ambivalence and no clear pattern. While this means the courts will be engaged at some point, it may simply reflect on the respondent's individual sensibilities where the law and state legal infrastructure is concerned. One issue which may have an impact here is the costs involved with the legal process and perhaps the unwillingness to engage can be seen as a reflection on the burden of costs as opposed to any ideological considerations.

V - Other (details provided)



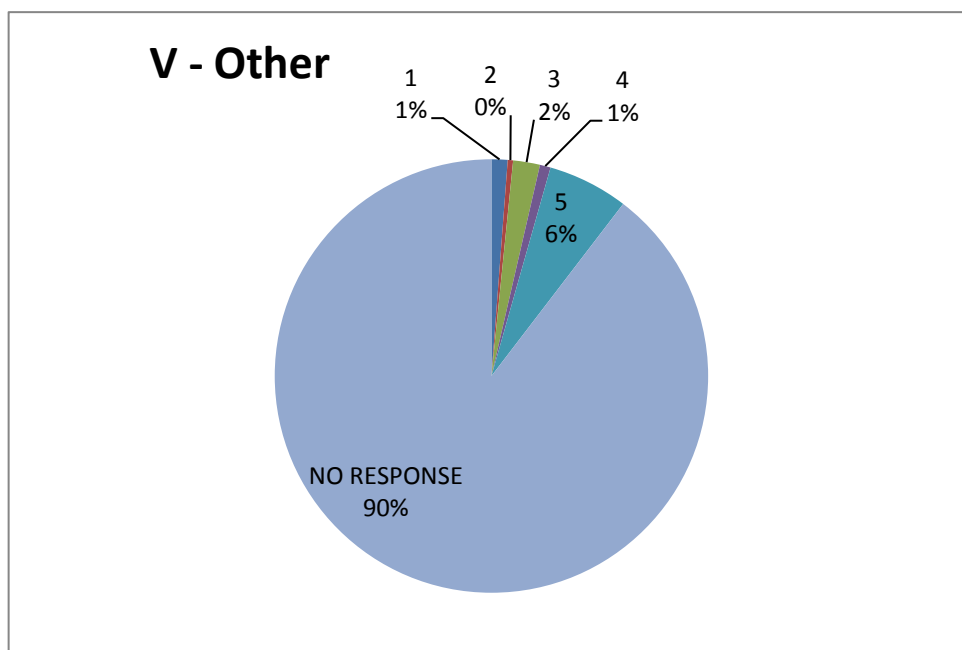


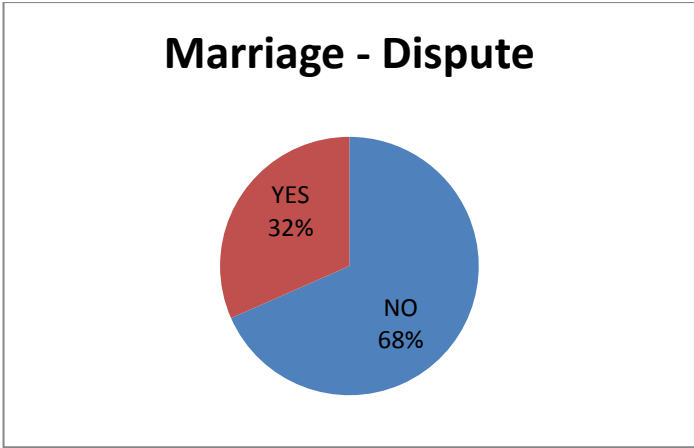
Fig. 30 Inheritance: Dispute resolution option - other

The alternatives were (in order of frequency): Friends, the internet, the Muslim Arbitration Tribunal and the community. Due to the relatively negligible numbers here, it is likely to reflect individual experiences and preferences rather than any specific trends. Certainly, citing the Muslim Arbitration Tribunal appeared to be based on knowledge of it reflecting a general lack of awareness about it within the respondents engaged.

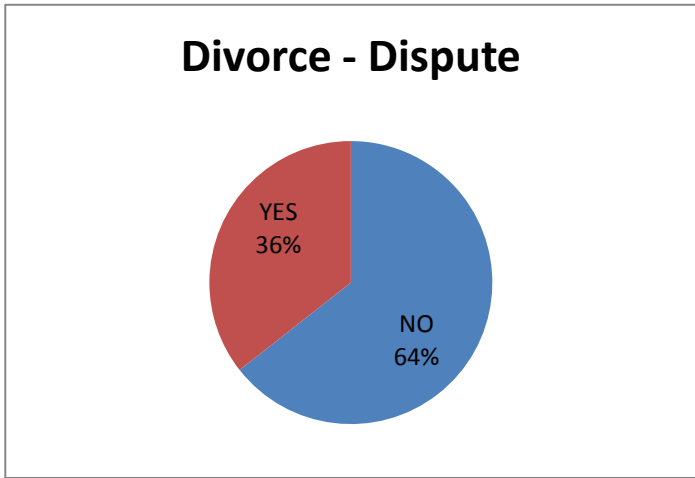
Experience of Dispute Resolution concerning Marriage, Divorce and Inheritance

The 250 respondents were asked to detail whether they had experience of dispute resolution concerning Muslim marriages, divorce and inheritance:

Marriage - 171 respondents had no experience



Divorce - 161 respondents had no experience



Inheritance - 214 respondents had no experience

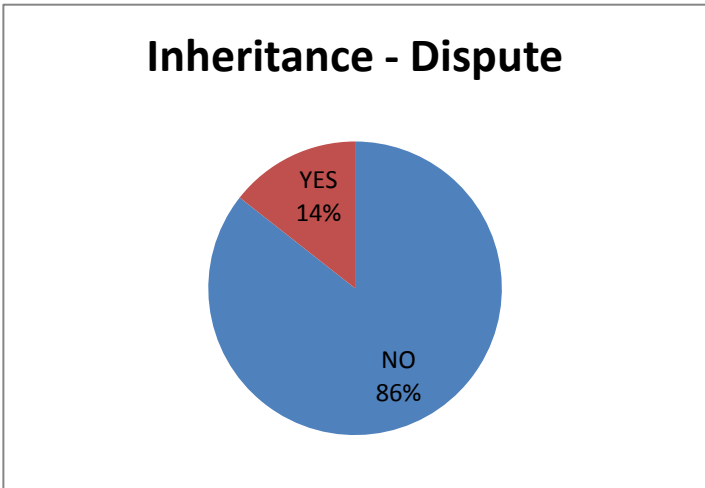


Fig. 31 Experience of dispute resolution: marriage, divorce and inheritance

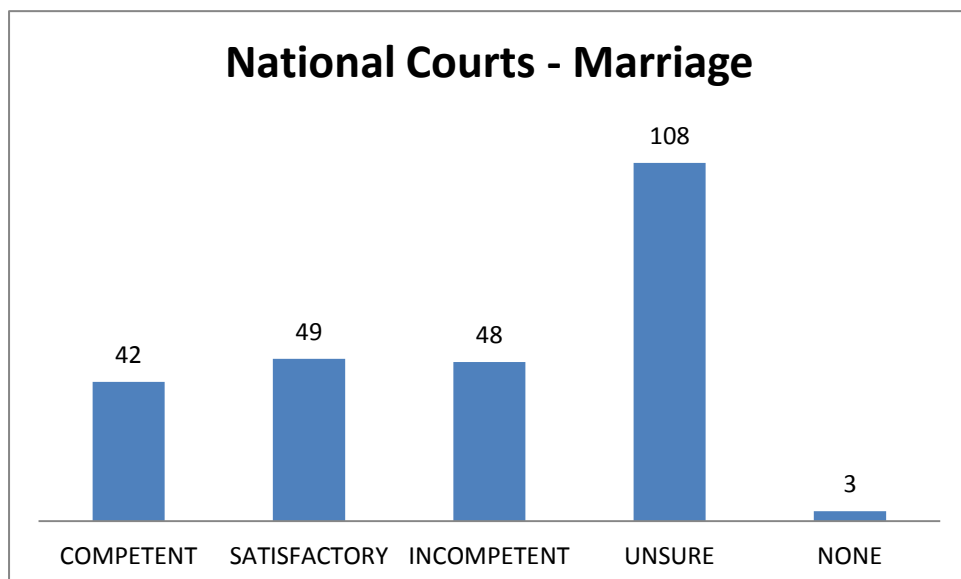
The question allowed for disputes concerning the individual, family or friends/acquaintances to be detailed. With marriage and divorce, approximately one quarter of the respondents had experience. With inheritance, the figure was much lower at 14 per cent. If these figures are extrapolated across the British Muslim communities, they clearly reflect the need for dispute resolution mechanisms to deal with them.

Respondents' perceptions of the national courts' and Shariah councils' competency in dealing with Muslim family law issues

This enquiry sought to decipher the opinions of the respondents on the competency of the national courts and Shariah Councils where certain family law issues were concerned. These questions were intended to provide some data on the attitudes and perceptions of British Muslims where certain dispute resolution mechanisms are concerned, and the overall perceptions of and confidence in, the state legal system.

Findings:

View on national courts' ability to deal with Muslim Family law relating to marriage



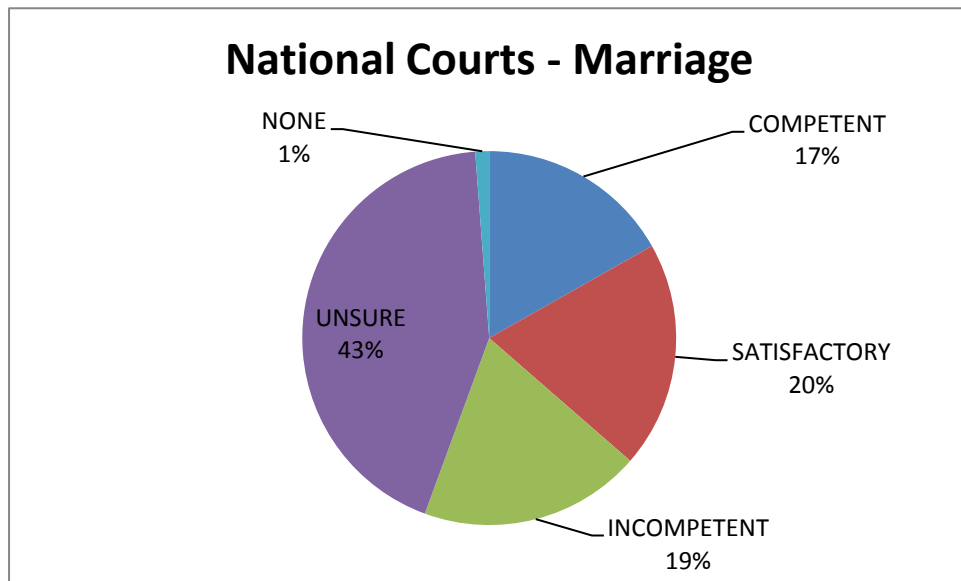


Fig. 32 Marriage - perceptions on competency of national courts

A greater number of respondents think national courts are incompetent (19 per cent), compared to those who think they are competent (17 per cent) in this area. The overwhelming number of respondents appeared not to have enough experience on the matter and stated that they were not sure (43 per cent).

These findings provide no conclusive trends or patterns on the views of British Muslims; however, there is clearly a lack of knowledge about the issue. When the statistics for those who consider the courts competent and those who think they are satisfactory are combined, 37 per cent of the respondents can be said to have some level of confidence in the national courts. However, this figure is overshadowed by the numbers who are unsure. When this is combined with the approximate fifth of respondents who believe the courts are incompetent, it does reflect a lack of conviction on this state apparatus which is intended to resolve disputes with fairness and justice. However, the number of respondents who base their views on experience as opposed to perception is unclear. The lack of conviction in the system may be the result of a number of issues including a perception that Muslims are not treated equally by the courts. Such

perceptions are reinforced by statistics such as those revealing that the Muslim prison populations are increasing dramatically. While some may see this as an increase in crimes committed by Muslims, more will view this as a result of discrimination against Muslims within the legal system.

View on national courts' ability to deal with Muslim Family law relating to divorce

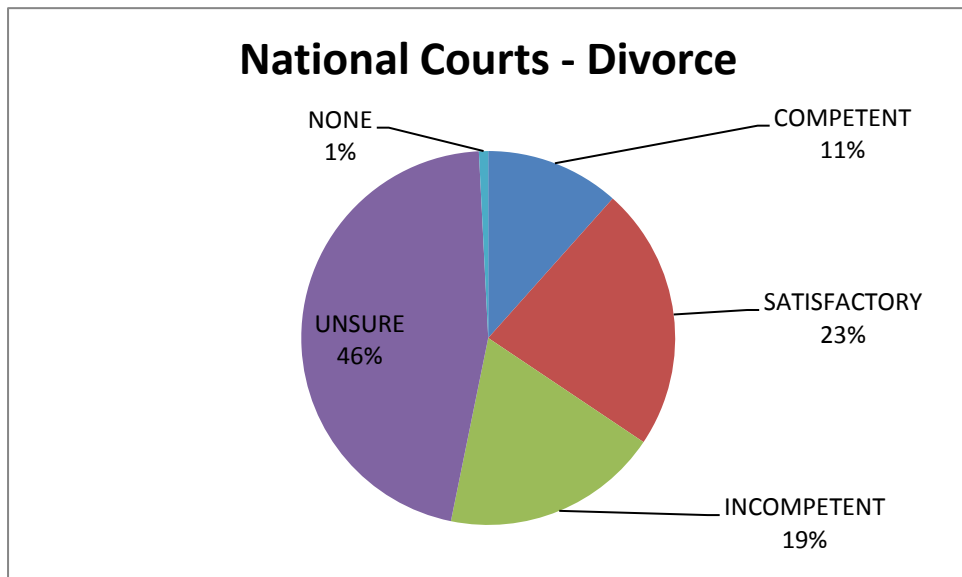
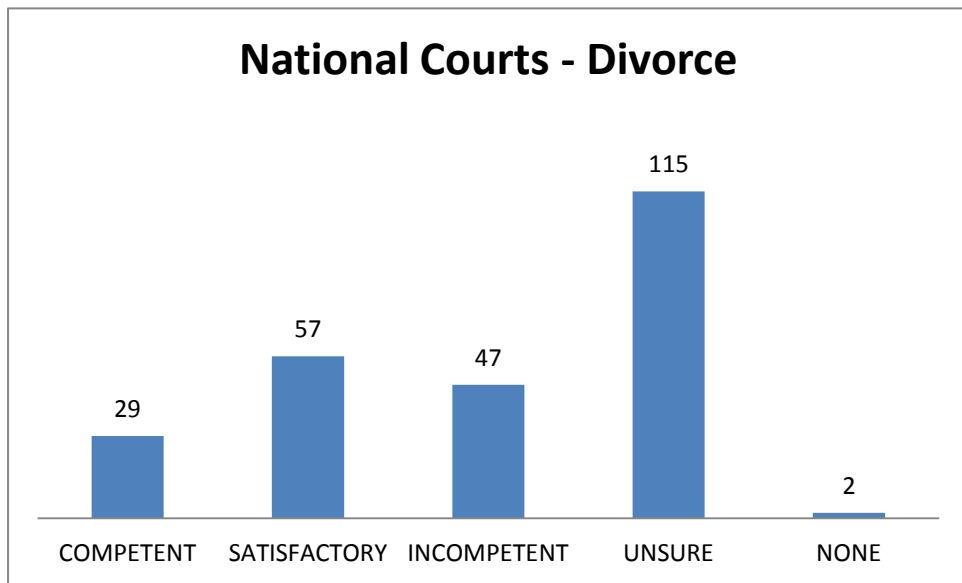
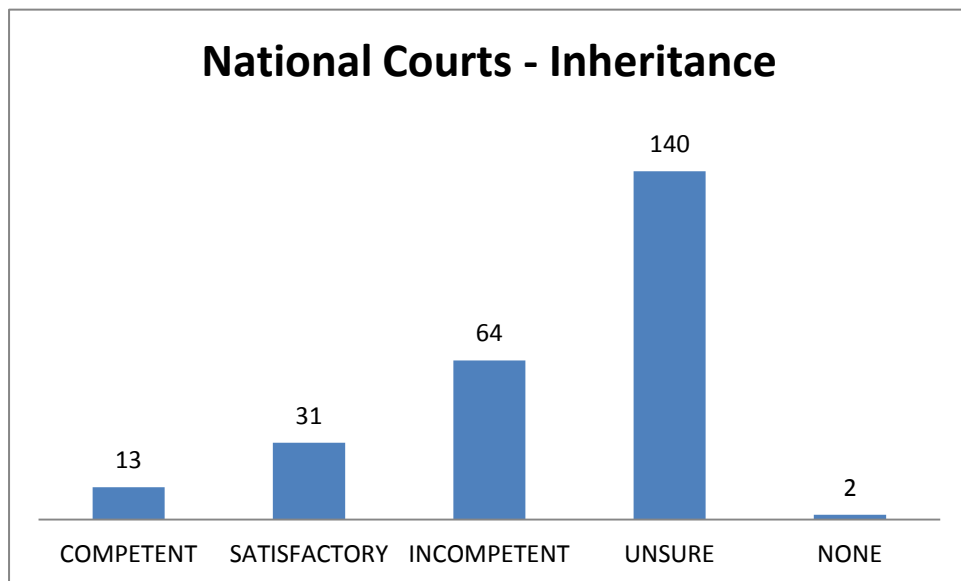


Fig. 33 Divorce - perceptions on competency of national courts

Where Muslim divorces are concerned, only 11 per cent thought that national courts were competent to deal with the issue, while 19 per cent thought they

were incompetent. 23 per cent thought they were satisfactory while 46 per cent were unsure. This data reflects a more pronounced lack of confidence in the courts, with only 11 per cent having confidence in the courts' abilities to deal with these issues competently. While it can be argued that Muslim divorces are actually out of the purview of the state courts, and thus, any confidence in the courts to deal with the issues is a positive reflection on the legal system; at present one can assume that most religious divorces would in some way impact on civil divorces and therefore, the level of confidence needs to be much higher.

View on national courts' ability to deal with Muslim Family law relating to inheritance



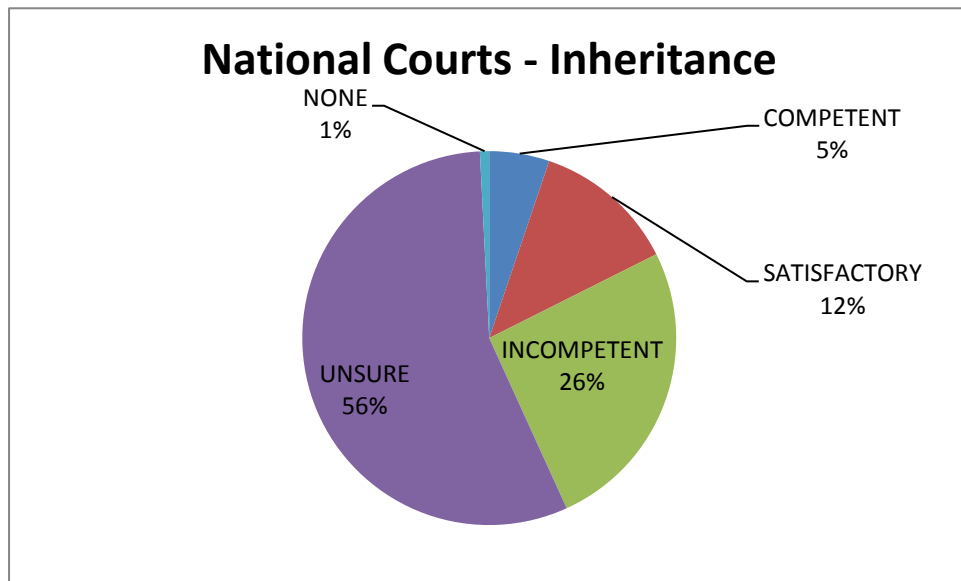


Fig. 34 Inheritance - perceptions on competency of national courts

On the issue of inheritance, the data reflected an even greater lack of confidence with a mere 5 per cent stating that they believed the national courts were competent with this. Only 12 per cent also believed they were satisfactory while over a quarter (26 per cent) believed they were incompetent. The views expressed here seem to be more decisive than with marriage or divorce disputes, despite inheritance being an issue where there was a lesser degree of dispute experience reported. An overwhelming 56 per cent said they were unsure, which is greater than those who were unsure about marriage and divorce disputes.

View on Shariah councils' ability to deal with Muslim Family relating to marriage

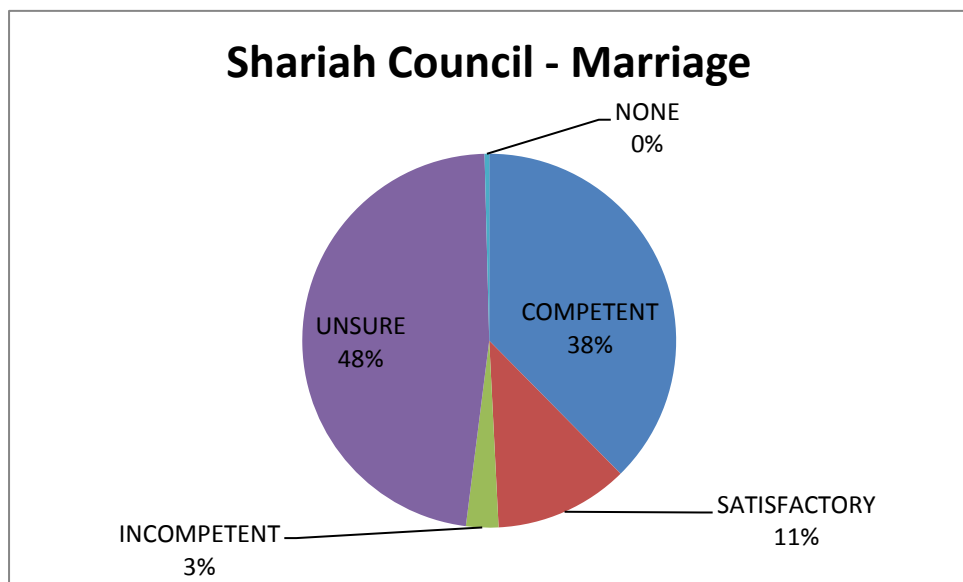
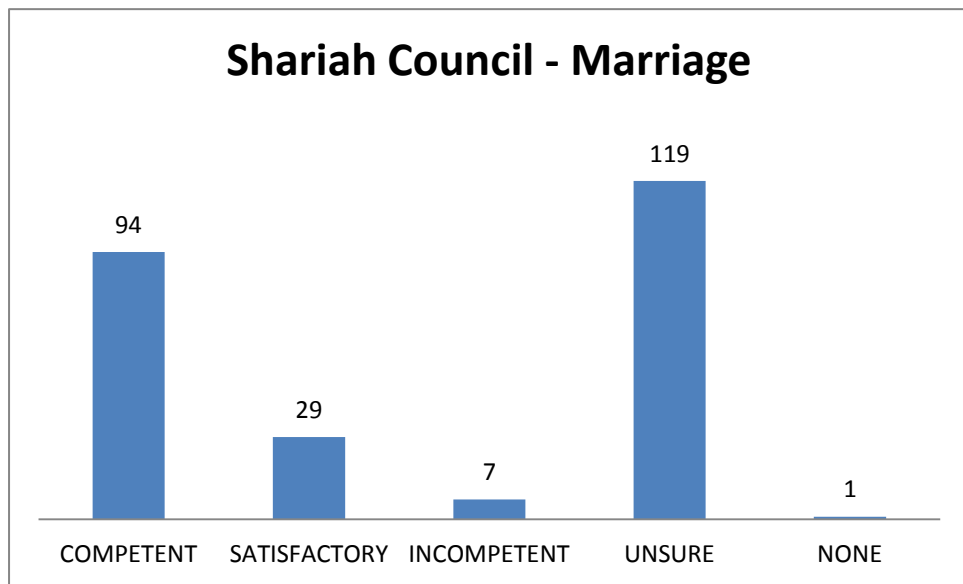
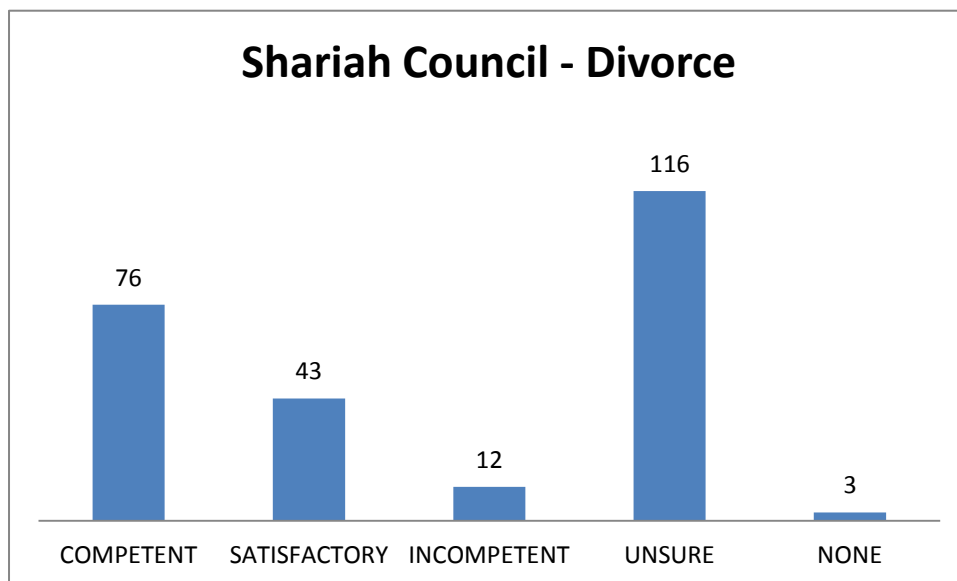


Fig. 35 Marriage - perceptions on competency of Shariah Councils

The data here was interesting as it once again reflected confidence in Shariah Councils is greater than the confidence in the national courts. With marital disputes, 38 per cent said they believed the Shariah Councils were competent, compared with 17 per cent for national courts. Only 3 per cent said they were incompetent, compared with 19 per cent for national courts. Only 11 per cent listed them as satisfactory, while this was 20 per cent for national courts.

