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**Complexity, Difference and ‘Muslim Personal Law’:
Rethinking the Relationship between Shariah Councils and
South Asian Muslim Women in Britain**

by

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Declaration

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

Samia Bano

ABSTRACT

At the outset of the twenty-first century and despite the challenges presented by the global networks and communities, conceptions of culture, religion and rights in the West remain firmly situated within the moral frameworks of western universalism and cultural relativism. Indeed it seems that the uncertainties of local and global conditions have only served to entrench cultural and religious diversity as fixed, bounded and uncontested. A striking feature of this development in the West has been the rigid adoption of liberal multiculturalism to accommodate the emergence and settlement of diasporic minority ethnic communities into mainstream society. More recently, the specific cultural practices that can lead to intra-family inequalities for women from minority ethnic communities as generated much discussion in political and social theory. While much of this literature has contributed to our understanding on the relationship between gender equality, justice and the limits of liberal multiculturalism, it also seems that the fluid and contradictory understanding of identities has been lost and replaced by the acceptance of culture as essentialized and homogeneous. In this context we have also witnessed the emergence of a 'culture of rights' and the 'politics of recognition' under the framework of human rights. Yet in the process the contestation over 'meanings' and the intermeshing and complexity of cultural and religious practices have in essence been lost, only to be replaced by static and fixed definitions of culture, religion, identity and community.

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. Framed as sites upon which family law matters are resolved according to Muslim family law they 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. Most interestingly, for the socio-legal scholar this process opens up the conceptual space in which to see in evidence the multiple legal and social realities in operation, within the larger context of state law, liberal multiculturalism and the rights discourse.

This thesis explores the ways in which these bodies constitute as unofficial dispute resolution mechanisms between and within the context of local 'community' and the overarching determinacy of state law. Of particular concern is how gender is transformed through the position and participation of women in this process of 'privatized dispute resolution'. The discourses produced by the participants in such processes constitute and transform understandings of British Pakistani Muslim women that are significant to their position and autonomy in the family, home and community. Drawing upon fieldwork data and interview material the study explores the socio-legal reality of these women's lives in relation to the complexities of attachment, belongingness and identity that multicultural society introduces.

ABBREVIATIONS

BSC	The Birmingham Muslim Family Support Service and Shariah Council
EUMC	European Monitoring Centre for Racism and Xenophobia
FAIR	Forum Against Islamaphobia and Racism
IHRC	Islamic Human Rights Commission (UK)
ISC	Islamic Shariah Council
MFLO	Muslim Family Laws Ordinance (1961)
MLSC	Muslim (Law) Shariah Council
MWHL	Muslim Women's Help-Line
SCUK	Shari'ah Court of the United Kingdom

TABLE OF CASES

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Family Law Act 1996

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Matrimonial and Family Proceedings Act 1984

Motor-Cycle Crash Helmets (Religious Exemption) Act 1976

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PAKISTAN

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GLOSSARY

biraderi	South Asian extended family
'dar al-Islam'	Land of Islam
'dar al-kufr'	Land of War
dhimmis	protected non-Muslim minorities in a Muslim state
faskh	judicial dissolution of marriage
fatwa	legal opinion from a religious scholar/jurist
fiqh	Muslim jurisprudence
hadith	saying, traditions of the Prophet
hakim	arbitrator/mediator
Hanabali	one of the four classical fiqh schools of Sunni Muslim law, founded by Imam Ahmad Ibn Hanbal
Hanafi	one of the four classical fiqh schools of Sunni Muslim law, founded by Imam-I-Azam Abu Hanifa
haraam	forbidden
idda or iddat	period of waiting of three months after divorce
ijtihad	interpretation
iman	faith
imam	mosque /prayer leader
izzat	honour and family honour
jahez	dowry
kafa'a	equal status
khul or khula	release from divorce in return of dower
khiyar al-bulugh	option of puberty
lena-dena	give/take [gifts]

qadi	religious judge
Qur'an	holy book of Islam
mahr	dower
Maliki	one of the four classical fiqh schools of Sunni Muslim law. Founded by Imam Malik
maulana	religious leader
mubaraat	mutual discharge, divorce by mutual consent
mufti	religious scholar
maulvi	mosque/prayer leader
nashiz	disobedient wife
nashuz	disobedience
nikah	Muslim marriage
nikahanama	marriage contract
rukhsati	marriage ceremony leading to consummation of the marriage
shariah or shari'a	the divine law of Islam
sheikh	Religious leader
Shia	followers. An Islamic sect that regards Ali (the fourth caliph of Islam) and his descendants as the rightful successors of the prophet and disregard the first three caliphs.
sunna	source of law and practice of the Prophet
Sunni	literally, one on the path. The largest sect of Muslims who unlike Shias, acknowledge the first 4 caliphs as the rightful successors of the prophet. They belong to the 4 classical school of jurisprudence, Hanafi, Shafi'I, Maliki, Hanbali.
tahkim	mediator/arbitrator
talaq	the unilateral pronouncement of divorce by the husband

umma or ummah	community of all believers
ulama	community of religious leaders
valima	wedding celebration organised by groom
wasiq	religious dissolution of marriage with the intervention of the qadi
zina	illicit sexual relationship

INTRODUCTION

Of late, it seems the relationship between Islam and the West has become ever more entangled with ideological differences, practical incompatibilities and the perceived lack of propensity of Muslims to transpose of fundamentalism and to fully embrace the western ideals of 'progress, modernity and globalisation' (Sayyid 2000:32). Indeed the recent events of 11 September 2001 and the conflicts in Afghanistan (2001-) and Iraq (2003-) have only further served to increase this binary opposition of Islam versus the West and to confirm for some at least, the view that what we bear witness today is in essence the 'clash of civilizations' (Huntington 1996:3). For Muslims in the West, the 'war on terror' and the new emergence of the 'home-grown Muslim terrorist' has further compounded this binary opposition that identifies western Muslims as the 'Other', in conflict, incompatible and disloyal to the state.

Interestingly the centrality of gender to these debates is crucial. From a liberal perspective Muslim women are often presented as dominated, controlled and insubordinate to archaic religious traditions. And, within this discourse it is the gendered construction of the Muslim family that is perceived to be the barrier that denies Muslim women access to rights, equality and empowerment, bestowed upon other women in the West (Okin 1999, Nussbaum 1999). Yet conspicuously absent from these debates are the voices of Muslims themselves and in particular, Muslim women living in the West. This is surprising, bearing in mind that there are diverse generations of British Muslims within local, national and transnational networks and communities which in themselves generate immense differences (Werbner 2000).

It is the purpose of this thesis, to explore this lacuna in order to illuminate the diversity of experiences of one heterogeneous group of women identified in this study as 'British Pakistani Muslim Women'. Underlying this analysis is an exploration of their experiences in obtaining a Muslim divorce from a British Shariah Council. Thus we pose two central questions: How do Shariah Councils in Britain constitute as unofficial dispute resolution mechanisms? And, what are

the experiences of Pakistani Muslim women using such ‘privatized’ forms of dispute resolution to obtain a Muslim divorce? In trying to understand these multiple and conflicting socio-legal processes we critique the dialectic of ‘unofficial law’ and ‘rights’ and ‘multiculturalism’ and ‘community’ that has created a renewed assertion of internal community homogeneity and instead draw upon the awareness that identities are complex, diverse, and contested.

The Scope of the Study

It is of course both difficult and contentious to speak of a ‘British Muslim Pakistani community’ as “the very process of naming involves drawing boundaries around and ‘freezing’ the diversity which exists within all social groupings” (Burlet and Reid 1998:270). As far as this study is concerned, we are rarely in a position to capture the multi-faceted nature of diversity, difference and complexity manifest within minority ethnic communities. Nevertheless there are spaces, which provide us with the opportunity to engage with this process, and the complexity of Muslim legal pluralism is one such example. In this instance we see how the fragmentation of communities has led to competing claims of power, ‘voice’ and representation that in turn allow us to investigate and explore the relationship between Pakistani Muslim women and the processes of unofficial dispute resolution.

Drawing upon fieldwork data we explore how expectations of marriage and, the process of divorce interact with Shariah Councils and consider how such socially sanctioned parameters embody notions of honour and shame may affect their decisions and autonomy. In doing so this thesis builds upon the insights of existing research, which provide fascinating accounts on the nature of Muslim legal pluralism in Britain, but which ultimately pay insufficient attention to internal contestation and change within Muslim communities (see Bunt 1998, Carroll 1997, Hamilton 1995, Menski and Pearl 1998, Shah-Kazemi 2001, Yilmaz 2001). Thus disappointingly, the current coalescence of literature situates these debates within the framework of ‘cultural rights’ that embody fixed, essentialized definitions of community, culture, religion, identity and belonging. Instead we re-

evaluate these debates in the light of empirical reality providing a more nuanced, complex understanding.

The Organisation of the Study

Muslim family law defines the position of women in relation to marriage, divorce, child custody, dowry and inheritance (see Nasir 1990). An empirical approach offers the opportunity to explore how these unofficial legal norms manifest in the 'private sphere' of family, home and local community and the nature of interaction with state law.¹ For Yilmaz, "Muslims 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 formalise such an arrangement within the states own legal system" (2001:299). Indeed few voices have expressed caution or outright opposition to the development of some kind of cultural autonomy or what Parekh refers to as the creation of 'self-disciplinary communities' for Muslims in Britain (2000:295). Given the potential effects upon individuals within communities and in particular women, it seems extraordinary that the centrality of gender relations has been largely ignored and, that an understanding of the gendered nature of the 'informal' legal sphere(s) remains a theoretical construct.²

Since these and related questions form the core basis of the study we begin in chapter 1 with a conceptual and theoretical analysis of the key debates. The purpose of this chapter is twofold, firstly to provide a critique of existing material and, secondly to explore the relationship between legal pluralism, dispute resolution and multiculturalism in Britain. Thus the attempt to link law with debates on multiculturalism, gender and identity provides the conceptual space to explore how cultural and legal diversity is characterized by difference and complexity. To gain a clearer understanding on the relationship between empirical research and theoretical understanding the next chapter goes onto discuss the research methodology adopted in the study. The challenge here is conceptualize a methodological approach that recognizes difference and complexity from the standpoint of women and the researcher.

