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Islamic Family Arbitration, Justice and
Human Rights in Britain

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Abstract

It has been argued that in a multicultural and heterogeneous society there must be a commitment to cultural diversity and pluralism in the area of family life, just as in other areas, and that the law should uphold and support a diversity of family arrangements whether or not they are reflective of differences in race, culture or religion. This paper draws upon doctrinal research to explore the rise of a new kind of faith-based, unofficial and, privatized forms of matrimonial dispute resolution process(es) emerging within Muslim communities in Britain. Framed as sites upon which family law matters are resolved according to the principles of *Sharia* and Muslim jurisprudence Shariah councils have developed frameworks that are characterized by specific cultural and religious norms and values. This mobilisation of communities challenges the hegemonic power of state law and unsettles the multicultural project in its attempt to reconfigure social and legal discourse in matters of family law. The paper questions how such mechanisms of conflict resolution which have traditionally been defined as non-legal, may co-exist alongside state law in Britain.

Keywords:

Alternative Dispute Resolution, Divorce, Family Law, Gender, Islamic Law, Legal Pluralism, Multiculturalism, Shariah Councils.

1. Introduction

The recent report *Living Apart Together: British Muslims and the Paradox of Multiculturalism*¹ published by the research group Policy Exchange suggests that 37 percent of Muslims in Britain are in favour of being governed by some form of Shariah Law. Although this report has been heavily criticised for its methodological framework and its assumed accuracy in reflecting the views of Muslims in Britain this statistic does raise interesting questions regarding the relations between Muslims, citizenship, religious legal practice and loyalty to the state. It also reflects the fact that over last few years theoretical debates on multicultural citizenship have moved from the context of policy accommodation of cultural and religious difference to a widely perceived crisis of multiculturalism. Western commentators and legal scholars now discuss at length the limits of religious practice and belief and many query the need to accommodate and respect cultural and religious diversity, in western societies. For many the politics of multiculturalism and the recognition of cultural difference has directly contributed to a rise in the politics of cultural separatism, the rise of segregated communities and the upsurge of home grown terrorists. In this context this statistic has been seized by those who link the failure of multiculturalism in Western Europe with the failure of Muslims to integrate into western societies. It confirms to some the belief that Muslims are simply unable to integrate and illustrate their commitment to liberal democratic values. Instead Muslims are portrayed as using the freedoms given to European citizens to undermine their social and civic responsibility. Islam it seems is incompatible with secular Europe and Muslims can never see it as their home. In this way 'existing models and policies of immigrant integration and the accommodation of (Muslim) minority claims are questioned' (Modood et al. 2006, p 2).

In this paper I draw upon empirical research to critically examine the basis of these claims. Using this statistic as my starting point I focus on the practice of Islamic family law to consider whether the emergence and development of a system of alternative dispute resolution (ADR) within Muslim communities in Britain constitutes *new* forms of governance in matters of family law and whether these ADR bodies undermine the universal principles of justice, equality before the law and common citizenship. In doing so it explores the underlying reasons as to why these bodies exist and motivations of those Muslims who wish to be regulated by Muslim family law principles when resolving matrimonial disputes- thus confirming the statistic that a sizeable number of Muslims wish to be regulated by Shariah law in Britain.

In the first part of the article I explore the emergence of a Muslim subjectivity which lays claims to the practice and demands of separate personal systems of law. I then analyse what is meant by Muslim legal pluralism in Britain and document the interaction of religious personal law systems with English law. In the final part of the article I draw upon empirical research to better understand how these ADR bodies operate in the realm of matrimonial dispute resolution and the extent to which these bodies are creating new forms of governance and justice.

2. Muslims in Britain

The emergent politics of a specific Muslim identity² draws upon the idea that the fragmentation and shifting identities prevalent within minority ethnic communities has led to an emergence of a homogeneous, discrete and fixed Muslim identity. Indeed the understanding of identity as fluid and changing³ has led many commentators to conclude that at specific times, a particular aspect of the group identity will emerge as more important at different times (Modood 2000) and under this context it seems in Britain we have the emergence of a 'renewed' Muslim religious identity (Afshar 1992; Anwar 1997; Burlet and Reid 2001; Dwyer 1997; Modood 2000; Shah-Kazemi 2001; Werbner 2000). This last argument is presently dominant in identity discourse and we learn that the South Asian Muslim diaspora has been transformed as part of the 'Muslim diaspora' or Muslim Umma (Castells 1997). Moreover the universal concepts of belonging and Muslim Umma have, it is argued, led to the identification with this global Muslim community (Ahmed and Donnan 1994, p 79). This emergence of a 'Muslim subjectivity' and its challenge to citizenship has led many commentators to essentialise the 'Muslim community' or the 'Muslim Umma' as bounded, fixed and stable. For example Castells writes, 'For a Muslim, the fundamental attachment is not the watan (homeland), but to the Umma, or community of believers, all made equal in their submission to Allah' (1997, p 15). In this way the term 'community' is used as a rubric to identify different collectivities in relation to ethnic, religious and cultural difference that may provide 'a sense of solidarity in the face of social and political exclusion' (Alleyne 2002, p 609). In doing so however, it also ignores the multiple and shifting identities within these bounded communities serving to ignore uncertainty and doubt in favour of conceptualising Muslim community as unified by faith and transcending national state boundaries.⁴

And this understanding based upon Muslim community consensus and the homogeneity of internal Islamic religious values also presents the scenario of a clash in western societies with liberal political principles and the participation of Muslims in the common public culture. Castells argues that the global Muslim Umma serves as the focal point of a primary religious identity, 'where the search for identity becomes the fundamental source of social meaning' (1997, p 4). However Parekh challenges 'the extraterritorial loyalty to Ummah' (2006, p 182) arguing that it amounts to nothing in practice and Muslims are not only loyal and committed as citizens but have taken considerable pride in their country of settlement. For Sayyid (2000) the Muslim 'Umma' cannot be understood in a uniform way. The heterogeneous nature of Muslim communities coupled with social and political rivalries in reclaiming this term also reveals the ambiguities in the notion of 'Muslim Umma'. What becomes apparent is that the particular features of the Muslim umma are contested, debated, challenged and appropriated by different members and groups.

Yet the public perception of Muslims in Britain continues to be based upon constructions of the Muslim as the 'other', disloyal and in conflict with liberal democratic principles of individual choice, equality and free speech. And this image involves an imaginary dimension of the Muslim other which is not in sync with the material reality of Muslim lives in western democratic societies. As Zapata-Barrero points out, 'Two main stereotypes contribute to nourishing this sort of historical snowball: the demographic invasion and the spectre of the Holy War' (2006, p 155). This raises fundamental questions on the presence of Muslims in the public space and public debates on issues such as the Rushdie affair, Muslim women wearing the hijab and niqab (deemed symbols of repression) and growing concern of Muslim home

grown terrorists reflects widespread ideas that Muslims are simply incapable of integrating into British society. It also raises fundamental questions of how British Muslims connect themselves to a diverse set of public spheres in order to base their claims on a religious identity (Werbner 2000, p 307).⁵ The legal sphere thus becomes an important space in which demands are raised and challenged - which is discussed in the next section. For many, what differentiates a Muslim religious identity from others is the unique form which this may take within the political context in which it is situated (Modood 2000; Werbner 2002). Thus the development and emergence of a Muslim identity must be understood as part of wider social, political and economic developments in Britain. This renewed assertion of a religious identity has important implications for public policy because if religious practice is no longer confined to private life as Modood questions 'then to what extent should public policy reflect these developments?' (2002, p 23). It is within this context of liberal multiculturalism that we have seen the emergence and development of unofficial non-statutory bodies identified as Shariah Councils in Britain. In the next section I briefly examine how English law has dealt with the issue of religious difference.