However, despite this, more respondents said they were ‘unsure’ – with 48 per cent giving this response about Shariah Councils compared with 43 per cent for the national courts. Despite this high percentage, there was only a 10 per cent difference between those who thought the Shariah Councils were competent and those who were unsure about them, suggesting that perhaps experience and exposure was the compelling influence in their responses. What remains untested however, is whether these respondents feel under an obligation to refer their disputes to the Shariah Councils instead of the courts, as they are deemed to be ‘Islamic’.

View on Shariah councils’ ability to deal with Muslim Family law relating to divorce



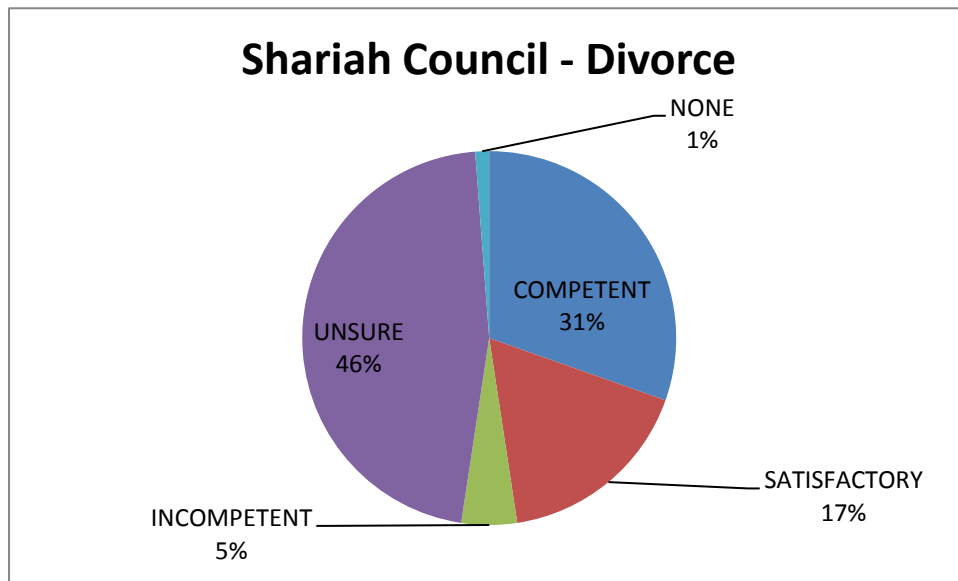


Fig. 36 Divorce - perceptions on competency of Shariah Councils

The statistics relating to marital disputes and divorces were very similar. It is perturbing that in an area which is considered the staple for Shariah Councils, more respondents were unsure of competency than those confident in it. When contrasted with the number of people who had some experience of dispute resolution in this area (36 per cent) however, it suggests that these views are the result of abstract perceptions rather than actual experience. Thus, it is likely that popular discourse (which is highly critical of Shariah councils) may also be having an influence.

View on Shariah councils' ability to deal with Muslim Family relating to inheritance

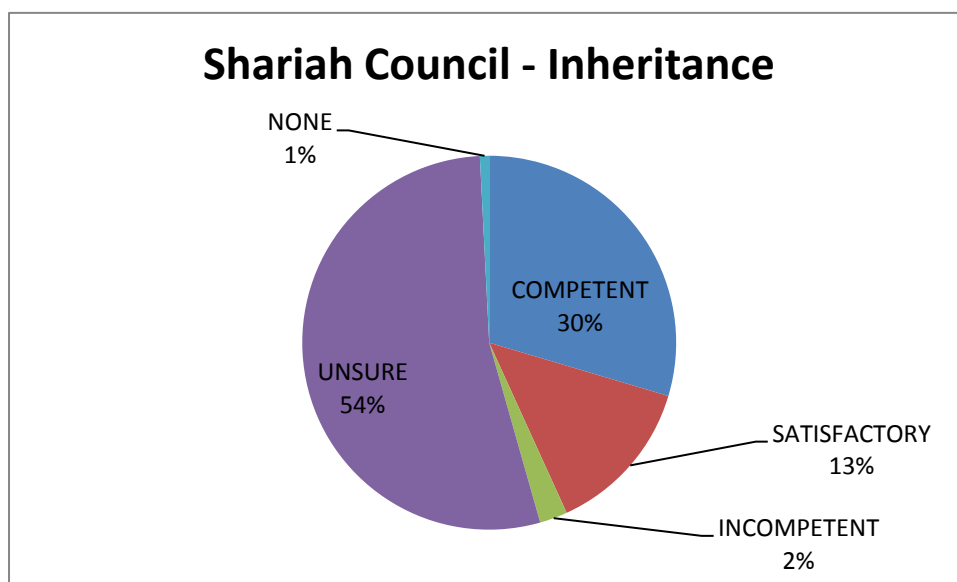
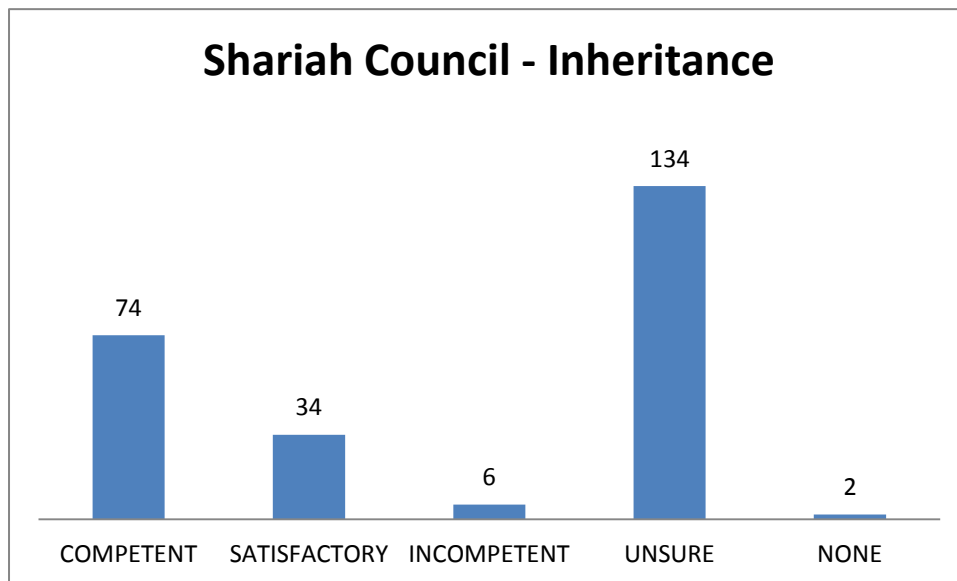


Fig. 37 Inheritance - perceptions on competency of Shariah Councils

The data here was similar to that for divorce, reflecting 30 per cent believed the Shariah Councils were competent to deal with Muslim family law inheritance issues. A marginal 2 per cent believed they were incompetent, while 13 per cent believed they were satisfactory. However, an overwhelming 54 per cent were unsure, reflecting the lack of experience and exposure a sizeable proportion of

the respondents appeared to have with inheritance related issues. Comparatively, 56 per cent were unsure of the national courts' abilities in this area, supporting the theory that a lack of experience is a factor.

Further Questions

Finally, the respondents were asked to provide their views on the following five questions, which are listed below along with the response data:

Q Does Islamic law allow you to use the national courts to resolve disputes?

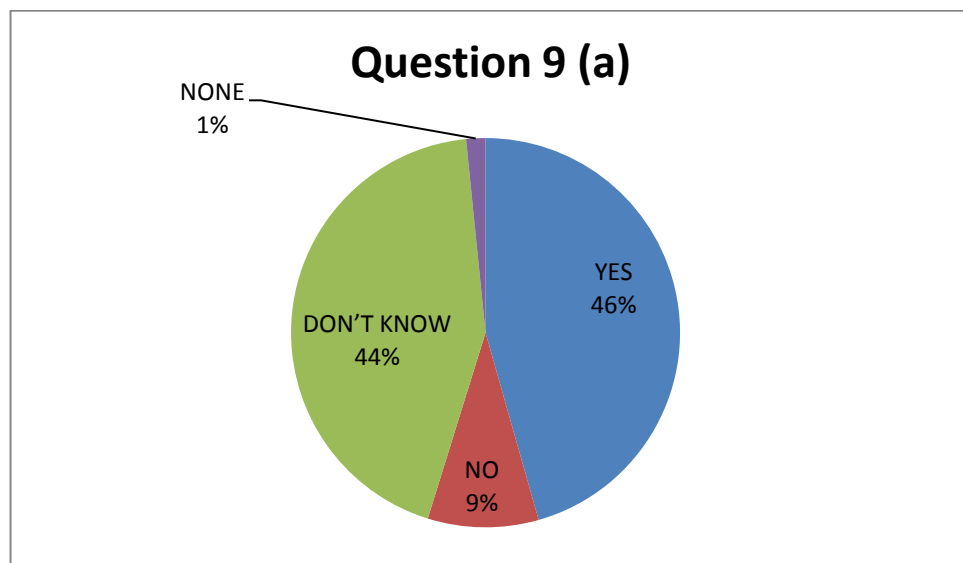
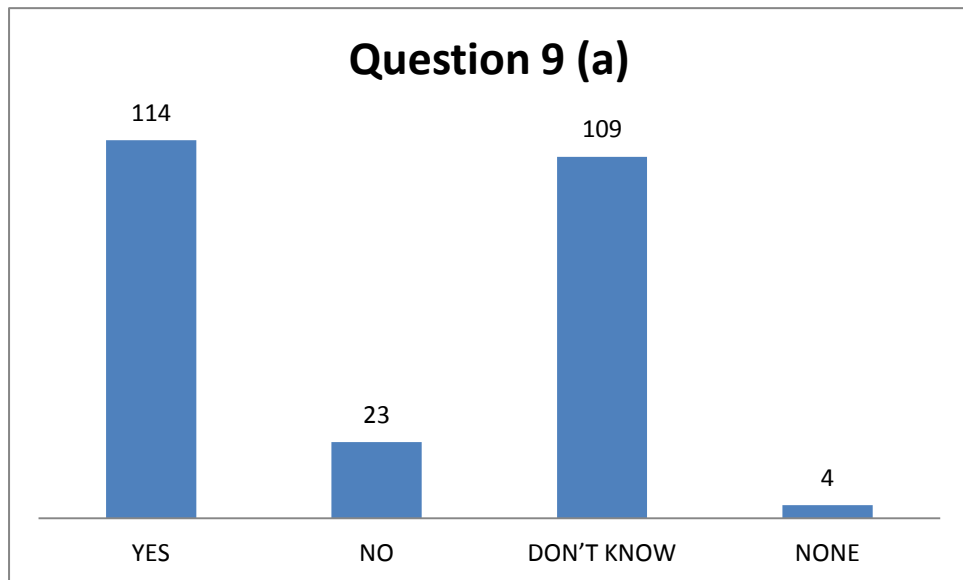


Fig. 38 Response to question 9(a)

It was very revealing that almost identical numbers of respondents here either believed that Islamic law allowed the use of the national courts (46 per cent), or did not know (44 per cent) whether it did. This lack of knowledge may be hampering the national courts' abilities to deal with Muslim family law issues as it may impede access to justice for British Muslims who mistakenly believe this forum is not open to them. When this is coupled with a lack of confidence in the state apparatus, this provides even greater barriers. 23 respondents making up 9 per cent believe that Islamic law does not allow them to refer to the national courts and this is a worrying statistic as it is an erroneous view which is likely to impact on the abilities of these individuals to utilise the legal system of the state.

The fact that 44 per cent stated they did not know whether they can use the national courts is a high statistic and raises a number of questions about Islamic laws regarding citizenship of a non-Muslim jurisdiction. As recounted in earlier chapters, the transformative processes in the Islamic legal traditions pertaining to *Siyar* have been considerable and Muslims living in majority non-Muslim jurisdictions as equal citizens are greatly confused about their rights and responsibilities due to the lack of explicit Islamic laws on the issues. The traditionalists fail to engage in the issue or do so using the separatist narrative. Reformists like Shaykh Yusuf Qaradawi⁵⁸³ lack the influence over Muslim communities with ethnic links to South Asia (as opposed to Arab lands) and high profile scholars like Professor Tariq Ramadan who call for dramatic overhauls in the accepted narratives of European Muslims are viewed as

⁵⁸³ Who propounded '*Fiqh al Aqaliyah*' or the Islamic jurisprudence for Muslim Minorities.

maverick. The confusion is made greater by the discord between various Scholars of Islam who refute each other's' position.

Thus, the lack of a uniform directive for British Muslims on their role and responsibilities in non-Muslim jurisdictions of which they are a citizen is impeding their access to justice.

Q Does Islamic law require you to use the Shariah Councils to resolve disputes?

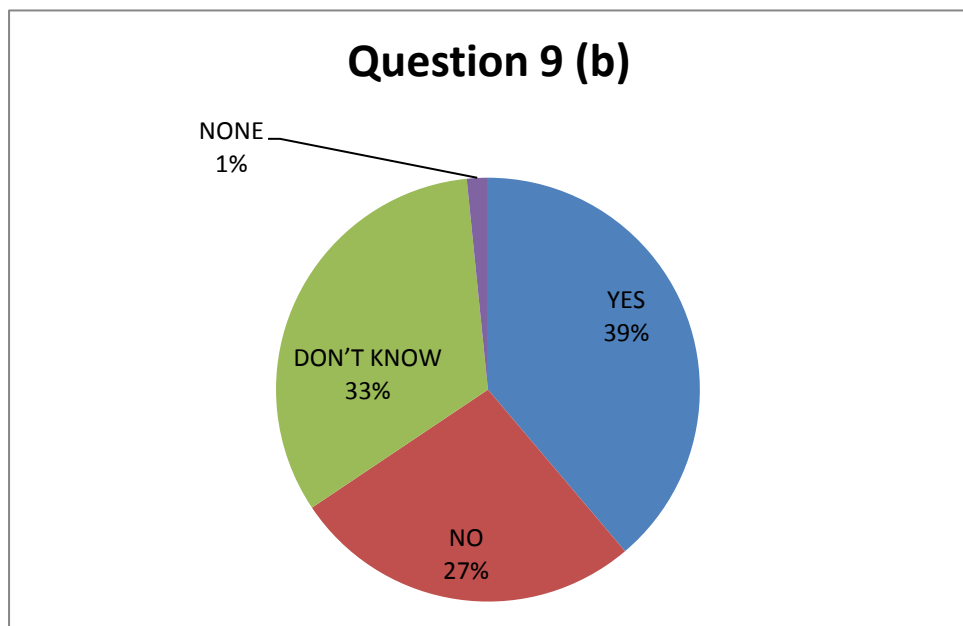
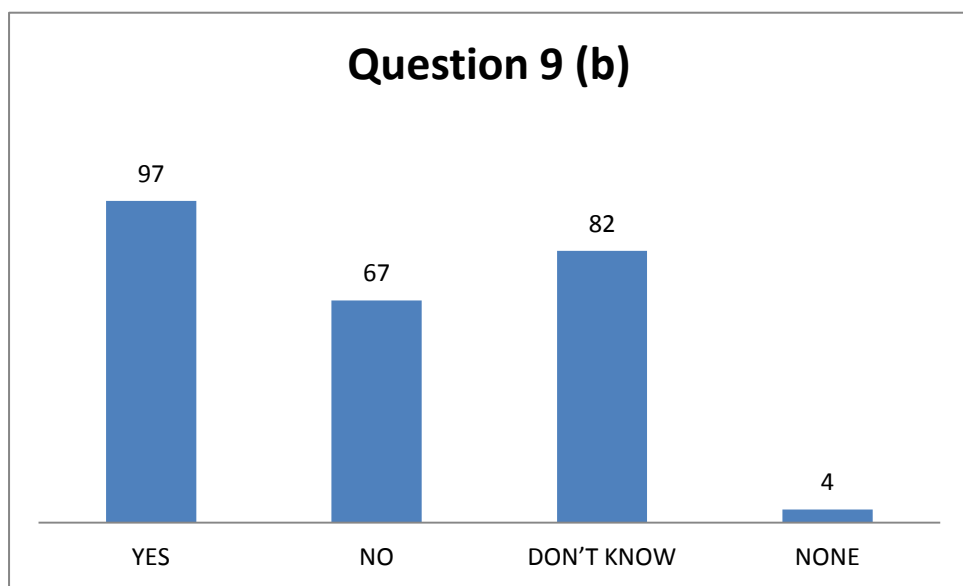
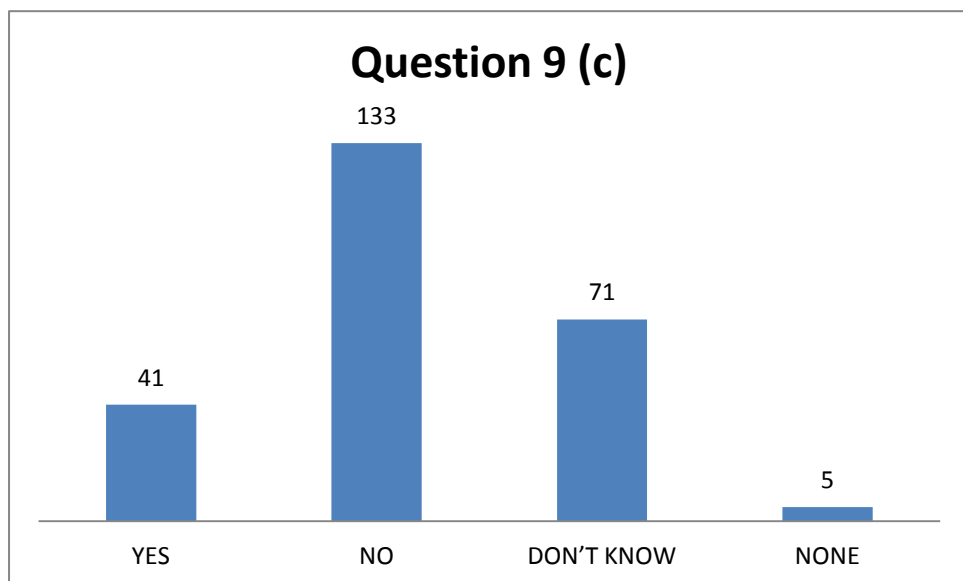


Fig. 39 Response to question 9(b)

Here, 39 per cent said they believed Islamic law required them to use Shariah Councils, while a comparable 33 per cent stated that they did not know. A lesser 27 per cent held the view that Islamic law did not require them to use Shariah Councils, suggesting that a great deal of confusions and misinformation may exist surrounding Shariah Councils. For a number of possible reasons, it appears that the existence of Shariah Councils in Britain may be limiting the number of dispute resolution forums British Muslims believe is available to them, by purporting to be a 'Muslim' forum which should exclude the need for 'non-Muslim' forums such as the national courts.

While reflecting the confusion, the statistics do however also display the plurality of views which exist within the British Muslim communities. This is only to be expected of a group of people who are so diverse in religious beliefs and practice, albeit under the 'Islamic' umbrella.

Q Is there any pressure from the Muslim community to use the Shariah Councils instead of going to the national courts?



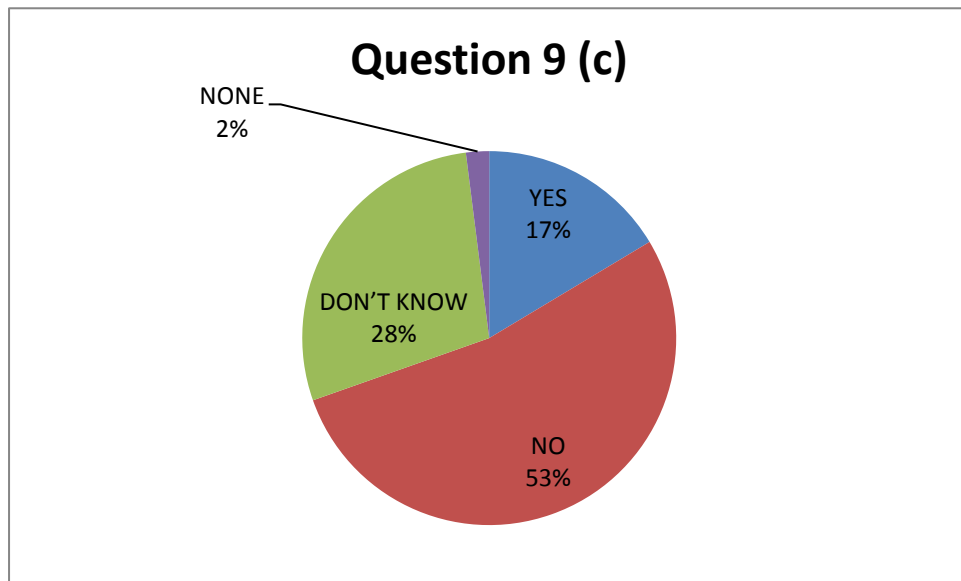


Fig. 40 Response to question 9(c)

An important question within this research is the issue of social pressure where choice of dispute resolution forum is concerned and this question sought to establish general views on this. 17 per cent believed that there was community pressure, while an overwhelming 53 per cent believed there was none. 28 per cent stated that they did not know, a likely reflection on their lack of exposure to Shariah Councils in general, negating a positive or negative response. The data here suggests there is not an overwhelming impression of community pressure to use Shariah Councils, however, as a large proportion of the respondents were university educated, it is possible that they would not succumb to pressures in the same way other (women) might. This is especially the case with those women who are unsure of their rights in general and may find accessing services outside the immediate vicinity of their communities problematic. One envisages that inner-city built up areas where Muslims reside in large numbers, would throw up a multitude of challenges that women who have access to many services as well as higher education simply would not face.