¹ This is insufficiently explored due to the limitations of the study. See chapters 4 and 5.

In the next three chapters we draw upon empirical data and situate the study in the context of South Asian Muslims in Britain. In chapter 3 we focus on debates on citizenship and explore the relationship between individual and collective identities. A particular focus here is to draw upon the experiences of marriage for the women in the sample. The next chapter explores how 4 Shariah Councils chosen for fieldwork research constitute as unofficial dispute resolution mechanisms in Britain. Here in microcosm and drawing upon fieldwork data we can begin to explore the particular and multiple ways in which unofficial law operates, the different ways in which it is conceived and the role it plays in configuring legal discourse at all levels (see Griffiths 2003:2).

This dialectic between legal centralism and legal pluralism raises the underlying relationship between gender and legal discourse and the role of gender in configuring legal discourse at the unofficial level. Thus in chapter 5 we draw upon interview data to understand how gender is constructed in the realm of unofficial law. We question how Pakistani Muslim women engage with unofficial law and whether these socio-legal processes act to silence women within the community? Situating this study within the context of the lived experiences of women's lives is extremely significant. As Griffiths points out, "Women cannot escape from the fact that what shapes the power and authority of women within social life also has an impact on them in the legal domain" (2002:304).

The Limitations of the Study

This study has obvious limitations. An interdisciplinary approach to the study of law and social theory provides an exciting opportunity to combine multiple perspectives and a variety of data sources to explore compelling outcomes and possibilities. An overwhelming feature of this approach is to draw from key theoretical concepts while revealing the complexities and tensions between them. Nevertheless, in a study of this size the use of an interdisciplinary approach can also have the effect of weakening arguments and reducing the 'analytic

² The exception is Shah-Kazemi (2001) but even here Muslim communities are presented as bounded and homogeneous.

kaleidoscope' (Mccarthy, Holland and Gillies 2003:19) to sideline complexity in favour of commonalities. In order to establish the empirical reality we may adjudicate to a pragmatic approach that accommodates a combination of paradigms and a diversity of approaches, but in effect limits the interdisciplinary approach. For example in this study the gendered dimension of informal law pays insufficient attention to how these processes may interact with state law and international law which lead to a conflicts of law scenario.

The most obvious limitation in this study however relates to the fact that although the study draws upon Muslim literature³ it does not comprehensively explore the contributions from Muslim legal scholars and Muslim feminists to debates of human rights and gender equality from an Islamic perspective and, hence one may legitimately conclude that these analyses remains insufficiently explored (see Ali 2000, An-Na'im 1997, Mayer 1999). This is intentional and for two reasons: firstly the study does not seek to focus on the specificity of a single religious identity but instead explores the multiplicity of identities that reflect the complex lived realities of the lives of Pakistani Muslim women in Britain. For this reason we draw upon the work of feminist sociologists and social theorists who have explored the multi-faceted nature of identities in 'multicultural Britain' for the past four decades. Secondly a study framed upon the Islamic human rights perspective would undoubtedly pose a completely different set of questions and possibly produce different outcomes. In other words the most important component of the study would most probably be the dimension of a religious identity and as stated earlier it was not the objective of the study to focus on the specificity of a single religious identity.

A related matter involves the processes involved in collating empirical data and the benefits and/or drawbacks to be found in the sample. For example originally a larger qualitative study was envisaged which included case-file analysis from all the Shariah Councils under study but this proved virtually impossible due to constraints on access to materials. Possibly a more important limitation was the sample of interviewees itself. Apart from a bias in the socio-economic background

of the interviewees there was an imbalance on regional variations from where the sample was drawn. Again this was due to problems of access and the subsequent need to adopt the 'snow-balling technique'. We discuss the significance of these issues to the study in chapter 2.

In what follows then, this thesis not offer a new theory, but instead engages in the intellectual strategy of rethinking the relationship between Shariah Councils and British Pakistani Muslim women in the light of the "messiness of social life, where competing claims and contestation over meaning are not a sign of cultural or community failure but, rather, part of the human condition" (Cowan, Dembour and Wilson 2001:21). It is this process which enables us to challenge the current totalising approach of Muslim Personal law and culture in existing literature, as partial and incomplete.

³ Primarily the principles of Muslim Family Law as they relate to marriage and divorce.

CHAPTER 1

LINKING LAW AND SOCIAL THEORY: A CONCEPTUAL AND THEORETICAL ANALYSIS

1.1 Introduction

This chapter provides a review of literature. It draws upon a number of different but closely related disciplines and adopts an interdisciplinary approach to the study of law, drawing upon social theory, feminist political theory, feminist legal theory, anthropology, legal pluralism and literature in the area of race and ethnicity. A socio-legal approach to the study of law⁴ thus provides us with the conceptual tools with which to explore the complex relationship between ‘law’, ‘unofficial law’ and social life.

The first section of the chapter 1.1 draws upon studies on legal pluralism to explore the complexities of socio-legal reality in Britain. As has been argued elsewhere, Muslim legal pluralism manifests in the area of family law (Carroll 1997, Menski 1998, Pearl 1996, Poulter 1998, Yilmaz 2001). Informal Muslim legal bodies known collectively as Shariah Councils provide advice and assistance in matters concerning marriage, divorce and custody.⁵ Drawing upon a ‘thick, deep, strong or new’ (Banakar and Travers 2002:4) description of legal pluralism this section explores the contested ‘space(s)’ Shariah Councils occupy between and within the boundaries of community and law (Santos 1987).⁶ In other words, to challenge the dichotomy of formal versus informal law. Furthermore, literature on ‘postmodern analyses’ of law, suggest that a definition of legal pluralism must

⁴ The terms ‘sociology of law’, ‘socio-legal studies’ and ‘law and society’ are often used interchangeably and can create conceptual difficulties on precisely their ‘meanings’. For an interesting discussion see Roberts (1998).

⁵ For an in-depth analysis of the ways in which Shariah Councils constitute as unofficial legal bodies see chapter 4.

⁶ It does not provide a comprehensive review of the different approaches within the field of legal pluralism but instead only focuses on those approaches drawn upon in the study. To simplify matters we can ‘categorize’ legal pluralism into 3 periods: the first focused on the debate between ‘colonial laws and indigenous law’ in post-colonial countries and the relationship between the state and non-state dimension of social regulation through law (see Hooker 1978). The second period focused on community justice where theorists such as Abel (1982), critiqued the traditional idea of informal law as a social transformative ideal. And finally the third period can be described as ‘postmodern legal pluralism’ that includes new forms of legal pluralism such as ‘internal legal pluralism’ and supra or ‘transnational legal pluralism’ which introduces the idea of multiplicities of law transcending national boundaries (see Santos 1992).

incorporate “differing legal orders within the nation-state” (Griffiths 2001:289). The present study therefore constitutes an attempt to investigate the relationship between ‘unofficial’ decision making bodies, law and social life.

Studies on dispute resolution processes in the context of community and family mediation programmes suggest that the distinction between state and non-state dispute resolution is far more complex than previously envisaged (Roberts 1979, Gulliver 1963, Abel 1984). Thus in this study, a critical reading of the relationship between state, law and power allows us to question how moves towards the introduction of non-adversarial procedures in matters of divorce illustrates a blurring of boundaries between official mediation policies and unofficial mediation practices pursued by Shariah Councils. In other words, we can see the way in which ‘negotiations’ may take place within the private sphere of Shariah Councils and how such processes that have traditionally been defined as non-legal may co-exist in multi-faceted ways alongside state law. This process is described by Santos as ‘porous legality’, involving “the conception of different legal spaces super-imposed, interpenetrated, and mixed in our minds as much in our actions (that constitutes) inter-legality” (1987:280).

In the present study, we are also interested to understand this process of dispute resolution from the perspective of women. Thus in section 1.1.4 we draw upon the work of legal pluralists who have used ethnography in their analysis of law to explore how gender frames the relations of power on which negotiations may be based within the family and unofficial decision making bodies. The ‘ethnographic’ approach to ‘law’ evolves from legal anthropologists and is based on the idea that it allows people a voice to put forward their stories on how they perceive law, what it means to them and how they deal with issues of control, power, domination and subordination.⁷ However, much of the early literature on legal pluralism does not incorporate a gender perspective and subsequently the “specific lived realities of women’s lives remains largely marginalised” (Griffiths 2001: 156). In addition, the traditional ‘structure’ of legal pluralism itself gives insufficient weight to the

⁷ For Geertz (1963) such local, specific micro-studies allow a thick description of law. For an overview of his approach and other legal pluralists see Woodman (1998).

power of non-legal social arrangements within the spheres of the family, home and community. With regard to understanding the way in which women participate in such processes, the present study attempts to synchronize theories on law, legal pluralism with the power of legal and non-legal social processes to consider what effect it may have upon their decisions to access 'law' both at the formal and informal level (Griffiths 1997, Hirsch 1998 and Hellum 1999). Drawing upon a Foucauldian analysis of 'power' and feminist critiques of the public/private dichotomy it questions what impact these 'unofficial' legal processes may have upon women's power to negotiate family law matters regarding marriage and divorce (O'Donovan 1985, Mackinnon 1983, Rose 1987). Furthermore given the differential position women occupy within family, home and community we must also, "document how this gives rise to the exercise of different forms of power, which impact upon individuals abilities to negotiate with one another"(Griffiths 2003: 304).

