12

British Muslim Communities, Islamic Divorce and English Family Law

SAMIA BANO

I. Introduction

At present, there are no data on marriage breakdown and divorce in England and Wales according to the parties' ethnic and religious background. There is, however, a wide body of sociological and anthropological literature detailing a rise in marital breakdown and divorce within British Muslim communities and the complex factors behind this, including the increasing economic independence of Muslim women and the use of religion as a source of female empowerment and control. Similarly, there is an established body of scholarship examining the relationship between law and cultural and religious diversity, and the experience of marriage and divorce within British Muslim communities. This scholarship, encompassing empirical research, covers a wide range of issues, including: the nature of transnational marriage; arranged marriage practices and strategies to combat the practice of forced marriage;[1] the formation in England and Wales of religious marriages that are not recognised by English marriage law; the recognition or not of divorces obtained in other jurisdictions; and the increasing emphasis on private ordering of the consequences of divorce and its impacts on religious communities. At the heart of this body of scholarship lie the important questions of identity, multiculturalism, law and rights.

This chapter draws upon some of this literature to trace and analyse divorce practices within British Muslim communities over the past 50 years. It begins by providing brief introductions to the issue of religious diversity and its accommodation (or not) by secular law, and to the sources of Sharia law, and then considers the practice of Muslim family law in Britain, around both the formation of marriage and divorce as forms of social and legal lived realities. Sharia Councils have a significant role in relation to divorce, and so these are also examined.

[1] Agarwal and Kapil (2014); Ahmed (2006); Anitha and Gill (2009).

It is necessary to consider marriage formation as well as divorce, as many Muslim couples do not create their religiously-recognised marriage in a way that will be recognised at all by English law. For these couples, Sharia law is the only pertinent marriage and divorce law, and so they reject civil law and procedure altogether, marrying and divorcing according to their faith via community mosques and Sharia Councils. Meanwhile, observant couples who did contract a marriage recognised by English law and so who do fall within the jurisdiction of the matrimonial court, may nevertheless still need or wish to engage with Sharia law to ensure that their legal status (under English law) and their status under religious law are congruent.

II. Religious Diversity and the Law

In 1986, Sebastian Poulter wrote:

> Should the ethnic minorities who have come to live here conform to English ways or should they be free to continue and practise their own customs in this country? More specifically, should English law adapt its principles and rules to accommodate foreign customs or should new arrivals bear the burden of any adjustments?[2]

Similarly, in his early work, Werner Menski detailed the ways in which Muslim communities were forging new ways of incorporating and developing Sharia and Western legal norms to describe what he termed (in Urdu) '*Angrezi Sharia*' ('English Sharia').[3] Menski, in particular, brought attention to the 'lived reality' that Muslim religious communities were creating new forms of 'personal law systems' based upon diverse religious and cultural traditions, while being clear that 'Western state law … obstructs and restricts the scope for Muslim law in a new diaspora to become part of the recognised official law.'[4] For Poulter, the marginalisation of 'ethnic minority customs' meant the law neither understood nor was able effectively to regulate practices that might be unfair and unjust, breaching principles of equality and respect. This early work raised important and fundamental questions for scholars, and continues to lay the template for much current academic research and policy work.

Debates across Britain and wider Europe have also examined policies of multiculturalism and the extent to which minority religious practices are tolerated and/or endorsed by national domestic courts. Further afield, debates in Canada, the United States and Australia highlight issues of conflict, equity and discrimination. Muslim women remain at the centre of these debates, while feminists from across the political spectrum seek to defend or resist calls for greater accommodation of

[2] Poulter (1986) iv.
[3] Menski (1993) 28.
[4] Pearl and Menski (1998) 50.

religious norms, values and practices in Western democratic societies. This has led to debates crossing political spectrums over the extent to which state law should recognise alternative systems of family law dispute resolution. As Marie Ashe and Anissa Helie explain:

> Civil governmental recognitions of jurisdiction in specifically-religious courts may be the most extraordinary of the accommodations currently being provided to religious organisations. The toleration of judicial autonomy in such bodies in itself manifests a striking sharing of sovereignty. And the ceding to religious bodies of a central feature of governmental sovereignty – the judicial power – becomes particularly problematic when that power is utilized in order to enforce religious law that conflicts with fundamental principles of the civil law.[5]

Examination of the British Muslim identity reveals important insights into the ways in which community formation, legal regulation and the rights of minority religious communities have taken shape over the past five decades. There has been significant debate about religious and cultural difference, and about whether minority groups should be afforded a different family law regime from regular English law to take into account specific cultural and religious norms.[6] This underpins debates on the role of religion in society, the limits of secularism and the extent to which the state should intervene in the private space of family life and personal relations to protect minorities within the groups against potential injustice, unfairness and abuse.

This chapter specifically addresses the validity of religious marriages and the use of Islamic divorce laws and process. But there are other examples in the marriage arena. In her early work, Jessica Jacobson[7] detailed the ways in which South Asian Pakistani communities in the 1980s and 1990s began rejecting culturalised forms of Pakistani identity in favour of a religious faith-based Islamic identity. Similarly, Robina Mohammad's research has traced the ways in which young Pakistani Muslim women enter into transnational marriages as ways to challenge patrilineal norms of marriage conventions in order to reflect 'new repertoires for remaking the self and women's assertion of modern, cosmopolitan, Muslim identities'.[8] Religious identity therefore provides an important context in which to understand the relationship between law, culture and identity. As Andrea Büchler explains, 'Religion is indeed experiencing some of a renaissance in the discourse of cultural diversity and is becoming an ever-important form of self-identification.'[9]

Research has also detailed the ways in which family expectations may influence marriage and divorce patterns within South Asian communities. For example, Katherine Charsley[10] has demonstrated how young British Pakistanis

[5] Ashe and Helie (2014) 142.
[6] Ahmed (2013).
[7] Jacobson (1998).
[8] Mohammad (2015) 599.
[9] Büchler (2011) 25.
[10] Charsley (2013).

take ownership of their marriages (as arranged and transnational kin marriages) while challenging parental assumptions and doing things in a different way. More importantly, Islam – not mere cultural expectations – provides the context within which young people are able to make choices that enable them to challenge parental power and control. In 2007, Pnina Werbner explained that 'being observant Muslims empowers these young men and women with the right to choose their own marriage partners, even against the will of their parents'. Their religiosity offers licence to 'accuse their parents of being ignorant, locked into false or mistaken parochial "customs" and "traditions" of the old country'.[11]

Collectively, this body of work not only raises important questions on the role of religion and faith in the lives of Muslims and British Muslim communities, but has also raised critical questions over the extent to which cultural diversity and religious practices should be recognised in English law.