Q Is the British legal system adequate for Muslims to resolve family law issues?

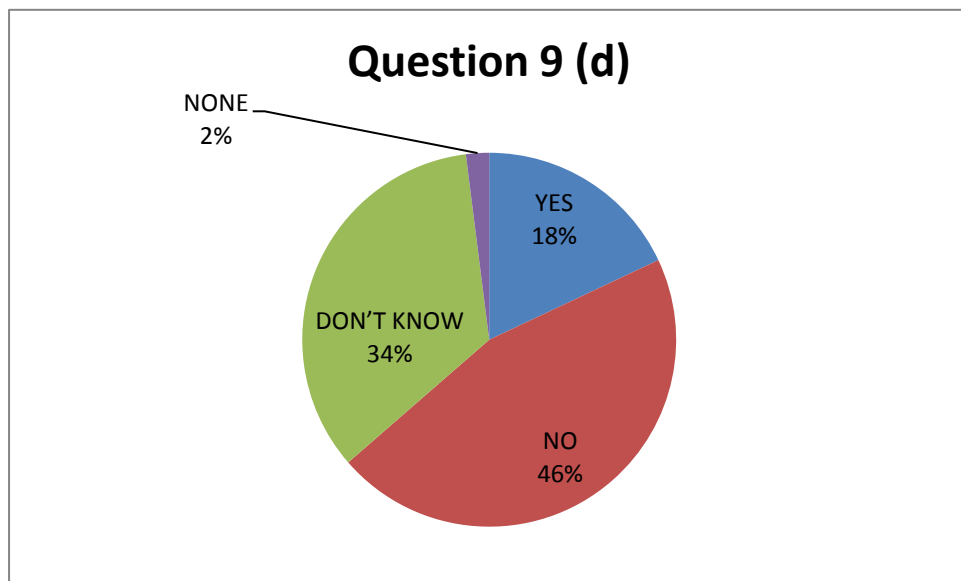
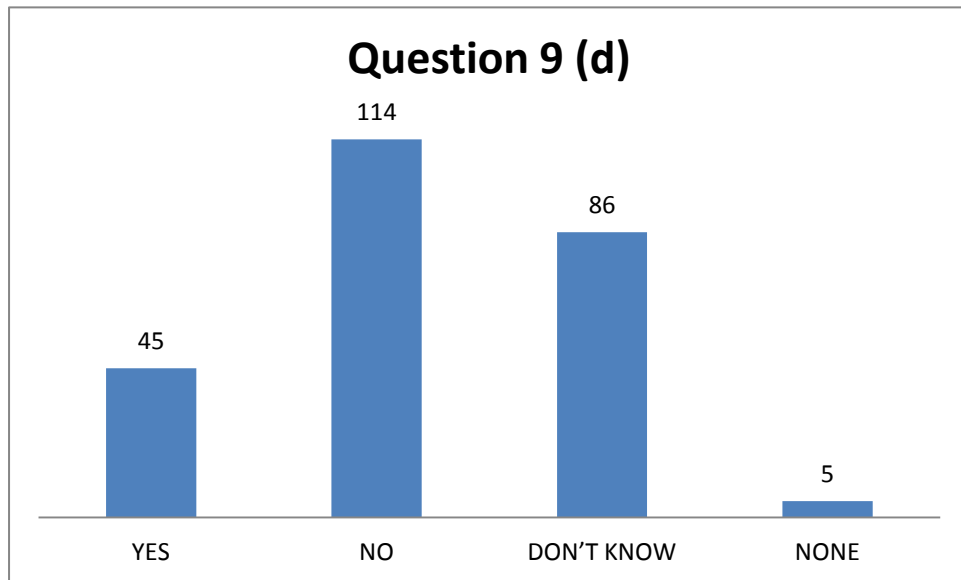


Fig. 41 Response to question 9(d)

Based on these perceptions, it can be concluded that the British Muslim community needs to be better informed about the state legal apparatus available to them for family law disputes, and the courts need to better equip themselves to deal with issues which frequently recur. This significant finding will be analysed further in chapter Seven.

Q Is the British legal system Muslim friendly?

In order to ascertain whether there was generally trust in, or suspicion of, the British legal system; this question was posed.

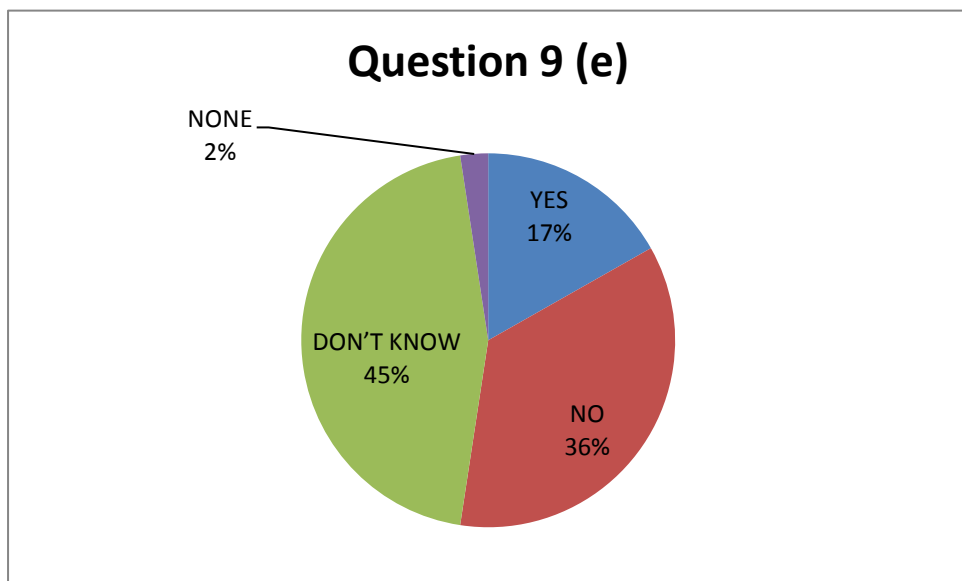
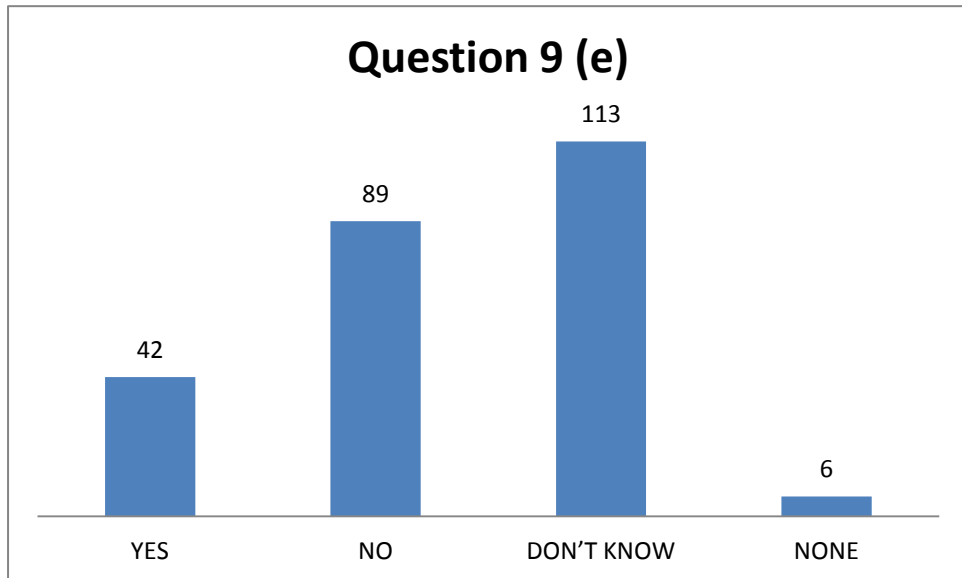


Fig. 42 Response to question 9(e)

Only 17 per cent said they believed the British legal system was Muslim friendly, while 36 per cent believed it was not. The latter is a significantly high statistic as it reflects that over one-third of the respondents do not trust the legal system to be fair to them. However, 45 per cent stated that they did not know, suggesting they are open-minded about a system which in all probability,

they have had minimal interaction with. This critical issue will also be analysed further in Chapter 7.

Conclusion

This chapter has charted the statistical data collected from the 250 questionnaires which were completed as part of the empirical research undertaken in this study, and provided some analysis where appropriate. It offers a great deal of rich data about British Muslims, their views on the legal system, dispute resolution forums and confidence in the various dispute resolution forums available to them. The socio-demographic profile of the respondents appears to incline towards 'British Muslims who understand the obligations of their faith and are university educated.' This unexpected outcome from the field results in the research findings being tailored towards British Muslims who fit that socio-demographic profile, allowing for a greater focus for the research findings.

The survey results reflected a varied mix of respondents engaged from 24 British cities, comprising a diverse range of ethnic backgrounds and spoken languages, 70 per cent of whom were British born. A brief overview of the survey reveals that 31 per cent of the respondents were male and 69 per cent female, evenly spread in terms of age between 18 to 45 years. 62 per cent were graduates or postgraduates, with a further 20 per cent potentially still at university. Of those born in Britain, 56 per cent spoke English as their first language. 5 per cent of the respondents were converts to the faith.

Religiosity was described by 94 per cent as either practicing or understanding of religious obligations while not practicing. Of these, 75 per cent stated that

Islamic law either governed their lives or played a significant role. Despite these statistics in the subjective analysis of faith in their lives, when knowledge about Islamic family laws was tested, less clarity was apparent. 53 per cent had textually accurate knowledge about Islamic marriage regulations, with 48 per cent and 42 per cent respectively demonstrating textually accurate knowledge about male and female instigated divorce. For inheritance, this was much lower at 26 per cent textually accurate responses where the husband dies, and 17 per cent when the wife dies. Where commercial contracts are involved, a significant 51 per cent had no knowledge about the procedures.

On the point of dispute resolution forums, for disputes concerning marriage, the family was the preferred forum, followed by the local imam or knowledgeable person. 22 per cent would not approach the Shariah Councils and 28 per cent would not approach the courts. For divorce matters, family remained the first forum, followed again by the local imam or knowledgeable person. 13 per cent would not approach a Shariah Council and 10 per cent would not approach the local courts. Finally, on inheritance, there was a clear preference for the local imam or knowledgeable person, and 15 per cent would not approach the Shariah Council and 13 per cent would not approach the courts.

Experience with disputes were revealed to be varied, with 37 per cent experiencing them in marriage, 36 per cent in divorce and 14 per cent in inheritance related issues. This reflects a need for forums to resolve such disputes.

Where perceptions relating to competency of the Shariah Councils and courts were tested, for marriage disputes only 17 per cent believed the courts were

competent to deal with them while 38 per cent believed the Shariah Councils were competent. For divorce, only 11 per cent believed the national courts were competent compared with 31 per cent for Shariah Councils. On inheritance issues, only 3 per cent believed the national courts were competent while 30 per cent believed the Shariah Councils were. However, on all three fronts, the most significant proportion of respondents stated they were unsure of the competency or otherwise of both the Shariah Councils and the national courts, ranging from 43 to 56 per cent.

Further confusion was revealed by the question of whether Islamic law allows the national courts to be used for dispute resolution. 46 per cent believed it did, while an almost identical 44 per cent did not know, and significantly 9 per cent believed it did not. Further to this, 39 per cent believed Islamic law required them to use the Shariah Councils, with 27 per cent stating it did not, and 33 per cent who did not know. The final question enquired whether the British legal system was Muslim friendly and only 17 per cent believed it was, with 36 per cent believing it was not, and a further 45 per cent professing not to know.

These statistics provide an extensive coverage of interaction, understanding and experience which shall be further analysed in Chapters Seven and Eight utilising the data collected from the four Focus Groups conducted in various British cities, and the expert interviews. There will be an element of gender weighting during this analysis to allow for the uneven male/female ratio of respondents to be taken into consideration. In conclusion, the empirical research conducted utilising the questionnaire surveys have revealed rich data for the application of Grounded Theory methodology.

Chapter Seven

Interaction, understanding and experience – British Muslims, the British Legal System and Islamic Law: Part II

Introduction

This chapter will consider in greater detail the research findings presented in Chapter Six, with the added dimensions of data collected within the focus groups and expert interviews. Analysis of the data from the gendered perspective will additionally be presented in order to ascertain the impact of the gender variable. The analysis here and within Chapter Eight will be rooted in the Grounded Theory presented in Chapter Four, in order to facilitate theories and conclusions concerning British Muslim communities and their approach to the negotiation of law, culture and religion where faith based ADR is concerned.

In assessing the data compiled within this research, it is necessary to view it through the lens of one who is a ‘believer’ as far as the subject group is concerned, but also as a researcher who can comprehend the perceptions of the religious group objectively and if necessary, with scepticism.⁵⁸⁴ MacIntyre⁵⁸⁵ writes that “sceptic and believer do not share a common grasp of the relevant concepts” and for the purposes of this research, it is necessary to balance the needs of the state and the needs of this religious group who are citizens of the

⁵⁸⁴ An interesting discussion on the differentiation on this point can be found in A. MacIntyre, ‘Is Understanding Religion Compatible with Believing?’, (1999)pp37-49, in R. McCutcheon, (Ed), *The Insider/ Outsider Problem in the Study of Religion, A Reader*, Continuum International Publishing

⁵⁸⁵ Ibid, at 49.

state. My self-identification has facilitated a unique access to the subject group, and the focus groups have accomplished frank and open debate and discussion. The possible conflict between genuine participation in research and what may be deemed to be 'in the best interests' of the British Muslim communities, was a lesser focal issue for the participants as they were able to identify with me at a personal level, while simultaneously having confidence in me at a professional level. This enabled frank discussions of issues such as women's roles and positionality in Muslim communities, which may not have been the case with an 'outsider'. Some concerns about perceived inequality experienced by British Muslim women came from both those who outwardly display all the characteristics of practising Muslims women, including the Hijab and other religiously inspired dress; and those who did not. Significantly, both conveyed their understanding with confidence and without apology.

The cross-disciplinary study of Muslims in Britain has been a recurring theme in academia since its spike in the late 1980's following the Salman Rushdie Affair. The public display of Muslim anger at the *Satanic Verses* brought a previously subordinate part of British society to the fore, openly displaying all their apparent disparities with the rest of Britain. This was followed by similar themes, concerning school uniforms and the *Hijab, halaal* food, and finally, the turning point of 9/11 which saw the issue of terrorism, fundamentalism and extremism dominate the discourse. While these diverse issues continue to attract a great deal of consideration, there is a need to juxtapose these with the assessment of Muslims in Britain in a social context. How have these communities themselves moved beyond the Rushdie and anti-terrorism

discourse to identify their own place in British society, at a level not dictated by the establishment and media discourse, but rather fashioned by their own experiences and contributions? To what extent are they now 'British Muslims' as opposed to Muslims living in Britain? Where dispute resolution and the state legal system are concerned, the interaction and viewpoint of British Muslims provides evidences for the advancement of this British Muslim identity.

The transition of the Muslim community to the post-modern era requires reformulation of complex aspects of religious identity, legality and practice where faith matters are concerned. Such transformations are peppered throughout Islamic history,⁵⁸⁶ reflecting a deeply pragmatic faith on the political level. There is also a great deal of individualism in terms of practice, as each believer has his or her own aptitude to interpret and apply religion.⁵⁸⁷ While there has certainly been a clear endeavour to make religion more prescriptive for Muslims within many majority Muslim jurisdictions, in the context of the British Muslim communities, the lack of state intervention into religion allows for greater freedom for transformative processes to occur within Islamic laws. Thus, British Muslims are free to take examples from history and formulate an Islamic identity which is intellectually satisfying and transcendentalist in nature. They can discover characteristics from within Islamic history, and postulate a new religious identity. Whether Islamic liberalism,⁵⁸⁸ conservatism or reformative, they are open to (juristically accepted) innovation.⁵⁸⁹ This research essentially questions the existence of such acclimatisation where

⁵⁸⁶ See Chapters Two and Three.

⁵⁸⁷ W.C. Smith, *Islam in Modern History*, (1957) Princeton University Press, at 9.

⁵⁸⁸ Coined by Smith, *ibid*, at 55-73.

⁵⁸⁹ All such advancements must necessarily be progressed by religious scholars in the first instance, in keeping with Islamic theological and legal traditions.

interaction with the state legal system is concerned, with particular reference to faith based ADR mechanisms and family law, and searches for evidences pertaining to it. This notional freedom may be offset by the cultural traditions which British Muslims are descendant from, which may remain present or dominant.

Before commencing on these multiple considerations, a gendered perspective will be presented in order to take account of the higher response rate and participation in this research from Muslim women.

A Gendered Perspective⁵⁹⁰

Historically in Arabia, there is a well documented patriarchal tradition which was challenged by the sources of Islamic law in order to apportion women with equal or equitable rights far greater than previously witnessed in any social or religious groups before that time. However, with the passage of time, Muslim women to lesser or greater degrees; have faced the adoption of oppressive narratives labelled as 'Islamic'. The drive to provide a model for the ideal Muslim woman has been particularly pronounced, and she is one who has no public agency and largely functions on the peripheral of the man's central role in the home and in society. Her exclusion from politics is particularly pronounced. As time progressed, the contribution of women to the development of law and religion appeared to fade, however, Nadwi⁵⁹¹ opines that some sources suggest that women did participate, but Islamic history

590 This research will not consider the feminist position as that falls largely outside the remit of this study. However, the issue of gender will be considered briefly as an incidental component of this study.

591 M.A. Nadwi, *Al-Muhaddithat: the Women Scholars of Islam*, (2007) Interface Publications

recognises this contribution in a strictly selective way. In the sources quoted by Nadwi, it is clear that women were not excluded from places of learning and trained with high ranking scholars. However, the more popular narrative is the segregation and thus exclusion of women from such circles of learning.⁵⁹²

As a result, women attempting to reclaim their rights under Islamic laws are now deemed radical feminists, although they do not reject Islam but rather attempt to reconcile their rights by referring back to the sources of Islamic laws in place of the derived laws regarding women which have long since been accepted in Muslim societies. Thompson suggests that these women form the most radical Muslim feminists of our day.⁵⁹³ She states that these women “pose the graver threat to the old center, as they seek to appropriate a measure of religious authority for themselves.”⁵⁹⁴

Most of the female respondents and participants in the focus groups are educated to degree level or beyond. This provides a unique sampling of British Muslim women, which many would rightly argue is perhaps not representative of the general British Muslim population.⁵⁹⁵ The census statistics from 2001 reflected that 86 per cent of Muslim women were not working.⁵⁹⁶ However, it must be acknowledged that they are an emerging class within the British Muslim communities, whose numbers will increase as generations become more entrenched in British society and the ‘participation’ narrative becomes

592 E. Thompson, ‘The Gendered Edge of Islam’, (2004) Yavari et al (Eds), *Views from the Edge, Essays in Honor of Richard W. Bulliet*, Columbia University Press, pp. 304, 321, at 310.

593 Ibid, at 305.

594 Ibid.

⁵⁹⁵ Gilliat-Ray, for example. S. Gilliat-Ray, *Muslims in Britain, An Introduction*, (2010) Cambridge University Press

⁵⁹⁶ Ibid, at 214.

more assured. Therefore, the research findings in this area will provide valuable data for hypothesizing future trends in the narratives relating to British Muslim women and their views on Islamic family law and dispute resolution. Questions arising here include whether and to what extent the views of Muslim women differ from that of Muslim men. Do women within the British Muslim Diaspora have particular concerns or does the diversity factor belay any particular trends?

Gilliat-Ray⁵⁹⁷ sets out the historic challenges faced by Muslim women who migrated to Britain in the 1960's and 1970's to join their spouses, setting out a multitude of challenges which they faced at the social, economic and personal levels. However, they were also faced with a liberating freedom, away from the penetrating gaze of extended families and 'in-laws,' which allowed them freedom to develop their contributions beyond the home and into the economic realm. They were also able to extend their social circles, beginning with the school drop off and pick up of children, which exposed them to other parents and a whole new social environment. While all women may not have taken advantage of the opportunities presented, second and third generation Muslim women can be seen publicly participating within this environment. For many, it would appear that the cultural limitations faced by their mothers, including safeguarding one's reputation and the implications of working, etc., upon the husband/father's self-image and social standing, are a thing of the past.

While educational attainments appear to present the picture of full participation, recent studies continue to show that some Muslim women still

⁵⁹⁷ Ibid, pp.206-233.

feel disenfranchised and their voices are unheard. The government sponsored 'Empowering Muslim Women Case studies'⁵⁹⁸ of 2008 is one example of the voice of disconcerted British Muslim women appealing for greater public roles, albeit within the anti-extremism framework.

British Muslims and Politics of Identity

The 2011 UK census revealed that 2.7 million people in Britain follow the Islamic faith, representing 4.8 per cent of the population.⁵⁹⁹ The demographic profile has altered during the last half century, from mainly South Asian migrants in the 1950's-1970's, to the arrival of large numbers of refugees and asylum seekers during the 1990's and 2000's.⁶⁰⁰ These figures belie the complexities surrounding any single form of cultural or indeed religious identity which British Muslims can be attributed with. In addition, British Muslims enjoy a younger demographic profile with an average age of 28 contrasted with 41 for the remainder of the population.⁶⁰¹

Muslims who live as citizens of the state following a minority religion have faced challenges in the construction of their identities as 'British' Muslims.⁶⁰² While 'British-ness' is a national identity, one must ask to what extent it also forms a cultural identity despite the multi-ethnic links and multi-cultural origins of many British citizens. Traditional assumptions about culture are

⁵⁹⁸ Empowering Muslim Women Case Studies, 2008

⁵⁹⁹ The statistical breakdown of ethnic origin from the 2011 census is not yet available, however, based on the 2001 census, it was as follows: Pakistan (43 per cent), Bangladesh (17 per cent), Indian (8 per cent), 'white' or European, Turkish, Arab or British origin (12 per cent) and 'Black' (7 per cent).

⁶⁰⁰ P. Lewis, *Young, British and Muslim*, (2007) Continuum, at 19.

⁶⁰¹ Open Society Institute, 2005, as cited by S. Gilliat-Ray, *Muslims in Britain, An Introduction*, (2010) Cambridge University Press, at 121.

⁶⁰² A useful discussion about 'What is a British Muslim' is presented by: D. Hussein, 'British Muslim Identity', (2004 M. Seddon, *et al* (Eds), *British Muslims Between Assimilation and Segregation, Historical, Legal and Social Realities*, The Islamic Foundation, pp.83-118.

facing increasing challenges in the globalised world and the ramifications can be felt in even the most remote villages in Britain.⁶⁰³ A widely accepted yet undefined 'British' culture is suddenly confronted with the need for an exact classification and demarcation in order to protect this identity; yet, one suspects that in the world in which we now live, any definition would be imprecise. Parekh⁶⁰⁴ sets out his view that "Identity politics have so far been defined and conducted in terms of particular collective identities, such as those based on gender, ethnicity and nationality. While this is important, it is just as crucial to affirm our universal human identity, locate particular identities within its framework, and engage in what I call a new politics of identity."⁶⁰⁵ Thus, a greater focus on common threads of identity such as family relationships and professional occupations should form the bulwark of cultural identities.

Many theories purporting to decipher the elements forming 'identity' have been propounded. Hussain⁶⁰⁶ proposed the concepts of self, territory and community as three elements forming the bulwark of a Muslim identity. The self is presented here as a subject of God; territory refers to presence in fact on Muslim or non-Muslim majority jurisdictions; and community refers to the immediate people amongst whom a person lives *vis a vis* the *ummah*.⁶⁰⁷ While these factors can be seen as Muslim specific, they are unlikely to be the only factors which form the foundation of the British Muslims' identity formulation.