If we accept the complex socio-legal reality of Muslims in Britain it becomes imperative to locate these debates within a wider social and political context. The final section 1.3 briefly analyses literature on the relationship between multiculturalism, feminism and conceptions of the family to explore the relationship between 'unofficial law' and gender inequality. Thus we draw upon 'multicultural theories' to explore how a fragmentation of identities (based upon ethnic and religious specificities) challenge the liberal notions of 'common citizenship' and 'equality before the law'. A critical reading of citizenship allows us to question whether a multicultural definition of citizenship undermines the liberal principles of autonomy, choice and free will for women within minority communities.⁸ This raises a number of important conceptual and theoretical questions regarding the relation between individual and groups rights, how these are distinguished and how clashes between individual and group rights may be reconciled. Embedded in these is the key question of what makes a community a

⁸ As Purvis and Hunt point out that citizenship, "has always operated in tandem with assumptions about who are valid political actors and what are the appropriate boundaries of community" (1999:461). Also the debates on citizenship must be understood as part of the wider issues on immigration and immigration control. See Bhabba and Shutter (1994) for an invaluable contribution to our understanding of the relationship between immigration control, citizenship and gender in Britain.

community of rights. Does the state, in granting individuals the right to enjoy their culture, have an obligation to foster that culture and ensure its survival? O'Donovan argues, that the liberal public/private distinction is crucial to understanding the subordination of women and which liberal political theory fails to investigate (see Phillips 1993). This distinction designates women to the private sphere, an area of greater legal 'deregulation' and "central to liberalism is the concept of privacy as a sphere of behaviour free from public interference, that is, unregulated by law" (O'Donovan 1985: 181).

This also raises questions on what we mean by the term 'community'. Communities nest within one another: local, national, and global. They also intersect: British Muslims belong to the global Muslim umma, for example. Some individuals may regard the recognition of a cultural/religious practice as a 'right' and by other members of the same community as a means of oppression. A particular cause for concern for liberal feminist theorists has been whether the practice of personal laws within the family context leads to the unequal treatment of women within these communities. This area of work has been couched within the context of tensions between multiculturalism and feminism (Okin 1999, Phillips 2002, Shachar 2001).⁹ Hence we consider how women may have to balance social expectation based on cultural duties with religious obligations and, explore how socially sanctioned parameters that embody notions of 'family honour' and 'shame' interact and affect their ability to negotiate disputes within families and communities whilst maintaining their autonomy and independence (Griffiths 2003: 305).

Moving away from the traditional liberal western approaches, the chapter draws upon the work of black feminists who have developed more complex and nuanced conceptual and analytical frameworks to understanding the relationship between gender, justice and equality. In particular the 'intersectional' approach (Crenshaw 1999, Volpp 2001) and the concept of 'translocational positionality' (Anthias 2002) provides the conceptual frameworks with which to explore the complex,

situated positionings of women according to race, class and gender differences as well as understanding the relations of power underpinning these categories. Thus these analyses interrogate what we understand as culture, community and identity as fluid, changing and contested entities that are open to social and cultural contestation within diasporic communities and such a dialogue allows us to develop what Yuval-Davis has called the “multi-tier approach to citizenship” (1999:5).

1.2 Studies of Legal Pluralism

Legal pluralism moves away from the study of law based upon abstract legal rules to understanding its meaning and existence in the context in which it operates. For many theorists, it provides a space for critical thought and discussion where they are able to explore the relationship between law, culture and social change in society. Griffiths notes that, “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: 289).

The different approaches to legal pluralism are dependent upon the ways in which law itself is constructed as a concept. Much discussion therefore centres on what we understand as law, which in turn has invoked much debate, discussion and dissension.¹⁰ Early legal theory defined the relationship between law and state as central to understanding the political and social organisation of society. Law was designated the role of maintaining the prevailing social order and served to entrench the existing social status quo facilitated by the highly stratified hierarchical class system and the power of the state (Kelly 1992:17). Legal pluralism directly challenged this claim and early studies focussed on undermining the ideological and hegemonic position that state law assumes, a doctrine many define as ‘legal

⁹ Okin argues that such tensions become especially clear when we consider a controversial proposal endorsed by some multiculturalists: to provide cultural minorities with ‘group rights’ as a way to preserve those minorities from undue pressure on their ways of life (Okin 1999:5).

¹⁰ For an interesting discussion on the historical development of law in western society see Tamanaha (2001).

centralism' (Griffiths 1986:11).¹¹ The term 'legal pluralism' itself has been subject to much critical discussion and hindered by some conceptual difficulties.¹² Much of the discussion has focussed on its meaning and implications for legal relations in society (Gilissen 1989, Galanter 1981, Benda-Beckmann 1988). A simple but clear definition by Merry (1988) serves as a useful starting point. She defines legal pluralism as "as a situation in which two or more legal systems co-exist in the same social field" (1988:45). 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.¹³

1.2.1 'Weak' and 'Strong' Models of Legal Pluralism

Much of the literature categorises legal pluralism, in either 'weak' or 'strong' terms. These distinctions originate from Griffiths seminal article on legal pluralism, in which he discusses the development of the concept in its challenge to the 'doctrine of legal centralism' (1986:4). Given the diverse and multifaceted nature of the different approaches in the studies of legal pluralism, it is useful to analyse their differences in order to merit their application to this study.

Examples of 'weak' models of legal pluralism originate from early anthropological studies that highlight the existence of customary law or indigenous law in postcolonial countries. In this context the state defines the parameters of legal systems and hence their autonomy is controlled by the hegemony of state power.¹⁴ Thus critics point out the 'weak' model of legal pluralism remains largely limited as it relies too heavily upon a legal centralist model of law which, promotes a uniform view of law and its relationship to the state

¹¹ For Griffiths legal centralism is described as a 'false ideology' perpetuated by the state in order to maintain its hegemonic position in society. See Griffiths (1986).

¹² The concept developed in the field of 'legal anthropology' where the study of law focused on the relationship between colonial and indigenous laws. A number of theorists have been critical of those engaged in an anthropological approach to the study of law, for example Benda-Beckmann argues that "many legal sociologists submitted to, and inevitably romanticized the dominant legal system" (1989:56).

¹³ Other definitions of legal pluralism include "the situation in which two or more laws interact" (Hooker 1975:6) and "the condition in which a population observes more than one body of law" (Woodman 1998:157).

¹⁴ Examples include Hooker (1971) and Chiba (1986).

(Griffiths 1986: 12). Thus in reality, state law remains dominant, hierarchical while maintaining a false image of neutrality and equality.

To put it simply, strong forms of legal pluralism recognises 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. In the present study we are keen to adopt this approach for our understanding of Muslim legal pluralism in Britain. As for just how the 'thick, strong or new' form of legal pluralism manifests, we can begin with the work of Pospisil (1958) and his notion of 'different legal levels' and Smith's concept of 'corporations' (1978).

From the point of view of Pospisil (1958) the traditional definition of law is both inadequate and dismissive of those legal systems that do not fulfill the criteria of the traditional state-centered definition of 'law'. Instead he argues that in different societies there are different levels of law, which we must recognise and not simply dismiss as having no law. Thus in order for us to understand 'law', we must explore the complex interaction of legal phenomena operating within society. He explains, "Society, be it a tribe or a 'modern' nation, is not an undifferentiated amalgam of people. It is rather a patterned mosaic of subgroups that belong to certain, usually well-defined (or definable) types with different memberships, composition, and degree of inclusiveness. Every such subgroups owes its existence in a large degree to a legal system that is its own and that regulates the behaviour of its members..." (1958:125). The nature of legal pluralism therefore varies among the groups (depending upon inclusiveness) and is stratified accordingly, thus constituting different 'legal levels'. Criticisms of his work focus on his emphasis on the structural presentation of society into groups and subgroups essentially being bounded and delineated into groups "to idealized to do justice to social reality" (Griffiths 1986:17). Thus although Pospisil challenges the power of state law his approach remains rooted within the structural approach to what we understand as 'law' as 'legal levels' (1958:123).

In turn, Smith's theory of legal pluralism is based upon his concept of 'corporation' that acts as a basic unit of social structure (1981:78). The

corporation acts as a form of political organisation and the individual membership to the corporation is the source of their duties, rights and obligations. These corporations exist in all parts of society for example, the Church or within a caste group. There are different levels of 'corporations' and he outlines three different types of legal pluralism, which he describes as cultural, social and structural pluralism. The main objection with Smiths work is that it is present in an 'ideal type form' and there is very little room for variance within the phenomena under study. Griffiths explains, "An ideal-type approach undermines the applicability of the theory, by making it unclear how its basic entities, corporations, can be identified in practice. Features such as permanence, autonomy and distinctiveness, etc. of corporate groups are treated as definitional attributes rather than as dimensions of variation" (1986:112). Both these studies depart from the 'weak' description of legal pluralism in their recognition of other legal system, nevertheless both studies remain limited by their structural approach to the study of law.

An alternative approach to the study of legal pluralism has developed within the 'sociology of law' paradigm and derives from the work of Ehrlich (1913). He developed a descriptive theory of legal pluralism where law becomes part of another "ordering" and cannot therefore assume a dominant position. He describes this as "living law", the law "which dominates life itself even though it has not been posited in legal propositions" (Ehrlich 1936:493, quoted in Griffiths 1986: 26). This approach subsumes all social norms into legal norms and challenges the power of the state in the creation and administration of 'law'. Critics however stress how Ehrlich has failed to address the issue of conflict between the different bodies of living law (see Fitzpatrick 1995).

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 which state law and its legislative mechanisms fails to take into 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 1978:720). This framework is certainly useful as it allows us to explore the complex interplay of different legal orders in operation for example in this study, state law, family and Shariah Councils. The notion of ‘semi-autonomous social field’ allows us to conceptualise multiple forms of ordering that maybe perceived as ‘legal’ but do not rely upon state law to determine their power or authority. It thus challenges the dominance of state law and the doctrine of legal centralism. Under this framework we can understand how state regulation filters into different organisations via different social fields. This approach has been further developed by Fitzpatrick (1984) with the concept of ‘integral plurality’ where the state legal order is deemed to be part of other social ordering which includes the family, the workplace and social networks. He departs from Moore in that he does not see the semi-autonomous necessarily constituted by the state but vice versa and thus law “is the unsettled resultant of relations with a plurality of social forms and in this law’s identity is constantly and inherently subject to challenge and change” (Fitzpatrick 1984:138).