III. Sources of Islamic Family Law

The term 'Sharia' in classical Muslim law refers to 'definition of practice'. In day-to-day usage it refers to the body of rules and principles that make up Islamic religious law. Wheeler observes that Sharia' determines how certain aspects of everyday life are to be practised according to the model provided by the canon', which includes both civil and criminal codes.[12] Its application is wider, however, than the word 'law' implies, as these precepts do not distinguish between public and private activities. Rather, Sharia covers a broad range of actions and obligations for Muslims. Washing, cleaning, eating, marriage, divorce, bank loans, business transactions and property purchases are all examples of areas of day-to-day life on which Sharia provides guidance.

Sharia has its roots in two key religious scriptures: the *Qur'an* and the *Sunna*. The *Qur'an* contains the religious scriptures of Islam, while the *Sunna* contains the actions and words of the prophet Mohammed.[13] Where issues or disagreements cannot be settled through religious texts, jurists look toward the *Ijma*, the body of principles arrived at through the consensus of Islamic scholars. Where neither the *Qur'an* nor *Sunna* provides the necessary authority, a jurist may apply *qiyas*: reasoning through analogy to provide the applicable Islamic principle to decide the issue at law.[14]

No single document or source gives a definitive list of every Sharia precept. Even to describe Sharia as a singular framework can be misleading, since there is no atypical model of Sharia in the Muslim world today, and therefore no one

[11] Werbner (2007) 134.
[12] Wheeler (1996) 34.
[13] Nasir (1990) 2–3.
[14] Hallaq (1999).

comprehensive Islamic legal system. Instead there is variation according to Islamic school of thought, ethnic background, local customs, cultural practices and local traditions. Notably, Sharia law is subject to interpretation by different religious scholars and communities, broadly divided into Sunni and Shia schools of thought.[15] As such, there is no cohesive body of Sharia, but differing strands based upon the *Qu'ran* and *Hadith* literature. However, common themes nevertheless emerge, and Islamic scholars aim to establish a cohesive body of Islamic jurisprudence, *Fiqh al-Aqalliyyat* (or, more simply, the *fiqh*).[16] Overall, Sharia is therefore perhaps best characterised as an evolving legal philosophy (jurisprudence).

Since the *Qur'an* is concerned predominantly with religious precepts, there are relatively few identifiably legal injunctions, covering perhaps only 3 per cent of the total text. However, as Badr notes, most of those legal provisions deal with family law and inheritance, and so we now turn to marriage and divorce.[17]

IV. Muslim Marriage Practice in Britain Meets English Law

As Vora points out, 'Islam prohibits adultery and restricts sexual relationships to within the framework of marriage. In order for a British Muslim couple to live together, they must marry in a form that is accepted by their community'.[18] His research emphasises the importance British Muslim communities place on the institution of marriage, and how this may shape their experience of using English family law. It is important, therefore, to examine how minority ethnic groups practise marriage and divorce, how different forms of marriage practices may be accepted or recognised in English law today and the kind of change that is taking place around marriage practices within South Asian Muslim families.

Under Sharia law, the Muslim marriage itself is simply a civil contract between an adult woman and an adult man who have the legal capacity to enter into such an agreement. In Arabic, a Muslim marriage is described as a *nikah* (meaning 'to tie a knot'). The marriage contract is not sacrosanct and is revocable. The requisites of a valid *nikah* contract include 'legal capacity' (individual to be of sound mind and to have reached puberty), consent, acceptance and the dower or *mahr*. The *mahr* is a key component of the Muslim marriage contract: for the contract to be valid, the groom must provide a sum of money that the parties have agreed, known as the *mahr*. This belongs to the wife. In her work, Ali notes that the significance

[15] The Sunni schools of Islam include: *Hanafi*, *Hanbali*, *Shafii* and *Maliki*. The dominant Shia school is *Twelvers* (sometimes also called *Jafari*, which excludes the *Ismaili* and *Zaydi* sects).
[16] Ali (2010) 28.
[17] Badr (1978) 188.
[18] Vora (2020) 53.

of the *nikah* to the institution of the 'Muslim family' cannot be underestimated, explaining:

> [T]he central idea in Muslim family law is the institution of nikah or marriage. Almost every legal concept revolves around the central focal point of the status of the marriage. It is through marriage that the paternity of children is established, and relationship and affinity are traced.[19]

Debates on Muslim divorce are closely connected to the initial validity of Muslim religious marriages. Marriage law today in England and Wales is regulated by the Marriage Act 1949, the Matrimonial Causes Act 1973 and the Marriage (Prohibited Degrees of Relationship) Act 1986, which determine who can marry, where they can marry and at what time. It is possible for a religious marriage ceremony conducted in England and Wales to create a marriage recognised in English law, but only if the normal civil preliminaries have been completed (ie appropriate notice given to the local registrar) and the marriage has been solemnised in an appropriately registered building in the presence of an authorised person. But, as the Law Commission has identified, very few mosques have been registered for this purpose.[20]

How the status of a religious marriage ceremony is to be assessed was clarified in *Attorney-General v Akhter and Khan*.[21] The couple in this case had entered a religious marriage. None of the formal requirements just outlined had been complied with, no attempt at all having been made to marry in a way that could be recognised by the Marriage Act 1949.[22] Indeed, it had been expected that the religious marriage would be followed by a civil ceremony (which the wife understood was essential to ensure a marriage recognised in English law). But despite the wife's repeated requests of the husband to arrange for this second, legal marriage ceremony, no such wedding occurred. Upon the breakdown of the relationship, the husband claimed the religious marriage had no legal effect, and so argued that he had no financial obligations to the wife of the sort that would follow divorce or nullity proceedings. At first instance, the High Court[23] applied a novel human rights approach based on Article 8 of the European Convention on Human Rights and the right to respect for family life (and the best interests of the child) to determine marital status, and recognised the marriage as a void marriage, thus giving rise to financial remedies. But this was overruled by the Court of Appeal in favour of a more orthodox reading of the law. The religious-only marriage was classified as a non-qualifying ceremony, leaving the wife (mother of four children) with no