3. Religious Diversity and English law

The plural nature of British society reflected by high levels of social, cultural and religious diversity and its impact on the English legal system has been extensively documented over the past twenty years, by anthropologists, sociologists and legal scholars. The debate over the nature of this interaction is characterized by a clash of a given set of values, identity and interest claims by state law and the minority religious communities. For example Shah (2005, p 2) argues that the concept of law must be re-evaluated in a culturally diverse, plural society if we are to make law relevant to minority ethnic communities in Britain today. He proposes this is done with a move away from a concept of law which is based upon homogeneity and objectivity (in particular the notion of the *reasonable man*) to one based upon subjective experiences which include definitions of law but based upon personal systems of law and perhaps more importantly include alternative definitions of the principles of justice, human rights and equality before the law. In this perspective the acceptance of a postmodern conception of law⁶ provides the basis for recognising difference, diversity and plural legal orders which operate within the space(s) officially inhabited by English law.

This argument is taken one step further by Ballard who points out that while the common law tradition in English law aims to 'take careful cognisance of the specific context in which matters under dispute took place' (2006, p 30) the continued use of the yardstick of reasonable man fails to adequately recognise the cultural and behavioural code of litigants and affects the delivery of justice in English Law⁷. Thus English law remains restrictive and fails to understand the religious and cultural frameworks upon which litigants of minority ethnic communities act to resolve their disputes. In this way the discursive constructions of 'us' and 'them' demarcate the cultural and religious diversity debate.

The public/private dichotomy in English law remains central to constructing the boundaries within which the free practice of cultural customs and religious beliefs is deemed acceptable. English law based upon principles such as the rule of law (equality before the law) and the separation of the public/private spheres does not recognise systems of personal law for different communities. Personal laws are

instead defined as ethnic customs (Poulter 1986; 1987; 1990; 1992) which are recognised by English law as long as they are not deemed 'unreasonable' nor clash with the principles of English law; this also includes violation of any international treaties to which Britain maybe signatory (Pearl et al. 1988).

Concerning Muslim interaction with state law and the conflicts presented by Islamic religious practice in the public sphere it is noteworthy that recent case law is constructed around the discourse of a crisis of multiculturalism. For example the recent two high profile cases seem to best illustrate this conflict- between Islamic religious practice and public space both involving Islamic dress code for Muslim women and the use of the Human Rights Act 1998 and in doing so illustrating the view that although Muslims are unable to integrate into British society are still nevertheless willing to utilise secular state law legislation to lay claims for religious rights.⁸ In *Begum v Denbigh High School Governors*⁹ the House of Lords ruled that the exclusion of Sabina Begum for her unwillingness to comply with school uniform requirements was not in violation of Article 9 of Human Rights Act (HRA) 1998. In the *Azmi v Kirklees* case, a Muslim woman who worked as a school teaching assistant refused to follow an instruction not to wear a full-face veil when in class with pupils assisting a male teacher. She had been suspended and brought claims for direct and indirect religious discrimination and harassment on the ground of religion or belief. Again the appeal was dismissed as the tribunal found no indirect discrimination and held that the local council's way of achieving its aim was reasonable and proportionate. These cases illustrate not only the specific claims for recognition made under the HRA 1998 but also the social practices that underlie these claims and how they relate to law.

In Britain anti-discrimination legislation such as the Race Relations Act 1976 seeks to safeguard the rights of minority groups by attempting to create equal opportunities for ethnic and racial groups in all major areas of life. The Act has therefore been subject to criticism for failing to extend protection to religious groups such as Muslims and failing to recognise 'religious discrimination' as an offence. The Race Relations Act 1976 aimed to promote equal opportunities and to eliminate discrimination in employment, housing, education and the provision of goods and services. The legal system has on other occasions recognised certain demands of ethnic minority groups for example the Shop Act 1950 which exempted Jews from Sunday trading laws. The Slaughterhouses Act 1979 which allows the slaughter of animals for the purpose of obtaining kosher and *halal* meat for the Jewish and Muslim communities; and since 1976, a Sikh with a turban may ride a motorcycle in Britain without wearing a crash helmet under the Motorcycle Crash Helmet (Religious Exemption) Act, which is otherwise compulsory. In addition, voluntary-aided religious and denominational schools are funded by the state, as are army chaplains and university theology faculties.

The courts have also ruled on what is defined as an ethnic and racial group. In *Mandla v Dowell Lee* (1983) a Sikh boy was excluded from carrying any religious symbols in school. Lord Denning argued that Sikhs were not racially distinguishable from other Asians. In the House of Lords, however, a wider view of 'ethnic minority' was taken and seven criteria, including a common religion, were established. Thus the headmaster was found guilty of indirect discrimination under the Race Relations Act 1976, and Sikh children are allowed to carry religious symbols in school. It is

important to note that under the Race Relations Act 1976, Jews, Sikhs and Gypsies are defined as ethnic groups but Muslims, Hindus and Afro-Caribbeans have so far been excluded. The Race Relations (Amendment) Act 2000 now places a duty on public authorities to have 'due regard' to the need to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups (Shah 2005, p 15).

In relation to family law matters case law relating to the validity of Muslim marriages, polygamous divorces and the circumcision of young children illustrate the areas of conflict with religious legal practice and state law principles. In her work, Probert draws upon case law to discuss problems of valid religious marriages in Britain and her work illustrates how distinctions between valid, void and voidable marriages are not only problematic but additionally that the courts are also producing contradictory rulings.¹⁰ One important development has been the introduction of the Divorce (Religious Marriages) Act 2002 which impacts the right of Jewish women to obtain a Jewish divorce ('get') before a civil divorce can be pronounced. Taking into account the fact that the legal framework is characterised by the ideal of a homogenous and objective ideal based upon reasonableness, the legal remedy for Jewish women illustrates a growing understanding between the law dealing with ethnic diversity and the wider principles of religious practices, compatibility and the questions the limits of multiculturalism in practice.

4. Muslim Legal Pluralism in Britain

For many scholars the concept of legal pluralism provides a space for critical thought, analysis and reflection where the relationship between law, culture and social change in society can be documented and better understood. Griffiths notes its usefulness when she states, 'it raises important questions about power- where it is located, how it is constituted, what forms it takes- in ways that promote a more finely tuned and sophisticated analysis of continuity, transformation and change in society' (2001, p 289). In the British context one of the first scholars to document the scope of Islamic legal practice in British society was the legal anthropologist, Werner Menski. His research not only brought to the fore challenges that migration and the ensuing cultural and religious diversity brought to the English legal system but he was also one of the first legal scholars to articulate a policy approach which called for the accommodation of minority identities and cultural/religious practice in the private and public spheres. This debate was characterized by the different models of legal pluralism operating within western democratic societies and framed in terms of either 'weak' or 'strong' pluralist traditions of law.