1.2.2 Limitations of the ‘Weak/‘Strong’ Dichotomy

It is very clear that as a concept ‘legal pluralism’ provides us with the conceptual tools to challenge state-law power and recognise other forms of legal ordering. Nevertheless as indicated earlier, it remains hindered by conceptual difficulties on what is understood as ‘law’ and the distinction between social and legal norms. Most legal pluralists dismiss the ‘weak’ model of legal pluralism for its embodiment of legal centralism and its failure to challenge hegemonic state power (Hooker 1981). A criticism of the strong model centres on the difficulties in distinguishing between differing normative orders that subsequently all fall under the rubric of law. Merry questions, “Where do we stop speaking of law and find ourselves simply describing social life?”(1988:878). For Collier and Starr (1989), the concept of legal pluralism remains limited as it fails to take into account the

power between and within legal systems- power which is not equally shared. We can also conclude that little attention is paid to power relations within families and communities consequently the strong legal pluralist approach purports an anti-state ideology that presupposes that “non-state or indigenous law is good” (Tamanaha 2001:199).

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 2001:199).

1.2.3 Legal Pluralism and the Study of ‘Disputes’

A rather different literature shifts from the study of ‘law’ to the study of ‘disputes’. This approach adopts a cross-cultural dimension to the study of law that allows a comparative approach between ‘groups’ and ‘societies’ to explore what is understood as law. Based upon an ethnographic approach, it moves away from the instrumentalist approach to the study of law whereby primacy is given back to the individual at the centre of the ‘dispute’ allowing us to understand the complex reality of ‘law’ in practice. It highlights both the ethnocentric bias implicit in the traditional conception of ‘law’ and the dynamic processes involved in law (see Abel et al 1984).

More recent analyses, challenge the limitations of the ‘dispute’ paradigm which stem from its claims upon ‘knowledge’ and ‘representation’ of the group under study. The main criticism with the dispute paradigm is that it adopts a relativist approach to understanding cultural difference, with culture presented as ‘fixed’, homogenous and indeterminate and little attention paid to exploring issues of dissent and diversity within the group under study. In this way it replaces one framework of analysis, law based upon substantive rules and procedures, with

another the dispute paradigm that also remains fixed and rigid. This approach therefore, fails to address the key issue of power within and between groups but remains useful to the extent that law in modern societies must be understood in relation to the cultural context in which it operates.

In response legal pluralists have developed conceptual frameworks where gender and dispute processes are the focal point of analysis. Yet this approach adopts the intellectual strategy which incorporates the everyday lived experiences of women's lives that "produce hybridities of identities, cultural forms and perceptions of difference" (Cowan, Dembour and Wilson 2001:20). Clearly this approach can provide us with a useful insight into the experiences of Pakistani Muslim women using unofficial dispute resolution mechanisms in Britain.

1.2.4 Gender and Legal Pluralism

In her study of gender and marriage among the Kwena tribe in Botswana, Griffiths (1997) examines how gender frames the relations of power upon which negotiations concerning family relationships are based. This study draws upon the narratives of the women, focusing upon their perspectives and experiences and challenges the traditional constructions of law and culture as fixed and bounded. Instead she focuses on how meanings are constructed and "raises questions about the power and authority to construct meaning, whether at a local, national or international level" (2001:102). The narratives focus on dispute resolution and dispute resolution mechanisms and analyse the different strategies employed. This work illustrates how women can be both empowered and constrained by these processes in different contexts.

For Hirsch (1998), feminists must develop an epistemological approach to the study of law to incorporate "ways of knowing" that "shape understandings of social life" (1998:3). Through close analysis of specific disputes she explores how gender is constructed at a micro-level of interaction. Of particular interest to this study is her analysis of the language and disputing in cases and mediation in local Islamic courts. Thus she locates broader gendered discourses on exploring "how gendered people can and should speak" (1998:3). Thus in this way we

understand the complex intersection and interaction between social and legal norms within a particular social context.

Finally, Hellum (1999) problematizes the relationship between women's identities as individuals and as members of a family group. In doing so she critiques existing debates on cultural relativism, universalism and pluralism that fail to understand the unique experiences of women's lives that give rise to different social and legal relations. By applying a gender perspective, this fascinating study based on the Shona-speaking women in Zimbabwe, is one of the few studies that challenges legal centralism and cultural relativism and provides an insight into the inconsistencies, contradictions and challenges that local practices may have upon legal relations.

What each of these studies provides us with, is a more complex and nuanced approach to understanding the relationship between gender, law and dispute resolution. By citing the multiple axes of differentiation between and within communities in terms of power relations and symbolic meanings, it unsettles the ideologies of law as universal and homogeneous. Further, these studies recognize that culture is constantly changing, reformulating and that women are active agents in this process. Thus while in some contexts they may challenge patriarchal norms and values in others they actively participate in these processes. Thus law must also be understood as 'situation specific' a product of negotiation and discussion rather than just formal imposition. The key question for us is whether we are able to draw upon these approaches to understand the experiences of Muslim women in modern western liberal societies? The shift to a postmodern understanding of law opens up this conceptual space.

1.2.5 Postmodern Approaches to 'Law'

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, 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)¹⁵ and the impact of modernism upon the fragmentation of the nation-state that has led to new understandings of 'law' (Benton 1994). It is interesting to note that in response to new global challenges legal pluralists draw upon social theory to understand this process of fragmentation and the plural nature of legal orders. These approaches are significant as they challenge the 'state law/non-state law' dichotomy that remains prevalent in many studies of legal pluralism.

One of the key theorists to link the development of globalisation to law is Santos (1987, 1995). He defines law as, "a body of regularised procedures and normative standards, considered justiciable in any given group, which contributes to the creation and prevention of disputes, and to their settlement through an argumentative discourse coupled with the threat of force" (1995:428-9). He goes on to limit the characteristics inherent within social life, which can be defined as law to 6 clusters defined as domestic law, production law, exchange law, community law, systemic and territorial or state law. Each of the 6 clusters interacts and overlaps with each other. Santos's account of law and legal pluralism is both complex and elaborate and for the purposes of this study will not be extensively critiqued. Nevertheless the present writer is interested in two of these clusters, domestic law and community law. He describes domestic law as, "the set of rules, normative standards and dispute settlement mechanisms both resulting from and in the sedimentation of social relations in the household" (1995:429). He goes on to describe this as, "very informal, non-written, so deeply embedded in family relations that it is hardly conceivable as an autonomous dimension thereof" (1995:429). Community law challenges state power, "it may be evoked either by hegemonic or oppressed groups" (1995: 434). These analyses provide a clearer understanding on the nature of legal pluralism within diasporic communities in the West. Yet despite the vast array of literature now available, we continue to learn very little on the experiences of

¹⁵ 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

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

1.2.6 Muslim Legal Pluralism in Britain

As discussed earlier, 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 & Pearl 1998; Poulter 1996; Yilmaz 2001; Shah-Kazemi 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 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 and is, indeed, unlikely to happen in the foreseeable future in the case of most Muslims. 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 1998:75).

In Britain, Muslim family law is referred to as personal law as there have been some voices within the Muslim community in the UK demanding that a ‘personal regime of law’ be adopted for the Muslim community as a whole within the area of family law (Nielsen 1991: 56). Muslim Family law, like other South Asian religious and customary corpuses of law, defines the position of women in relation to marriage, divorce, child custody, dowry and inheritance (Nasir 1990, Ali 2000). In the case of Islam, Muslim Family Law is subject to interpretation by different religious leaders and communities. There is no one comprehensive Islamic legal system but varieties exist according to ethnic or religious backgrounds. For example, the Islamic personal laws which exist in the Indian subcontinent vary greatly in comparison with those which exist in Iran or Iraq. There are two main groups of Muslims in Britain, Sunni and Shi’a Muslims, and the practice of Islam within these groups varies in accordance with the different Shariah schools of thought (see chapter 3). There are also many class and sectarian divisions, however, operating according to different Islamic codes of laws; for example, Ismaili Muslims are part of the wider Shi'a group but practice distinct laws applicable only to them. It is therefore difficult to speak of ‘Muslim family law’ in Britain when it varies so widely according to ethnic and sectarian affiliation. Nielsen notes that the discussion of Islamic family law in Britain in the Muslim magazines centres on the *ethics* of the subject rather than the law (1991: 12). This means that the general principles highlighted in these texts are based on human relations. According to one interpretation, custom is dependent on place, time and circumstances; others regard the role of religious leaders as crucial in defining current Sharia practice. Muslim feminists argue that there is a fundamental tension in Islam between its ethical or spiritual vision of sexual equality and the unequal hierarchies contained in family laws, instituted in early Islamic society and perpetuated over time by those holding power (Ahmed 1992, Mernissi 1987).

1.2.7 Unofficial Dispute Resolution Mechanisms: Locating Shariah Councils

In addressing the issue of legal pluralism in western liberal societies we can see that writers fall into two categories. The first highlight the ontological divide between state law and personal laws which may produce a new set of hybrid laws but in effect replicate the legal centralist approach it seeks to challenge. In this context it is vital to differentiate state law from non-state law as it involves different notions of power and “monopolizes the symbolic power associated with state authority” (Merry 1988, Cotterrell 1992). Critics of this approach fall into the second category, pointing out that the ontological divide between state law as doctrine and non-state law as social ordering is false and misleading. Instead it is argued that studies in legal pluralism must include the operation of ‘state legal pluralism’ in order to understand the interaction of state legal processes with customary law (Woodman 1998). State law is not homogeneous and there are areas of contestation and incompatibility¹⁶ between the two systems. The dichotomy between state law as formalist and centralist and legal plural order as fluid therefore does not exist and we can begin to understand the different perceptions of law in operation. Law is therefore described as a social fact. This approach allows us to understand how the distinctions between state and non-state law may in fact be blurred.