[19] Ali (2010) 157.
[20] Law Commission (2015), (2020).
[21] *Attorney-General v Akhter and Khan* [2020] EWCA Civ 122.
[22] A wilful and knowing disregard of formal requirements will render a marriage void, but only where the parties were purporting to marry in accordance with the Marriage Act 1949, which was not the case here or in other 'non-qualifying ceremony' cases.
[23] *Akhter v Khan* [2018] EWFC 54.

financial remedies for her benefit in English law at the end of her 18-year religious marriage.

Data on the number of 'religious-only' or 'unregistered' Muslim marriages within British Muslim communities remain limited, but what data we have provide some important insights. In her small-scale study of unregistered Muslim marriages, Akhtar[24] found participants reluctant to contribute to the study, as 'enquiring about one's decision not to register a marriage appeared to infringe on the couple's privacy and those who were within higher ranking professions in particular were unwilling to engage'.[25] A principal reason given for not registering marriages related to time constraints and the 'busy lives of Muslims' to arrange a second (civil) ceremony alongside often lavish religious celebrations, rather than a strategy to circumvent formal civil marriage in order to enter into polygamous marriage relationships. Some couples reported perceiving no need to engage with the civil law; and some younger respondents deliberately avoided marrying in a way recognised by English law, in order that they could conduct their relationships in a way of which their parents would approve without taking on the legal status of spouse.[26]

Akhtar's study also found that the practice of having religious-only marriages could not be linked to the perceived rise in polygamy.[27] However, this can be contrasted with another short study recorded in a report produced by Habiba Jaan for 'Aurat: Supporting Women', a charity that supports female victims of honour and cultural-based abuse, based in Birmingham, UK.[28] The report focused on the predicament of Muslim women who found themselves in unregistered marriages and who lived in polygamous households with little state and/or community support. Of central concern was that many Muslim women were simply unsure of their rights in law when entering into a religious-only marriage. Of the sample of 50 women in unregistered Muslim marriages, two-thirds identified themselves as being 'married' but had received no financial support from their husbands. Husbands often took second wives and abandoned the first wife if she disagreed with what he understood as his marital choice.[29]

Whether or not polygamous in nature, religious-only marriages of this sort, not recognised at all by English law, leave the women in them (in particular) in a vulnerable situation in the event of relationship breakdown, with no access to the usual matrimonial financial remedies. So their only source of protection may lie in religious divorce and associated remedies, discussed in Section V. But before moving on to that issue, it is important to appreciate that the difficulties presented for Muslim women in this arena – the obstacles Muslim women may experience

[24] Akhtar (2015).
[25] ibid 175.
[26] Akhtar (2020).
[27] ibid 76.
[28] Jaan (2014).
[29] Akhtar (2020) 83.

in order to register their marriages – provide a key rationale for reform of English law's very complex marriage laws.[30] To this end, the Law Commission for England and Wales is currently reviewing the law of weddings, with a view to recommending reforms, and published its Consultation Paper in 2020, following an earlier scoping review in 2015.[31] The project considers whether the current law provides a fair and coherent legal framework for enabling people to marry, and identifies areas of the law that might benefit from reform. The problems raised by these religious-only marriages receive extensive attention in the Law Commission's work, and the proposals currently under consideration would go a long way towards avoiding the difficulties currently experienced, making it far more likely that religious ceremonies could create at least a void marriage.[32] If Muslims are more able to determine how and when they marry within a framework that meets the requirements of both English law and religious obligations, then the objectives of both state law and religious identity can potentially be met.

V. Muslim Divorce in Britain, and the Role of Sharia Councils

In her study, Kaveri Qureshi[33] details rich ethnographic research identifying an increase in marital breakdown in British Muslim communities. She finds that while the experience of divorce for Muslim women mirrors marital breakdown across all British communities, the experience of Muslim women living close to wider families can influence their decision making in divorce. Two key issues can be identified for Muslim women in Britain regarding the ending of their marriages: first, the extent to which Muslims are divorcing outside the civil law system and whether this creates a conflict-of-law scenario with English law; second, the problem of 'limping divorces', whereby a civil divorce has been obtained by the woman but her husband is refusing to grant her a Muslim divorce.[34]

A. Types of Muslim Divorce

There are several types of Muslim divorce and a diversity of approaches to these among the different schools of Islamic thought.

Muslim men have the right to terminate their marriage unilaterally. Such a divorce is known as *talaq*. Other forms of Muslim divorce include *tafwid*, *khula*,

[30] Parveen (2020) 85.
[31] Law Commission (2015), (2020).
[32] ibid.
[33] Qureshi (2016).
[34] Pearl and Menski (1998).

mubarah and *faskh*. Divorce may also be granted, in a sense, by mutual consent where parties have simply included a term in their nikah (marriage contract) that permits the wife to divorce if she wishes, the husband thereby effectively delegating the decision to divorce to the wife: this is known as *talaq at-tafwid*. The *khula* divorce can be instigated by a wife with her husband's agreement, on the condition that she forgoes her right to the *mahr* (excluding instances of neglect and abuse). *Faskh* permits the marriage to be ended if the wife can prove her husband has acted unreasonably. However, in order for the wife to access these other types of divorce where the husband refuses to pronounce a *talaq*, she must contact a Sharia Council, and so has to invoke the authority of religious scholars who will determine the kind of divorce to be issued.

B. Sharia Councils: An Introduction

The role and use of Sharia Councils are clearly important for a significant number of Muslim women seeking a Muslim divorce. Sharia Councils operate as unofficial legal bodies specialising in Muslim family law and providing advice and assistance to Muslim communities on these matters. They have developed their services to cater to the local and specific needs of British Muslim communities whilst fitting in with the wider framework of dispute resolution in Islam. They have three key functions: issuing Muslim divorce certificates; reconciling and mediating between parties; and producing expert opinions on matters of Muslim family law and custom to the Muslim community, solicitors and the courts.