⁶⁰³ R. Ballard, *et al*, 'Cultural Diversity: Challenge and Accommodation', (2009) R. Grillo, *et al* (Eds) *Legal Practice and cultural Diversity*, AshgatePublishing, pp9-29

⁶⁰⁴ B. Parekh, *A New Politics of Identity, Political Principles of an Interdependent world*, (2008) Palgrave Macmillan

⁶⁰⁵ *Ibid.*

⁶⁰⁶ Hussein (2004), *op. cit.*, at 91.

⁶⁰⁷ *Ibid*, at 91-99.

Concerning territory, British Muslims with cultural ties to multiple territories may experience complex negotiations in identity formation. The extent of the impact of cultural differences is dictated by the strength of the ties to other territories. This was identified by Menski amongst others; however, the question arises of how this interplays with the identity of a 'British Muslim' with loyalties to the British state. Thus, has a new cultural identity been formed relating to the territory of residence?

This enquiry is exemplified by the questionnaire data which revealed that 70 per cent of the respondents were British born, or whom (when taken as a whole) 67 per cent listed English as their first language, while the remaining 33 per cent cited another language. Where age is used as a variable, the prevalence of English as a first language with those born in the UK was found to be:

	18 - 22	23 - 30	31 - 40	40+
English	55%	77%	60%	75%
Other Language	45%	23%	40%	25%

Fig. 43 Frequency of English as first language for British born respondents with age variables

The most surprising discovery is that 75 per cent of those over 40 born in the UK cite English as their first language. As it can be expected that these respondents were born close to the time when their parents migrated to the UK, English would not be expected to be their first language. Conversely, greater prevalence of English as the first language would be expected for those who are younger; yet the largest percentage, 45 per cent, who did not list English as their first language can be found within the 18-22 age category., Those aged 23-

30 and 31-40 displayed more predictable data with 77/23 and 60/40 per cent ratios.

What do these statistics reveal about British Muslims and their expression of identity in linguistic terms? It appears clear that the younger generation have displayed a greater affinity to the language of their parents' ethnic origins. However, based on the focus group interviews, this appears to be the result of a confident display of dual heritage – both British and that of their ethnic origin. This is clearly reflected in the fusion of cultures which British Muslims appear to display, and provides a great deal of scope for specific research in this area. One such fusion was apparent in manner of dress. The ladies were attired in a range of clothes from jeans and a top, to skirts, blouses, and *jilbabs*; all of which was present with or without *Hijab*. At this basic level, dual or unique cultural identities were apparent. These dual heritages are mutually exclusive; thus one does not prevail at the expense of the other and this flows into the discourse about self-identification.

Most significantly, the statistics relating to language reveal that two-thirds of British born Muslims listed English as their first language, thus identifying closer to Britain than to their places of ethnic origin at this fundamental juncture. This is an overt exclusion of their parents' lands of ethnic origin, and a clear demarcation for forming a unique identity which does not compromise religious practice, as indicated by identification of the latter within the questionnaire. 77 per cent of those who listed English as their first language, or as a dual first language, described their religious observation as 'practising'.

In order to progress the notion of self-identification, Parekh sets out another three-dimensional approach to determining a person's identity, separating their personal identity, social identity and individual identity.⁶⁰⁸ The personal identity comprises the unique aspects of an individual such as biographical details. The social identity reflects the groups of which they form a part and by which they can be identified such as religious and professional groups. The individual identity is the reflection of the recognition of the human species and the collation of the other forms of identity. The mapping of this three-tier classification would be just as complex with any social or cultural group in Britain. However, for religious groups, there is the added complexity of possible structured coercive normative influences which cannot be easily measured. It is highly probable that this process would present a commonality of factors which can be expected to influence British citizens who belong to any religious group with a history of faith based arbitration/mediation for the resolution of disputes. Similar conditions can be seen, for example, in Muslim majority jurisdictions such as Jordan, where the 10 per cent Christian minority self-regulate in certain arenas such as family law.⁶⁰⁹ The common thread between Jordanian Christians and British Muslims, for example, would be their religious self-identification and perceived religious obligations, which one can expect to impact upon their choice of dispute resolution where they perceive community (or state) apparatus allows for their religious beliefs to be upheld. However,

⁶⁰⁸ Parekh (2008), *op. cit.*, at 9.

⁶⁰⁹ The Ecclesiastical Courts linked to different churches in Jordan have the authority to rule on disputes related to Christian family law. See 'Christian Marriage Guide' prepared by the National Council for Family Affairs, available online at <http://www.ncfa.org.jo/Portals/0/Christian%20E.pdf> (Last visited 9 December 2012)

these divergences can readily be left at the door when one enters their wider society.

The politics of identity has a great impact on the pragmatic steps taken by Muslims in their everyday lives. Where dispute resolution and Muslim family law is concerned, the research data appears to support the assertion that self-identification narrows the options British Muslims avail themselves of. In order to evaluate this further, the following strands of discussion will be explored based on the focal points of discussions and survey conducted in the empirical stages of this research:

- i. Basic understanding and conceptualisation of Muslim family law – considering the socio-demographic profile of the respondents, and its congruence with the level of knowledge displayed.
- ii. The application of Muslim family law in the lives of British Muslims – concerning marriage, divorce and inheritance. How does informal legal pluralism contend with a mono-legal tradition and the practical reality of faith based informal dispute resolution excluding state apparatus? What is the underlying socio-legal construct in the dispute resolution process considering the formal/informal dichotomy, the autonomy of the social group, state intervention and the state law?
- iii. The Muslim marriage contract and the state – considering the arguments for recognition of the *nikkah* contract by the state in light of the legal consequences of non-recognition.
- iv. Negotiating faith based ADR mechanisms such as Shariah Councils in Britain – Is there a particular need for dispute resolution mechanisms specific to the British Muslim religious community? What is the wider scope of these bodies in relation to *fatwas*? Will they continue in their

current form, or do the alternative hybrid mechanisms such as MAT provide a superior socio-legal solution?

Before further consideration is given to these strands of discussion, a general overview of the focus groups discussions is presented below.

Focus Groups

The research methods conducted within this study were varied and the element which allowed the deepest levels of enquiry about the subject matter was the focus groups. Conducted in 4 major British cities, they allowed for an array of variables to be taken into account while focussing discussion on the same issues of concern. One repeated indication from all four groups was that the areas focussed upon within the questionnaires were considered 'unexplored' and issues which many had 'never thought about'. Some comments from participants which reflect the diversity of views and homogeneity in certain attitudes are included at Appendix IV.

The level of discussion in each group varied as would be expected. However, the range of views reflected the disparity in impressions and opinions which emanate from British Muslim communities, even within such relatively small groups. This should indicate that a search for uniformity is likely to fail and any findings would need to be loosely termed in order to prevent unwarranted compartmentalisation. While some participants viewed their position as British citizens as affording them a multitude of rights, others felt that it required an acceptance and perhaps assimilation to the established legal order. The overall impression is that most participants accepted the status quo as being a good system and therefore there was no need for change. Others held the same

position; however, the cognitive reasoning appeared to involve resignation and a belief that nothing could or would change, thus the status quo *should* be accepted.

What is apparent is that a process of integration is taking place as the reasoning presented for opinions were always couched in terms of British-ness, and prevalent themes were responsibilities to the state and a rights based discourse. This supports the contention of Parekh and others, that integration is a “two-way process”,⁶¹⁰ requiring mutual adjustments between those who would be deemed ‘immigrants’ and their off-spring, and wider British society. This requires an acceptance of the right of groups like British Muslims to choose to adopt or reject some aspects of British culture and tradition, without this being deemed to negate their citizenship or loyalty to the state.

It became apparent that many participants identified themselves on national and religious grounds, which often excluded their (parents’) countries of origin or ethnicities. Thus, the statistics about first language presented above were reinforced. Further consideration of the focal points of discussions and survey conducted in the empirical stages of this research will now ensue.

Conceptions, Applications and Analysis Discovered from Research Data

i. Basic understanding and conceptualisation of Muslim family law

The data collected within the questionnaires revealed that where marriage and divorce are concerned, at least half of the respondents displayed textually

⁶¹⁰ Parekh (2008), *op. cit.*, at 85.

accurate knowledge or some knowledge about the basic Islamic rulings on these areas.

	Marriage	Divorce - Male	Divorce - Female
Textually Accurate	53%	48%	42%
Some Knowledge	28%	15%	9%
TOTAL	81%	63%	51%

Fig. 44 Table of knowledge about Islamic family law

Thus, the basic understanding of religious protocols for an Islamically valid marriage seemed to be widely understood as would be expected for an event usually celebrated publicly. For many British Muslims, conducting a religious ceremony is a cultural norm which is very much embraced. Whether they practice the Islamic faith or not, many seem to have a desire to ensure that their union is accepted in the sight of God or at least conforms to community norms. With the divorce process, marginally less than two-thirds of participants were clear on the process when male instigated, while just over half understood the process when female instigated.

Where knowledge is deciphered according to age, it was interesting to note that there was no clear impact of age on knowledge about the elements to a valid Islamic marriage. Textually accurate knowledge was highest in both the 18-22 and 31-40 age brackets, revealing no clear pattern of knowledge.

	18 - 22	23 - 30	31 - 40	40+
No Knowledge	20%	18%	18%	22%
Some knowledge	24%	29%	26%	36%
Textually Accurate Knowledge	56%	50%	56%	43%
Incorrect Knowledge	0%	4%	0%	0%

Fig. 45 Table of knowledge of Islamic family law with age variable

Using highest educational achievement as a variable, the following table reveals the distribution of knowledge where marriage and divorce are concerned:

Marriage

	GCSE	A-Level or equivalent	Graduate	Post-Graduate
No Knowledge	46%	25%	11%	11%
Some knowledge	36%	28%	30%	21%
Textually Accurate Knowledge	18%	47%	56%	65%
Incorrect Knowledge	0%	0%	3%	3%

Fig. 46 Knowledge of marriage, with highest educational achievement variable

Those with GCSEs as their highest educational achievement displayed the highest occurrence of respondents with 'no knowledge', and the rate decreased the more educated the respondents were. A similar clear pattern can be seen with respondents who displayed textually accurate knowledge, with 18 per cent for those with GCSEs, rising to 47 per cent for those with A-Levels and 56 for graduates. The highest proliferation of knowledge was 65 per cent for those with post-graduate qualifications. No clear link between education and knowledge emerged for respondents displaying 'some knowledge'.

Divorce - Male Instigated

	GCSE	A-Level or equivalent	Graduate	Post-Graduate
No Knowledge	55%	33%	18%	28%
Some knowledge	9%	14%	20%	13%
Textually Accurate Knowledge	27%	46%	53%	51%
Incorrect Knowledge	9%	7%	9%	8%

Fig. 47 Knowledge of divorce (male), with highest educational achievement variable

Divorce - Female Instigated

	GCSE	A-Level or equivalent	Graduate	Post-Graduate
No Knowledge	64%	42%	24%	35%
Some knowledge	18%	12%	9%	8%
Textually Accurate Knowledge	9%	37%	49%	44%
Incorrect Knowledge	9%	9%	18%	13%

Fig. 48 Knowledge of divorce (female), with highest educational achievement variable

For both types of divorce, once again, ‘no knowledge’ was more prevalent in those with GCSEs only, however, the statistics for the other qualifications listed showed no clear pattern. Textually accurate knowledge appeared to increase according to how educated the respondent was, as with knowledge about marriage. However, those who were graduates displayed marginally more textually accurate knowledge than those with post-graduate qualifications. No other clear patterns emerged.

These statistics appear to reveal that education is only a factor when considering textually accurate knowledge or no knowledge, with those less educated displaying a propensity towards 'no knowledge' and displaying the least number of respondents with textually accurate knowledge. Those with undergraduate and post-graduate degrees were less likely to have no knowledge and more inclined towards textually accurate knowledge. 9 per cent more post-graduates had textually accurate knowledge than graduates where marriage was concerned. For divorce, graduates displayed marginally greater textually accurate knowledge than post-graduates.

Inheritance – wife survives

	GCSE	A-Level or equivalent	Graduate	Post-Graduate
No Knowledge	64%	17%	28%	28%
Some knowledge	27%	37%	36%	28%
Textually Accurate Knowledge	9%	29%	24%	30%
Incorrect Knowledge	0%	17%	12%	14%

Fig. 49 Knowledge of inheritance (female), with highest educational achievement variable

Inheritance – husband survives

	GCSE	A-Level or equivalent	Graduate	Post-Graduate
No Knowledge	82%	29%	39%	37%
Some knowledge	0%	20%	18%	25%
Textually Accurate Knowledge	0%	20%	16%	20%
Incorrect Knowledge	18%	31%	27%	18%

Fig. 50 Knowledge of inheritance (male), with highest educational achievement variable

On inheritance, the pattern continued with respondents with GCSEs only displaying a greater propensity towards ‘no knowledge’ on inheritance issues, with 64 per cent where the wife survives and 82 per cent where the husband survives. In the latter case, they also displayed no accurate knowledge with 18 percent having incorrect knowledge. On the issue of textually accurate knowledge, once more the patterns indicate that higher levels of education results in more knowledge. Overall, the incorrect knowledge was greater than textually accurate knowledge where the husband survived, yet where the wife survived; ‘some knowledge’ was more prevalent.

The only clear conclusion to these statistics is that education is a key factor in the level of knowledge displayed about Islamic family law by British Muslims. Those with GCSEs display a great deal less knowledge than graduates and post-graduates, with no clear distinction between the latter two.

Commercial Contract

	GCSE	A-Level or equivalent	Graduate	Post-Graduate
No Knowledge	73%	62%	44%	37%
Some knowledge	9%	6%	17%	25%
Textually Accurate Knowledge	18%	26%	35%	33%
Incorrect Knowledge	0%	6%	4%	5%

Fig. 51 Knowledge of commercial contract, with highest educational achievement variable

For commercial contracts, overall respondents displayed a lack of knowledge, but specifically, there were few with ‘incorrect knowledge’, and most had ‘no knowledge’ where highest educational qualifications were GCSEs or A-

Level/equivalent. Graduates and post-graduates displayed a higher proportion with 'no knowledge;' however, this was significantly less than the former two categories. Those with 'some knowledge' varied.

Contrasting these statistics with those respondents who stated they were 'practicing' or 'understand' their religious obligations while not practicing, reflects a wide discrepancy and respondents with textually accurate knowledge would be expected to be higher. 94 per cent placed themselves in the aforementioned categories, yet the only figure that came close was 81 per cent relating to knowledge about marriage. This brings into sharp question how the enquiry about religious knowledge and practice was decoded, and suggests that participants may have focussed their responses on ritual practices as opposed to religio-legal understanding.

When the data is considered in gendered terms, it reflects a minimal gender differentiation where these aspects of Islamic law are concerned. For marriage, from the 81 per cent of respondents having textually accurate or some knowledge, 54 per cent were female. For male instigated divorce, 43 per cent out of the 63 per cent were female, and for female instigated divorce, 36 per cent out of the 51 per cent had textually accurate or some knowledge. It is surprising that more women were not versed in their rights to an Islamic divorce, and further, 23 per cent of the female respondents had no knowledge about the methodology for obtaining divorce when female instigated, and a further 9 per cent had incorrect knowledge. For male instigated divorce, 6 per cent of the female respondents had incorrect knowledge while 20 per cent had no knowledge. These statistics reveal that on these issues which potentially

have a personal impact on female respondents, knowledge is not as prevalent as one would assume. Thus, reinforcing the conclusion that 'practicing' religion is perhaps deemed to reflect ritual acts of worship.

ii. The application of Muslim family law in the lives of British Muslims

The very existence of multi-cultural communities presents a challenge to any monolithic legal system. Menski believes that the danger of failing to rise to this challenge is disengaged and disconnected parts of British society over whom the legal system will wield little influence as it is viewed as largely irrelevant for them where certain issues are concerned.⁶¹¹ The exercise of Muslim family law has developed within Shariah Councils and this self-regulation excludes the state, even in the absence of enforcement powers. However, this segregation is unofficial and not accepted within the state legal system. Shachar argues against recognition on the grounds that allowing this form of 'private diversity' will result in true segregation⁶¹² and thus achieve the opposite of what Menski advocates. At present, under the structure of the Arbitration Act 1996, tribunals arbitrating utilising Islamic law can still use the national courts to enforce certain types of decisions, such as those related to commercial agreements.

The idea of accommodating Muslim family law in Britain can be seen in the spectrum of catering for Britain's multicultural society, and this accommodation can occur at many levels without official plurality. The judiciary recognises that its position is pivotal to ensuring that cultural (and thus one assumes religious)

⁶¹¹ W. Menski, 'Rethinking Legal Theory in the Light of South-North Migration', (2006) in P. Shah, and W. Menski, (EDS) *Migration, Diasporas and Legal Systems in Europe*, Routledge-Cavendish, pp 13-28.

⁶¹² A. Shachar, 'Privatising Diversity: A Cautionary Tale from Religious Arbitration in Family Law', (2008) 9:2 *Theoretical Inquiries in Law*, pp. 573-608, at 581

differences are taken into account in the cases being heard. Thus, *The Equal Treatment Benchbook* was born, which notes: “Each of us comes from our particular section of the community, and has grown up with its customs, assumptions and traditions.”⁶¹³ The *Benchbook* is intended to “enable all judges to deal confidently, sensitively and fairly with all those who appear before them.”⁶¹⁴

The *Benchbook* goes some way to ensuring that the judiciary has information about the specific cultural practices of certain minority ethnic groups which may impact upon their interaction with the British legal system. It is a positive contribution to the recognition of Britain as a multi-cultural society, and is intended to reinforce the mono-legal British tradition by making the law more diversity-friendly. Such acknowledgement is an essential first step, as pointed out by Parekh, “cultural diversity is an inescapable fact of modern life. Culture refers to a historically inherited system of meaning and significance in terms of which a group of people understand and structure their individual and collective lives.”⁶¹⁵ Culture has always been unavoidable and this is recognised within the vast Islamic legal traditions which have been developed the world over. In modern times, in the British context, a multicultural society gives its citizens meaning and a measure by which their thoughts, beliefs and actions are determined. This is a fact which cannot be ignored except at peril.

Within the Focus group discussions, comments included:

⁶¹³ Section 1.1.2. The Benchbook was last updated in April 2010 to include .

⁶¹⁴ <http://www.judiciary.gov.uk/publications-and-reports/judicial-college/Pre+2011/equal-treatment-bench-book>

⁶¹⁵ Parekh (2008), op. cit., at 80.

“Multiculturalism is being adopted in all spheres of British life – except within the legal system. There should be some leeway where there are certain proportions of certain communities represented [in the legal system], so that differences can be taken into account [in passing judgement].”

Other comments reflected these sentiments, giving rise to a rights based analysis which recognised that British Muslims had responsibilities to the state, but they also had rights as citizens for the law to cater to their specific needs.

When considering the perceived need for the British legal system to recognise some aspects of Muslim family law, the debate is as much about access to justice for British Muslims as it is about the national identity of all British citizens. Parekh states that “national identity is ultimately about the ownership of the country, about who does and does not belong to it and whose interests and claims should be accorded priority, it becomes a site of contestation between those who think the country is theirs and those who want to share its ownership.”⁶¹⁶ Thus, the British legal system needs to accept that its largest (and fastest growing) minority faith group⁶¹⁷ has specific needs which may need to be addressed to ensure that issues related to that specific group of citizens allows them access to justice. However, conversely, this needs to be balanced with the demands it would place on the British legal system. As Bowen points out, “any form of “recognizing shariah” in English civil law would require lawyers, judges, and Islamic scholars to take cognizance of Islamic legal

⁶¹⁶ Ibid, at 96.

⁶¹⁷ Statistics from the census 2011 data reveal that the British Muslim population rose from 1.6 million in 2001 to 2.7 million in 2011. Available online at: <http://www.ons.gov.uk/ons/rel/census/2011-census/key-statistics-for-local-authorities-in-england-and-wales/rpt-religion.html> (Last visited 11 December 2012)

traditions, social practices in countries of origin, and current procedures in England's Shariah Councils—for reasons that themselves derive from English contract law."⁶¹⁸ This would seem wholly unreasonable for the accommodation of 4.8 per cent of the population. Perhaps a more feasible solution is presented in the form of specialist courts which are able to deal with specific religious laws. This would not be restricted to Islamic law and could accommodate other faith groups

During the expert interview with Professor Ramadan, he opined that before any such steps are taken, there must be clarity regarding definition.

"In the legal system today, there is latitude for you to find your way as a Muslim. The legal system here is helping Muslims to find their way. The problem we have with some of the scholars is what they call family law.

Their interpretation of family law is coming from Pakistan / Bangladesh and we take this and say this is what we want. We have to be very cautious with this as I really have a problem with people coming with things that have been done in their countries of origin and saying 'this is Islam'. No, we need to think about an Islamic framework that is relevant for Muslims living in the West. What do we mean by this? It might be that we have to reassess for example what was seen in the countries of origin.

For example, ...We might have to rethink the nature and substance of the Islamic contract to make it adaptable or at least so that it's like the civil contract. We still have the perception that everything is parallel, we work

⁶¹⁸ J. Bowen, 'How Could English Courts Recognise Sharia?', (2010) 7:3 *University of St. Thomas Law Journal*, pp. 411-435, at 414.

with the informal as we don't know what the formal is. We do not have an idea about the formal in its true sense. "

This response appeared to question the very premise of a separate system, instead advocating a rights based discourse utilising the mechanisms available within the state legal system itself. Significantly, it questioned the premise of 'laws' being applied within informal faith based ADR mechanisms, stipulating a need for reassessment and reformulation without the cultural hindrances of the 'land of origin.'

iii. The Muslim marriage contract and the state

In considering the *nikkah* contract and its relationship with the state, it is necessary to look at three factors: the scope for recognition, the desirability for recognition and the inherent limitations likely to arise. The reason for this focus is the consequences of non-recognition for the rights of the wives and children from any *nikkah* instigated union. Such wives would be treated merely as partners⁶¹⁹ and would not have all of the safeguards guaranteed by the law to spouses such as an automatic interest in property,⁶²⁰ automatic right of inheritance in the case of intestacy⁶²¹, and maintenance.⁶²²

⁶¹⁹ The notion of a 'Common Law marriage' does not draw any specific legal obligations.

⁶²⁰ The couple must hold title to the property as Joint Tenants in order to become automatically eligible to a share in the property, or the entire property on death of one partner. However, a 'Beneficial Interest' may be lodged with the courts in certain circumstances including where minors under the age of 18 are involved. In the case of *Oxley v Hiscock* [2004] EWCA Civ 546, the court held that where property was purchased with joint contribution of the partners, its division upon separation would be determined by the facts upon separation and not upon purchase.

⁶²¹ A married couple have automatic rights of inheritance and are also exempt from tax on inheritance. Unmarried couples do not have the same benefit. A draft bill titled 'Inheritance (Cohabitants) Bill' was proposed in 2011 to provide such couples with greater rights to inherit.

By suggesting that the Muslim marriage contract should be recognised by the state, are British Muslims asking for a privileged position or can this be viewed merely as recognition of a cultural norm which has subjective legal force for the faithful? Parekh describes the confusion of a “form of authority with a culture”⁶²³ which can be related to the state requiring British Muslims to marry according to perceived cultural norms of the state. Does this confuse the role of the state with the perceived identity of a nation?