In Britain, the distinction between state and non-state law has come under increasing scrutiny. In this context the practice of Muslim Personal laws can manifest in the form of Shariah Councils (Menski 1998). In this scenario personal law operates in the private spheres away from both the knowledge and recognition of state law (Menski and Pearl 2000). Yet the relationship between state law and customary law in modern western societies cannot be seen as so clear-cut (Fitzpatrick 1984, Woodman 1998, Santos 1987). Santos points out that the practice of personal laws in western countries has led to a situation where the state expands and involves itself in areas that are traditionally defined as non-state, a process he describes as ‘secondary civil society’ (1982: 252).¹⁷ In this context we

¹⁶ For an interesting analysis of this approach see Petersen and Henrik (1995).

¹⁷ Explanations range from informalism challenging existing ideas on the nature of law and embodying a social transformative role to materialist explanations where informal social control works to discipline labour; a repressive state initiates ‘informalism’ as a mode of social control

can see how the emergence of a 'politics of identity' with demands for communal autonomy may in fact lead to an "ever greater internal heterogeneity of state action" where the state realigns itself and manifests in different ways. According to Santos, "the unity and universality of the official legal system break down, new forms of legal pluralism within state legality may arise which are identified 'internal legal pluralism' " (1987:54). In the British context we can see how this dialectical relationship between state law and unofficial law in relation to mediation illustrates the need to develop a theory of legal pluralism, which is wide enough to capture different forms of pluralism(s) rather than focusing on the dichotomy of state law versus indigenous law. In his fascinating historical account on the development of formal state law in nineteenth-century England, Arthurs, illustrates the existing dialectic "between centralism and pluralism" (1985:3) and the development of a "single legal culture out of a pluralistic system" (1985:8). Hence a historical narrative allows us to understand the pluralism inherent within state-law through mediation, arbitration and private arrangements.

The role of the individual within these plural legal developments has also been extensively developed. Henry (1983; 1985) develops the work of Fitzpatrick and draws upon Giddens (1992) and his idea of the 'self' to illustrate the role of the individual and individual action in such legal processes. In this study the issue of choice and whether or not the individual wishes to use these non-official legal bodies is crucial. Poulter points out that Muslim women may be compelled to use these bodies which may be conservative and patriarchal due to issues of family honour (1998:14). Shariah Councils are part of a Muslim community (the Muslim umma) and these demands of belonging to a Muslim community may conflict with local ones. Cownie and Bradney point out that there may be different levels of pressure to comply as, "even with voluntary dispute resolution mechanisms there may be considerable pressure to accept the dispute resolution mechanisms ruling. A person who refuses to accept the jurisdiction of the family to mediate in a family quarrel may find that they lose contact with that family" (1996:7).

and finally the role of professionals in informalism that serve the interests of the state. See Santos (1982).

1.2 The Relationship of ‘Mediation’ to Law

The relationship between state law and personal law brings into question of where the latter is located within the social, political and legal sphere(s). Literature suggests personal laws manifest in the area of mediation (Harrington 1992, Merry 1992, Mulchany 2000). In other words, mediation serves as a useful link between official and customary law as these programmes are located on the boundary between state law and non-state ordering. As Merry suggests, mediation “can be thought of as intermediate, distinct from both sides but linked to each” (1992:164). It is this linkage between state law and unofficial mediation bodies, which is of interest to the present writer.

In seeking to understand how Muslim legal pluralism manifests in Britain, it is pivotal to explore how Shariah Councils challenge the state/non-state law distinction. How does the state define dispute settlement processes? To what extent are disputes settled within the private arena of the family and home and in the community by non-state agencies such as Shariah Councils? And in what form does this non-state intervention take? In doing so this thesis explores the relationship of ‘mediation’ to law. Is there a blurring of boundaries between official mediation policies and unofficial mediation practices? We can see with informal dispute resolution mechanisms that the distinction between state and non-state dispute resolution collapses. Religious bodies embody legal rules and norms and can demand different levels of obedience even though they may be in conflict with state law rules. Menski argues that “While it would be alarmist to speak of a parallel Muslim court structure in Britain, there is much evidence that many disputes among Muslims in Britain are today settled in the context of such informal family or community conciliation involving senior family members or community leaders, depending on the length and seriousness of the dispute” (1998:79). Adversarial proceedings are to be avoided, if possible.

Mediation is a contested space where competing legal discourses interact. It can be deemed as oppositional to state law but equally be supervised and supported by the state. Working in tangent with individuals and local communities, it is

perceived as the natural space in which conflicts arising from formal and informal legal systems may be amicably resolved. This increase in forms of 'informalism' has been generally perceived as a positive development against the overarching power of state law and which can have a social transformative role on 'law'. Indeed, the relationship between mediation programmes and the community have generated an interesting array of literature (see Abel et al 1984). For Fitzpatrick, the relationship between mediation and state law is closer than envisaged and it acts as "a mere mask or agent" of the state (1992:199). Further, he describes the relationship between the two as 'mythic' where popular forms of justice can oppose formal law "even while being identical to them" (1992:200).

1.2.1 Community Mediation

Literature on mediation and its relationship to the community has raised interesting issues. For example, the San Francisco Community Boards in the US are based around the notions of 'civic responsibility' and 'local self governance' in order to encourage settlements away from state law (Harrington 1992:32). The relationship between mediation and the community has led to interesting discussion on the nature of state control. Abel points out that mediation works under the guise of reducing state control and though presented as being less coercive and oppressive in fact it demands greater forms of state control and domination. He accepts however that state law mediation can offer protection against forms of abuse which informal mediation may fail to protect against. "Formality" he states, "can frequently be a useful weapon for the powerless. It can justify the demand for equality across lines of race, religion, gender and even class" (Abel 1982:10). But he concludes that mediation does not embody a social transformative role and as it remains a part of the existing legal system it cannot instigate any real change.¹⁸

One of the interesting issues to consider is how communities are constructed in mediation programmes. Yngvesson and Fitzpatrick illustrate how mediation

¹⁸ Adopting a dialectical approach to the relationship between law and community justice, he illustrates the contradictions within the law. He argues that to understand the dialectical relationship between formal law and informal justice we must focus on the intersection between law, justice and power (see Abel 1984).

actually creates “representations and identities for ‘community’ in a legal setting” (1992:178). In the US the role of religious bodies as conflict resolution mechanisms has in recent times generated much interest. Harrington points out that prior to setting up of community boards dispute resolution was organised around religious, cultural and ethnic lines. She states, “They were established to maintain cultural values and preserve ethnic and religious identity, often seen as being under attack from the ‘outside’” (2000:186). In his early research into the formation of such tribunals during the early twentieth century Auerbach (1983) describes the role of the tribunals within the Chinese community in New York. He states that the tribunals played a specific role in maintaining close-knit ties within the community and ensuring assimilation was being resisted. He also traces the origins of the Jewish Conciliation Board in similar terms. Thus in the 1960s there were a number of government initiatives such as funding programmes aimed at resolving conflicts within communities. The aim of such programmes was not empowerment within the community and it was the courts that were given powers. During this time private mediation bodies also came into operation, for example the Ford Foundation¹⁹ set up bodies to resolve racial disputes in order to prevent widespread disobedience. In this way the relationship between community and law is conceptualised according to the different contexts in which it operates. Thus law plays a minimal role in some contexts and a greater role of governance in others. In the British context, religious bodies are not part of official mediation processes but as discussed in chapters 4 and 5, these initiatives are being developed by some Shariah Councils.

1.2.2 Official Family Mediation

Mediation in English Family law has been presented as a dilemma for the liberal state that grapples with regulating ‘family life’ on the one hand and with preserving ‘family privacy’ on the other (Maclean 1997, Bottomley 1984). This relationship between the state and the family²⁰ is epitomised through family law

¹⁹ For a brief outline on the role of the Ford Foundation see <http://www.fordfoundation.ac.uk>

²⁰ Sociological accounts of the family vary from functionalist writers such as Talcott Parsons who argue that the family serves a particular purpose to ensure the stability of all individuals and hence the stability of the existing social system. Marxist and feminist accounts of the relationship between state and family is based “on the notion that state activity is not simply family-relevant but presupposes, reinforces and perpetuates, as the appropriate unit for personal care and for the

legislation. Kurczewski explains, "...the duty of the State is to support and protect the authentic institution of the family, respecting its natural shape and natural and inalienable rights"(1997:5). Most commentators accept that the 'authentic' shape of the family is based on the idea of the 'sacred character' of the family with the centrality of gender relations. In so doing, what the family means in English family law, is transformed to reflect male interests.²¹

For feminist scholars the analytical framework of the public/private dichotomy underpins the subordination of women in English law. Rather than seeing women as active participants in civic and political life they are consigned to 'private sphere' at the expense of personal autonomy (Freeman 1985). In her critique Olsen (1983) analyses the interrelationship between the market and the family and the public and private dichotomy. She points out that these dichotomies serve to control family and productive lives and this obscures the power relations between women and men and the state and the individual. Moreover the ways in which the state intervenes in family regulation has also been subject to extensive critique. The designation of marriage, divorce, sexual behaviour and domestic violence to the private sphere under the liberal political discourse of personal choice and freedom means that women are often left with little state protection (Olsen 1983:1503).

It is under this analytical framework of the public/private dichotomy that has led to recent proposals to resolve marital disputes back to the sphere of the 'private' against 'unnecessary' state intervention. In this context the development of informal justice in the guise of mediation derives from the liberal legal conception of public and private space whereby family privacy becomes a natural extension of liberal philosophy. As Mnoonkin points out, "The core reason is rooted in notions of human liberty. Private ordering is supported by the liberal idea that

regulation of sexual and parental relationships, a privatized nuclear family based on the sexual division of labour and the subordination of women"(see Smart 1987:45).