Sharia Councils in Britain are not unified beneath any one overarching governance structure, and do not all adopt a single school of thought; instead, they are a collection of various different bodies representing the different schools of thought in Islam. They generally form part of a wider range of community services, rather than being distinct and separate bodies, and are often linked to a mosque, either occupying a room there or being based in a local community centre with weekly drop-in sessions for clients and panel meetings (see Section V.D) taking place on average once a month. While the nature and scope of Sharia Council activity in England and Wales remain relatively undocumented, it is likely that a fairly small number of key Councils operate in England: one report[35] in 2012 identified just 30 working on issues of Muslim family law and issuing Muslim divorce certificates.

Sharia Councils can be traced to a diverse set of social, political and religious developments in civil society as part of a Muslim identity. Yilmaz[36] identifies four key conditions that have led to the emergence of Sharia Councils in Britain. First, according to Muslim tradition, family issues are purposively left to 'extra judicial' regulation, and this continues within Muslim diasporic communities today, who

[35] For the Ministry of Justice, Bano (2012b).
[36] Yilmaz (2002) 349.

choose to resolve disputes in the private sphere. Second, Muslims do not recognise the authority and legitimacy of Western secular law as being on a par with Muslim law. Third, familial notions of honour and shame prevent family disputes from being discussed in the 'public sphere', which gives religious laws greater legitimacy within religious communities. And finally, the failure of the state to recognise plural legal orders has led to the development of 'alternative' dispute resolution processes in the private sphere. In his study, Warraich regards all of South Asian Muslim family laws, localised cultural practices in British Muslim communities and the inflexibility of English family law as contributory factors in the emergence of Sharia Councils. He argues that such bodies 'have appropriated for themselves the role and position of parallel quasi-judicial institutions', and attributes this to 'the lack of space in the English system for appropriate solutions to dilemmas facing people', leading to 'this confusing situation'.[37]

C. The Role of the Sharia Council in Relation to Divorce

There is very little variation between Councils in the procedure adopted in divorce cases, which can broadly be described as follows:

- Applicant makes contact with the Sharia Council to obtain a Muslim divorce certificate.
- A meeting takes place between the applicant and the religious scholar.
- The applicant is asked to fill in an application form citing the grounds for divorce and pays an administrative fee.
- A divorce notice is sent to the husband asking for his version of events.
- If there is no response from the husband, a further notice is sent out.
- Once contact has been made with all parties, a meeting is arranged to consider reconciliation.
- If contact is not made with the husband and his family then the religious scholar continues with the process to issue the divorce certificate.
- If reconciliation fails then a process of mediation begins, with a view to trying get the husband's consent to divorce.
- The religious scholar considers what type of divorce certificate can be issued.
- Once all meetings are completed and evidence has been collected, a copy of the file is passed to all members of the Council panel.
- A date is set for a meeting of the panel to discuss all cases, where all panel members make a collective decision as to whether a divorce certificate can be issued.
- If so, a divorce certificate is sent to the applicant *or* she is asked to collect it.

[37] Warraich (2001) 11.

The type of Muslim divorce granted to women by the Sharia Council raises important practical issues for those women. For example, if a *khul* is granted, the female applicant must give up her right to dower or *mahr* in return for a divorce, and this seems unfair given that this is the result of the husband's refusing to pronounce the unilateral *talaq*. As Menski explains, '[u]sually the wife will offer to pay a certain sum, normally the amount of the dower either given to her or promised to her, in return for the agreement of the husband to release her from the marriage tie'.[38] Again, this is a complex area and one that ensures some confusion as to the precise amount of dower the husband should receive for the *khul*.[39]

Sharia Councils also deal with how the wife can retrieve her *mahr* after her husband has willingly divorced her. Nasir points out that, in theory, Muslim women entitled to the *mahr* have an exclusive right to it under the terms of the marriage contract, though in practice this may vary 'according to the circumstances. She may be entitled to the whole dower, half of it or may have no dower at all.'[40] Furthermore, Afshar points out that 'What women are entitled to and what they get are very different. Married women are not expected to assert their proprietorial rights. They are not to bring conflict, but peace.'[41] Therefore in Muslim divorce we are dealing with a complex formulation, whereby 'legal discourse' in matters of religious marriage and divorce are reconfigured in the private sphere and privatised dispute resolution mechanisms such as Sharia Councils.

D. The Experience of British Muslim Women before Sharia Councils

So what are the experiences of Muslim women using religious mechanisms of dispute resolution in matters of divorce? Do religious tribunals promote patriarchy and gender inequality? Several significant pieces of research provide important insights into how Sharia Councils in Britain operate as alternative dispute resolution mechanisms, detailing the lived experience of British Muslim women and their use of Sharia Councils.

Gohir and Akhtar-Sheikh analyse several case files from their work with the national Muslim women's organisation, Muslim Women's Network (MWUK), and illustrate the problems Muslim women experience in their use of Sharia Councils. They found that, upon the breakdown of marriage, Muslim women seek to resolve disputes outside English courts, as Islam directs Muslims to seek conciliatory redress in the form of mediation and arbitration. This gives considerable power and influence to Sharia Councils. And of course, women who have a religious-only

[38] Pearl and Menski (1998) 284.
[39] Carroll (1997).
[40] Nasir (1990) 103.
[41] Afshar (1994) 29.

marriage are necessarily propelled towards Sharia Councils in order to obtain a Muslim divorce. The Councils' focus on reconciliation and mediation within these bodies remains a significant concern:

> [T]here is no evidence to suggest that Sharia Council members, mediators and case-workers have had any adequate training in mediation, arbitration, or even general counselling. They therefore have neither the skills nor the knowledge to deal with family and divorce matters, whether from an Islamic or UK perspective. It is also of concern the panelists can interchangeably act as mediators with no separation of role or procedure. The lack of training, lack of transparency, and lack of accountability and discriminatory processes make it essential that the issues surrounding certain Sharia Councils be addressed as soon as possible.[42]

Case-file analysis and interviews with women users of Sharia Councils also revealed several complaints by Muslim women of not being listened to, their grievances not being taken seriously or given due consideration, and being questioned by panel members in accusatory tones and made to feel guilty for pursuing a divorce. By contrast, the women felt that their husbands were given a disproportionate level of attention in the divorce process.