To better understand the type of legal pluralism inherent in British society - which prides itself on the uniformity of state law - it is useful to briefly outline what is meant by the term. In essence legal pluralism moves away from the study of law based upon abstract legal rules to understanding the meaning and existence of law in the context in which it operates. A simple but clear definition by Merry (1988) serves as a useful starting point; legal pluralism is defined 'as a situation in which two or more legal systems co-exist in the same social field' (1988, p 45). This definition recognises the existence of a plurality of legal orders in operation within society and challenges what we understand as 'law' in the traditional sense.¹¹

To put it simply, strong forms of legal pluralism recognise multiple forms of ordering which may be central to the lives of individuals and is not dependant upon state or state law for recognition or legitimacy. Thus in an attempt to challenge the dominance of state law and its overarching power and influence in society, Moore (1978) developed the concept of a 'semi-autonomous social field'. This concept analyses the ways in which social change takes place in society of which state law and its legislative mechanisms fail to take account. She defines a semi-autonomous social field as one that 'can generate rules and customs and symbols internally, but that...is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance' (Moore 1978, p 720). This framework is certainly useful as it allows us to explore the complex interplay between different legal orders in operation for example, state law, family and Shariah Councils as ADR fora. In this way the notion of 'semi-autonomous social field' allows us to conceptualise multiple forms of ordering that may be perceived as 'legal' but do not rely upon state law to determine their power or authority.

While it is indeed the case that the concept of 'legal pluralism' provides the conceptual tools with which to challenge state-law power and recognise other forms of legal ordering, it nevertheless remains hindered by conceptual difficulties regarding what we understand as 'law' and fails to provide a clearer distinction between social and legal norms. For Collier and Starr (1989), the concept remains limited as it fails to take into account power between and within legal systems - power which is not equally shared. We can also conclude that little if any attention is paid to power relations within families and communities and consequently the strong legal pluralist approach purports an anti-state ideology that presupposes that "non-state or indigenous law is good" (Tamanaha 2001, p 199). Clearly this is not the always the case. Thus a strong description of legal pluralism, rather than solely being an object of our analysis, can be used as a means of developing a better understanding of the particular ways in which power operates between and within law, unofficial law and social life. In this way, 'social investigators can ask who (which group in society, which social practices), identifies what as 'customary law', why and under what circumstances? What is its interaction with state law, and what relationship does it have, if any, with actual customs circulating within society?' (Tamanaha 2001, p 199).

Most recently scholars point to a shift in our conception of law that explores the impact of globalisation upon the power and legitimacy of state law (Santos 1987; Fitzpatrick 1996; Greenhouse 1998; Flood 2002; Merry 2001; Griffiths 2001; Yilmaz 1999 and 2001). Here, the international human rights context provides the fora for challenges to the traditional sources of power brought about by a new assertion of 'rights' deriving from local, cultural, religious and indigenous groups. Significantly this has led to interesting discussion on the relationship between legal pluralism and cultural identity in modern western liberal democracies (see Greenhouse 1998)¹² and the impact of modernism upon the fragmentation of the nation-state that has led to new understandings of 'law' (Benton 1994). These approaches to new legal formations and legal understandings are significant as they challenge the 'state law/non-state law'

dichotomy. How then are we to understand the nature of legal pluralism within diasporic Muslim communities in Britain?

Existing literature presents the socio-legal reality of Muslims as a complex scenario whereby official and customary laws interact to produce a new set of hybrid laws (Bunt 1998; Carroll 1996; Menski and Pearl 1998; Poulter 1996; Shah-Kazemi 2001; Yilmaz 2001). In attempting to develop a conceptual framework which both adopts a 'postmodern approach' to the study of law and recognises pluralism and diversity in social life, Menski (1998) employs the analytical framework by the jurist Masaji Chiba (1986) and constructs a legal model he defines as 'Angrezi Sharia'. According to Menski, Asian Muslims in Britain, have not simply given up Islamic law but combine Islamic law and English law to form 'Angrezi Sharia'. He describes a three-fold process generated by internal conflicts within Asian communities and leading, as mentioned, to the creation of 'British Asian Laws in Britain'. The first stage occurred at the time of migration. At this stage ignorance of the legal system meant that customary practices continued to be observed. For example, up until 1970 many Asians did not register marriages and this later resulted in huge matrimonial disputes. Subsequently, however, Asians learnt to adapt to English law but rather than abandon their customary traditions, they built the requirements of English law into them. The result has been that new British Muslim, Hindu and Sikh law, unique to Britain, has emerged, differing in some important aspects from the Indian, Pakistani or Bangladeshi laws and customs. This was the second phase, which created the corpus of precedent law that Menski labels 'Angrezi' law. The third stage in this process might involve abandoning ethnic customs and religious personal laws altogether, and practising only state law, but this has not happened. Thus English law remains the official law while 'angrezi sharia' is the unofficial law.

As part of this complex process, redefined Muslim laws in Britain have become 'hybrid' and thus 'all ethnic minorities in Britain marry twice, divorce twice and do many other things several times in order to satisfy the demands of concurrent legal systems' (Menski 1998, p 75). This analysis contributes to a better understanding of the development of a British legal discourse which comprises of a complex interplay of cultural, social values, Islamic legal practices with state law norms and values. In doing so it demonstrates how law evolves and develops over time emphasising both the commonalities and differences between and within the different legal orders. In the next section I outline one example of how this process manifests in the Muslim community concentrating on the emergence of Shariah Councils as ADR bodies in resolving matrimonial disputes. I present the findings of empirical research exploring how the community framework of family law in the context of dispute resolution regulates the relationship between Muslims, matrimonial disputes, community belonging and interaction with state law norms, values and procedures. In this light, it is possible to see how the Muslim presence in both public and private spaces raises the question of granting the Islamic religion a legal status (Borras and Mernissi 1997).

5. Shariah Councils as ADR fora

Shariah Councils have been described as 'internal regulatory frameworks' (Menski 1998, p 396), 'complex informal networks (Poulter 1998, p 61) and sites where 'new ijtihads'¹³ are taking place (Yilmaz 2000, p 1). This form of Muslim self-organisation is characterized as 'Muslim legal pluralism' and has led to extensive discussion on a

possible conflict of laws scenario with English law (Carroll 1997; Hamilton 1995; Poulter 1998). Indeed, existing literature presents these bodies as evidence of an emerging parallel legal system whereby Muslim family laws are reconstructed to accommodate the needs of diasporic Muslim communities in Britain (Bunt 1998; Menski and Pearl 1998; Poulter 1998; Yilmaz 2001). While this literature has been valuable in identifying the ways in which Muslim family law may operate, it tends to omit any discussion on the key issue of 'power'. The lack of empirical research means that Shariah Councils are implicitly presented as unified with little recognition of the internal and external contestation of power both within and between them.

Beyond these initial difficulties we learn from existing literature that Shariah Councils operate as unofficial legal bodies specialising in providing advice and assistance on Muslim family law matters. They are neither unified nor represent a single school of thought but instead are made up of various different bodies representing the different schools of thought in Islam.¹⁴ In essence, the Shariah Council has three main functions, mediation and reconciliation, issuing Muslim divorce certificates and producing expert opinion reports on matters of Muslim family law and custom to the Muslim community,¹⁵ solicitors and courts. Within this community framework of dispute resolution Shariah Councils act also to manage Muslim presence and preserve Islamic legal principles within non-Muslim societies. (Bunt 1998, p 103). The process of dispute resolution therefore is produced through various discursive practices and can only be understood in relation to the locus of power in which they are embedded as community regulatory frameworks. By this I mean the ways in which the religious community is creating a process of dispute resolution which complements discussions on homeland, belonging and human rights and which defines a role for Islam in a non-Muslim environment.