²¹ In particular the role and position of women within the family serve to reflect male interests. In her work Mackinnon argues that as the law itself is patriarchal family law merely reflects this. She writes, "If objectivity is the epistemological stance of which women's sexual objectification is the social process, its imposition the paradigm of power in the male form, then the state will appear most relentless in imposing the male point of view"(1983:447).

individuals have rights, and should largely be left free to make of their lives what they wish” (1984:366 quoted in Diduck and Kaganas 2000:350). Yet as Rose points out such proposals “gloss over, ignore or obscure the different powers and interests of different members of the family” (1987:66). This emphasis on analysing the power relations which underpin new reform strategies and the development of ‘informalism’ offers us the opportunity to engage in debates on legal pluralism and diversity without simplifying the categories of family, state and individual. Thus as discussed in section 1.1.3 the development of informalism in resolving family disputes can in practice extend state control to monitoring and defining family relations. Thus a “critical analysis of family law must relocate legal regulation within the complex networks of powers which link up domestic, sexual and parental relations with social, economic and political objectives” (Rose 1987:74). This approach reveals the ambiguities in family life that are not always noticed in theoretical accounts. The complex lived realities of women’s lives means that they are both regulated and active participants in the process of social and family life. Recognising the multiplicities of power means that we can uncover the conditions upon which such processes are based.

Clearly this approach provides a conceptual framework in exploring how 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. We engage in these debates in order to contextualize demands by some community leaders and religious scholars for recognition of Muslim Personal Law into English law.

1.3 Multiculturalism and Family Life in Britain

The relationship between ‘family’ and liberal political theory has focused on the family threatening ‘citizenship’ and loyalty to the state. It is deemed to undermine democracy with its emphasis on loyalty to family networks, rather than the state. Kurczewski explains, “Family, in the theory of liberal democratic politics, threatens the freedom and purity of individual judgement and decision. Under the influence of family, the citizen instead of voting according to his or her beliefs may vote for those whom he or she finds personally unworthy. Even

worse, the family presupposes a bond that rivals the bonds of interests or communality of beliefs” (1997:6).

Yet 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 (Bainham 1995: 235). This is echoed by Raz, who argues “the phenomenon of a multicultural society goes beyond mere toleration and non-discrimination. It involves recognition of the equal standing of all stable and viable cultural communities existing in a society” (1986:38). Raz suggests, that we need a radical policy of liberal multiculturalism that would transcend an individualistic approach but would at the same time “recognise the importance of unimpeded membership in a respected and flourishing cultural group for individual well-being” (1986:44). A redefinition of society would mean there would no longer be majority and minority groups but rather a plurality of cultural groups each of equivalent worth. Debate on the question of what we mean by the ‘family’ raises the question of whether there is “an irreducible core of family values to which everyone could subscribe” (1996:234) or whether English family law has the “scope for accommodating a plurality of views about the family and family lifestyles” (Bainham 1996:234). More recently, the issue has moved to one of ‘rights’ and ‘participatory democracy’. This raises two key questions: To what extent is the law committed to multiculturalism in the family context? And, does the practice of Muslim personal laws lead to the unequal treatment of women within these communities?²²

1.3.1 Multicultural Citizenship: Recognising ‘Diversity’ and ‘Pluralism’

‘Multiculturalism’ is a relatively new concept in western political thought. Hesse, points out that it has become “a contested frame of reference for thinking about

²² Due to the limitations of the study the conflicts of law scenario with state law and cultural practice is only briefly addressed and only in the context of this study. Yet this issue raises a number of interesting questions which merit further research. There seems to be an inevitable tension inherent in social legal policy which seeks at one and the same time to admit and accept cultural difference and value pluralism, while supporting what may be thought to be basic, non-negotiable values which are within the very concept of the family.

the quotidian cohesion of western civil societies uncertain about their national and ethnic futures” (2000:1). Bhabha describes it has a ‘floating signifier’ where “differentiation and condensation seem to happen almost synchronically” (1998:). Indeed the conflation of ‘multiculturalism’ with the related terms ‘identity’, ‘race’, ‘ethnicity’ and ‘diaspora’ has led to epistemological questioning over its precise meaning.²³ The term remains useful however to understand the different strategies and policies employed by the state in its attempts to ‘govern’ and ‘manage’ the problems posed by the presence of minority communities (Hall 1996).²⁴

‘Multiculturalism’ remains a contested idea (see May 1999) though within the British context it is commonly accepted that it arose from political thinking on how to deal with post war Commonwealth migration to Britain. The nature and practice of multiculturalism in Britain has been extensively documented and critiqued (Hall 1996, Gilroy 1987, Anthias and Yuval-Davis 1992, Sahgal and Yuval-Davis 1999, Parekh 1996, Brah 1996, Bhachu 1992, Modood 1998, Rattansi 1992, Hesse 2000, Vertevoc 1996, Werbner 1998).²⁵ These critiques have focused on the tensions between a definition of citizenship based upon liberal notions of universality and equality with the reality of a fragmentation of identities, which has led to ‘claims’ of recognition from various groups based upon an ethnic and/or religious specificity. Such critiques explore the implications of the failure of citizenship to accommodate other forms of identity and investigate the possibility of developing a ‘multicultural’ model that recognizes group rights in the form of cultural rights. Purvis and Hunt describe this process

²³ Hall argues that it has now become so discursively entangled that it can only be used ‘under erasure’ (2000:234).

²⁴ Multiculturalism is not a singular doctrine and has been described as embodying 3 different types: Conservative multiculturalism insists upon assimilation, Liberal multiculturalism focuses upon integration in mainstream society whilst tolerating certain cultural practices in the private. And, Pluralist multiculturalism affords groups rights for cultural communities under a communitarian political order. See Hall (2000). He engages in a very interesting discussion on whether multiculturalism as any epistemological value when it has been appropriated and critiqued in so many difference disciplines (2000: 210-211).

²⁵ The debate on multiculturalism has been accompanied with critiques on what is understood as ‘British’ and Britishness’ (see Hall 1988, Rattansi 1992, Gilroy 1987). Also Hall (1999) has challenged the popular misconception that prior to post war migration to Britain, Britain symbolised a fixed, unified nation-state. In fact, the presence of ‘black’ and Asian communities in Britain has been documented as early as the sixteenth and eighteenth centuries (see Ballard 1997).

as a “neo-liberal mode of governance which decenters the state” and thus “neo-liberal rule is better conceived as a new alliance between the state, autonomous experts, and self-governing individuals” (1999:469-470).

The term citizenship is a contested term with inherent definitional tensions.²⁶ Marshall’s definition of citizenship as “a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed” (1950: 28-9) has served as a useful starting point for critiques. The key elements in this definition are thus membership of a community, equality and the rights and obligations that derive from this membership but the emphasis upon a singular identity has led to criticism on its failure to recognise the actuality of a plurality of social identities in operation (Purvis and Hunt 1999). Literature on citizenship falls into two main camps with an analysis of the social implications of citizenship debates and those considering the political implications. Mouffe develops a synthesis between the different approaches and argues that we must “go beyond the conceptions of citizenship of both the liberal and the civic republican traditions while building on their respective strengths”(1992:65). Thus she advocates a dialectical approach to understanding the social and political dimensions of citizenship, whereby it emerges as a dynamic concept but the core to this synthesis is the important role of human agency.

Feminist writers point out that women have historically been excluded from citizenship debates (Walby 1992, Phillips 1995, Yuval-Davis 1999).²⁷ Furthermore citizenship as well as constructing men and women differently is also an ethnicized and racialised concept (Anthias and Yuval-Davis 1992). Women are affected by ethnic and national processes including as biological and cultural and

²⁶ There are number of different citizenship models. The first can be defined as the liberal approach where citizenship focuses on equality and rights bearing citizens. On the other hand the republican approach to citizenship focuses upon the conceptualization of citizenship as active political participation and civic engagement. Riley (1992:180) has called it a ‘slippery term’ referring to the vast literature which exists on the subject and the impossibility therefore of arriving to a comprehensive common definition.

²⁷ Lister argues “a conceptualization of citizenship is particularly important in challenging the construction of women (and especially minority group women) as passive victims whilst keeping sight

national reproducers; as cultural embodiments of collectivities and their boundaries and as carriers of collective honour. As Yuval-Davis points within citizenship debates the notion of 'the community' assumes an organic wholeness and naturalness in that it is out there and something to which you can either belong too or not (1997). This construction of a 'community' as led to the designating of community leaders as representatives of the interests of the community. The term 'multicultural citizenship' therefore remains problematic as it defines all cultural groups as homogeneous and operating around fixed categories and does not take into account issues of control, power and conflict arising from conflicts of interest within minority groups. Instead we must view citizenship as 'a multi-tier construct' that operates in a number of different ways (Yuval-Davis 1997).

For many the rise of a 'politics of identity' has brought to the fore such tensions with the claim for recognition of groups rights being based upon fixed constructions of identity (Soysal 1999). Thus it is argued that a focus on universalism has merely "served to entrench social divisions of gender, race, sexuality and culture" (Purvis and Hunt 1999: 468). This has led to discussion on the social and cultural contestation of identities. For Squires, the benefits of multiculturalism are innumerable if it is grounded in a "diversity politics framework" (2001:115). This attempts to move away from the pitfalls of identity politics and focuses on the need to develop a fully inclusive political citizenship that enables all citizens to "have equal opportunity to take part in the decision-making process' whereby rules are formulated" (Squires 2001:123).

1.3.2 Multiculturalism and the 'Rights' Discourse

More recently debates on the limits of the 'multicultural citizenship' have been located within the discourse of rights and in particular the conflictual relationship between individual and community rights. Under liberal political theory the principles of individual choice, personal freedom and religious toleration are grounded in the notion of individual rights. Within this tradition group rights are viewed with suspicion and seen as inherently dangerous and oppressive if they fail

of the discriminatory and oppressive male dominated political, economic and social institutions which still deny them full citizenship" (1990:34).

to acknowledge conflict and diversity within the group. Recently, however, liberals have begun to argue that group interests may, in fact, be accommodated within the framework of individual rights (Taylor 1994, Kymlicka 1995).