The ambivalent relationship between some Muslim women and Sharia Councils has also been documented in my research.[43] While on the one hand Muslim women identify as Muslims and therefore recognise the importance of Sharia Councils in helping them to obtain a Muslim divorce, they can also be critical of these bodies as mediation forums and critical of the attempts by the scholars to reconcile them with their husbands. The most obvious questions concern the autonomy and independence of the women during this process of dispute resolution, and their experience of mediation and reconciliation. Although not all women are marginalised and denied equal bargaining power during official mediation processes, there is evidence to suggest that there is deep anxiety amongst many women at the prospect of initiating both official and unofficial mediation in order to obtain a Muslim divorce, and this anxiety persists throughout the process.[44]

Parveen analysed 100 closed files in one Sharia Council based in Birmingham, UK, related to cases where wives had sought a religious divorce.[45] She found that no women were employed in the Council in any capacity, and that this made it an intimidating environment for the women users. Indeed, probably the most common criticism of Sharia Councils is that they refuse to allow Muslim women to act as religious scholars on a par with male scholars when issuing Muslim divorce certificates. For example, it is widely assumed within the Councils that Muslim women are simply forbidden under Islamic law and jurisprudence to act as religious scholars in family law matters, and this norm is rarely challenged.[46]

[42] Gohir and Akhtar-Sheikh (2017) 177.
[43] Bano (2012a), (2018).
[44] Bottomley and Conaghan (1993).
[45] Parveen (2017).
[46] Bano (2012a).

Parveen also found that the Sharia Council process and meetings can be confusing for Muslim women, explaining:

> [T]he objectives of the meetings were never entirely clear, and I share this view. The parties did not seem to be aware at the beginning of the meeting what its purpose was, nor were they sure at the end what was likely to happen next. Some of the women said they had expected a final decision at the end of the meeting and had not been aware that there was a process and the matter would need to go to a board.[47]

Despite this, Parveen concludes that Sharia Councils offer an important service to Muslim women, providing them with the essential service of issuing religious divorce certificates 'while remaining faithful to normative Islam'. Therefore, she argues, the state should neither ban nor ignore Sharia Councils but instead provide them with support and assistance.[48] Research also demonstrates that Sharia Council verdicts serve primarily to uphold the 'moral authority' of the Muslim community, and there are no mechanisms of enforcement, relying instead on the goodwill of the parties concerned.[49]

The debate on Muslim family law and 'alternative dispute resolution' has not yet developed satisfactory explanations of gender relations and power, nor the fact that the reality of women's connections to these bodies may be very complex, contested and subject to the contingent local variations of the Councils. While mediation has for many years now has a central place in the family justice system in England and Wales, and reconciliation practices emerging within all communities have been explored, there is very little analysis of the growth of religious bodies operating in privatised spaces and developing such services in Britain.

Douglas et al conducted research with three religious tribunals operating within Jewish, Christian and Muslim communities,[50] and found little if any formal conflict between these bodies and state law as the bodies deliberately and carefully sought to avoid any potential conflicts with law. However, the exercise of different forms of power and power relations within these frameworks of unofficial dispute resolution may affect the decision-making abilities of some female users. Clearly in this situation, the unofficial mediator is in an all-too-powerful position, potentially able to encourage or coerce the applicant into reconciling, making the potential consequences for women particularly disastrous. This argument is powerful, particularly if there is no screening process at these bodies to determine which cases are suitable for mediation and which are not.

[47] Parveen (2020) 154.
[48] ibid 162.
[49] Bano (2012a).
[50] Douglas et al (2011), examining the Birmingham Sharia Council, the London Beth Din of the United Synagogue, and the National Tribunal for Wales of the Roman Catholic Church.

In his research, Uddin makes an important finding relating to the continued use of Sharia Councils by Muslim women who had in fact registered their marriages according to civil law but still continued to pursue a religious divorce. He explains:

> [R]eligious divorce was important to them as it severed the religiously recognised marital relationship and contact with the husband and his family, removed any doubts as to whether the women were still married, and allowed women the freedom to move on, and remarry if they wished.[51]

He concludes, therefore, that while the Councils are imperfect in their current form, they currently fill a void in civil law provision by settling religious divorce, and this must therefore be supported by the state.

E. The 'Limping Marriage' Problem

The discussion so far has focused on the situation where the marriage is not recognised by English law. However, Sharia Councils may also have a role to play where the marriage *is* legally recognised, given the importance of obtaining a religious as well as a civil divorce. As Yilmaz explains:

> If the woman is not religiously divorced from her husband, it does not matter that she is divorced under the civil law, in the eyes of the community her remarriage will be regarded as adulterous and any possible offspring will be illegitimate since it is not allowed under the religious law. So, in reality, until the religious divorce is obtained, the civil divorce remains ineffective because one party is unable to remarry.[52]

Section 10A of the Divorce (Religious Marriages) Act 2002 enables a spouse concerned to ensure that a religious – as well as legal – divorce is obtained to apply to court for an order that will prevent a decree of divorce being made absolute unless and until both parties declare that they have taken the steps required to ensure the dissolution of the underlying religious marriage.[53] Specific religions need to be prescribed by secondary legislation for this provision to be available, and thus far only the Jewish faith has been covered.[54] But there is no reason why the Muslim faith could not also be included, in which case, as Gohir and Akhtar-Sheikh point out, 'where the couple have entered into a both civil and Islamic marriage, the courts can ensure that the husband grants the Islamic divorce by withholding the decree absolute'.[55] As in the Jewish context, an inherent limitation of this 'remedy' is that its efficacy depends on the husband's desire to secure a divorce recognised by English law – if he is not concerned about that, denial of that

[51] Uddin (2020) 121.
[52] Yilmaz (2001) 355.
[53] Matrimonial Causes Act 1973, s 10A.
[54] See Edge (2013).
[55] Gohir and Akhtar-Sheikh (2017) 179.

decree will not induce him to move in relation to the religious divorce. However, since Sharia law (unlike Jewish law) does – in theory – provide a route for wives to obtain a divorce without the husband's consent, albeit via the Sharia Council, the problem is arguably less acute in the Muslim context.