5.1. History and Background

The history of Shariah Councils in Britain can be traced to a wide set of social, cultural and political developments over the past 30 years. Cultural and religious diversity coupled with the perceived threat posed by the visibility of racial groups led to a process of integration under the rubric of multiculturalism. In the course of the 1970's and 1980's there was an expansion of organisations which focused on the cultural and religious specificity of the minority group in question and the practice of minority religious values in the public space thus assumed a renewed political importance. The continued political mobilization of British Muslims today has led to questions of Muslim integration, and the state, in facilitating multicultural policies, it is argued, has led to cultural separatism and community divide. While some studies attribute the emergence of religious organisations to state initiatives under the context of multiculturalism others see the communities themselves forging closer ties with family and community for a multitude of reasons. For example, in his analysis on the relationship between the emergence of cultural and religious organisations and 'ethnic governance',¹⁶ Vertovec (1996) concludes that minorities have their own reasons for choosing their 'idioms of mobilization' as well as 'their own orientations, strategies and levels of experience that affect the kind of state liaisons which they foster and maintain' (1996, p 66).

The relationship between mosques and shariah councils illustrates the conditions in which these mechanisms of ADR have emerged. From the initial stage of a prayer hall, to the appointment of Imams, the widespread construction of mosques and the

emergence of Shariah Councils we can see the norms, symbols and values embodied within these structures of community regulation. In his study of Muslims in Bradford, Lewis argues that the socio-political establishment of Muslims in Britain via mosques and community organisations indicates a shift 'within the migrants self-perception from being sojourners to settlers' (1996, p 56). In particular, it is the close relationship to mosques that has shaped the type of Shariah Councils that we see emerging in Britain. It is useful to explore this relationship between mosques and Shariah Councils if we are to understand the establishment, regulation and legitimacy of these bodies within local Muslim communities.

As Lewis points out, '[t]he creation of mosque reflects the growth, location and differential settlement patterns of distinct regional and linguistic communities' (1994, p 58). Consequently, we see the proliferation of different mosques each fragmented according to village-kinship, sectarian affiliation and intra-ethnic differences. Hence in Britain, mosques cater to the needs of Muslims of various different ethnic backgrounds including Punjabis, Mirpuris, Pathans, Bangladeshis, Yemenis, Somalis and Gujaratis. In larger communities, mosques are not only based on ethnic differences but also split along the differential doctrinal teaching. In Britain the different Islamic schools of thought have been identified as Barelwi, Deobandi, Jama'at-I-Islami, Ahl-I-Hadith, Shi'a and Ahmadiyya (see Lewis 1994, p 57). Most Pakistanis in Britain belong to the Barelwi tradition and consequently mosques are closely aligned to the sectarian affiliation of the local community (see Shaw 1988; Werbner 1988; Geaves 1996; Lewis 1996). Thus the emergence of Shariah Councils in Britain must be understood in this context of social, cultural, religious and political change.¹⁷

In this study, three Shariah Councils had been established under auspices of a mosque by the Imam. Prior to this establishment, individual Imams undertook the work of the Shariah Council providing spiritual and religious guidance in matters of Muslim family law to Muslims including settling marital disputes and issuing Muslim divorce certificates. In his study, Bunt (1998) found that Imams found this work to be time-consuming and took them away from their traditional duties of providing spiritual guidance and sermons for Friday prayers. This was confirmed by the findings in this study; Dr. Nasim at the Birmingham Shariah Council explained:

'We realized that some form of body was needed which could resolve family disputes. Before the Shariah Council it was the Imam who used to deal with these issues and this caused problems not only because he was not versed in dealing with all the issues that confronted him but he didn't have the time on top of his other duties. So in that respect the Shariah Council was formed. This body is led by religious scholars including Imams.'

Thus a key feature of Shariah Councils is the attachment to mosques which is closely interlinked to the aims and objectives of the mosque in question. Most Shariah Councils continue to be based in mosques and Imams continue to serve as religious scholars on the Council's body. In this study all the Shariah Council's had close contact with a mosque and indeed were closely aligned to one particular mosque. There are however two key differences between mosques and Shariah Councils. Firstly, unlike mosques, Shariah Councils are not voluntary bodies and therefore are not subject to public body regulation (thus they do not need to reveal details of their

organisational structure nor their financial status). Secondly many mosques in Britain are organised on ethnic and kinship allegiance reflecting the specific needs of different groups of Muslims whilst Shariah Councils in this study aimed to cater to the needs of all Muslims irrespective of ethnic, racial or national background.

Most importantly, the ways in which Shariah Councils constitute as unofficial dispute resolution mechanisms reflects how they are situated within local Muslim communities. Hence by simply focusing on the paradigm of legal pluralism or dispute resolution, obscures the complex contestation within the 'community' over its 'identity' in multicultural Britain. And, by positing these processes in the terms of either assimilating into majority society or exercising their choice not to 'belong' leaves unaddressed the issue of the internal dynamics of power. This is not of course to deny that these bodies do not share a set of 'common characteristics' based on religious norms and values, clearly they do; and in doing so they identify in their unity of belonging to a universal Muslim community. In this way, their mark of otherness derives from a shared set of understandings with little need or desire for state recognition. Instead the private sphere provides the space and opportunity for them to develop forms of communal autonomy and the regulation of communities, away from state interference. From this perspective Shariah Councils do fit the model of the 'semi-autonomous social field' (Moore 1978) since this approach places very little demands on the state and the councils remains autonomous but also recognise the power of state law. However as fieldwork data suggests, given the strong desire to ground and establish these unofficial legal processes within the framework of state law, some Shariah Councils seek the establishment of a parallel legal system in Britain. For this to be met, the universal language of rights, autonomy and choice are reformulated within particularistic claims for recognition (based on religious specificity) as the basis for differential treatment.

We can see from the discussion above that Shariah Councils have developed and have been shaped by different mosques and their structuring in this space has shaped their self-definition and identification. Moreover, the way in which this discourse has been transformed within the context of the 'British Muslim diaspora' raises questions regarding their legitimacy under Islamic law. For example, how has the experience and position of the Pakistani Muslim community in Britain transformed Shariah Councils from their origins of existence? This of course raises questions on the relationship between migration, diaspora and belonging (Brah 1996; Werbner 2000). In this study, within each of the 4 Shariah Councils, it is notable that Pakistani Muslims were involved in setting up the organisations and continued to be actively involved in the administrative affairs as well as acting as religious scholars. It might be observed therefore that the primary guidance for these individuals in determining the type of Shariah Council set up reflects their background, position and credentials in Pakistan. For example, within some mosques, Imams are deliberately recruited from Pakistan to keep alive localised cultural practices.¹⁸

It is clear that Shariah Councils in Britain have potential overlaps with social and legal processes in Pakistan. In doing so, many reformulate cultural practices of the specific Pakistani Muslim communities in Britain to fit within this framework of dispute resolution. But it is important to note that different sets of power relations and normative values interact with this specific form of dispute resolution and hence the process of cultural reformulation is far more complex. Interviews with religious

scholars revealed that many draw from their experiences as working as Imams in Pakistan. Dr. Suhaib Hasan at Islamic Shariah Council explained:

‘In Pakistan I have many friends who are learned scholars in Islamic matters concerning marriage and divorce. I often consult them for advice and this helps our work immensely.’

This development of Shariah Councils to mirror the local ethnic profile of Muslim communities has however been challenged and rejected by other religious scholars. In an interview at the Muslim Law Shariah Council, Dr. Badawi was keen to distinguish between the role of a Shariah Council and its location, often within local Pakistani Muslim communities:

We work on the basis of Islamic principles and we draw upon a wide range of school of thought in Islam. We are not made up of just Pakistanis and we do not adhere to Pakistani law. We are here for all Muslims.

However, Dr. Saeeda at Birmingham Shariah Council acknowledged that she conceptualised dispute resolution in relation to the needs of the Pakistani Mirpuri community in Birmingham. This simply meant she was aware of localised cultural practices and hence the process of dispute resolution was expressed via an ethnicised idiom.