Fournier⁶²⁴ specifically studied the Muslim *mahr* and its treatment by ‘Western’ courts, citing the USA, Canada, France and Germany as illustrations. He argued that while these courts all seek to apply the laws from their jurisdictions in a non-ideological way, in fact “courts demonstrably respond to the enforceability of *mahr* in ways that can be classified ideologically.”⁶²⁵ As the *mahr* can be argued to be a contractual obligation, the nature of the contract (the *nikkah*) is irrelevant. Thus, courts are able to intervene in cases of dispute without needing to recognise the affects of the contract (i.e. a religious marriage).

Fournier’s consideration of the *mahr* requires it to be couched in legal terms whereby it can be seen as a rule of Islamic law which can “homogenously travel”⁶²⁶ around the world to different jurisdictions and remain in a form which can then be adjudicated upon. Parallels can be drawn with the rules

⁶²² Married couples have a legal right to maintenance from their spouse, but this does not extend to unmarried couples. However, where children are involved, a right to maintenance does arise.

⁶²³ B. Parekh, ‘The Rushdie Affair, Research Agenda for Political Philosophy’, (1990) 38:4 *Political Studies*, at 701.

⁶²⁴ P. Fournier, *Muslim Marriage in Western Courts, Lost in Transplantation*, (2010) Ashgate Publishing

⁶²⁵ *Ibid* at 3.

⁶²⁶ *Ibid*, at 29.

relating to the *nikkah* contract. Before any discussion can commence, however, there is a need to ensure that there is a common understanding of the rules and principles to be applied and upheld for all British Muslims before any discussions about state intervention can take place. It is clear that a plurality of understandings exists and therefore any state intervention at this juncture is likely to impact negatively upon this dynamism. As witnessed in Muslim majority jurisdictions such as Pakistan (as previously depicted in relation to rape), once the state legislates using Islamic law as its basis, the laws become stagnant and lose their previous fluidity and flexibility. As a result, religious dictates can easily be moulded according to cultural understandings within the region, thus losing their original moral and ethical values.

However, if one accepts that Islamic laws should be kept fluid and dynamic, it limits state intervention and enforcement. Participants in the female only focus group held in Leicester were of the view that when considering whether the British legal system should recognise the *nikkah* contract, the protection of the women should be pivotal. There was a unanimous opinion that the *nikkah* contract should be recognised in order to protect the rights of women who consider themselves married when they enter into that contract (regardless of whether they also conclude a civil marriage ceremony). This opinion was upheld even if it would be at the expense of accepted practices such as polygamy. The consequence of legal recognition of the *nikkah* contract would be a prohibition on entering more than one *nikkah* contract at a time. Thus, the idea of protecting a woman's rights by the legal recognition of the *nikkah* contract was deemed to supplant the religious sanctioning for polygamy.

The Glasgow focus group, which was also female-centric, held the same position where the *nikkah* contract was concerned, arguing that state recognition would prevent exploitation of women. However, the discussion deepened to explore individual responsibility where marriage is concerned, and one participant suggested that religious beliefs alone should be enough to ensure self-monitoring by British Muslim men so that women's rights are not infringed. Another pointed out the right of Muslim women to rule out polygamy within the *nikkah* contract itself, and such stipulation would curtail the possibility of the husband marrying again. Despite the firm conviction that the *nikkah* contract should be recognised, within this focus group there was a clear conflict within the minds of the women between their desire to protect women's rights, and their desire to remain faithful to religious beliefs. Thus, one participant opined:

"We can't just take the bits that we like in religion and leave the rest. Even if we hate it, there may be goodness in it. God is just and fair."

Detailed analysis of the data from the questionnaire surveys revealed that when respondents were asked whether the national courts were sufficient for dealing with Muslim family law relating to marriage, 17 per cent stated they were competent while 19 per cent stated they were incompetent. 20 per cent viewed them as satisfactory, however, the majority of 43 per cent were unsure. When compared to the responses relating to Shariah Councils, it is apparent that the latter are considered to be more competent in dealing with Islamic law issues, with 38 per cent stating they were competent and only 3 per cent viewed them as incompetent. Conversely, a greater figure of 48 per cent were unsure. The following table provides a gendered analysis of the responses relating to the

Shariah Councils' and national courts' ability to deal with Muslim marriage issues.

	Female Respondent		Male Respondents	
	Shariah Council National Courts		Shariah Council National Courts	
Competent	36%	19%	42%	13%
Incompetent	2%	20%	5%	18%
Satisfactory	11%	17%	13%	26%
Unsure	51%	44%	40%	43%

Fig. 52 Table of perception of competence of national courts and Shariah Councils, gender variable

These statistics reveal that overall, the gender weighing did not have a substantial impact on the views expressed on the competency of the Shariah Councils and national courts to deal with disputes in Muslim marriages. However, slight variations are apparent, including the viewed competency of Shariah Councils, with 36 per cent of the female compared with 42 per cent of the male respondents considering them competent. Conversely, a higher 19 per cent of females viewed national courts as competent compared with 13 per cent males. More male respondents viewed the national courts as satisfactory - at 26 per cent, compared to 17 per cent of female respondents. A much higher percentage of female respondents were unsure of the competency of Shariah Councils, however, accounting for over half at 51 per cent. Male respondents were also unsure, however, at 40 per cent.

The high occurrence of 'unsure' responses can possibly be attributed to a lack of interaction with the national courts and/or Shariah Councils on this issue. The

low competency ratings for the national courts can perhaps be attributed to recognition that the British judiciary does not (and is not expected to) have the expertise to deal with Islamic law issues. The greater confidence in the Shariah Councils on these issues is no doubt a reflection of attributed 'expertise'. Thus, while data related to choices of dispute resolution forums appear to reflect a potential lower rate of referral to Shariah Councils in favour of local imams or knowledgeable persons, it is clear that the Shariah Councils are still imbued with expertise. Concerns about their operation raised within the focus group discussions potentially reflect mistrust built from the public mainstream discourse on the issue - which is overwhelmingly negative. However, it was also clear that many participants did not have firsthand experience of Shariah Councils.

The data in this research supports the view that Shariah Councils, or similar faith based ADR mechanisms, are needed within the Muslim communities in Britain, but in their current form they are viewed as imperfect. No specific mention was made of the MAT in the questionnaire or the focus group and due to the lack of independent reference to it by participants, it appears to be an institution that many respondents appeared to be unaware of, with only 5 referring to them as a potential forum for dispute resolution under the 'other' category within the questionnaire. Thus, perhaps greater publicity is required for this forum which is a more formal faith based ADR institution.

iv. Negotiating Shariah Councils in Britain *vis a vis* the state legal system

The current discourse around multiculturalism and integration is focussed on religious diversity rather than racial variations as was the more common thread

in the 1980's and 1990's.⁶²⁷ While research relating to race and integration/assimilation concluded as early as the 1960's suggested that there was no homogenous collective within minority groups, with each individual having the capacity to display distinctive patterns of behaviour, Muslim communities do not seem to have been afforded the same consideration. Rose et al conducted a 5 year study at the Institute of Race Relations in the 1960s, which culminated in a volume over 800 pages in length detailing Britain's particular race relations issues in light of its colonial past.⁶²⁸ Yet when focus is on religious groups, and certainly the Muslim communities, there appears to be a regression in understanding. The research undertaken in the current thesis reflects that while some common threads can be drawn, the level of variation in beliefs and practices and indeed, understanding of the Islamic faith, makes it impossible to apply any blanket theories. However, the focus group participants revealed a distinct level of assimilation with British values, customs and cultures at numerous levels, which seemed to validate their separate religious norms as reflecting individual character traits perfectly legitimate in a multi-cultural society.

Despite this, there is still a tendency within mainstream discourse to polarise Muslims under one banner or other. Lewis makes the point that "The term fundamentalism presupposes a unitary notion of Islam, spawning militant Muslim activists across the world. Drawn from American Protestant history, it is almost totally useless today for either description or analysis. Its pejorative

⁶²⁷ P. Lewis, *Islamic Britain, Religion, Politics and Identity among British Muslims*, (2002) I.B. Tauris, at 3

⁶²⁸ E.J.B. Rose, *et al*, *Colour and Citizenship, A Report on British Race Relations*, (1969) Oxford University Press

overtones of religious fascism obscure the diversity of traditions and groupings within Islam.”⁶²⁹ It is clear that anti-Muslim ideas are espoused openly in some political and media discourses. In the *Seen and Not Heard, Voices of Young British Muslims* study in 2009,⁶³⁰ young Muslim participants were eager to show that they felt loyal to the state; however, they considered this loyalty to be rejected by the state and society.⁶³¹ Referral to bodies like Shariah Councils, or to local imams or knowledgeable people is not considered to undermine this loyalty, yet from the society, it is likely that the existence of such bodies is seen as evidence of separation. Saeed⁶³² opines that “some in the West argue that Muslim presence in the West is a great concern. Others go even further and argue that Muslims in the West are a serious threat to Western Societies...For them, Muslims cannot be loyal citizens of a western nation state because their loyalty is to Islam.”⁶³³ In order to progress beyond this ineffectual discourse, there needs to be a concerted repositioning away from assessing British Muslims as a monolithic whole, towards a plural perspective which allows for fluidity.

The discourse pertaining to British Muslims and their loyalties to the state does not appear to relate to their aspirations for dispute resolution mechanisms which allow them to express their faith based objectives. Parekh cites a survey from 2004 in which “67 per cent of Muslims said they felt very or fairly

⁶²⁹ Lewis (2002), *op. cit.*, at 5

⁶³⁰ S. Ahmed, *Seen and Not Heard, Voices of Young British Muslims*, (2009) Policy Research Centre Publication

⁶³¹ *Ibid*, at 48.

⁶³² A. Saeed, ‘Muslims in the West and their attitudes to full participation in Western societies: some reflections’, (2009) G.B. Levey, and T. Modood, *Secularism, Religion and Multicultural Citizenship* Cambridge University Press, pp 200-215

⁶³³ *Ibid*, at 200.

patriotic, 11 per cent that they were mildly patriotic, and only 12 per cent, mainly under the age of 40 years, claimed not to feel patriotic at all.⁶³⁴ Statistics such as these and similar findings since then reflect delineation in the minds of British Muslims whereby they identify their political loyalties very obviously, while maintaining autonomy over their perceived social/religious rights.

The expert interviewees held clear views on the Shariah Councils and their roles. As expected, Shaykh Sohaib Hassan considers the Shariah Councils to be a pivotal part of the developing institutions of Britain's Muslim communities. He states that the objectives are to "guide the Muslim community in all such matters as they are confronted with in their daily lives." Thus, guidance is a primary objective. This guidance is largely manifested in the form of *Fatwas* issued following individual requests. Professor Ramadan was also of the view that such institutions were philosophically a good idea. Nevertheless, he cited problems with implementation, stating: "I really think that it is very often the traditional views on what a marriage is and very often taken from the cultures of the Muslim majority countries of origin much more than dealing with the societies here." This observation was echoed within the focus group discourses on Shariah Councils.

Professor Ramadan further opined that "we need institutions and an institutionalisation of the Shariah Council's presence. We need less informal operations and more clarity in what we are doing for institutions. We do need some form of mediation councils but this should be adapted to the way of what marriage is in Britain today for the man and woman. What does it mean and

⁶³⁴ Parekh (2008), op. cit., at 107-108.

how do we deal with it? We have to look at the philosophy and objectives of such councils and they need to be reassessed. But we need them."

This conclusion is one that is reflected in the research findings, recognising that Muslims require forums with independent 'expert' knowledge of religious issues to facilitate dispute resolution. However, where the matter of increasing case loads for Shariah Councils is concerned, Professor Ramadan suggested that:

"The explanation is that more and more women are daring to say their marriages are not working and they are unhappy in their family life. The silence culture is over, now there is more openness. There are greater rates of divorce in general. The increase in case load is not about the trust in the Shariah Councils, it is about the need for them. "

Such an assessment supports the contention that British Muslim communities are becoming more integrated and fashioning an independent cultural identity separate from their cultures of ethnic origin. Divorce is a pivotal point, where women's ability to take charge of their lives and futures can be assessed. Rising numbers of women seeking divorce appears to reflect this.

To facilitate examination of the general views held by British Muslims pertaining to the dispute resolution forums available to them, five specific questions were posed in the questionnaire:

- 1. Does Islamic law allow you to use the national courts to resolve disputes?**
- 2. Does Islamic law require you to use the Shariah Councils to resolve disputes?**
- 3. Is there any pressure from the Muslim community to use the Shariah Councils instead of going to the national courts?**
- 4. Is the British legal system adequate for Muslims to resolve family law issues?**
- 5. Is the British legal system Muslim friendly?**

The responses detailed in Chapter six, can be summarised as follows:

	Q.1	Q.2	Q.3	Q.4	Q.5
Yes	46%	39%	17%	18%	17%
No	9%	27%	53%	46%	36%
Don't Know	44%	33%	28%	34%	45%

Fig. 53 Table of perception of dispute resolution forums

Analysis of these findings was presented in Chapter Six. The response to question 2 provided an insight into the possible misconceptions which exist in the minds of British Muslims on the issue of dispute resolution. The response to question 3 was revealing, with community pressure seeming to be a myth. An overwhelming 53 per cent stated they believed it was not a factor, compared to 17 per cent who did. This idea is one that is espoused by some who have reported on Shariah Councils, including Civitas, however, their report had many failings not limited to sweeping and erroneous generalisations.⁶³⁵ Where women are concerned, the report concluded that they could never really consent to the use of Shariah Councils due to direct and indirect coercion as "There is a good deal of intimidation of women in Muslim communities and the genuine consent of women could not be accepted as a reality."⁶³⁶ Such statements undermine the independence, agency and legal personality of women by imbuing them and their communities with flawed generalisations based on culturally specific preconceptions. While many women in many cultures face intimidation and marginalisation, there is no proof that Shariah Councils operate to take advantage of such pressures. The majority of the

⁶³⁵ Such as concluding that the reason only 50 percent of 16-24 year old Muslims preferred British law to Shariah Law reflected "a trend towards extremism on the part of young Muslims in general." D. MacEoin *et al*, *Sharia Law or 'One Law For All'?* (2009), available online at: <http://www.civitas.org.uk/pdf/ShariaLawOrOneLawForAll.pdf> (Last accessed 20 December 2012), at 12.

⁶³⁶ *ibid*, at 4.

respondents in this study do not believe that such community pressure is a cause for referral to Shariah Councils.

Gender weighing of the responses revealed the following:

Female Respondents

	Q.1	Q.2	Q.3	Q.4	Q.5
Yes	51%	35%	31%	37%	45%
No	7%	25%	53%	45%	37%
Don't Know	42%	40%	16%	18%	18%

Fig. 54 Table of perception of dispute resolution forums, female respondents

Male Respondents

	Q.1	Q.2	Q.3	Q.4	Q.5
Yes	30%	29%	25%	32%	49%
No	13%	13%	57%	50%	34%
Don't Know	57%	58%	18%	18%	17%

Fig. 55 Table of perception of dispute resolution forums, male respondents

This analysis reveals some gender differences in responses to questions 1, 2 and 3, while questions 4 and 5 drew similar responses. In response to question 1, many more females believed national courts can be used (51 per cent) than males (30 per cent). More males believed the national courts could not be used than females, and more males were unsure.

Question 2 showed a large difference between males (58 per cent) who were unsure whether Islamic law required Shariah Councils to be used, than females (40 per cent). However, more women responded 'yes' (35 per cent), than male respondents (29 per cent). Finally, on the question of community pressure, 31 per cent of female respondents said yes compared with 25 per cent of male respondents. However, 53 per cent of females said 'no' which was a clear and decisive majority, and 57 per cent of males also said no. While these latter

statistics appear to contravene popular held views about pressures on women to approach Shariah Councils, they may also be reflective of the group of Respondents - most of whom are well educated and thus probably able to resist such pressures based on their life experiences.

In order to bridge the gap between informal faith based ADR mechanisms and the formal legal system, professor Ramadan suggests three main objectives must be pursued: Substance, Objective and Diversity. These would ensure that a cohesive institution is established which can potentially meet the needs of all British Muslims.

Conclusion

This chapter has delved further into the rich data revealed by the empirical research undertaken within this study, reflecting the diversity of views within the British Muslim communities present even in a limited sample. The findings suggest that Shariah Councils or similar faith based ADR mechanisms are indeed needed within the Muslim communities in Britain, but in their current form they are viewed as imperfect. The MAT was not an institution that many respondents appeared to be aware of. Where dispute resolution and Muslim family law is concerned, the research data appears to support the assertion that self-identification narrows the options British Muslims avail themselves of. British Muslims require forums with 'expert' knowledge of religious issues to facilitate dispute resolution, which is not available within the state legal system.

The focus groups appeared to accept that the state legal system at present was a good system and therefore there was no need for change, while a lesser margin of participants were resigned to the belief that nothing could or would change,

thus the status quo *should* be accepted. These differences of opinion reflected processes of integration which appear to be taking place; reflected in opinions couched in terms of British-ness, with prevalent themes being recognition of responsibilities to the state, but embedded in a rights based discourse and reflecting the need for a mutual process of adjustment.

The lack of congruence between participants' subjective analysis of religious practice and the display of knowledge of Islamic law were identified here. While 94 per cent of respondents described themselves as practising or understanding their religious obligation but not practicing, textually accurate knowledge or some knowledge was only provided by approximately 50 per cent (with leeway on either side). This brought into sharp question how the enquiry about religious knowledge and practice was interpreted, and suggests that participants may have focussed their responses on ritual practices as opposed to religio-legal understanding.

A significant finding here was that two thirds of British born Muslims listed English as their first language, reflecting a closer affinity to Britain than their places of ethnic origin at this fundamental juncture. This reflects an overt exclusion of their parents' lands of origin, and a clear demarcation for the forming a unique identity which does not compromise their religious practice.

Some gendered analysis of the research findings was presented in this Chapter which reflected minimal gender differentiation in responses. However, some differences were apparent in understanding of laws, and the views on interaction with the state legal system. Significantly, where community

pressure on women to use Shariah Councils was concerned, over half of the female respondents did not believe this was the case.

Finally, education was revealed to be a key factor in the level of knowledge displayed about Islamic family law by British Muslims. Those with only GCSEs display a great deal less knowledge than graduates and post-graduates, with no clear distinction between the latter two. This correlation is surprising and, if extrapolated, it suggests that British Muslims without further education may not fully appreciate the legal obligations of their faith. Thus, the need for religious bodies which provide advice and guidance becomes paramount.

Chapter Eight

British Muslims and Approaches to Islamic Law and the State Legal System

Introduction

The research findings presented within Chapters Six and Seven revealed the data collected from the various research methods undertaken within this study. They provided details of a diverse sample group in terms of ethnic background, age distribution, spoken languages and places of residence. Similar socio-demographic traits included subjective analysis of religious practice and educational attainments. These factors were used as variables to ascertain the impact on opinion and perceptions where dispute resolution mechanism and Islamic family law is concerned. This chapter focuses on evaluating the data from the questionnaires and focus groups utilising the Grounded Theory methodology outlined in Chapter Four. Here, coding was used to analyse line by line the discussions and expression of opinions focussing on faith based ADR mechanisms and models for interaction and negotiations with the state legal system.

This basic coding exercise involved deciphering the participants' answers and expressions of opinion and identifying recurring common themes. This analytical process culminated in the grouping of common themes and the formulation of descriptive categorisations for the views expressed by the sample group on Islamic law, faith based ADR mechanisms and the British legal system; expanding on the research findings presented in Chapters Six and

Seven. I have generated the following labels which represent the diversity of approaches to Islamic law and the state legal system:

1. Rights-based evaluation promoting interlegality
2. Negative - hybridity promoting private implementation of religious devotion
3. Affirmative forum shopping
4. Necessity for validation of religious beliefs
5. Subordinate pragmatism leading to practical scepticism
6. No accommodation of plurality

These categories will be expounded in detail below.

Rights-based evaluation promoting Interlegality

A range of participants viewed their religious needs as a basic right for which they felt entitled to accommodation from the state and its apparatus. This discourse is hinged on the idea that their British citizenship grants them certain inalienable rights, including religious freedoms. These Muslims are more likely to be rationalists who use intellectual reasoning and realism to conclude that the Islamic component of their identities is mutually exclusive to their citizenship and other facets of self-identification. Thus, they are 'British Muslims'. Piscatori⁶³⁷ describes the development of an "intellectual consensus"⁶³⁸ achieved by some Muslims today who see "the nation-state as part of the nature of things and perhaps even inherently Islamic."⁶³⁹ Thus, a rights-based evaluation can be projected from this intellectual reasoning. This rights based discourse was present in all four focus groups and appeared to be the most prevalent view, while in some cases it did not exclude other categories,

⁶³⁷ J. Piscatori, *Islam in a World of Nation States*, (1986) Cambridge University Press

⁶³⁸ *Ibid*, at 76.

⁶³⁹ *Ibid*.

namely 'affirmative forum shopping' and 'necessity for validation of religious beliefs'.

This idea of a 'British Muslim' identity was studied by Jacobson in 1998, where she tested the following hypothesis in an empirical study: "In what terms do second generation British Pakistanis conceive of their own nationality, ethnicity and religion? Of these sources of social identity available to them, why does religion appear to have an especially strong appeal?"⁶⁴⁰ She concluded that a British Muslim identity appears to exist and Islam is seen not only as a religion but something far more encompassing in a young British Muslim's identity transcending beyond national borders.

Thus, the basic essence of the right to accommodation exists, however the extent of accommodation may vary. The idea of interlegality was first developed by Santos.⁶⁴¹ In the present context, it refers to "the process through which new legal regimes emerge from the interaction between what are often, misleadingly, thought of as discrete legal systems or social entities."⁶⁴² Ballard expands on the idea of interlegality as a manner of transformative accommodation, where the state legal system may impact on local informal ones, and vice versa. This interaction would lead to accommodation whereby the requirements of both are met, with compromise from both. Those who use the rights based evaluation can use interlegality as a means of achieving their goals. Even where the interaction is intended to reassert the supremacy of state

⁶⁴⁰ J. Jacobson, *Islam in Transition, Religion and Identity among British Pakistani Youth*, (1998) LSE/Routledge, at 2.

⁶⁴¹ B. Santos, *Towards a New Legal Common Sense, Law, Globalisation and Emancipation*, (2nd Edition), (2002) Butterworth, at 437

⁶⁴² R. Ballard, et al, 'Cultural Diversity: Challenge and accommodation', (2009) R. Grillo, et al, *Legal Practice and Cultural Diversity*, Ashgate Publishing, pp.9-29, at 23.

law, Hoekema⁶⁴³ suggests that “intermingling of distinct legal orders will still be underway.” Thus, interlegality is not concerned with the intended purpose of the interaction, but focuses solely on the end product of that interaction. This is particularly relevant for Islamic laws, as the cultural reality of the presence of Muslims in Britain and the socio-legal impact need not be officially recognised, but may still be catered for.

Each focus group responded negatively to the idea of a separate legal system for Muslims, as this was deemed to negate their identities as ‘British Muslims’. Rather, for those who advocated a rights-based evaluation promoting interlegality, there was the aspiration for state regulated pluralism which incorporated certain rules which only affected British Muslims within the national legal framework. Inherently, any contradictory religious rules of law would subside in favour of the national legal principles. Thus, questions related to polygamy for example, would not be accommodated and there was no expression of opposition to this.

A discourse which focuses on the rights based analysis of a citizen’s religious expectations from the state legal system reflects one who identifies as an equal member of the state. There is an expectation that the state will accommodate specific aspects of their faith based needs which is built on the guarantees found within the state’s own legal apparatus. Article 9 of the European Convention on Human Rights (although not quoted by any participant directly) would seem to

⁶⁴³ A. Hoekema, ‘Does the Dutch Judiciary Pluralize Domestic Law?’ (2009) R. Grillo, et al, *Legal Practice and Cultural Diversity*, Ashgate Publishing, pp.177-198, at 192.

uphold this position. As Esposito⁶⁴⁴ points out, Muslims who are becoming a part of society in Europe (and America), can practice their faith freely and this also opens up opportunities to interpret and re-interpret aspects of their faith, which is especially significant for those seeking to implement rights within a non-Islamic legal system. In addition, where they have kinsmen in Muslim majority jurisdictions, there is also a flow of information and ideas leading to an export of new religio-legal concepts which challenge the more traditional narratives.