F. The Muslim Arbitration Tribunal

Another example of Muslim family law practice that aims to settle disputes in accordance with religious Sharia law is the Muslim Arbitration Tribunal (MAT), set up in June 2007. The authority of this tribunal derives from the Arbitration Act 1996, which permits civil matters to be resolved in accordance with Muslim law and within the ambit of state law. For many, this process of resolving disputes may provide the ideal forum, not only because it brings the usually claimed advantages of arbitration – granting parties some autonomy in the decision-making process, its informal setting, lower costs, flexibility and time efficiency compared to litigation through the courts – but more particularly, in this context, because it allows the arbitrating parties to resolve disputes according to English law while fulfilling any obligations under Islamic law.

Al-Astewani (2020) argues that the MAT represents a successful model of family arbitration in disputes involving religious marriages for three primary reasons. First, the Tribunal panel has access to a number of experts both in Islamic law and English law, which provides a body of expertise and an in-depth understanding of complex legal matters. Second, the Tribunal is run and managed by British Muslims, ensuring a cultural as well as religious understanding of the issues raised. And, finally, women are fully involved in the functioning and work of the Tribunal, ensuring no gender bias and an environment more suited to the needs of Muslim women.[56]

Consent to arbitration and the enforcement of any agreements reached can only take place under the principles of English law.[57] In a case in which the High Court approved a consent order that had been arbitrated and facilitated by a Beth Din under rabbinical law in New York,[58] Baker J reiterated in his judgment that resort to arbitration of any sort, religious or otherwise, could not oust the jurisdiction of English family court and family law, and the draft consent order was approved, pursuant to English law, as being in the best interests of the child. Bowen argues that this case signals 'a partial opening of courts toward private arbitration of divorce, and even to arbitration considered by religious bodies, but with the proviso that the court has the last word, and that principles of equity and the child's welfare prevail'.[59]

[56] Al-Astewani (2020) 140.
[57] Blackett (2009) 13.
[58] *AI v MT (Alternative Dispute Resolution)* [2013] EWHC 100 (Fam). See also Blackett (2009) 13.
[59] Bowen (2016) 178.

However, despite this, the establishment of the MAT has also been controversial for a number of reasons, and there remain real concerns over whether it restricts women's equality in family law matters. It has been claimed that such tribunals have allowed Sharia law in through the back door, directly challenging the superiority of the English legal system and undermining the principles upon which English family law is based. Patel argues that

> [t]he prime concern of the MAT is to achieve reconciliation between women seeking a divorce and their husbands even where there is evidence of abuse and violence. Indeed, reconciliation is viewed as a moral duty (to preserve the sanctity of religious values) and as a religious obligation (many claim that a divorce cannot be pronounced without reconciliation). But evidence shows that the MAT's approach to family matters flies in the face of established good practice and leads to profoundly unequal outcomes and violations of rights in which the state by its acquiescence is implicated.[60]

Since 2011, Baroness Cox has been promoting a Private Member's Bill, the Arbitration and Mediation Services (Equality) Bill. The Bill last received a Second Reading in January 2017, but, whilst it generated considerable media attention, it has made no further progress. It aims to clarify the limits of arbitration, seeking to make amendments to the Arbitration Act in order to ensure its compliance with the Equality Act 2010 and to outlaw discrimination on the grounds of sex. This Bill was widely believed to target Muslim communities and to attempt to limit the powers of organisations such as MAT and Sharia Councils. But for many scholars it also raised the question how far state law should intervene in religious Councils and tribunals. It was criticised for promoting the ideas that the practice of Muslim family law is based upon unfair and unequal principles, specifically targeting and discriminating against Muslim women as primary users of Muslim dispute resolution bodies.[61] Critics also objected to the Bill's formalist, top-down, state-interventionist approach for seeking to limit the powers of religious bodies and so being predicated on fixed and homogeneous notions of Islam and Islamic legal practice, which fails to recognise the dynamism and pluralism within the communities themselves.

VI. Conclusion

In his book *Muslim Families, Politics and the Law, A Legal Industry in Multicultural Britain*, Grillo[62] charts the very specific ways in which the law targets Muslim families, Islam and Islamic practices, a phenomenon underpinned by a general anxiety surrounding Muslims. He explains:

> Muslim families are caught up in socio-legal and political arguments and cultural and social disputes about meaning and practice, with issues such as marriage registration,

[60] Patel (2017) 89.
[61] Grillo (2015) 32.
[62] Grillo (2015).

> forced and arranged marriages, polygamy and divorce disputed among and between Muslims and non-Muslims, reviewed in consultations, discussed in Parliament, tested in the courts with Muslim religious leaders and their critics and supporters, increasingly prominent in public life.[63]

At present, a good part of the discussion of Muslim divorce relates to the prior question of whether the initial marriage is valid as a matter of English law. The Law Commission is shortly to publish its recommendations for reform of marriage laws in England and Wales in order to promote a simpler and fairer system for all, including Muslim communities and the problem of the recognition of religious marriages. In turn, in order to be legally effective, faith-based arbitration must comply with the requirements of the Arbitration Act 1996 and fall within the provisions of the Human Rights Act 1998. And in order for agreements to be recognised by the matrimonial courts, they will need to comply with relevant English family law principles. And in order to be approved – and so rendered enforceable – as a consent order by the matrimonial courts, the outcome will need to comply with relevant English law principles.