With the seemingly visible emergence of Shariah Councils in Britain their role as dispute resolution mechanisms has more recently come under scrutiny. In his study, Warraich points to the conflation of South Asian Muslim family laws, localised cultural practices in British Muslim communities and a rigid application of English family law as the contributory factors leading to the emergence of these bodies ‘who have appropriated for themselves the role and position of parallel quasi-judicial institutions (2002, p 11). He argues that ‘the lack of space in the English system for appropriate solutions to dilemmas facing people’ has led to this confusing situation (2001, p 11). Instead state law must create the space within its existing framework and recognise and adapt to the complexities of diversity and pluralism inherent in the lives of individuals (2001, p 12). Yet one of the difficulties with a focus solely upon state law means that subsequently we learn very little about how the boundaries between state law, personal law and privatized dispute resolution within diasporic Muslim communities are in fact being contested, challenged and appropriated in specific contexts.

The emergence of Shariah Councils in Britain can also be traced to a diverse set of social processes within Muslim communities. According to Yilmaz (2001), there are four conditions under which Shariah Councils emerge in Britain. Firstly, under Muslim tradition, family issues are purposively left to ‘extra judicial’ regulation and diasporic communities continue this tradition and resolve disputes within this sphere. Secondly, Muslims do not recognise the authority and legitimacy of western secular law on par with Muslim law and therefore deliberately choose to resolve disputes through a non-adversarial process. Thirdly the familial notions of honour and shame prevent familial disputes from being discussed in the ‘public sphere’ and subsequently religious laws are given greater potency and legitimacy within the communities. And finally, the failure of the state to recognize these plural legal orders has led to the

development of these 'alternative' dispute resolution processes within the private sphere (Yilmaz 2001, p 299).

In short, what we see in this analysis is the development of a parallel legal system in opposition to state law. Yet conceptualising unofficial dispute resolution in this way is premised on the homogeneity of 'Muslim communities' with little analysis on how these bodies are constituted within the local communities themselves. The primacy of a Muslim identity means that we learn very little about cultural and religious practices that may affect the autonomy of the users of Shariah Councils (more often women) and there is very little discussion on how such processes are contested, redefined and possibly open to change. It is to these questions to which we now turn.

5.2. Modus Operandi: Shariah Councils 'In Action'

The fact that existing literature on Shariah Councils is not based upon empirical research means that we are given very little insight into *how* these bodies constitute as ADR bodies within local Muslim communities. In this way it has been simply assumed that they operate in the private sphere of family, home and local community with little analysis of potential conflicts within the communities in which they are located and their interaction with state law. In this study empirical fieldwork with Shariah Councils included content analysis of case-files and observation and interview research.¹⁹ The observation research aimed to explore the extent to which marital disputes are settled within the context of family, home and community by the intervention of non-state agencies such as Shariah Councils. In this respect the aim was to examine the context in which this form of non-state intervention take place and consider how these mechanisms of dispute resolution that have traditionally been defined as non-legal may co-exist alongside state law in Britain. The data provides an interesting insight into the strategies, procedures and practices adopted by these bodies when resolving disputes and how they define the concepts of equality, justice and autonomy when resolving matrimonial disputes.

The Shariah Councils, in this study, reported marriage breakdown and divorce to be the two key issues which they dealt. In relation to divorce, female applicants contact a Shariah Council where husbands may refuse to grant them a unilateral divorce (talaq). Under Muslim law women are permitted a divorce without the consent of their husbands but this must involve the intervention of a religious scholar to determine which kind of divorce can be issued. A divorce can be obtained in a number of different ways: talaq (unilateral repudiation by the husband); khul (divorce at the instance of the wife with her husband's agreement, and on condition that she will forego her right to the dower or mehr) and ubara'at (divorce by mutual consent). There is of course much diversity within three major categories of divorce.

5.3. A Common Approach to Dispute Resolution

Perhaps it should not be surprising that given the objectives of a Shariah Council data reveals that they adopt strikingly similar approaches to resolving matrimonial disputes. From a conceptual standpoint, we see an administrative process that focuses on collecting evidence to determine the grounds for divorce coupled with attempts to reconcile the parties. Yet rather than embodying a singular set of shared cultural and religious norms the Shariah Councils in this study were imbued with different interpretations of Islamic legal principles and differing power relations revealing internal contestation, conflict and change among and between them. In this context

legal discourse reconfigures itself as ‘different levels of legality’ (Santos 1987, p 113). The disputants’ participation also raises our attention to the paradox of the new ‘interdisciplinary dialogues around questions of state power, cultural domination, resistance and hybridity’ (Greenhouse and Greenwood 1998, p 8).

In this study, the scholars described themselves variously as a ‘Registrar’, ‘Imam’, ‘Sheikh’, ‘Maulana’ or ‘Qadi’. Each term can be translated into ‘religious scholar’ and the variation in usage depends upon what the scholars felt comfortable with and, also their general reluctance to associate the councils as on par with official courts. Thus the term ‘religious judge’ was not used by any of the religious scholars as it was deemed likely to confuse clients as to the legality of their verdicts under English law. In fact the scholars were all keen to underline the fact that their verdicts were not legally binding under English law but served to uphold ‘the moral authority of the Muslim community’. The religious scholar plays a critical role in the nature of the advice given.

I was allowed to observe initial meetings, counselling sessions and Shariah Council proceedings in action.

5.3.1. Stage One: The Initial Contact

In this study, all the religious scholars were keen to emphasise that Muslim women are neither coerced nor obliged to contact Shariah Councils to obtain a Muslim divorce. Instead it was emphasised that the onus rests upon the individual to contact a Shariah Council for help and assistance-if required. Described as ‘community organisations’ that ‘act in good faith’ while providing a service with ‘minimal charge and no financial gain’ (Sheikh Abdullah, Shariah Court of the UK [SCUK]).

The religious scholars nevertheless emphasized the importance of these bodies in resolving marital disputes within the sphere of family and local Muslim community thus preserving the unity of the Muslim Umma. Mohammed Raza, at the Muslim Law Sharia Council (MLSC) explained: ‘We act in the best interests of Muslim women...they come to us for advice and with guidance from Allah we help them as best we can.’ Most strikingly, this space of dispute resolution is conceptualised as ‘the *duty* upon Muslims to abide by the requirements of the Shariah’ (Badawi 1996, p 12) in which Muslims are expected to utilise community frameworks. Indeed it is the interpretation of this term ‘duty’ that transforms this process of dispute resolution for diasporic Muslims in Britain. For Sheikh Abdullah, this duty becomes a greater ‘moral obligation’ for Muslims living in the West:

‘As Muslims, we have a duty to live according to the Qu’ran and Sunnah even though we may have chosen to live in non-Muslim countries. I think it is incumbent upon us to live up to this responsibility because of the effect of western influences upon our children and ourselves. It is easy to neglect our duties in this secular environment.’

With the perceived weakening of the Muslim community under threat from secular values, the scholars were keen to identify Shariah Councils as a key to strengthening a sense of belonging for Muslims within local communities and as part of belonging to the wider Muslim umma.