The idea of accommodating Muslim family law in Britain can be seen in the spectrum of catering for Britain's multicultural society. This can be instigated at different levels, namely by the legislature or the judiciary at the state institution level. There has clearly been a lack of legislation on the issue thus far despite the existence of the Divorce (Religious Marriages) Act (2002) which specifically caters for the Jewish community and allows cooperation with divorces obtained through the medium of the Beth Din courts. The application of this legislation "allows civil judges to suspend divorce proceedings between the *decree nisi* and the *decree absolute* (which mark the two stages of a civil divorce proceeding) if there is an ongoing religious divorce."⁶⁴⁵ The need for such legislation arose from the fact that numerous Jewish women were not being religiously divorced by their husbands so were unable to remarry, while the husbands obtained the civil divorce and were able to continue with their lives.

⁶⁴⁴ J. Esposito, 'The Future of Islam', (2001) 25:2 *The Fletcher Forum of World Affairs*, pp 19-32, at 28.

⁶⁴⁵ J. Bowen, 'How Could English Courts Recognise Sharia?', (2010) 7:3 *University of St. Thomas Law Journal*, pp. 411-435, at 420.

The difference between the Beth Din's role in overseeing religious divorce, and that of the Shariah Council is precise. The Beth Din only acts as a witness to a divorce but cannot grant one independently. The Shariah Councils on the other hand are able to grant divorces even where one party is unwilling. It remains to be seen whether the provisions of the Divorce (Religious Marriages) Act (2002) will be extended to Muslim divorces where the issues arising are very similar and the predicament faced by women whose husbands refuse to grant divorces are identical. A useful analogy can be drawn with what Bader⁶⁴⁶ calls "institutional pluralism or 'joint governance'"⁶⁴⁷ which provide accommodation.

The judiciary's pivotal role appears to have been recognised and the response was the *The Equal Treatment Benchbook* (as referred to in Chapter Seven) which notes: "Each of us comes from our particular section of the community, and has grown up with its customs, assumptions and traditions."⁶⁴⁸ There may be scope to argue that a certain amount of 'internal pluralisation'⁶⁴⁹ of the law has taken place. Hoekema⁶⁵⁰ investigates this phenomenon in relation to the Dutch legal system and investigates the depth of interaction between the informal 'legal' rules of distinct community groups within the domestic setting, and the state laws, as applied by the judiciary. This is a subjective interaction dependent very much on the sensibilities and experiences of each judge and will differ from court to court, and region to region. However, it may lead to an eventual hybrid system which recognises the particular norms or concerns of

⁶⁴⁶ V. Bader, 'Legal Pluralism and Differentiated Morality: Shari'a in Ontario?', (2009), R. Grillo, *et al*, *Legal Practice and Cultural Diversity*, Ashgate Publishing, pp.49-72

⁶⁴⁷ Ibid, at 49.

⁶⁴⁸ Section 1.1.2. The Benchbook was last updated in April 2010 to include .

⁶⁴⁹ Hoekema (2009), *op. cit.*, at 178.

⁶⁵⁰ Ibid.

any given socio-religious group as a simple evolutionary process not couched in legal plurality terms. This form of internal pluralisation can informally meet the needs of British Muslims, however, the lack of regulation and regularity is likely to make it insufficient as a long term solution.

One of the opinions which emerged amongst a minority of the participants within the focus groups was that other religious groups are able to deal with family law matters using their own informal institutions and Muslims should be afforded the same right and privilege. Faith based ADR mechanisms such as the Shariah Councils were not viewed of as being a replacement to the British legal system or even a challenge to it. Rather, they were deemed to fulfil a peripheral role in light of specific community needs. The rights based discourse alluded to the idea that participants projected the Shariah Councils and other alternative dispute resolution mechanisms which mediate on religious doctrine, as being a means of protecting their religious freedoms. Comments included:

“multiculturalism is being adopted in all spheres of British life, except the legal system. There should be some leeway where there are certain portions of certain communities [represented in the locality], so that laws are slightly different to take it into account.”

“Is this not a human right in general? And this is discrimination.”

An interesting point to note is that most of the participants who held this opinion nevertheless responded negatively to the idea of a separate legal system for Muslims in Britain. They did not support the idea of plurality in the official legal system, even to the extent of dismissing the idea of having British

Muslims ‘experts’ based within national courts in regions where large numbers of Muslims resided. This rejection was the consequence of recognition of the diversity of opinions found within Islamic jurisprudence which would make it almost impossible for any expert to be accepted universally by British Muslims.

One suggestion at the Leicester focus group was for the courts to work in conjunction with the unofficial Shariah Councils where the need arose, as these bodies have already dealt with the issues of difference in juristic opinion. This would not require recognition of the Shariah Councils in any legal sense, and they would simply be ‘experts’ who the courts or lawyers may refer to. However, once again, this does not contend with the weaknesses of the Shariah Councils and the criticisms levelled towards them.

A more complex idea was put forward in the Birmingham Focus group where it was suggested that Muslims, wherever they live in the world, are bound by certain “rights which God has” over them. This idea represents core tenets of belief and practice which many practising Muslims would consider to be sacred. There was little exploration of this; however, it represented the recognition that British Muslims may have specific religious beliefs which cannot be overridden by the state, in the interests of protecting basic religious freedoms. The rights based discourse promotes protecting these religious practices and beliefs within Britain, for all religious groups, not just Muslims.

A relevant study on this point, as referred to previously, was conducted by the Policy Research Centre.⁶⁵¹ The study focused on identifying themes on

⁶⁵¹ S. Ahmed, *Seen and Not Heard, Voices of Young British Muslims*, (2009) Policy Research Centre Publication

'belonging' and 'citizenship' and concluded that on the point of 'Identity, Belonging and Citizenship' "the vast majority of young people who spoke to us felt no contradiction between their religious and national identities. They felt part of British Society and wanted to be treated as equals, not to be privileged, nor discriminated against"⁶⁵². Thus, the Shariah Councils in this light are mechanisms which evolved to fulfil a right to religious mediation in disputes and do not represent special treatment of Muslim citizens above others within the state with similar religious needs.

Where Shariah Councils are concerned, a rights based approach to a more formalised status is argued by those who believe that from a religious perspective, there is a need for a body which can be referred to for binding opinions of Islamic law. One comment which encompasses the argument was:

*"Islam is a relationship between you and God. Do you need a credible body to enforce elements of that? As a Muslim, you need 'Islamic rulings' about your situation and the Shariah Councils do this. There was a void and the reason for that void was that no one [in Britain] was able to say... 'in the eyes of God you are...married, divorced, etc.' Shariah Councils filled that void."*⁶⁵³

Thus, an opinion emanated within the focus groups which suggested that following the rights based evaluation promoting interlegality, Shariah Councils (or other similar bodies) may have a role to play within official institutions in Britain. However, it is pertinent to point out that those who promoted this opinion did not accept Shariah Councils in their current form and without

⁶⁵² Ibid, at 59-60.

⁶⁵³ Comment from the Birmingham focus group – Male participant.

radical reforms and regulation; they would be deemed to fall short of fulfilling this criteria. This was a sentiment expressed in the expert interview conducted with Professor Ramadan, as detailed in Chapter Seven. In conclusion, those who fall within this category follow the integrationist methodology for the implementation of religious laws.

Negative - hybridity promoting private implementation of religious devotion

Some participants expressed the view that religion was solely for the private domain where the state cannot and should not interject or interfere. Thus, they do not advocate any legal implementation of religious laws in Britain. The practice of religion at all levels is viewed as a private manifestation of core private beliefs and conscience to which the state is not a party, and there is no scope for state participation. Some participants consigned full responsibility for religious practices upon the individual, such as ensuring that their wills were drawn up in an Islamically valid manner to be implemented through the state institutions, however, never being dependable on the state for their basic construction. Thus, the private implementation of religious devotion is seen to go beyond private worship, and includes procedural matters.

This view is supported by the fact that when Islamic laws are being measured in any non-Muslim majority jurisdiction, the question of 'whose Islamic law?' arises. British Muslims are a multi-ethno religious group within which there exists a diverse range of views and practices which are accepted in each particular circle as correct Islamic custom. At times, these can contradict each other. In the Canadian example, when the debate and consultation about Shariah Law was taking place, one of the fundamental elements was deciding

'who speaks for Muslims or Islam(s) in Canada'.⁶⁵⁴ There is a clear lack of unified leadership within the Muslim communities in Britain and therefore this question becomes rhetorical. This phenomenon is something which plagues Muslim communities in jurisdictions where the faith is followed by a minority. In light of this, allowing private implementation of religious actions and devotion means each community can self-regulate, albeit without any enforcement authority. However, the various issues raised previously in this thesis regarding negative perceptions of Shariah Councils and similar bodies would need addressing.

This may be tackled by allowing the state some role within the private community forums, which will enable some form of external regulation in order to combat negativity, even if this role is merely regulatory and not institutional. This would ensure that marginalised voices are brought to the fore such as that of women, by simply enforcing existing anti-discrimination rules of law. This continues to allow private implementation of religious devotion, while the state recognises that it is occurring. In addition, this caters for differences in interpretations and understandings between various groups of Muslims. This may not, however, fulfil the negative-hybridity preference of the participants who held this position as it does require some state recognition.

A negative-hybridity approach would however ensure that British Muslims continue to engage with the state and its legal apparatus, and thus combat segregation of the Muslim communities which is a concern opined by many

⁶⁵⁴ Bader (2009), *op. cit.*, at 61.

scholars.⁶⁵⁵ Where private religious forums exist and the state is no longer able to wield authority over the citizens, citizens can no longer rely on the state's protective mechanisms which guarantee their rights, such as freedom from discrimination. This is not a negligible issue. Bano commented that Shariah Councils may "unfairly situate Muslims on the periphery of British society by reducing their chances to gain 'access to justice' and be 'equal before the law', thus effectively undermining their citizenship rights."⁶⁵⁶ Negative hybridity would require British Muslim citizens to engage with the official legal system just as any other citizen would.

During the focus group discussions, one participant opined that "*Shariah Law tends to be practiced by people at a personal level. When it comes to other issues, you have to go to British law and I wonder how you can flow from one to another.*"⁶⁵⁷ This was echoed by a small number of other participants, totalling 6 from all focus groups, who felt that Islamic laws were restrictive and too rigid to play any role in British life. However, most of these participants also qualified their comments by stating that their views are probably "*because of a lack of understanding of the reasons why Islamic laws are a certain way.*"⁶⁵⁸ The ensuing discussions made it clear that popular mainstream discourse on the issues seemed to be the main point for information gathering and there was a lack of independent education on the issues and rules of law. Thus, a small minority held the opinion that Islamic laws were undesirable, which one can conclude is

⁶⁵⁵ See for example, Shachar (2008), at 581

⁶⁵⁶ S. Bano, 'In Pursuit of religious and legal diversity: a Response to the Archbishop of Canterbury and the "Sharia Debate" in Britain', (2008) 10:3 *Ecclesiastical Law Journal*, pp 283-309, at 305.

⁶⁵⁷ Birmingham focus group – Male participant.

⁶⁵⁸ Glasgow focus group, Female participant.

in line with popular narratives on the issue in Britain. However, the focus groups allowed the opportunity for some popular stereotypes to be confounded, such as the issue of division of assets on inheritance. It appeared that some of the participants were unaware that distribution was directly linked to maintenance obligations on the male heirs in favour of the female heirs, rather than being based on discrimination against female heirs.

These latter discussions presented a valuable opportunity to observe the dynamic plurality of opinions which exist in Britain's Muslim communities, and significantly provided evidence of the depth of discourse regarding the manifestation of the interplay between law, culture and religion at the individual level.

The overwhelming opinions expressed seemed to support the notion that Islamic laws have a lot of values and codes to offer the British legal system and so should not be ruled out. Negative-hybridity promoting private implementation of religious devotion would allow these rules to be applied in Britain without state interaction, thus they would simply have a normative influence on Muslims who may expound them further without labelling the source. However, strict negative-hybridity was a minority opinion. A more popular assertion seemed to promote negative-hybridity on the basis that the 'Shariah Laws' in places like Britain needed to mature and develop before they could offer British Muslims a feasible solution and good governance. This is attested by the lack of agreement between Muslims on rules of law and the nature of criticisms levelled at the informal institutions which exist.

Affirmative forum shopping

Some participants revealed sceptical scrutiny of the application of religious enactments, generally viewing religious apparatus with cynicism and/or recognising that individuals may simply act in their own best interests when forum shopping for dispute resolution mechanisms. Such participants deemed religious based apparatus as essentially ‘forums of choice’ for those who selectively implement religious rulings or consult institutions established based on religious parameters in order to further their own bias motives.

Douglas et al⁶⁵⁹ found that within the three faith based ADR mechanisms they examined, covering Muslim, Jewish and Roman Catholic; the idea of forum shopping was present in the Shariah Councils and Beth Din courts, as there was no hierarchy in place. The Christian Court did operate within a hierarchical structure, providing less remit for this.⁶⁶⁰ The decision on which institution to use for a dispute is dictated by the likelihood that the outcome will be more favourable from one above another. The decision is not based on religious conviction and can be described more aptly as opportunism. This was a minority opinion although expressed by at least one individual in each focus group.

Some participants commented that in their own experience, sometimes Islamic laws are exploited by people who seek to manipulate their own positions in certain situations. Thus, *“they use it when they know they can gain something*

⁶⁵⁹ G. Douglas, N. Doe, S. Gilliat-Ray, R. Sandberg, and A. Khan, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts*, (2011) Report of a Research Study funded by the AHRC, available online at: http://www.religionandsociety.org.uk/uploads/docs/2011_07/1310467350_Social_Cohesion_and_Civil_Law_Full_Report.pdf (Last visited 12 December 2012)

⁶⁶⁰ *Ibid*, at 43.

from it.”⁶⁶¹ When this opinion was explored, some participants offered examples of such affirmative forum shopping, including:

“I’ve met people who have gone through previous marriages and they now only want nikkah. The idea of their wives getting 50% [in the event of divorce] is something they want to avoid.”

This example clearly reflects that an individual’s own experiences may play a significant role in the manner in which they approach religious institutions. While Islamic law does require the *nikkah* to be entered for there to be a valid marriage, it does not exclude the state civil ceremony. Thus, how the individuals act in order to sanctify their marriage before the state is a personal choice. In the example cited above, it is clear that the person involved went through a marriage where he lost assets in a divorce and is keen to avoid that a second time around. One option to ensure this is to enter a *nikkah* contract only. Another option is provided by English law, in the form of a pre-nuptial agreement which is recognised and enforceable in English courts, provided that the agreements do not give rise to manifest unfairness or injustice by infringing on the provisions of Section 25 of the Matrimonial Causes Act 1973.⁶⁶² However, the cheaper option is clearly the *nikkah* contract which can be entered without the need for expensive lawyers.

For those who entered the *nikkah* contract as well as the civil ceremony of marriage, a further suggestion for ensuring that Islamic law would apply to marriage and divorce included signing a pre-nuptial agreement which would

⁶⁶¹ Comment from the Birmingham focus group – Male participant.

⁶⁶² This extensive Section provides for the “first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.”

ensure that Islamic legal principles were applied where both parties agreed to opt out of using the national courts in the case of dispute. This reflects the recognition of hybridity in the affirmative forum shopping choice. However, this only represents half of the narrative as on the other hand, participants also noted that in their experience, couples also ensured that they entered the civil marriage contracts to guarantee the support of state laws and institutions in case things did go wrong. This included the comment that:

“The registry [of the marriage] is a protection for the couple.”⁶⁶³

Thus, the idea of affirmative forum shopping does not restrict itself to the use of religiously focused non-state institutions but can also extend to the use of state apparatus in order to ensure that rights are guaranteed and protected.

On a practical front, opinions were also expressed which favoured the ‘legal’ route (loosely termed) which would be the most expeditious. Thus, comments such as the following were made:

“Most people know that the British legal system takes a long time, whereas the Islamic legal system takes a shorter time and is simplest. If you had the option, you would usually pick the easiest route first.”⁶⁶⁴

There was also an added dimension to affirmative forum shopping which involved the perceived attitude and overall aims of the institutions involved. Where Shariah Councils and religious institutions were concerned, there was the opinion that reconciliation and social counselling were more likely to be promoted before divorce and division of assets were considered. With the

⁶⁶³ Comment from the London focus group – Male participant.

⁶⁶⁴ Comment from the Glasgow focus group – Female participant.

mainstream courts on the other hand, the opinion seemed to be that the courts did not consider this to be an objective of their role in the process. The social responsibility that any (so called) Islamic institution attracts would mean that they would have a more holistic approach to disputes within marriage.

Historically, the existence of plural *Qadi* courts within Islamic jurisdictions meant that even within Muslim majority legal systems, forum shopping was both possible and probable.⁶⁶⁵ Thus, this is a practical manifestation of an individual's own characteristics and personality trait.

Necessity for validation of religious beliefs

Some participants viewed religious practices as private manifestations of religious doctrine, however, based on historic paradigms, they perceived a need for an advisory body to be available to the faithful, regardless of which jurisdiction they live in. Thus, the Shariah Councils and comparable institutions are deemed to be a necessity for British Muslims where Fatwas and rulings can be issued. Even a lack of historic attestation for these specific institutions does not dissuade these participants from considering them to be necessary. They are accepted as meeting the evolutionary needs of Muslims living as citizens with equal rights in majority non-Muslim jurisdictions. They are not deemed to challenge the national legal order in any way, and play a peripheral role.

Each focus group included a concentrated discussion on Shariah Councils and the views were varied depending largely on the individual's own exposure and

⁶⁶⁵ K. Vikor, *Between God and the Sultan, A History of Islamic Law*, (2005) Oxford University Press, at 151.

experiences. It was clear that those who had approached them for assistance overwhelmingly described negative experiences, including the following:

“The Shariah Council is a very difficult place for a woman. I personally have stood outside one and not gone in because you think about the community implications and you know these people, what will they think of you, etc.”⁶⁶⁶

“I went to a Shariah Council and they could not help me. The Mosque was very good, they dealt with it straight away.”⁶⁶⁷

“Some of the Shariah Councils are just ‘shut up’ or ‘go home’ Councils.”⁶⁶⁸

“Shariah Councils... need to be educated as they are mainly old school and they need modern education on religion. It is still the older generation and what they believe is stronger [within the Shariah Councils].”⁶⁶⁹

“I do not trust Shariah Councils. I feel they are inconsistent and very influenced by culture. Sometimes they are from a specific ethnic background and the advice that they give you will reflect that.”⁶⁷⁰

Despite the obvious negativity, participants who were aware of Shariah Councils and their objectives accepted that they were effectively filling a socio-legal void for British Muslims. The popular conception about the rise and development of Shariah Councils involves the issue of the Islamic divorce instigated by the female. This is an accurate reflection of the history and current practical reality. Another peripheral role which is now accepted is the issuance

⁶⁶⁶ Birmingham focus group - Female participant.

⁶⁶⁷ Birmingham focus group – Female participant.

⁶⁶⁸ Birmingham focus group – Male participant.

⁶⁶⁹ Glasgow focus group – Female participant.

⁶⁷⁰ Birmingham focus group – Female participant.

of *Fatwas*. On both of these fronts, Muslims require the intervention and advice of learned scholars of Islamic jurisprudence, however, within the focus groups some participants accepted that an *Imam* at their local mosque can do the same job.

*“There is a need for Shariah, maybe not Shariah Councils.”*⁶⁷¹

*“If they [Shariah Councils] have no enforcement powers, then why would you not just go to your local imam instead? I know two people in a Shariah Court and I don’t agree with either of their way of thinking, so I would rather go to my local Imam whose opinion I do accept.”*⁶⁷²

*“Most people already know someone close to them who is knowledgeable, so when it comes to guidance, they can turn to them. If the Shariah Councils had enforcement powers, more people would turn to them. I would never go to a Shariah Council as I have someone who I can always turn to.”*⁶⁷³

This narrative reflects how a number of participants have preferred to consult local *Imams* on issues requiring religious guidance and the issuance of *Fatwas*. They felt that this was a better medium despite the deeper degree of informality when compared with Shariah Councils. It appears that this was largely because of the personal relationships between the individuals and their local *Imams* who were more in touch with the congregation and the individuals within them. Gilliat-Ray describes the changing role of the imams and states that today they

⁶⁷¹ Birmingham focus group – Male participant.

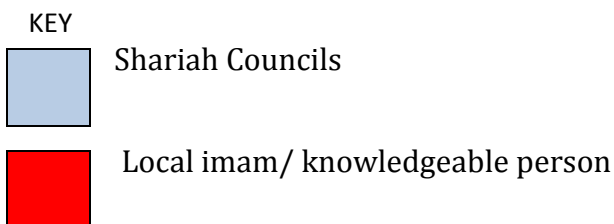
⁶⁷² London focus group – Male participant.

⁶⁷³ London focus group – Male participant.

are expected to provide a service far beyond mere ritual or scholarly advice, but are also expected to meet the needs of all of their ‘constituents’, especially the youth.⁶⁷⁴ She states that “there is a growing sense that imams should be active community leaders, engaging with and addressing the social, educational and political realities facing Muslim in contemporary Britain.”⁶⁷⁵ The responses to the questionnaires also clearly represented greater confidence and dependence on local imams or knowledgeable persons comparative to Shariah Councils.

	Marriage		Divorce		Inheritance	
1st	28%	6%	42%	13%	44%	16%
2nd	55%	14%	40%	20%	34%	26%
3rd	3%	35%	5%	32%	8%	22%
4th	2%	8%	2%	9%	1%	7%
Would not approach	3%	22%	2%	13%	4%	15%

Fig. 56 Choice of dispute resolution mechanism, Shariah Council or local imam, etc.



The data extracted and presented on this table displays the respondents’ preferences for dispute resolution forum where marriage, divorce and inheritance issues are concerned, in order of preference on a scale of 1st to 4th;

⁶⁷⁴ S. Gilliat-Ray, *Muslims in Britain, An Introduction*, (2010) Cambridge University Press, at 167.

⁶⁷⁵ *Ibid.*

including those who stated they would not approach that medium at all. It is clear that in each instance, the local imam or knowledgeable person is preferred to Shariah Councils by an unquestionable majority. In disputes concerning marriage, 83 per cent would approach the imam first or second, with only 20 per cent listing Shariah Councils first or second. For divorce, 82 per cent listed the local imam first or second compared with 33 per cent for Shariah Councils. Finally, for inheritance 78 per cent listed the local imam compared with 42 per cent for Shariah Councils. On this latter point, it is probable that the respondents considered inheritance a more formal issue; however they nonetheless showed a preference for the local imam or knowledgeable person. These statistics reveal the greater trust and reliance on local imams over institutionalised bodies such as Shariah Councils. This is confirmed by the statistics revealed by those who chose 'would not approach' as their response. For the local imam, this response was only received from 2-3 per cent of the Respondents. For Shariah Councils on the other hand, this ranged from 13-22 per cent, revealing some scepticism about these bodies.

Some were of the opinion that the Shariah Councils were adequate, stating:

*"If you are practicing [Islam], then you need to have a port of call."*⁶⁷⁶

*"If you are unsure about something and you are a practicing Muslim, you need somewhere to go to so that you can get the Islamic perspective."*⁶⁷⁷

*"[Shariah Councils] have a role. It does not replace the British legal system, it plays a periphery role."*⁶⁷⁸

⁶⁷⁶ Leicester focus group – Female participant.