Nevertheless the issue of 'unofficial' mediation in forums such as Sharia Councils and the MAT remain of concern, in particular the question of their 'voluntary' use by Muslim women and the experience of Muslim women as directed through procedures laid down by Sharia Councils. The *Independent Review into the Application of Sharia Law in England and Wales*[64] found evidence of good and bad practice across Sharia Councils and made a series of recommendations, including: legislative changes to the Matrimonial Causes Act 1973 to ensure that civil marriages are conducted before or at the same time as an Islamic marriage; awareness campaigns to inform women of their rights and responsibilities, including the need to highlight the legal protection that civil registered marriages provide; to ensure that Sharia Councils operate with best practice and adopt non-discriminatory processes; and, finally, the regulation of Sharia Councils through the creation of a body to ensure good practice and continue self-regulation.[65] Such recommendations share ground with those put forward by Uddin, who concludes that 'while Sharia councils are imperfect in their current form, with great room for improvement, they currently fill a void in civil law provision by settling religious divorce and therefore fulfil a need in the Muslim community'.[66] He describes the need to establish 'a standard of practice' to ensure equality and justice for Muslim women, and calls for the implementation of the following measures: the recognition of a civil divorce as the basis of a religious divorce; equal fees applied to men and women respectively during the process; a complaints procedure incorporated into the Sharia Council process; and, finally, female representation at different levels of the application process, including on the Council decision-making boards.

[63] ibid 1.
[64] Siddiqui (2018).
[65] ibid 26–29.
[66] Uddin (2020) 128.

Such recommendations aim to both recognise and accommodate religious practices within the existing legal framework, supported by legislation, whilst ensuring adherence to existing legal rules and the consent of all parties in the religious dispute resolution process. Yet evidence presented by the research drawn upon in this chapter also clearly reflects the different treatment of women in the Sharia Council processes, leading to conflicts between women's equality and autonomy and the protection of family, culture and religion, as enshrined by the norms and values of Sharia Councils and the MAT. Manea describes Sharia Councils as 'inherently discriminatory'[67] and calls for them to be abolished.

Yet existing research also points to the diversity of women's experiences and the strategic and complex ways in which they utilise divorce and Sharia Councils. As Anitha and Gill point out:

> Women exercise their agency in complex and often contradictory ways, as they assess the options that are open to them, weigh the costs and benefits of their actions, and seek to balance their often competing needs with the expectations and desires. While there remains a need to recognise gendered power imbalances at the same time there also remains a need to respect women's exercise of agency … We need to give more support to those women who wish to express their subjectivity within the framework of the communities of which they perceive themselves to be such a fundamental part.[68]

There seems, therefore, an inherent conflict between recognising religious identities as diverse and plural, and formulating social policy initiatives that are based upon specific and fixed cultural practices, precisely because cultural and religious practices are open to change, contestation and interpretation. The practice of Muslim divorce within British Muslim communities challenges the mutually exclusive binaries of religious law versus state law, highlighting the dynamic and nuanced ways in which religious institutions as such Sharia Councils conduct dispute resolution work and how the goals and practices of dispute resolution work have complex implications both for the relation between the state and faith-based legal systems and for gender equality. The empirical research demonstrating the lived reality of Sharia Councils, religious arbitration and the experience of Muslim women highlights both the dangers and the emancipatory possibilities of such new forms of dispute resolution in the family law context. At the very least, we must therefore ensure that mechanisms are in place so that those who choose not to participate in such privatised mechanisms of dispute resolution are not compelled to do so.

[67] Manea (2016) 56.
[68] Anitha and Gill (2009) 168.

References

Afshar, H (1994) 'Muslim Women in West Yorkshire: Growing up with real and imaginary values amongst conflicting views of self and society' in H Adshar and M Maynard (eds), *The Dynamics of Race and Gender* (London, Taylor and Francis).

Agarwal, G and Kapil, G (2014) 'Arranged Marriage as an Example of Marginalised Relationships' 19(10) *Journal of Humanities and Social Science* 89.

Ahmed, F (2006) 'The Scandal of Arranged Marriages and the Pathologization of BrAsian families, in N Ali, V Kalra, S Sayyid (eds), *Postcolonial People: South Asians in Britain* (London, Hurst).

Ahmed, F (2013) 'Religious Norms in Family Law: Implications for Group and Personal Autonomy' in J Eekelaar and M Maclean (eds), *Managing Family Justice in Diverse Societies* (Oxford, Hart Publishing).

Akhtar, R (2015) 'Unregistered Muslim Marriages: An Emerging Culture of Celebrating Rites and Conceding Rights' in J Miles, P Mody and R Probert (eds), *Marriage Rites and Rights* (Oxford, Hart Publishing).

—— (2018) 'Modern Traditions in Muslim Marriage Practices. Exploring English Narratives' 7 *Oxford Journal of Law and Religion* 427.

—— (2020) 'Religious-Only Marriages and Cohabitation: Deciphering Differences' in R Akhtar, P Nash and R Probert (eds), *Cohabitation and Religious Marriage, Status, Similarities and Solutions* (Bristol, Bristol University Press).

Al-Astewani A (2020) 'Arbitration as a Legal Solution for Relationship Breakdown in the Muslim Community: the Case of the Muslim Arbitration Tribunal' in R Akhtar, P Nash and R Probert (eds), *Cohabitation and Religious Marriage, Status, Similarities and Solutions* (Bristol, Bristol University Press).

Ali, S (2010) 'Cyberspace as emerging Muslim discursive space? Online Fatawa on women and gender relations and its impact on Muslim family law norms' (2010) 24 *International Journal of Law, Policy and the Family* 338.

Anitha, S and Gill, A (2009) 'Coercion, Consent and the Forced Marriage Debate' 17 *Feminist Legal Studies* 165.

Ashe, M and Helie, A (2014) 'Realities of Religio-Legalism: Religious courts and women's rights in Canada, UK and US' 20 *UC Davis Journal of International Law and Policy* 120.

Badr, G (1978) 26 'Islamic Law: Its relation to other legal systems' *American Journal of Contemporary Law* 187.

Bano, S (2012a) *Shariah Councils and Muslim Women: Transcending the Boundaries of Community and Law* (Basingstoke, Palgrave Macmillan).

—— (2012b) *An Exploratory Study of Shariah Councils in England with Respect to Family Law* (London, Ministry of Justice).

—— (2018), 'Feminist Methodologies, Legal Pluralism and Muslim Family Law in Britain' in R Scarciglia and W Menski (eds), *Normative Pluralism and Religious Diversity: Challenges and Methodological Approaches* (Padova, Kluwer Press).