One kind of critique of liberalism comes from ‘communitarians’ who argue that liberalism has failed to encompass the concept of ‘community’ adequately within its analysis of rights. These critics claim that liberalism, by assuming that the individual exists prior to a community, fails to capture the reality of human experience. By contrast with liberals, communitarians aim to place the individual within a community, seen to play a defining role in identity formation. According to Sandel, the introduction of ‘community’ into the liberal conception of rights enhances self-consciousness and individual identification with a wider subjectivity of “participants in a shared identity, be it family, community, class or nation through a sense of participation and engagement with others” (Sandel 1982: 79). Belonging is central to the communitarian ideal. Human beings are defined as being socially interdependent, connected over their life course through complex social networks. People as subjects are continuously ‘made’ through their engagement with their society and its institutions (Bay 1978: 45). ‘Community’ thus provides a sense of social selfhood and identity, a moral biography embedded in the ‘story of those communities from which I derive my identity’ (McIntyre 1981: 205; Parry 1969:182). What we are or are able to become depends to an important extent on the wider community in which we live. The limitations of the ‘communitarian’ approach is in its failure to address the issue of difference and diversity within a group. For Hirsch, the communitarians fail to acknowledge the negative dimensions of ‘community’, “[b]oth homogeneity and moral education can be politically dangerous in several ways: by encouraging the exclusion of outsiders; by encouraging indoctrination or irrationalism; by compromising privacy and autonomy”. (Hirsch 1986: 14)

The notion of community constructs boundaries, which involve processes of exclusion as well as inclusion. The development of the individual thus becomes dependent upon the community yet this fails to recognise that individual and group rights may diverge. The issue is, therefore, how a theory of cultural

minority group rights may include recognition of difference, including gendered difference, within groups. The principle of recognition may open a Pandora's box, as van Dyke points out, "from which all sorts of groupings might spring, demanding rights" (1995: 234). To avoid this proliferation of 'groups' claiming 'recognition', Fiss identifies two characteristics of a social group, which differentiate it from 'mere aggregates': its 'entity' and its interdependence. By entity he means that the group has a distinct existence and identity apart from its members, and that individuals derive their sense of well being, status and identity from their membership in the group (see Dunleavy and O'Leary 1987: 57).

Poulter argues that, given liberal principles, we must be clear about the limits of cultural pluralism 'which need to be imposed in support of the overriding public interest in promoting social cohesion' (1992: 156). This view is shared by Lester and Bateman who warn that cultural tolerance must not become a "cloak for oppression and injustice within the immigrant communities themselves" (cited in Poulter 1992) nor must it endanger the integrity of the 'social and cultural core' of English values as a whole. Providing provisions for ethnic minority groups seeking to practice religious customs and practices has raised the question of the need for 'special treatment'. This is because, as Montgomery argues, "Provisions providing for formal equality may result in greater restrictions of the freedom of minority groups than is experienced by the majority" (1992: 193). Such restrictions must be viewed in the light of the legal commitment to protect rights of religious freedom that make it necessary to devise special rules for particular groups. But does recognising a group right mean compelling all members of the group to partake of the right in question, even against their will?

Montgomery outlines four different types of group rights. The first is where individuals acquire rights by virtue of their membership of the group, once membership is established. This principle has been applied in English law to Quakers and Jews, for example, who are allowed by the Marriage Acts 1949-86 to solemnize marriage acts. Their special privileges date from 1753 and they are not subject to the regulations. English domestic law makes no concessions, however, to other religions or customs, apart from Christianity. The second type of a 'group

right' recognizes a 'private' space in which "a self-contained parallel system of rules would operate" (Montgomery 1992: 195). The Ottoman Empire operated with a plural system according autonomy to religious groups or dhimmis to manage their family law internally. The third type of group right is a dispensation or entitlement allowing members of the group, as a collective body, to act in a way which would otherwise be unlawful. For example, the Sex Discrimination Act 1975, section 19, allows qualifications and authorizations to be withheld from one sex 'for purposes of organized religion' in order to comply with the doctrines of that religion or avoid offending the religious susceptibilities of a significant number of its followers. Finally, the fourth sense of a group right is where the right permits some individual members to have special privileges deriving from their membership in the group. For example, both the Jewish and Muslim communities have designated members of the community who have the right to slaughter animals differently from the rest of society. Furthermore Muslim girls have been allowed to wear headscarves to school, contravening the school uniform, and a similar dispensation exists for Jewish boys to wear religious caps. Prior to changes to the law, Muslims and Jews were exempt from Sunday trading prohibitions.

Despite his strong advocacy of an active and transformative multiculturalism, Parekh (1995) is critical of calls for autonomous group rights from different religious groups. He believes that Britain cannot allow separate legal systems for different communities without violating the fundamental principles of common citizenship and equality before the law. The law, he points out, has evolved and accepted cultural differences in case law without violating these principles.²⁸

²⁸ Parekh analyses a number of cases that illustrate that religious/cultural traditions can be practised within the private sphere of the family, as long as they do not conflict with liberal legal principles of 'equality before the law' and 'common citizenship' (Parekh 1997: 23). For example, in *R v Bibi* (1980) the Court of Appeal reduced the imprisonment of a Muslim widow, found guilty of importing cannabis, from three years to six months on the grounds that, among other things, 'she was totally dependent on her brother in law and was socialized by her religion into subservience to the male members of her household' (Parekh 1992: 200). In *R v Bailey* and *R v Byfield* the moral codes of men brought up in the West Indies were taken into consideration in sentencing them for having sexual intercourse with girls under the age of 16, and in *Malik v British Home Stores* (1980) it was decided that in appropriate circumstances Asian women may

In Britain there have been demands for Muslim personal laws to be recognized in English law under the context of multiculturalism and ‘rights’ and we explore these demands in chapters 3 and 4. In English law, personal laws are defined as ethnic customs (Poulter 1992, 1998) which are recognized, 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).²⁹ Menski notes that the framing of these claims drive from western human rights approach. He asks “who determines the criteria for what is acceptable and what is not? Should the official law restrict itself to controlling the limited space that it recognises, knowingly ignoring the rest of the social field, or should it attempt to control the entire field while being prepared to make concessions to diversity?” (Menski 1998:68). While we may be sympathetic to both arguments we would be reticent in adopting either analytical framework on the basis that they are both firmly located in the dichotomy of western universalism versus cultural relativism. Conceiving this situation as the juxtaposition of two distinctive approaches and their embedded legal systems (English Family Law versus Muslim Personal Laws) is not a useful way to make sense of the process. Furthermore this approach does not deal adequately with the power relations and continues to see cultures and religions as homogeneous entities. There are clearly underlying assumptions about the role of the individual and general relations within cultural and religious identities that may run counter to the lived complexities of social life in Britain. We thus turn to the work of feminists who have critiqued the relationship between the individual and the community.

wear trousers at work, even though white women may not. Full citations of cases can be found in the Table of Cases.

²⁹ Legislation to protect specific cultural and religious practices include: The Race Relations Act 1976 which aimed to promote equal opportunities and to eliminate discrimination in employment, housing, education and the provision of goods and services. The legal system has over time recognised certain other demands of ethnic minority groups. The Shop Act 1950 exempted Jews from Sunday trading laws. The Slaughterhouses Act 1979 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

1.3.3 Feminism and Multiculturalism

More recently ideas of gender equality, justice and the limits of liberal multiculturalism have emerged from within the discipline(s) of political theory, ethics and philosophy and couched within the context of tensions between feminism and multiculturalism. Of particular concern is the extent to which the liberal state should recognise and accommodate differences based upon cultural and religious values or whether it should adhere to a single set of norms and values that apply to all citizens in an 'equal' way (Okin 1999 et al). Shachar refers to this as the 'paradox of multicultural vulnerability', "which arises when an identity group members rights as a citizen are violated by her identity group's family law practices" (2001:6). As one of the central concerns in this study is to explore the experiences of Pakistani Muslim women using Shariah Councils we are particularly interested in engaging with this process, but from a perspective that is located in the specificities of women's lives.

We find however that these approaches are imbued with simplified and unqualified understandings of culture, religion, identity and community that fail to adequately engage with the multiple positions women occupy in relation to race, ethnicity, class, family and community (Anthias and Yuval-Davis 1992). Indeed they posit western culture against 'other cultures' (the preoccupation mostly with Islam and its 'subordinating' effects upon Muslim women) and lose sight of the fact that women are social agents and "occupy positions in other categories of difference and location" (Anthias 2002:276). Furthermore it is extremely self-centered to think that the only a western framework of 'human rights' provides Muslim women with access to equality, justice and autonomy. We should not lose sight of the fact that Muslim feminists and scholars are currently engaged in exploring the relationship between human rights, Islam and gender equality from an Islamic perspective, some of which renders such simplistic analyses virtually meaningless in relation to the complex lived realities of Muslim women's lives (see An-Nai'm 1990, Mayer 1999, Ali 2002, Mirza forthcoming).

addition, voluntary-aided religious and denominational schools are funded by the state, as are army chaplains and university theology faculties.

It is this complex reality that leads us in this study to the work of black feminists who have explored issues of difference and complexity and the intersection of race, gender and class subordination. Moreover the complex nature of identities leads us to draw upon the categories of hybridity and difference and, diaspora and space to challenge the assumed homogeneity of community.

1.3. 4 Translocational Positionality

The distinctive dependency of feminists such as Moller Okin (1999) to rely upon uncontested definitions of culture and identity has led some theorists to challenge the premise underlying the dichotomy of feminism and multiculturalism. It appears that while challenging the inherent superiority imbued within liberal definitions of multiculturalism and human rights it has been especially difficult to avoid the pitfalls of cultural relativism and identity politics and, the issue remains paradoxical and potentially difficult.