⁶⁷⁷ Leicester focus group – Female participant.

A minority voice expressed the opinion that perhaps it is the stereotype view of Shariah Councils which is the problem. In order to improve the informal socio-legal function they perform, one suggestion included a compulsory training or educational process for members of Shariah Councils in order to combat decision making which hinges solely on the member's cultural and religious background. Such training, it is envisaged, would include an element which ensures exposure to the society and community in which they live, in order to ensure that decision making reflects wider experience or societal norms than is perceived to be the case of members at present.

Within the Birmingham focus group, the consensus amongst all participants was that Shariah Councils required regulation and that reformation was essential. Further to this, the consensus emerged that Shariah Councils needed to be able to enforce their decisions and to facilitate this, they needed to be state sanctioned. No consensus was reached within the other three groups either due to a lack of experience with them or a lack of knowledge about them.

A further perspective which emerged was the possible over-exposure of Shariah Councils in the media and political discourse, which did not reflect the experiences of British Muslim users. Within the London and Glasgow focus groups, no single participant had direct experience with them. Within Glasgow, the participants concluded that although they exist, they had no impact on their lives. Thus, where dispute resolution forums were concerned, the Shariah Council was not considered to be an option. Basic geography may explain this

⁶⁷⁸ Leicester focus group – Female participant.

however, as Glasgow does not have such a service on offer. One participant from the group commented that:

“I think we would have appreciated a Shariah Council, just to get advice from them to help us live more Islamic lives.”⁶⁷⁹

Within the Birmingham focus group, which has more experience of Shariah Councils, the perception was that they represented a derivation of the village tribal councils, or the ‘uncles’ councils’ consisting mainly of elderly men who were out of touch and mainly preached ‘patience’ to the women who approached them. This was supplemented by the opinions of the women in the Glasgow focus group, who commented that the Shariah Councils were responding to the needs of the first generations of British Muslims who would culturally refer to their ‘elders’ for guidance and advice. This is no longer the case, and in seeking religious guidance, the new generations of British Muslims, especially those who are educated, would seek guidance from people with proven knowledge regardless of age. Thus, a religious scholar with proven credentials will be pursued for guidance and advice over the elderly/wise.

This has a significant bearing on the development of Islamic forums for dispute resolution. It suggests that institutions such as the Muslim Arbitration Tribunals, which consist of legal experts both in the fields of Islamic and state laws, are likely to see their case loads continue to increase. Shariah Councils also have reported an increase in their caseloads, and this may be reflective of the growing communities of British Muslims in general especially in areas

⁶⁷⁹ Glasgow focus group – Female participant.

where there are concentrations of Muslims. Where the *khula* divorce is concerned, as opined by Professor Ramadan, it may also reflect the increasing awareness of rights of Muslim women.

Subordinate pragmatism leading to practical scepticism

Some participants take an approach which they deem to be pragmatic based on their perception of the reality of living in Britain. They do not expect the state to cater for specific legal needs of a religious community based on their own laws and practices as they find this *both* impractical and improbable. This scepticism reflects a number of cognitive processes including a view that Muslims should 'make do' with the rights they have been granted and not expect too much from the 'host'. This view is the antithesis to the rights based evaluation promoting interlegality.

Some participants expressed the view that more British Muslims were now opting for the British legal system to obtain a divorce. However, upon closer questioning, it appeared that the majority of participants did not believe that a divorce obtained from a British court could simultaneously result in an Islamic divorce also being concluded. Thus, even at the expense of Islamic rules of law, subordinate pragmatism means that some participants were sceptical about their own legal rights to implement religious practices in Britain, and this scepticism led to resignation about the rights which could potentially be exacted as British citizens.

Some of the statements made by participants included:

“We need to work with the British system to make our lives easier.”⁶⁸⁰

“If we want our laws to be implemented, then everyone can bring every religion and demand the same. For example, the Star Wars religion. No country can really accommodate judging every person by their own religion so there would need to be basics which are the same. I think we are here by choice and if there are other countries around the world which implement Islamic law you have a choice to go there and live.”⁶⁸¹

“Some laws in Britain are better for us so we should be able to use them.”⁶⁸²

The Leicester focus group predominantly positioned itself strongly against such subordinate pragmatism, preferring the rights based evaluation approach. The Glasgow Focus group, which was also all-female, on the other hand appeared to be more sceptical about the application of Islamic laws in Britain, and was split between those who displayed subordinate pragmatism leading to practical scepticism, and no accommodation of plurality. Comments included:

“If we feel so strongly about Islamic law being law, then we would not choose to be here. There is obviously more holding us here and to being British than there is pulling us away to another country.”

“I think British Law is just and it tries to treat people fairly and equally. Maybe not every single time, but I think it is a just system and judges are

⁶⁸⁰ Leicester focus group – Female participant.

⁶⁸¹ Glasgow focus group – Female participant.

⁶⁸² Leicester focus group – Female participant.

generally educated enough to know. But then...I have never had a negative judgement against me!"

"I think we need to adapt to British Law instead of British law adapting to people"

These views were supplemented by pragmatic consideration, including comments such as:

"There cannot be different laws for everyone. But for Islamic law to rule, it needs to prove that it is a better system – just like it has with banking and finance. But until that happens, I don't think there is any chance for us to get preference over any other religion."

These considerations may be reflective of the obvious lack of interaction with the law within this group and thus reflect an idealised media based discourse on the issue. When asked specifically if there should be a separate legal system for Muslims in Britain, most of the group responded negatively, with one participant professing not to know, and one participant stating that in certain circumstances state laws need to be tougher like Islamic laws:

"I like laws being tough. No robberies would actually take place if people knew what the punishment was [under Islamic law] and the whole purpose of the punishment is to act as a deterrence."

Within the Birmingham Focus group, no consensus emerged and the participants clearly had a range of views on the idea of having Islamic laws recognised by the state. Subordinate pragmatism was not an apparent theme, and arguments about recognition of Islamic laws were couched in terms of the

laws themselves and the extent to which the state would be in a position to implement them accurately. Thus, for example, with the *nikkah* contract, the view was expressed that unless the entire institution of the Islamic marriage was recognised (including divorce, etc.) then the *nikkah* contract could not be recognised alone. Thus, the discourse was aimed more towards accurate dispensation of religious laws before terms for recognition could be considered.

Within the London Focus group, no signs of subordinate pragmatism arose within the discussion, with most participants displaying a range of views including negative-hybridity arguing for dual systems which do not interact, with the 'Islamic' one being informal and private. Those with legal backgrounds expressed pragmatic opinions about the abilities of the courts and the legal system to accommodate Islamic laws; however, there were no gestures towards subordination. The lack of plurality was seen as a position which would change with time, especially in light of mosques increasingly becoming registered venues for the conclusion of civil marriage ceremonies.

Consideration of the focus group discussions reveals that subordinate pragmatism leading to practical scepticism was not perceptible within all locations, however, where it did appear, opinions were held strongly. Individual ideas about pragmatism were reflective of individual experiences and the depth and level of understanding of Islamic laws and interaction with the British legal system. Thus, although likely to represent a minority opinion, this category is an important validation of the diverse ways in which British Muslims have responded to their surroundings.

No accommodation of plurality

This category of participants reject all forums for the implementation of religious doctrine and more specifically reject Islamic laws as being prejudicial (to women) and reject their application and/or implementation in Britain. These participants expressed a preference for state laws which were deemed to be unbiased and non-discriminatory and the idea of national homogeneity where the law is concerned. This is the acceptance of the arguments made by some against any form of accommodation of cultural or religious needs of non-indigenous citizens of a state and their descendants.

This opinion was expressed by a fractional minority, and was only present within the London and Glasgow focus groups. Those expressing the opinions did qualify their comments with uncertainty about the facts of Islamic laws, including comments such as:

“As a woman, I think British law gives you more rights and that’s probably because of my lack of understanding of the reasons why Islamic law rules are a certain way.”⁶⁸³

This final category is clearly not representative of the views of British Muslims where dispute resolution is concerned; and this is reflected by the overall statistics concerning choice of dispute resolution forum. However, it may be reflective of the wide-spread British societal view on legal pluralism where Islamic laws are concerned. Whether based on fact or media hype, it is clear that Britain is not ready for such a degree of accommodation. A recent poll by the

⁶⁸³ Glasgow focus group – Female participant.

Daily Telegraph, Britain's leading broadsheet newspaper,⁶⁸⁴ showed that 70.4 per cent of voters (a total of 16,918 people) believe that religion should 'stop at the door of the temple' and give way to public law. 26.31 per cent (6, 324 people) believe that religion could play a role, but only the Christian faith. A marginal 3.29 per cent (790 people) held the view that all religions should have a say.

The debate which suggests that Muslim women would be disadvantaged by Shariah Law has been repeated within many current Western liberal democracies. In Canada, the debate was very public and the opposing camps extensively divisive. Maryam Razavy's PhD thesis considered 'Faith Based Arbitration in Canada: The Ontario Shariah Debates',⁶⁸⁵ where she outlined the polarity of views as follows:

"Freedom of religion (as guaranteed by S.2 of the Canadian Charter of Rights and Freedoms) and our commitment to multiculturalism (as endorsed by S.27 of the Charter) encouraged us to respect different faith communities, and the constitutive role that these play in the lives of individual citizens. Islam is not monolithic, static or intrinsically misogynistic. If people with a given identity group consensually agree to be guided in their private lives by their religious beliefs and to do so within the confines of the existing law (in this case, the Arbitration Act), we should not interfere simply because we may disagree with the individual outcome.

Versus

⁶⁸⁴ The Daily Telegraph, 17 February 2012, 'Should religion have a say over public law?', available at <http://www.telegraph.co.uk/news/religion/9088957/Trevor-Phillips-stands-by-ridiculous-Sharia-comparison.html> (last accessed 17 May 2012).

⁶⁸⁵ M. Razavy, 'Faith Based Arbitration in Canada: The Ontario Shariah Debates', (2010) University of Alberta, Department of Sociology and Department of Religious Studies

Delegating state power to faith-based arbitrators sacrifices Muslim women on the altar of multiculturalism. Given the patriarchal orientation of Islam (or at least the elite who exercise leadership with Muslim communities), arbitration according to Muslim law will systematically disadvantage women and leave them unprotected by the state from the social, physical, financial and emotional harm inflicted in the name of religion. Many Muslim women are newcomers to Canada, unfamiliar with their rights, and especially vulnerable to forms of physical, psychological and material coercion from kin and community. A commitment to the equality of women (as required by S.25 of the Canadian Charter of Rights and Freedoms) requires that Islamic Tribunals not be permitted to operate under the Arbitration Act.”⁶⁸⁶

The arguments can be presented with equal conviction within the British context. Women’s rights are similarly protected, Shariah Councils draw equal antipathy, and there are Muslims who would opt for alternative dispute resolution on faith based parameters just as there are those who oppose it. It is clear that the law can be used to argue both sides, and thus it becomes very much a socio-legal debate where ideals and convictions can be left to wrestle it out. In the Canada debates, the issue became a political hotrod and the sway of public opinion led to the Arbitration Act being repealed resulting in all judgements from religious ‘courts’ being rejected and no longer having any influence within the civil law. Those who argue for no accommodation of plurality would support the Canadian solution, however, it is clear that this is not dealing with the issue, and may in fact perpetuate a great number of problems associated with Shariah Councils.

⁶⁸⁶ Ibid, at 5.

Razavy argued that the Canadian government failed to take a “balanced approach on competing rights between religious freedom and legal justice in banning faith based arbitration.”⁶⁸⁷ She argued for an alternative approach which would require some governance of the Shariah Councils, thus drawing them out of the shadows and providing for a more “formalised, reformed, and transparent system.”⁶⁸⁸ Within the British context, such formalisation seems desirable, in order to truly protect the users. A formalised system which brings with it accountability cannot operate from the proverbial back room. Decisions would need to be justified and accountability would be provided to a far greater degree than exists at present. However, no accommodation of plurality would have no practical implications for the majority of British Muslims based on the findings of this research, where it appears that most would prefer to simply approach an imam or knowledgeable person in order to resolve their disputes.

Conclusion

It is clear from the analysis presented above that British Muslims are a diverse group of people with broad ranging opinions. This plurality is not a new phenomenon and has been accepted as fact for some time. As Gellner postulated, “the diversity of Muslim civilisation is now a well-established fact, amply documented by scholars and by field workers, and it no longer requires further documentation.”⁶⁸⁹ The extent to which British Muslims have engaged with the British legal system varies, as one would expect from any other group of British citizens who may simply happen to share a common characteristic such as religious belief. For Muslims, the outsider perception that there is one

⁶⁸⁷ Ibid, at 13.

⁶⁸⁸ Ibid.

⁶⁸⁹ E. Gellner, *Muslim Society*, (1981) Cambridge University Press, at 99.

book governing them all gives rise to the belief that they are a homogenous entity, however, the vastly differing cultural understandings of that very same book negate this. In Britain, these cultural manifestations have presented themselves within a salad bowl rather than a melting pot, thus giving rise to the need for individual consideration. The categories presented above will help map out the possible avenues for addressing the needs of the British Muslim communities, however, they need to be considered in light of the wider research findings presented in Chapters six and Seven.

The application of Grounded Theory methodology allowed a coding exercise which led to the development of six possible categories for the interaction between Islamic law, faith based ADR mechanisms and the British legal system. A Rights-based evaluation promoting interlegality; Negative - hybridity promoting private implementation of religious devotion; Affirmative forum shopping; Necessity for validation of religious beliefs; Subordinate pragmatism leading to practical scepticism; and No accommodation of plurality were all explored as possible frameworks for engagement. The clear preferences appeared to be divided between a rights based evaluation promoting interlegality and necessity for validation of religious beliefs.

In conclusion, it is clear that a plurality of opinions relating to dispute resolution exists, and a plurality of approaches to the formal and informal legal institutions has evolved in line with the transformative processes which are occurring within the Islamic legal tradition practiced by British Muslims. This group is continuously negotiating law, culture and religion, and it still

experiences a great deal of uncertainty about its obligations as a citizen of the state *vis a vis* its religious beliefs.

Chapter Nine

Conclusion

The focal research questions of this thesis explored whether British Muslims can demonstrate understanding of obligations and methodology relating to Islamic family laws, and whether dispute resolution using faith based ADR mechanisms is viewed as an alternative to engaging with the official state legal system. The study investigated the British Muslim communities and considered the transformative processes occurring within the Islamic legal traditions. The empirical research concentrated on the exercise of Islamic family law in Britain, dispute resolution and faith based ADR mechanisms such as the Shariah Councils. The study has allowed several conclusions to be drawn which can be extrapolated across British Muslim communities presenting similar demographic profiles as the participants engaged with here.

The research methodology I undertook was multi-faceted and allowed a great deal of work in the field. Approximately 280 participants were engaged from across England and Scotland, and data was collected utilising the questionnaire method, focus groups and a survey of opinion in the form of expert interviews. The results provided a depth and breadth of significant data, and research findings offer valuable new insights into the British Muslim communities and their complex and multi-faceted negotiations between law, culture and religion. Grounded Theory methodology facilitated the advancement of terminologies revealing the varied perceptions for models for interaction between Islamic law and the state legal system.

Participants were found to be consciously engaged in formulating a cultural identity which encompasses their national identity as British citizens and their religious identity as Muslims. These facets are considered mutually exclusive, yet complementary, and where socio-legal considerations arise, the law of the land prevails. Further to this, there was a clear and unequivocal expression of opinion within all focus groups opposing the notion of a separate legal system for Muslims. Participants viewed such a concept as separatist and divergent from their identities as 'British Muslims'.

Where no conflict is identified between state and religious laws, for example, concerning certain Islamic family laws; private unofficial channels of dispute resolution are pursued. This reflects the challenges being faced by 'traditional assumptions about culture' in Britain and across the world⁶⁹⁰ highlighting the need for progression beyond notions of 'host' community and Muslims as a Diasporic group in Britain, in favour of an integrationist model which recognises similarities and belonging, while accepting divergences as a matter of course.

In considering the theoretical premise for faith based ADR in Britain and the resultant challenges to the monolithic state legal system, legal pluralism was considered in theory and practice. Acknowledging the factual existence of forums such as the Shariah Councils, and the Jewish *Beth Din*; the theories dominating the discourse argue that legal pluralism is already in play, and further to this, it does not require state sanctioning and is a reflection of the

⁶⁹⁰ Ballard, R. et al, (2009), 'Cultural Diversity: Challenge and Accommodation', in Grillo, R (et al) (Eds) *Legal Practice and cultural Diversity*, Ashgate Publishing, pp9-29

facts on the ground. In the British example, this can be seen with institutional manifestations such as the MAT and entrenched Shariah Councils such as the ISC in London.

The negotiation between the theoretical, legal and social perspectives on legal pluralism reveals that British Muslim communities are living a legal plural reality. Whether the 'laws' are imposed by informal bodies such as Shariah Councils, or self regulated through individual religious convictions, they are powerful rules which are potentially more coercive than state law. While Islamic law can be used as a normative base in bringing change to the state legal system, it is apparent that Muslim communities are instead using them to become, to some extent, self-regulating where family law issues are concerned. The Arbitration Act 1996 provides a structural framework which is being utilised by the MAT, and other forms of ADR are implemented by informal Shariah Councils. The result is complex and interwoven legal and quasi-legal dispute resolution forums which provide British Muslim citizens with a choice of laws and forums.

Any discourse relating to Islamic law must necessarily be precipitated by consideration of its historic developments. Thus, the massive upheaval, progression and accommodation resulting in persistent transformative processes within the Islamic legal traditions witnessed during the past fourteen centuries were presented in overview. Islam allowed and encouraged a plurality of acceptable and enforceable opinions adapting with time and culture; and there is no single Muslim community and no single set of Islamic laws either theoretically or practically. This feature is particularly relevant in the

multi-cultural British Muslim communities as it presents multi-tiered challenges to the notion of Islamic law *vis a vis* Muslim practice. Such divergences are particularly conspicuous when *siyar* or the 'Islamic Law of Nations' is considered as a framework to establish the religious obligations of British Muslims to the state. The modern formulation of Islamic jurisprudence relating to minorities, termed *fiqh al Aqaliyyah* is a direct response to the demands of the presence of Muslims during the late 20th and 21st century in Europe. This was a response to the recognition that the rights and responsibilities of Muslims living permanently in non-Muslim jurisdictions needs to be enshrined in *Siyar* so that adequate guidance is provided to ensure participation and contribution to their societies. It is also clear that this challenge has not as yet been adequately met by Muslim jurists.

The development of Islamic law is a highly skilled social science engaged in by only the most highly trained religious scholars. In order to ensure that this level of scholarship continues, there is a distinct mistrust emanating from the traditionalists of attempts to reconceptualise laws to accommodate contemporary Muslim communities; considering existing laws to be sufficient. On the other hand, there are a small but significant number of academics who follow the Islamic faith who are proposing groundbreaking reforms. The resultant stalemate will only be challenged adequately by the passage of time and the practical steps of adaptation taken by Muslims.

One such adaptation was the development of Shariah Councils presenting faith based ADR mechanisms for British Muslims. However, many concerns about their operation have been opined from numerous quarters of British society

with the critical mass of hostility resulting from the perceived discriminatory treatment of women. In order to consider the merits of state recognition or sanctioning of Shariah Councils (if at all desirable), a number of transformative processes need to be undertaken, allowing the formulation of Islamic laws that account for the contextual framework of British Muslims. Such laws would acknowledge the diverse roles played by women in society, and their contributions to bringing up children and nurturing their families, as well as critical exposure in every professional and academic sphere of life. A further consideration would be a substitution of the actors within the institutions to ensure fair representations from experts (both lawyers and therapists) and women. The MAT does provide for legal expertise and a proportion of female representation, however, it still remains male-dominated. From the users' perspective, with the majority of cases being heard at Shariah Councils being instigated by women, there is also perhaps a need to consider forums which are female dominated, providing all the expertise listed above. Such an initiative would counter some of the most prevalent criticisms levelled against Shariah Councils, namely the treatment of women. It is also possible that within such an institution, progression in Islamic thought and theology may become more pronounced as there is scope for greater empathy, which will invariably impact upon the experiences reported by the users. However, it is acknowledged that this would still fail to meet a number of other failings outlined, such as the enforcement of decisions.⁶⁹¹

⁶⁹¹ The Mosques and Imams National Advisory Board (MINAB) has made a number of suggestions relating to the operative framework of Shariah Councils and advised reforms including a "community driven system of self-regulation" with "elected representatives and

The development of the MAT has been a positive step towards utilising existing state laws in order to arbitrate on a limited range of Islamic family laws in Britain. The arguments for a more cohesive society arising from the rule of one law for all are also compelling, but perhaps this concept represents an attempt to preserve a society that no longer exists; one in which all people share the same culture and understanding of the law. The Muslim faith based ADR mechanisms are not the first independent religious ‘court’ systems seen in Britain; they were preceded by many decades by other religious courts such as the Jewish *Beth Din*. The state can choose to continue allowing these forums to operate on the peripheries, or take control by incorporating some juristic principles administered by these forums into state law. However, it is clear that Shariah Councils do not wish to operate as part of the state’s institutions or be funded by it, as this may challenge their independence in the eyes of the Muslim communities in Britain

Data Analysis

The analysis of the data collated within the empirical research stages displayed extensive coverage of interaction, understanding and experience of British Muslims, and imbued the research with the following findings:

1. The socio-demographic profile of the respondents appears to incline towards ‘British Muslims who understand the obligations of their faith and are university educated.’ This unexpected outcome from the field resulted in the

scholars nominated by national Muslim organisations with assured participation of women.” Such progression would ensure that Shariah Councils become more user friendly and more accountable. Available at: <http://www.minab.org.uk/news/press-releases/225-minab-seeks-self-regulation-of-shariah-councils> (Last visited 29 May 2013)

research findings being tailored towards British Muslims who fit that socio-demographic profile.

2. Respondents from 24 British cities were engaged, comprising a diverse range of ethnic backgrounds and spoken languages, 70 per cent of whom were British born. 31 per cent of the respondents were male and 69 per cent female, with an even age distribution between 18 to 45 years. 62 per cent were graduates or postgraduates, with a further 20 per cent potentially still at university. 56 per cent spoke English as their first language and 5 per cent of the respondents were converts to the faith.

3. Religiosity was described by 94 per cent as either 'practicing' or 'understanding of religious obligations while not practicing'. Of these, 75 per cent stated that Islamic law either governed their lives or played a significant role. Despite these statistics, in the subjective analysis of faith in their lives, when knowledge about Islamic family laws and methodology was tested, less clarity was apparent. This revealed a discrepancy between self-identification of religiosity and actual knowledge about rules of law. The textually accurate levels of knowledge pertaining to the methodology underlying the Islamic legal requirements for entering a marriage contract, obtaining a divorce (where male or female instigated), or dividing up assets according to Islamic laws of inheritance, was manifested to be at a comparatively lower level than the percentage who professed to be 'practicing' or at least 'understanding religious obligations'. The assumption here is therefore that religiosity is considered to reflect personal acts of worship, rather than knowledge about substantive law.

4. Where dispute resolution is concerned, respondents showed greater affinity to utilising family as the first forum for marriage and divorce related dispute resolution. Upon exhaustion of this medium, a local imam or knowledgeable person would be approached. It is clear that these are the individuals with whom a trusted relationship is likely to have been established, and who are aware of the concerns of the subject group, thus they fulfil a socio-religious role. A Shariah Council was most prevalently listed as the third choice forum reflecting the subordinate position these forums appear to occupy. However, more respondents stated they would not approach the national courts to resolve these issues than those who stated they would not approach Shariah Councils.

On the issue of inheritance alone, there was a clear preference for the local imam or knowledgeable person, placing it before the family.