As discussed earlier, divorce under the Shariah is available to women, yet this is neither the guaranteed nor the inexorable outcome. Once the application for divorce is completed the process of investigation begins and it is this which determines whether a divorce certificate can be issued and if so, the type of divorce certificate to be issued. The process begins with a set of documents sent to the applicant outlining the procedures involved in obtaining a divorce certificate. This may include information on a registration fee; a form requesting the agreement of the applicant to abide by any decision; a letter of acknowledgement of the application and finally, a request for certain basic information about the dispute.²⁰ The Birmingham Sharia Council (BSC) and Islamic Sharia Council (ISC) adopt a similar set of procedures with variations on the fee charged to cover the administration costs.²¹ The issue of cost creates some consternation with applicants. But in the words of Dr. Saeeda: 'we have no choice but to make a small charge. We work as volunteers and in order for the service to operate effectively we must ensure that our administrative costs are covered.' In contrast the SCUK are critical of any financial charge being made as Sheikh Abdullah explained, '...it's haraam to make money out of other people's misfortunes. If I'm in a position to help my fellow Muslim brothers and sisters then it is my duty to do so.' Although there does seem to be differences in approach here, it is largely left unchallenged and therefore seems insignificant to the investigation process.

Data analysis of the case files revealed that contact with the Shariah Councils had been made via telephone, through letter correspondence and via scheduled and unscheduled visits.²² All 4 Shariah Councils reported that in the majority of cases initial contact had been made by telephone. The point of contact is important as it reflects the first opportunity for the scholars to dissuade clients from pursuing a divorce. It also illustrates a difference in approach between the councils and this relates to whether the councils should meet with all clients in person. For example, in contrast to the other councils, the MLSC accepted cases via correspondence; with no face-to-face contact with the client. Mohammed Raza at MLSC explained: 'We get cases from all over the country and we cannot realistically expect all our clients to visit us in London. This doesn't mean that we hand out divorces to anyone who requests one. We make thorough checks and act in good faith'.

This approach however was heavily criticized by the other Shariah Councils who argued that the presence of the client at the Shariah Council was crucial for a successful outcome to the dispute. This was bore out by the statement of Maulana Abu Saeed at ISC: '...it baffles me, how can you try and reconcile two parties when you have never met them? No, for us it is important to meet with our clients, to reason with them and make sure they understand the consequences of their decisions.' The MLSC approach also led to criticisms that it undermines the work of all Shariah Councils. Sheikh Abdullah explained: 'I do recognise the MLSC make thorough checks as best they can but what we see happening is that if an applicant does not like our decision they go off to another Shariah Council and if, for example, their presence is not required this only makes it easier for them to do so.'

Conceding that choice is necessary to accommodate the needs of all Muslims, he nevertheless remained convinced that the MLSC approach undermines the work of other Shariah councils and in so doing challenges the validity of the Muslim divorce certificate issued by a Shariah Council.

5.3.2. Stage Two: The Application

Once contact has been made with the Shariah Council, the next stage involves the client completing an application form which details the grounds for divorce. It is clear that the application form represents a pivotal step in the process of obtaining a divorce certificate. This is apparent from the marked reluctance of the councils in issuing divorce certificates without detailed information from the applicant outlining the reasons for the breakdown of marriage. In fact, the 'grounds for divorce' cited in the application form often provide the basis for the type of divorce certificate to be issued to the applicant. According to Dr. Saeeda at BSC, it allows the parties an opportunity to consider why the marriage has broken down and more importantly raise the possibility of reconciliation. She explained:

'Applying for a divorce with us is not as straightforward as it may seem. We meet with the applicant and their families, sometimes with the husband too.... Myself and Saba take down the details and we ask them to fill out forms and provide concrete evidence to back up their claims.'

There would appear, therefore a concern that the evidence presented in this document is checked and verified accordingly and also provides an opportunity to reconcile the parties. As for the application form itself, it is interesting to note how the Shariah Councils have devised a form with a layout that draws parallels with official documentation. For example with three of the councils (MLSC, ISC and BSC)²³ the applicant is referred to as the 'Petitioner' and the application form is entitled 'The Petitioner's Submission'. The language in these documents works rhetorically to ensure that the applicant understands the importance of the proceedings. Sheikh Abdullah at SCUUK explained,

We've attempted to develop a process whereby the clients understand that you don't just get a Muslim divorce if you want one. They have to understand the seriousness of divorce and this process helps as they realize they have to provide evidence, that they need documentation and...well just the process the way it works...they know its going to be lengthy.

Thus the application form is deliberately constructed in a way that conveys the seriousness of the process.

Data analysis of 25 case-files at the MLSC highlights the centrality of the application form to the dispute resolution process. Thus aside from the general details of age, address and type of marriage the form is structured around the grounds cited for divorce. It states:

Please outline a maximum of five grievances against your husband to be considered as the main areas for your separation and request for an Islamic divorce. You are requested to be precise and concise. Please bear in mind that the Shariah Council may ask you to provide evidence to support your submissions.

At first glance, we are given an insight into the factors contributing to the breakdown of marriage and these include bigamy, violence, adultery, forced marriage and family conflict. It is noteworthy that in 18 cases the applicants go to great length to describe

the events leading up to the marriage, reasons for marriage breakdown and divorce and the applicant's current situation. On closer inspection we can see how the grounds cited for divorce provide an insight into the experiences of the women. Extracts from a case below illustrates some of the reasons put forward for divorce:

Case A

'My husband had previously had an Islamic marriage to somebody else but only in an Islamic way. He never told me. When I found out I asked him whether it was true and he lied and denied it but after getting proof he finally admitted it which completely shook me altogether.

I later realised that he had married me because he was trying to get stay in this country. I did not realise he did not have British nationality in fact later I found out he was on a claim for political asylum.

After the birth of our child he began to act very strange and refused to register the birth and state that the child was his. Which I have always taken as doubting the child is his.

He is unreliable, a liar and a crook. He has hidden many things, which I have later found out about. After separation a few friends have questioned him about his behaviour but he has always denied it.

I do not want him to have any contact with the child as I am in fear of him and fear that if contact were given he may try to harm the child in some way.'

Clearly, then, the applicant may use this opportunity to put forward their version of events. Additionally, for the Shariah Councils, the application form acts as an indicator for the possibility of reconciling the parties and forms the basis of the investigation process whereupon the scholar attempts 'to disentangle fact from fiction' (Dr. Nasim, BSC).

In essence the process can be summed up in the following way:

- i) A Muslim woman contacts a Shariah Council to obtain a religious divorce;
- ii) She is asked to fill in an application form and return it to the Council;
- iii) A divorce notice is sent to the husband;
- iv) If there is no response a further notice is sent;
- v) The husband is given the opportunity to challenge all the allegations, submitted by the wife in her application;
- vi) The investigations involve verifying the allegations put forward by the client- these comprise of a series of meetings with the religious scholar which also act as reconciliation and mediation meetings;
- vii) The process is often lengthy taking up to 6 months.

A religious scholar explained:

'First...we will send a copy of the woman's allegations to the husband. If he challenges those allegations then definitely we will demand the applicant produce evidence to prove those allegations. But if he accepts those allegations or he doesn't reply to our notices or he ignores those allegations then perhaps we will take the initial submissions of the applicant as sufficient for our purpose.'

5.3.3. Stage Three: Reconciliation and Mediation meetings

For all the Shariah Councils, the dispute resolution process is principally an opportunity for the possible reconciling of the parties. It is by no means an uncomplicated process and gives rise to an interesting set of cultural and religious practices, overlapping and, at times in conflict. What becomes clear is the centrality of gender relations that frame the terms of the discussion upon which the basis for reconciliation and mediation is sought. These 'common understandings' regarding the position and representation of Muslim women are critical to the outcome of dispute resolution.