Blackett, R (2009) 'The Status of Religious "Courts" in English Law' in *Decisions, Decisions: Dispute Resolution & International Arbitration Newsletter* (December) 11.

Bottomley, A and Conaghan, J (1993) *Feminist Legal Theory and* Strategy (Oxford, Blackwell).

Bowen, J (2016) *On British Islam: Religion, Law, and Everyday Practice in Shari'a Councils* (Princeton, NJ, Princeton University Press).

Büchler, A (2011) *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Laws* (London, Routledge).

Carroll, L (1997) 'Muslim women and "Islamic divorce" in England' 17 *Journal of Muslim Minority Affairs* 97.

Charsley, K (2013) *Transnational Pakistani Connections, 'Marrying Back Home'* (London, Routledge).

Douglas, G, Doe, C, Gilliat-Ray, S, Sandberg, R and Khan, A (2011) *Social cohesion and civil law: marriage, divorce and religious courts* (Cardiff, Cardiff University) available at https://orca.cardiff.ac.uk/26308/ (last accessed 27 July 2021).

Edge, I (2013) 'Islamic Finance, Alternative Dispute Resolution and Family Law: Developments towards Legal Pluralism?' in R Griffith-Jones (ed), *Islam and English Law, Rights, Responsibilities and the Place of Sharia* (Cambridge, Cambridge University Press).

Eekelaar, J (2013) 'Law and Community Practices' in J Eekelaar and M Maclean (eds), *Managing Family Justice in Diverse Societies* (Oxford, Hart Publishing).

Gohir, S and Akhtar-Sheikh, N (2017) 'British Muslim Women and Barriers to Obtaining a Religious Divorce' in S Bano (ed), *Gender and Justice in Family Law Disputes, Women, Mediation and Religious Arbitration* (Waltham, MA, Brandeis Press).

Grillo, R (2015) *Muslim Families, Politics and the Law, A Legal Industry in Multicultural Britain* (London, Routledge).

Hallaq, W (1999) *A History of Islamic Law Thought* (Cambridge, Cambridge University Press).

Jaan, H (2014) *Equal and Free? 50 Muslim Women's Experiences of Marriage in Britain Today* (Aurat: Supporting Women) available at www.secularism.org.uk/uploads/aurat-report-dec2014.pdf (last accessed 27 July 2021).

Jacobson, J (1998) *Islam in Transition: Religion and Identity among British Pakistani Youth* (London, Routledge).

Law Commission (2015) *Getting Married. A Scoping Paper* (London, TSO) available at www.lawcom.gov.uk/document/getting-married-scoping-report/ (last accessed 27 July 2021).

—— (2020) *Getting Married: A Consultation Paper on Weddings Law* (London, TSO) available at www.lawcom.gov.uk/project/weddings/ (last accessed 27 July 2021).

Manea, E (2016) *Women and Shari'a Law: The Impact of Legal Pluralism in the UK* (London/New York, IB Tauris).

Menski, W (1993) 'Asians in Britain and the question of adaptation to a new legal order: Asians in Britain?' in M Israel and N Wagle (eds), *Ethnicity, Identity and Migration: The South Asian context* (Toronto, University of Toronto Press).

Mohammad, R (2015) 'Transnational Shift: Marriage, Home and Belonging for British Pakistani Muslim Women' 16 *Social & Cultural Geography* 593.

Nasir, JJ (1990) *The Islamic Law of Personal Status* (London, Graham and Trotman).

Parveen, R (2017) 'Do Sharia Councils Meet the Needs of Muslim Women?' in S Bano (ed), *Gender and Justice in Family Law Disputes, Women, Mediation and Religious Arbitration* (Waltham, MA, Brandeis Press).

—— (2020) 'From Regulating Marriage Ceremonies to Recognizing Marriage Ceremonies' in R Akhtar, P Nash and R Probert (eds), *Cohabitation and Religious Marriage, Status, Similarities and Solutions* (Bristol, Bristol University Press).

Patel, P (2017) The Growing Alignment of Religion and the Law: What Price Do Women Pay? in S Bano (ed), *Gender and Justice in Family Law Disputes, Women, Mediation and Religious Arbitration* (Waltham, MA, Brandeis Press).

Pearl, A and Menski, W (1998) *Muslim Family Law* (London, Sweet & Maxwell).

Poulter, S (1986) *English Law and Ethnic Minority Customs* (London, Butterworths).

Qureshi, K (2016) *Marital Breakdown among British Asians* (London, Palgrave).

Siddiqui, M (2018) *Independent Review into the Application of Sharia Law in England and Wales* (London, OGL).

Uddin, I (2020) 'In Pursuit of an Islamic Divorce: a Socio-Legal Experience' in R Akhtar, P Nash and R Probert (eds), *Cohabitation and Religious Marriage, Status, Similarities and Solutions* (Bristol, Bristol University Press).

Vora, V (2020) 'The Case for Moving Away from "Non-Marriage" Declarations' in R Akhtar, P Nash and R Probert (eds), *Cohabitation and Religious Marriage, Status, Similarities and Solutions* (Bristol, Bristol University Press).

Warraich, S (2001) 'Migrant South Asian Muslims and Family Laws in England: An Unending Conflict' (unpublished MA Thesis, University of Warwick).

Webley, LC (1998) *A Review of Literature on Family Mediation in England and Wales, France, Ireland, Scotland and the United States* (London, Lord Chancellor's Advisory Committee on Legal Education and Conduct).

Werbner, P (2007) 'Veiled interests in pure space, honour, shame and embodied struggles among Muslims in Britain and France' 24 *Theory, Culture and Society* 117.

Wheeler, BM (1996) *Applying the Canon in Islam: The Authorization and Maintenance of Interpretive Reasoning in Hanafi Scholarship* (Albany, NY, State University of New York Press).

Yilmaz, I (2001) 'Muslim Law in Britain: Reflections in the socio-legal sphere and differential legal treatment' 20 *Journal of Muslim Minority Affairs* 353.

—— (2002) Challenge of post-modern legality and Muslim legal pluralism in England' 28 *Journal of Ethnic and Migration Studies* 343.