5. Dispute resolution forums responding to British Muslim needs were revealed to be essential by the statistical prevalence of disputes. The data revealed that 37 per cent of respondents had experience of marriage disputes; 36 per cent of divorce and 14 per cent of inheritance related issues.

6. Where perceptions relating to competency of the Shariah Councils and national courts were tested, Shariah Councils (to varying degrees) were considered to be more competent than national courts in dealing with Islamic family law issues. This is a reflection of the perceived 'expertise' of the Shariah Councils on these issues, where the national courts do not have jurisdiction or capacity, nor are they expected to delve into such issues.

7. Confusion was revealed about the parameters for engaging with the national courts in accordance with Islamic laws. The highest percentage of respondents stated there was no conflict; however, an almost identical number stated they were not sure. Similar findings were revealed for perceptions of the use of Shariah Councils, with the majority being under the (mistaken) impression that Islamic law required them to refer to Shariah Councils. This confusion may be limiting the dispute resolution forms which British Muslims will avail themselves of. Clarification lies with Muslim religious scholars who need to engage with this discourse.

8. Level of educational achievement produced a correlative effect where knowledge about Islamic laws was concerned. Those with GCSEs as their highest educational achievement displayed greatly reduced knowledge than those with A-Levels. Graduates and post-graduates displayed more knowledge than those in the former two categories. Thus, education is a key factor, and these findings suggest that British Muslims without further/higher education may not fully appreciate the legal obligations of their faith. Thus, the need for religious bodies which provide advice and guidance becomes paramount.

9. The focus groups appeared to accept that the state legal system at present was a good system and therefore there was no need for change, while a lesser margin of participants were resigned to the belief that nothing could or would change, thus the status quo *should* be accepted. These differences of opinion reflect a process of integration which appears to be taking place, reflected in the reasoning presented for opinions couched in terms of British-ness, with prevalent themes being recognition of responsibilities to the state, but

embedded in a rights based discourse; reflecting the need for a mutual process of adjustment.

10. Language can be viewed as an indication of cultural affinity, and within the sample group, two-thirds of British born Muslims listed English as their first language, reflecting a closer affinity to Britain than their places of ethnic origin at this fundamental juncture.

11. Some gendered analysis of the research findings reflected minimal gender differentiation in responses. Differences were most apparent in understanding of laws, and the views on interaction with the state legal system. Significantly, where community pressure on women to use Shariah Councils was concerned, over half of the female respondents did not believe this was the case.

Shariah Councils

The existence of institutions such as Shariah Councils in Britain reflects the permanence of Britain's Muslim communities within this geographic entity. Such informal legal structures help facilitate direction of religious convictions. Merely a few decades old, these institutions are still elementary in format, setting, structure and role; however, they are nonetheless being referred to increasingly in family disputes.

This research has revealed a number of findings:

1. British Muslims believe faith based ADR mechanisms such as Shariah Councils are essential to provide expert knowledge and dispute resolution on issues of Islamic law which fall outside the purview of the national courts. However, in their current form they are viewed as imperfect. The

MAT was not an institution that many respondents appeared to be aware of.

2. In the context of faith based ADR mechanisms such as Shariah Councils, their operational performance does not comply with the *Qadi* system as it fails on a number of grounds including independent appointment of 'judges' (or 'mediators' as is more correct in the ADR setting), verification of scholarly training, implementation of decisions in order to achieve *adl*, the provision of a right to appeal, and transparency in their decision making processes. A more appropriate model may be that of the informal *Hakim* system, or simply performing the role of a Mufti in executing a mediatory role, but within an institutional framework. However, the theoretical basis is weak and their operational capabilities are questionable.
3. The Shariah Councils as seen in Britain today are a manifestation of an informal institutional response to the religio-legal needs of British Muslims. However, these mechanisms do not derive religious legitimacy or authority from Islamic history or jurisprudence. They fall short of Islamic legitimacy due to the absence of enforcement power which would ensure justice is achieved. The MAT also fails to conform to this standard as the types of decisions which would be enforceable through the High Court do not include aspects of Islamic laws related to marriage and divorce as the state does not recognise these.
4. The respondents displayed doubts about the competency of the British legal system to deal with Muslim family law issues, and the Shariah Councils were imbued with greater competency. However, they would still only be approached by a marginal percentage of respondents to resolve disputes.

This lack of confidence coupled with a lack of awareness about both the national courts and Shariah Councils reflects Muslim communities who need further assistance on the avenues open for dispute resolution and access to justice.

5. In considering dispute resolution forums, a clear preference was indicated for utilising the local imam or knowledgeable person compared with Shariah Councils.

Grounded Theory methodology

The central contribution of this research comes in the form of six descriptive categories (developed using Grounded Theory methodology) detailing perceptions about the manner and form of interaction between British Muslims, faith based ADR mechanisms and the British legal system. These are:

1. Rights-based evaluation promoting interlegality
2. Negative - hybridity promoting private implementation of religious devotion
3. Affirmative forum shopping
4. Necessity for validation of religious beliefs
5. Subordinate pragmatism leading to practical scepticism
6. No accommodation of plurality

The majority preference appeared to be divided between a rights based evaluation promoting interlegality and necessity for validation of religious beliefs. It is clear that a plurality of opinions relating to dispute resolution exists, and a plurality of approaches to the formal and informal legal institutions

has evolved in line with the transformative processes which are occurring within the Islamic legal tradition in response to modern challenges. British Muslims are continuously negotiating law, culture and religion, and still experience a great deal of uncertainty about obligations as citizens of the state *vis a vis* religious beliefs.

The research findings suggest a new socio-legal identity is being mapped out by British Muslims, informed by their own beliefs about religion, their own experiences in interacting with the state and their self-identification as British Muslims. Islam in the West within Muslim communities does not have the same reservations and inhibitions witnessed in majority Muslim jurisdictions. As a result, this setting may provide the necessary foundations for a new transformation which responds to the particular needs of modern liberal societies.

APPENDIX I

Questionnaire

Thank you for agreeing to complete this questionnaire. This research project is intended to decipher the opinions of British Muslims where Islamic family law is concerned and the modes of dispute resolution that they would use.

All data will be anonymised but please provide the personal details in section 1 for statistical purposes.

Please remember that this is not intended to test your knowledge on the issues, it is intended to gauge the practical application of Islamic law in the lives of British Muslims.

Section 1

1. Gender: Male / Female
2. Age:
3. Occupation:
4. City/Town of Residence:
5. Highest Educational Qualification:
6. Country of Birth:
7. Ethnic Origin:
8. First Language:
9. Muslim by birth or conversion?
10. Description of Religious Practice:

(Practising, understand obligations but not very practising, not practising, Muslim in name alone)

11. Person family situation:
(married with children, married, divorced, single)

12. What role (if any) does Islamic law play in your life as a British citizen? (Please circle)

- 1) None 2) A small role 3) A significant Role
- 4) It governs my life 5) None of the above

Please comment on this:

Section 2

What is your understanding of the following issues from an Islamic law perspective (please provide details of what you know about each):

1. How to conduct a Marriage contract:
2. How to obtain a divorce:
Male:

Female:
3. Who is entitled to inherit under Islamic law when the husband dies (and wife is still alive) and what percentages are allocated:
4. Who is entitled to inherit under Islamic law when the wife dies (and the husband is still alive) and what percentages are allocated:

5. How to enter a commercial contractual agreement relating to money (with regards to witnesses and in what form the contract must take):

Section 3

This section deals with dispute resolution and how you would approach this as a Muslim.

6. How would you approach dispute resolution for the following family law issues (please rate them from 1-5 in the order in which you would approach them. 1 would be your first choice. Place 'x' where you would not consider approaching that medium at all).

		Marriage	Divorce	Inheritance
i	Approach family			
ii	Approach the local imam/ knowledgeable person			
iii	Consult a Shariah council			
iv	Consult the courts/ a lawyer			
v	Other (please give details).....			

7. Have you had any experience of dispute resolution yourself or witnessed it with someone close to you, in the following categories: Marriage, Divorce, and Inheritance?

A] Marriage

Yes/no

If yes, please provide details:

The issue:

The Forum used to resolve the dispute:

Why was this forum used?:

Was the dispute satisfactorily resolved?:

What were the shortcomings of the method used, if any:

B] Divorce

Yes/no

If yes, please provide details about:

The issue:

The Forum used to resolve the dispute:

Why was this forum used?:

Was the dispute satisfactorily resolved?:

What were the shortcomings of the method used, if any:

C] Inheritance

Yes/no

If yes, please provide details about:

The issue:

The Forum used to resolve the dispute:

Why was this forum used?:

Was the dispute satisfactorily resolved?:

What were the shortcomings of the method used, if any:

8. What is your view on the ability of the following bodies to deal with Muslim family law issues (Competent, satisfactory, or incompetent, or leave blank if unsure):

	Marriage	Divorce	Inheritance
The national (British) courts:			
Shariah Councils:			

9. Please provide your opinions on the following issues (mark 'X') :

	YES	NO	DON'T KNOW
Does Islamic law allow you to use the national courts to resolve disputes?			
Does Islamic law require you to use the Shariah Councils to resolve disputes?			
Is there any pressure from the Muslim community to use the Shariah Councils instead of going to the national courts?			
Is the British legal system adequate for Muslims to resolve family law issues?			
Is the British legal system Muslim friendly?			

Thank you for taking the time to complete this questionnaire.

Please return it via email to:

r.c.akhtar@warwick.ac.uk

APPENDIX II

Aims, Objectives and Structure of the European Council of Fatwa and Research from its inaugural meeting, and the list of Members as at March 2011

Aims, Objectives and Structure

European Council for Fatwa and Research

In the Name of Allah, The Most Gracious, The Most Merciful

- **Title, Description and Headquarters**

"The European Council for Fatwa and Research" is an Islamic, specialised and independent entity which comprises of a number of scholars.

Its current headquarters is in the Republic of Ireland.

- **The Inaugural Meeting**

The Inaugural Meeting of the European Council for Fatwa and Research was held in London, UK, on 21-22 Dhul Qi'da 1417AH, 29-30 March 1997. The meeting was attended by more than 15 scholars who responded to the invitation of the Federation of Islamic Organisations in Europe. This meeting saw the endorsement of the Draft Constitution of the ECFR.

- **Objectives**

The Council shall attempt to achieve the following aims and objectives:

1- Achieving proximity and bringing together the scholars who live in Europe, and attempting to unify the jurisprudence views between them in regards with the main Fiqh issues.

2- Issuing collective fatwas which meet the needs of Muslims in Europe, solve their problems and regulate their interaction with the European communities, all within the regulations and objectives of Shari'a.

3- Publishing legal studies and research, which resolve the arising issues in Europe in a manner which realises the objectives of Sharia and the interests of people.

4- Guiding Muslims in Europe generally and those working for Islam particularly, through spreading the proper Islamic concepts and decisive legal fatwas.

- **Means and Methods**

1- Forming specialized committees from among the Council members, which may carry a temporary or permanent mandate, and to which specific tasks which fall within the scope of the Council aims and objectives, will be assigned

- 2- Relying upon the sound and appropriate fiqh resources particularly those which are based upon sound evidence.
- 3- Taking full advantage of the fatwas and research which have been issued from the various fiqh establishments and other scientific and academic bodies.
- 4- Making relentless efforts with the official authorities in European countries to acknowledge and officially recognise the Council, and to refer to the Council in reference to Islamic judgements.
- 5- Holding Shari'a courses which would qualify and rehabilitate scholars and workers for Islamic Da'wa.
- 6- Holding seminars to discuss various fiqh issues.
- 7- Publishing information and periodical and non-periodical fatwas and translating Fatwas, studies and research to the various European languages.
- 8- Publishing a periodical which contains selected Fatwas issued by the Council as well as various papers and issues discussed and debated therein.

- **Source and Conditions of Fatwa**

In issuing a Fatwa, the following shall be observed:

- 1- Sources of Islamic legislation agreed upon by the majority of the Ummah, which are: Quran, Sunna, Consensus (Ijma'a) and Analogy (Qiyas).
- 2- The various other sources of legislation which are not entirely agreed upon such as preference (Istihsan), public interest (Maslaha Mursala), disadvantage prevention (Sad al-Thara'i), relativity (Istishab), tradition or custom (Urf), companions school (Mathab Sahabi), and the legislation of those before us (Shar'u man Qablana), considering the necessary conditions and regulations stated by the people of knowledge, particularly if the interest of the Ummah would be realised by considering these sources.

- **The ECFR bases its methodology upon:**

- 1- The four schools of Fiqh (mathahib) as well as all other schools of the people of Fiqh knowledge are regarded as a resource of immense wealth, from which is chosen whatever is supported by the correct and sound evidence and achieves the best interest.
- 2- In making a Fatwa, the Council shall offer the correct evidence in support and shall refer to the authorised and accredited source along with full awareness of the current situation and provide the option which does not create difficulty or inconvenience.

3- The aims and objectives of Shari'a must be taken into consideration, whilst the outlawed deceptions and crooked solutions which contradict the aims of Shari'a, are to be avoided in all cases.

- **Manner of Issuing a Fatwa**

Fatwas and resolutions are issued in the name of the Council during its Ordinary or Emergency sessions, by virtue of a consensus where possible, or by absolute majority. A member who has objections or reservations to the Fatwa has the right to record his reservation according to what is customary practice in Fiqh councils.

According to the Constitution, the President and members of the Council may not issue fatwas in the name of the Council without its approval. However, each member may issue a fatwa with his personal endorsement without mentioning his status within the Council nor using the official letterhead of the Council.

- **Membership of the Council**

The Constitution decreed that the following conditions must be fulfilled by each member:

- 1- To be of appropriate legal (sharia) qualification at university level, or to have been committed to the meetings and circles of scholars and subsequently licensed by them, and to be of sound Arabic language.
- 2- To be of good conduct and commitment to the regulations and manners of Islamic Sharia.
- 3- To be resident of the European continent.
- 4- To enjoy the knowledge of legal jurisprudence (fiqh) as well as awareness of current environment.
- 5- To be approved by the absolute majority of members.

The Constitution also stated that the members of the Council may select a number of scholars who do not normally reside in Europe but who otherwise fulfill the conditions of membership, to become members of the Council, given that their selection is approved by the absolute majority of members. Such members must not constitute more than 25% of the total members of the Council at any one time.

In selecting members to the Council, the representation of European countries with significant Islamic presence is to be taken into consideration as well as their representation of the various jurisprudence schools (mathahib).

In approving a nomination for new membership, the recommendation of three trusted scholars is to be sought.

- **Periodical Meetings of the Council**

The Constitution states that the Council shall hold an Ordinary session once every year to discuss the studies and research presented in relation to various matters of concern to the Muslim community in Europe. The Council shall also endeavour to answer any questions which have been submitted and require collective deliberations.

The Constitution also gives permission to invite the expert contribution of various specialized individuals, and request their attendance of the sessions in which their field of expertise is discussed, without having the right of voting.

Since it was established and up to the date of publishing this Introduction, the ECFR has convened three sessions:

The First Session, in Sarajevo, Bosnia between 24-26 Rabi'i Al-Thani 1418AH, 28-30 August 1997. This session was hosted by the Honourable Mustafa Ceric, Head of Bosnian Scholars.

The Second Session, in Dublin, Ireland, between 19-21 Jumada Al-Akhira 1419AH, 9-11 October 1998, hosted by Al-Maktoum Charity Organisation in the Islamic Cultural Centre.

The Third Session, in Cologne, Germany between 4-7 Safar 1420AH, 19-22 May 1999, hosted by Milli Gurus.

The Fourth Session, in Dublin, Ireland between 18-22 Rajab 1420 AH, 27-31 October 1999, hosted by Al-Maktoum Charity Organisation in the Islamic Cultural Centre.

The Fifth Session, in Dublin, Ireland between 30 Muharram – 3 Safar 1421AH, 4-7 May, 2000, hosted by Al-Maktoum Charity Organisation in the Islamic Cultural Centre.

The Sixth Session, at the newly approved Council Head Quarters in Dublin, Ireland between 18 Jumada Al-Ula and 3 Jumada Al-Akhir 1421 AH, 18 August and 1 September 2000.

The Seventh Session, at the Council Head Quarters in Dublin, Ireland between 29 Shawwal and 4 Dhul Qi'da 1421AH, 24-28 January 2001.

The Eighth Session, in Valencia, Spain between 26 Rabi' Thani to 1 Jumada Al-Awwal 1422AH, 18-22 July 2001.

The Council, during these sessions, discussed a number of major issues and matters of concern to Muslims in Europe, and also responded to a number of questions which had arrived to the Council.

- **Sub-Committees for Fatwa in France and Britain:**

Due to the lengthy recess of the Council, as well as its heavy workload during sessions, and due to its desire to respond to as many questions submitted as possible, it agreed in its Second Session, to establish 2 sub-committees for Fatwa; one in France and another in the UK. Both Committees have started practicing their respective responsibilities since then. The Council also established a Research and Studies Committee which was assigned the task of publishing the Council periodical and also collects and submits all studies and papers relevant to the issues being deliberated by the Council in order to assist it in reaching the most appropriate resolutions.

Allah alone is the provider of success and support.

The Members of the European Council for Fatwa and Research, March 2011

1. Professor Yusuf Al-Qaradawi, President of ECFR (Egypt, Qatar)
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APPENDIX III

Extract from Abd ar-Rahman Doi's Shariah Law

Abd ar-Rahman Doi⁶⁹² sets out the modes of divorce according to the Four Sunni Schools of Thought as follows:

“It is *talaq* in the following cases according to the Hanafi School:

- a. Pronouncement of divorce by the husband
- b. *Ila* divorce in which the husband swears an oath to abstain from sexual intercourse with his wife, and does not return to her within four months
- c. *Khul* divorce obtained by the wife in consideration of compensation paid to the husband such as the return of part of her dowry
- d. *Li'an*: in which the husband swears four times to have witnessed his wife in an act of adultery and a fifth time that the curse of Allah be upon him if he is lying, and the wife averts capital punishment by swearing four times that his evidence is not true and the fifth time that the wrath of Allah be upon her if he is truthful.
- e. Separation because of sexual defects in the husband such as impotence
- f. Separation due to refusal of Islam by the husband when the wife becomes a Muslim

It is *Faskh* (annulment) in the following cases according to the Hanafi School:

- a. Separation due to apostasy of the spouses
- b. Separation due to spoiling of the marriage
- c. Separation due to inequality of status or lack of compatibility of the husband

It is *talaq* according to the Shafi'i and Hanbali schools if there is:

⁶⁹² A.R. Doi, *Shari'ah. Islamic Law*, (2008) Ta Ha Publishers Ltd, 269-271.

- a. Pronouncement of *talaq* by husband
- b. *Khul*
- c. Declaration of *talaq* by the *Qadi* on the husband's refusal to give a divorce in the case of *ila*

It is *faskh* according to Shafi'i and Hanbali schools if there is:

- a. Separation due to defect in one of the spouses
- b. Separation due to the husband's difficulty in providing maintenance for his wife
- c. Separation due to *Li'an*
- d. Separation due to apostasy of one of the spouses
- e. Separation due to spoiling of the marriage
- f. Separation due to the husband's inequality of status

It is *talaq* according to the Maliki school in the following cases:

- a. Pronouncement of *talaq* by the husband
- b. *Khul*
- c. Separation due to a defect in one of the spouses
- d. Separation due to difficulty of the husband in providing maintenance for his wife
- e. Separation due to harm caused by one of the spouses to the other
- f. Separation due to *ila*
- g. Separation due to incompatibility or inequality of status

It is *faskh* according to the Maliki *fiqh* in the following cases:

- a. Separation due to the process of *Li'an*
- b. Separation due to the spoiling of the marriage
- c. Separation due to the denial of Islam by one of the spouses"

APPENDIX IV

Focus Groups

Some comments from participants

Birmingham

“Shariah Law tends to be practiced by people on a personal level. When it comes to other issues, you have to go to British law and I wonder how that is compatible and how you can flow from one to another.”

“There was a lot of guessing going on [with the questionnaire] as there have been no personal experiences or limited experiences for me, although I have known limited people who have gone through these things.”

“When you ask ‘What do you want from Islamic law?’ – for me, I want it to govern my life but I think there are certain things that we are guilty of. For example, if you left it to British law, and either spouse dies, the way that inheritance would work wouldn’t necessarily be the Islamic way and I think we are guilty of not pondering over what we would do about ensuring our wills reflect the Islamic law position.”

“Sometimes, people seek Islamic law as a means of getting what they want in certain situations. So they use it that way when they know they can gain something from it. So they know, for example, that they have some rights which the spouse won’t give them. I don’t know how consistent Shariah law is in the UK – as you have so many different Shariah Councils. So it can become more about picking and choosing.”

Leicester

“A lot of women do not feel that there is a way out for them [as Muslim women where divorce is concerned] – for an Islamic divorce other than the Shariah Councils. But more women now opt for the British legal system to get a divorce.”

“My understanding is that you would need to go to a Shariah Council if you are a woman and you want a divorce or get someone ‘higher up’ to intervene who has some understanding of Islamic law.”

“Those people who follow the opinion [that Shariah Councils are valid] – need to be able to obtain an opinion from the Shariah Councils to give themselves peace of mind. So [Shariah Councils] still have a role to play.”

“There is a lot of misunderstanding about Islamic law and Shariah law in the UK. There is a block which needs to be overcome.”

“[Muslims would want to go to Shariah Councils] to get advice from them if they do not know what their options are Islamically. You cannot get that kind of advice from the British legal system. If you are a practising Muslim, then you need that port of call.”

“Other religious groups have specific ways of dealing with issues like marriage, and the Shariah Councils are no different.”

“The Shariah Councils do not replace the British legal system. They play a periphery role.”

“Multiculturalism is being adopted in all spheres of British life – except within the legal system. There should be some leeway where there are certain proportions of certain communities represented [in the legal system], so that differences can be taken into account [in passing judgement].”

“I was born and brought up in this country and expect it to cater for my needs.”

“We are born and brought up here, so we have duties towards the state, but we also have rights.”

London

“The questionnaire asks about areas I should have thought about, but I haven’t, such as inheritance. The issues have never been relevant for me.”

“When they do become an issue, I will find out about them. It is similar to, for example, buying a house – I don’t need to know about that so I haven’t done any research on it. However, when I need to find out, I would research on the process.”

“For the protection of women, the nikkah contract should be taken into account by the state.”

“I don’t think there would be an option for courts to implement Shariah law as a whole – they may implement certain parts of it. For example, with regards to marriage and divorce. I don’t think anything further is likely in this day and age.”

“The nikkah contract should be recognised, but practically, it can’t be recognised as it comes as part of a wider whole. So if the courts recognised it as a valid marriage contract, they would have to accept the Islamic divorce process too.”

“If you are going to be a second or a third wife, then you would know the situation you are getting yourself into. You should then make another contract [to protect yourself] and you would be foolish not to do that.”

“I know two people in a Shariah Council and I don’t agree with either of their ways of thinking, so I would rather go to a local imam whose opinion I do accept.”

“You can use Islamic law and British law side by side. For example, with getting married, you can use both.”

Glasgow

“The questionnaire brought up issues which are unexplored and I have never thought about.”

“From experience of friends who have gone through it, I know that it is very difficult to use Shariah Councils, especially for women.”

“Our generation are taught to be more sensitive of these issues and respect the women’s point of view more. Men are more tolerant here towards women and they will give them a sense of respect, whereas men from the older generation still have the mentality that they are superior.”

“As a woman, I think British law gives you more rights and that’s probably because of my lack of understanding of the reasons why Islamic law rules are a certain way.”

“No country can accommodate judging every person by their own religion so there would need to be the basics which are the same. I think we are here by choice and if there are other countries around the world which implement Islamic law, you have a choice to go and live there.”

“If the Jewish people managed to get some parts of their laws recognised in Britain, we should be able to and so should other religious groups.”

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