Interviews with religious scholars revealed the importance attached to reconciling the parties. In this context, reconciliation is understood both as a moral duty (to preserve the sanctity of the Muslim family) and a religious obligation (a divorce cannot be pronounced without reconciliation). Mohammed Raza, at MLSC, explained

'[w]e do not just distribute divorces on a footpath...we are not encouraging divorce that's not our role. When a woman rings here to find out about divorce or to request an application form, we are initially reluctant to issue a divorce application. We ask her that you should try to rethink your position because divorce is something that is considered a stigma in society and divorce is nothing good for you and if they have children that will be another problem after divorce so we discourage it.'

Thus reconciling the parties remains a central tenet of all Shariah Councils. Interestingly it is the husband who is seen as key to this process. As one scholar informed me, '[w]e ask the husband that he should try for reconciliation and if he agrees to it then we offer a full reconciliation service at the Shariah Council we have a trained counsellor for that purpose.'²⁴ He was also aware however that many Muslim women were reluctant to pursue reconciliation as they had often exhausted this option prior to contacting a Shariah Councils. Nevertheless as a Muslim, I was informed, he had a duty to encourage reconciliation between the parties.

Unsurprisingly perhaps, despite the intervention of religious scholars for most disputants divorce remains the most likely outcome. The scholars were aware of this fact and explained that their intention was not to stop this outcome, but instead to provide a 'space' at Shariah Councils where the couple could be reminded of their 'Islamic duties as husband and wife' (Dr Hasan) and an opportunity 'to discuss personal matters from an Islamic perspective with the guidance from learned Muslim scholars' (Maulana Abu Saeed). Within this framework women are encouraged to engage and participate in the process of mediation and reconciliation. Of course, this process is not a simple one and the religious vision based on the Muslim ideal of marriage and family is neither uncontested nor unchallenged. Moreover, it is subject to local redefinition and interpretation of Muslim family law, within the framework of the particular Shariah Council.

It is not difficult to identify key generic traits in the reconciliation and mediation processes of the councils under study. There are two key approaches that are distinguishable from state law mediation practices at the point of intervention. With the exception of one Shariah Council, the clients must first meet with the religious scholar on a regular basis to discuss reasons for breakdown of marriage and in doing

so the scholars collate evidence to support the application for divorce. It is during this process that reconciliation is explored with the applicant. If the client makes a more formal request for mediation, then a separate process begins involving the applicant, the husband and both of their family members. If, however, the applicant refuses to participate in mediation and if it has been unsuccessful during the investigation stage, then the process for obtaining a divorce certificate begins in earnest. With the second approach, all applicants must first attend a counselling service prior to the case being discussed by the Shariah Council. Yet what unifies both approaches is the insistence upon reconciliation based upon Islamic values. Distancing themselves, however, from the perils of forced reconciliation, each Shariah Council is keen to promote the willing participation of female applicants. Yet as discussed in earlier the power relations aligned within Shariah Councils may in effect regulate, supervise, observe and confine the behaviour of women, dictating acceptable patterns of behaviour and particular outcomes.

Given the 'observed' general similarities in approach, the differences relate to the subtleties in the practice of mediation. Here, the powerful role of the mediator in constructing ideologies and the intervention of family members are two key features that require closer analysis. What are the implications for family justice for this privatised form of mediation?

Observation, case-file analysis and interviews revealed a troubling development for Muslim women using this space to obtain a Muslim divorce. For example, observing reconciliation sessions I became aware that several women had reluctantly agreed to attend the meetings and felt that they had little choice but to do so if they were to be issued with a divorce certificate. Of the ten women I observed in these sessions a staggering four had informed the religious scholar that they were party to civil injunctions issued against their husbands on the grounds of violence and threatening behaviour. In this way these privatised legal processes were ignoring not only state law intervention and due process but providing little protection and safety for the women in question. Furthermore the interviews and observation data revealed that husbands used this opportunity to negotiate reconciliation financial settlements for divorce and in many cases access to children. Settlements which in effect were being discussed under the shadow of law.

Quite clearly these women were in a weak bargaining position and their autonomy and choice was to some extent being limited if they were to be granted a Muslim divorce. In their study of mediation and divorce Greatbach and Dingwall found that often the weaker party is encouraged to accept a settlement considerably less than if they had gone through adversarial process.²⁵ They also found that mediators are not neutral and enter the mediation process guiding the participants to particular outcomes. This was clearly observable in this space of dispute resolution. Thus in operation, there are subliminal and covert forms of power and coercion the rendering the parties unequal and the process unfair. There is a strong imbalance of power; in this process of dispute resolution the women were encourage to reconcile and to conform to cultural dictates and acceptable patterns of behaviour if they were to be issued with a divorce certificate.

This also raises the question as to whether these processes are creating new forms of governance in English law? It is true to say the the establishment of Shariah Councils

illustrates the changing nature of the social and legal order for Muslims living in western democratic societies. While state law continues to maintain hegemony on issues of power, control and the administration of justice in society at large, the practice of religious principles in the public sphere also reflects the differing legal orders operating in society which may compete against and challenge the assumed centrality of state law. Yet an interesting development in English law has been the ways in which it deals with new social and legal formations. For example its interaction with Shariah Councils is documented in case law which questions the use of *specific* arbitration agreements by Shariah Councils as the councils do not bind agreements under the 1979 and 1996 Arbitration Acts, a practice deemed 'unislamic'. For example in *Al-Midani v Al-Midani* (1999)²⁶ a dispute arose over the validity of a will which had been negotiated with parties at a Shariah Council based in London. The claimant had refused to recognise the Shariah Council in question as a legitimate judicial body and refused the terms of the will. The courts held that the negotiators had not obtained the consent of all the parties involved and as the arbitration agreement was not based on any statutory authority could not be recognised in law. This reasoning can be applied to the divorce certificates issued by Shariah Councils - certificates which are not recognised under English law.

6. Conclusion

Empirical research reveals that Shariah Councils are the product of transnational networks and operate within a national and global space. The emergence of these bodies in Britain must be understood in relation to how Muslim communities came to be situated in Britain 'in and through a wide variety of discourses, economic processes, state policies and institutional practices' (Brah 1996, p 182). The internal contestation of power within these bodies is also crucial to how they constitute as unofficial legal bodies. Yilmaz argues, '[m]uslims do not only wish to be regulated by the principles of Islamic law when they are living in a non-Muslim state; they also seek to formalize such an arrangement within the state's own legal system' (Yilmaz 2001, p 299). Yet empirical data in this study found little support or enthusiasm for such a development.

The apparent unity of Muslims presented in such literature bears little resemblance to the diversity on the ground. For example, there are conflicts over the different approaches to dispute resolution and differences over the interpretation of Islamic principles relating to divorce and interpersonal conflicts within these bodies. In his study, Geaves reports on conflicts between Imams based at Shariah Councils and those who have attempted to resolve and conciliate in conflicts between different groups fighting for control of mosques in Birmingham, Bradford and Manchester (Geaves 1996, p 175).²⁷ Existing literature presents the process of dispute resolution as almost mechanical, structured and fixed. For example Pearl argues that Muslims wish to be governed by religious norms and values and that 'proceedings in the English court will exacerbate the difficulties and an imposed solution will be unacceptable to the cultural expectations of the parties' but this analysis provides little understanding of conflict, resistance and diversity within 'cultural groups' (1986, p 32). This is not of course to deny that Muslims do adhere to a complex set of unofficial Muslim laws as clearly, many do. However empirical research suggests this process is multifaceted and complex, has different levels of adherence and are contextually dependent upon factors of time, social context and the specific branches

of Muslim law. The dichotomous approach that posits 'law' and unofficial law as opposite and in conflict consequently fails to explore the spaces 'in between, the sites of resistance and change. Undoubtedly, as empirical data suggests, this is a dynamic process, but one which is also contested.

Furthermore religious arbitration bodies may provide the space for new forms of governance to resolve marital disputes away from the context of a western secular framework but this cannot imply that these local settings predetermine a more suitable outcome for parties. For example religious and socio-cultural terms of reference often marginalise women as was found in this study. Understanding these socio-legal processes requires a critique of the underlying power relations within family, community and state and to recognise that the dialogue in reconciliation meetings is often imbued with power relations. Therefore the dichotomous approach that posits 'law' and unofficial law as opposite and in conflict, consequently fails to explore the spaces 'in between', the sites of resistance and change. What I mean is that Muslim women may choose to utilise this space- to obtain a Muslim divorce- but they also challenge the norms and values which underpin the bodies.

In Islam, resolving disputes via the informal methods of mediation and arbitration exists among other reasons in a bid to establish societal order. The development of 'local informal courts' in Islamic states demonstrates how these processes are presented as discrete, clearly bounded entities rivalling the structure of state law (see Rosen 2000, p 14). It is clear that the 'discourse of disputing' (Hirsch 1998, p 18) is central to the emergence and development of Shariah Councils in Britain. Without doubt these bodies challenge the cognisance of state law with respect to resolving marital disputes and intervening in the process of divorce. Yet unsurprisingly this process of dispute resolution in Britain has been disrupted and reformulated by the 'diasporic experience' to suit the needs of local Muslim communities. The space(s) inhabited by these bodies is neither distinct from local communities nor in totality separate from state law instead, it is a space that intersects with contested sites of local communal power and state law and in this way is a unique formation of a British diaspora.

Endnotes

¹ The report was published in May 2007. A copy of the report can be obtained from <<http://www.policyexchange.org.uk/publications>> 3 December 2007.

² The recent census figures reveal a total of 1.6 million Muslims resident in Britain. The inclusion of the category religion in the 2001 census reveals important changes to conceptions of ethnic identity. The last census was conducted in April 2001. For full breakdown of the census data visit The Office for National Statistics website at <<http://www.ons.gov.uk>> 3 December 2007.

³ Recognising a distinction in group identity between a 'mode of oppression' and 'mode of being' (see Modood 1990, p 56).

⁴ This shift in understanding community as being culturally and religiously bounded and fixed ignores the complex processes of globalization and differentiation (see Sayyid 2001).

⁵ In relation to South Asian Muslims a number of studies have found religion to be the most prominent in their self-description (see Modood et al. 2006; Dwyer 2000; Werbner 2000). For Modood, this emergence has important social policy implication. He explains that 'once out, the genie has not been re-corked. In a very short space of time 'Muslim' has become a key political minority identity, acknowledged by Right and Left, bigots and the open-minded, the media and the government' (Modood 2000, p 134).

⁶ A critique of the 3 modernist postulations of law include: individual rationality as the single source of values; the formal or abstract universalism of the law and the centrality of state justice.

⁷ In particular he analyses the use of expert witness reports which challenge the assumed uniformity in state law and enhance the delivery of justice.

⁸ The use of Human Rights Act 1998 includes 3 key areas: Article 8 Right to private and family life; Article 9 Freedom of thought, conscience and religion and Article 12 Right to marry.

⁹ *Begum v Denbigh High School Governors* [2006] 1 A.C. 100.

¹⁰ She analyses judgments in the key cases of *Chief Adjudication Officer v Bath* [2001] I.F.C.R 419, *AM v AM (Divorce: Jurisdiction: Validity of marriage)* (2001) 2 F.L.R 6, *Ghandi v Patel* (2001) 1 F.L.R 603 and *Sheikh v Sheikh* (2005) Fam. LR 7 2005.

¹¹ Other definitions of legal pluralism include 'the situation in which two or more laws interact' (Hooker 1975, p 6) and 'the condition in which a population observes more than one body of law' (Woodman 1998, p 157).

¹² For example the power of transnational forms of law and ordering derived from such diverse sources as the European Union, the European Convention on Human Rights, the World Trade Organisation, the World Bank and the International Monetary Fund. See Greenhouse (1999).

¹³ Yilmaz describes *Ijtihad* as an activity, a struggle and a process to discover the law from texts and apply to a new set of facts. In this way Muslim legal pluralism in Britain is an indication of new *ijtihad* (see Yilmaz 2005).

¹⁴ The four ancient Islamic schools of Sunni thought can be broadly categorized as Hanafi, Maliki, Shafi'i and Hanabali. For an in-depth analysis on the historical development of these schools see Coulson (1969) and Schacht (1964).

¹⁵ Shariah Councils also issue fatwas which can simply be translated as a ruling from a religious scholar to members of the Muslim community over a contested issue. Observation research reveals that at some of the Shariah Councils under study the scholars spend considerable time deliberating on issuing fatwas. The outcomes of these fatwas are not known but this certainly raises interesting questions on how the community attempts to deal with local conflicts within the boundaries of the 'Muslim community' and the extent to which these processes may conflict with state law.

¹⁶ A term he takes from Breton (1991).

¹⁷ Unfortunately there are no precise figures on the number of Shariah Councils operating in Britain but estimates range between 60-70 councils across the country.

¹⁸ In Pakistan, the relationship between divorce and mediation is one enshrined in law. In cases of divorce the contending parties have to nominate their representative while the 'Umpire' shall be the Chairman of the Local Council. Under section 7 of the Muslim Family Laws Ordinance (MFLO 1961) once a husband pronounces a 'talaq' it must be registered with the Chairman of the Union Committee or Arbitration Council and a copy of this notice must be supplied to his wife. This notice remains valid for 90 days and during this time the couple are encouraged to resolve the marital dispute outside of the legal framework (See Ali 2005).

¹⁹ The 4 Shariah Councils in this study included: The Muslim Law (Shariah) Council in West London; The B'ham Muslim Family Support Service Shariah Council in Birmingham; The Islamic Shari'a Council in East London and The Shariah Court of the UK in North London. It is also useful to briefly explain why they were chosen for fieldwork research. The research design in this study was largely influenced by those Shariah Councils granting access to participate in the research. Hence the smaller Shariah Councils approached in Bradford and Birmingham (often in local mosques) refused to participate. The overriding reason given was that issues of divorce and marital disputes are private and confidential and the religious scholars were not prepared to jeopardise their credibility by the possibility of intimate facts being revealed in public and then obviously to stranger.

²⁰ This may include copies of certain documents, for example marriage certificates and any civil divorce proceedings documentation.

²¹ These range from MLSC (GBP 75), ISC (GBP 50), BSC (GBP 60) and SCUK (no charge).

²² Each Shariah Council reported that they were prepared to meet with clients who made unscheduled visits but they were reluctant to introduce a drop-in service due to time and financial constraints.

²³ By contrast, the SCUK do not provide application forms or any other forms of written documentation. Instead the onus rests upon the applicants to attend scheduled meetings to discuss the breakdown of marriage. In this instance access to case-files was refused but observation data revealed that family members often accompanying clients' to meetings are permitted to contribute to all discussions.

²⁴ I asked whether it was possible for me to interview the trained counsellor but was informed that he was away and that it would be highly unlikely that he would agree due to issues of confidentiality.

²⁵ For a full analysis of their study see Greatbatch D and Dingwall, R (1993) 'Who is in charge? Rhetoric and Evidence in the Study of Mediation' (1993) *Journal of Social Welfare and Family Law* 17, pp 199-206.

²⁶ 1 Lloyds Rep 923 (1999) C.L.R 904

²⁷ For a fascinating account of the different Barelwi traditions practised in 3 different mosques in Birmingham see Geaves (1996, pp 169-192).

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