In her work Anthias (2001, 2002) introduces the notion of 'translocational positionality' which provides the potential to recognise the importance of context and location in relation to shifting positions and identities. She explains, "A translocational positionality is one structured by the interplay of the different locations and their (at times) contradictory effects. The 'translocational' acts to fissure the certainties of fixed singular locations by constructing potentially contradictory positionalities" (2002: 279). On a practical level this involves a different grids in operation and at particular contexts, times, positions women may accordingly be in a position of dominance or subordination. In this way individuals are actively engaged in the process of cultural contestation, renewal and change.

This analysis is useful for it reminds us that we need to draw upon theoretical approaches that recognise contradictions and ambiguities in women's positions within families and communities. In this way the binaries of insider/outsider become destabilised "where one may be an insider and an outsider simultaneously in relation to different dimensions of power and hierarchical difference" (Anthias 2002: 282). The purposefulness of this approach is recognizing the complexity

and difference of women's lives but also understanding how their positions within the family and community may be fragile and potentially exploitative. This complements the 'intersectional' approach, developed by the writers Crenshaw (1989) and Volpp (2000) who point out that race, class, gender and other systemic oppressions work through rather than alongside each other.

1.3.5 Hybridity and Difference

In response to the essentialism of culture and community we now draw upon the concepts of hybridity and difference to explore the relationship between 'homeland' and new cultural formations. Mercer defines 'hybridity' as "the processes and products of cultural mixing which articulates two or more disparate elements to engender a new and distinct entity" (1999:89). As a concept it seeks to challenge and subvert essentialist and exclusionary notions of ethnicity and identity and challenge the dichotomous approach of liberal pluralism and essentialist definitions of community (Bhabba 1994). Developed within the discipline of postcolonial studies and popularised by Bhabba (1990, 1994) it contrasts to multiculturalist notions of diversity, which identify homogeneous organic cultures that remain unaffected by each other. Instead Bhabba views cultures as never existing 'in' or 'for' themselves, but as always in processes of cultural translation, as articulating with each other. This interplay of meanings and discourses gives rise to the 'Third Space', "*a new arena of negotiation of meaning and representation which produces counter-narratives from the nation's margins, which may be incommensurable with the anterior traditions*" (Bhabba 1990:211). The subversive parody of the colonizers by the colonized, and the mixed forms of ('high' or 'popular', progressive or 'fundamentalist') culture produced by postcolonial migration all indicate fissures in the center, spaces for agency and ambivalence (Bhabba 1995). As Bhabba argues, "I want to take my stand on the shifting margins of cultural displacement- that confounds any profound or 'authentic' sense of a 'national' culture or 'organic' intellectual" (1994:21). As a fluid concept it opens up spaces to interrogate notions of difference and diversity. Hence, Bhabba (1994) critiques the dialectic relationship between identity and culture and the totalising structures of power upon which

they are based.³⁰ In this way we have an increase in forms of diversity and difference by redefining our understanding of community.

The main criticisms levelled against the concept of hybridity are its destabilizing ability producing ambivalence and confusion. For some the concept of hybridity fails to recognise issues of social inequality and class and gender differences (Anthias 1998, Ahmad 1995). Importantly, Anthias (1999) argues contra the 'Third Space' of 'negotiation and translation', of counter-narrative, of 'in between', that the notion assumes that postcolonial intellectuals lack a central narrative of their own. She suggests that the 'Third Space', too, may be boundary making. The 'hybrids' inhabiting it are not only homogeneous but also internally differentiated.

The concept of difference emerged in response to the essentialism of much thinking on race and ethnicity. Hall (1992) celebrates difference through the construction of new ethnic identities while interrogating traditional understandings of culture and ethnicity (see also Gilroy 1987, Bhavnani & Phoenix 1994). For feminists the notion of difference has been articulated around the concept of 'situated knowledges' (Hill-Collins 1990:19) and situatedness where female subjectivity introduces alternative narratives. Under a multiculturalist context debate as also focussed on how the differentially situated groups in society and, this has led to a discussion on 'the politics of difference' which gives rise to claims for 'differential treatment' and access to 'equality'. Baumeister points out that "for liberals the 'politics of difference' raises important questions regarding the nature of diversity, the conception of the self and the role of the political" (2000:5)

Yet this epistemological position of difference has been subject to extensive critique. Anthias points out that the debates on difference have ignored the dynamics of gender and class inequalities (1998). The focus on difference between groups risks the perils of cultural relativism which homogenise cultural difference in opposition to otherness. Instead Anthias reformulates difference in

³⁰ Werbner identifies hybridity in two forms as cultural hybridity and political hybridity (1990:14)

terms of “imaginings around boundaries” and “hierarchical difference” (2002:279). This reformulation of difference re-evaluates the ways women are situated within different and often conflicting categories of race, gender, class and within the institutions of family, home and community. It recognises the existing power relations within these spheres that give rise to a complex interplay of values. Therefore the concept of difference in this study is employed as a conceptual tool to challenge the existing patterns of domination and exclusion within social and legal processes.

1.3.6 Diaspora and ‘Space’

Most recently, and departing from the traditional approach to the study of race and ethnicity, social theorists have turned their attention to the concept of diaspora to understand processes of transnational migration and community settlement in Britain (Brah 1996, Vertovec 1996, Parekh 1994, Gilroy 1997, Hall 1990). Theorists have used the term to explain firstly, the reasons and impetus for migration; secondly to question what impact new migrations are having upon older settled communities and finally to understand how the term can be employed to understand globalisation and the transnational configurations of power (Soysal 1999).

The South Asian diaspora has been described as a “transnational network of dispersed subjects, connected by ties of co-responsibility across the boundaries of empires, political communities or (in a world of nation- states) nations” (Werbner 2000:307). Employing Anderson’s notion of ‘imagined communities’.³¹ Werbner argues, that we now have ideas of “spatialised complex ‘imagined communities’ where despite dispersal members share “a collective past and common destiny, and hence also a simultaneity in time”(Werbner 2000:308). Thus the idea of an imagined community embodies the relationship between the process of migration and the settlement of communities culminating in the creation of a new ‘homeland’. This ethnographic approach to exploring and defining the Pakistani Muslim diaspora in Britain provides a fascinating insight into the relationship between identity and the active participation in the politics of ‘homeland’ and

'hostland' (Butler 2001: 189). Indeed the emergence of a discourse of 'diasporian studies' (Butler 2001:190) has led some scholars to produce a list of defining characteristics of what constitutes as a diaspora (see Safran 1991:83-4).³²

Yet it is precisely this kind of extensive and deterministic use of the concept as an epistemological tool that has led to a critique of its 'unproblematized' use in social science (see Anthias 1998, Soysal 1999).³³ Hence the ethnographic approach has contributed to the empirical enlargement of the term diaspora³⁴ but fails to explore the inherent difficulties in describing all migratory experience as culminating in a 'diaspora'. Clifford is aware of the dangers and points out that it is not easy to avoid the slippage between diaspora as a theoretical concept, diasporic 'discourses', and distinct historical 'experiences' of diaspora. Thus each diaspora is so firmly rooted in particular histories and maps that the term cannot be used to describe 'the' migratory experience (1994:56). Soysal takes this further and critiques the use of diaspora as an analytical category in explaining the immigration experience (1999:1). She points out that a focus on "ethnically informed diasporic arrangements" fails to take into account the processes of modernisation and globalisation. Instead a focus on the different proliferating 'sites' of making and enacting citizenship allows a fuller understanding "of the new dynamics and topography of membership" (1999:3). Another criticism relating to this is that the use of diaspora has become essentialized, resembling the framework of ethnicity with little understanding of difference, division and diversity within a social group (Anthias 1998:558). One of its obvious limitations is its failure to take into account issues of gender and class differences. Thus Anthias points out that we need to move away from its preoccupation of ethnicity to "other ontological spaces such as gender and class" (1998:578).

³¹ See Anderson (1983).

³² He argues that a diaspora can only be defined as a diaspora if it embodies the following characteristics, dispersal to two or more locations; collective mythology of homeland; alienation from hostland; idealization of return to homeland and on-going relationship with homeland.

³³ Brah is also aware of the problematic nature of adopting the term as a 'fixed' category but argues that it remains useful if it can be understood in terms of "historically contingent 'genealogies' in the Foucauldian sense (1996:180).

³⁴ For example there are now journals devoted to 'diasporian studies' and studies which explore the Irish diaspora, the Greek diaspora among others. See Butler (2001).

Not surprisingly, perhaps the manifestation of the concept in anthropological and sociological research has led to criticism, especially the essentialist interpretation of diaspora. Yet in light of such a critique we can draw upon the work of Soysal (1999) and Anthias (1998) to possibly transcend these impasses and raise new kinds of questions. In shifting our attention from a descriptive analysis of the Pakistani immigration experience (see Dwyer 2000) to one in which we explore the practice of citizenship with the mobilization of identities and claims-making in the public sphere, we are able to explore the relationship between new forms of membership and citizenship (Soysal 1998:7). Thus, rather than seeing the concept as being premised upon a set of fixed meanings or a prescriptive mode of analysis we engage with the “plethora of immigrant experience in a multitude of arenas” (Soysal 1998:11).

This concept relates closely to the notion of ‘space’ and the positioning of minority ethnic groups in Britain. In this context there are different types of ‘space’, physical space that the groups may inhabit; ‘social space’ in which networks and identities are delineated as new contexts are negotiated (Mirza 2000:4) and finally ‘cultural space’ where exchanges between Muslims and the wider community take place (see Massey 1993). However this understanding of space presupposes that individuals can be situated in one space at one particular time and leaves no room for internal contradiction and ambivalence. It only refers to the present and in this way remains limited.

Conclusion

As emphasized at the outset of this chapter a conceptual and theoretical analysis provides the means by which we are able to link law and social theory and locate this study within a socio-legal context in Britain. A key point to recognize is that this process is able to assess the limitations of existing literature and consider what has been excluded in contemporary debates. Thus in what initially seems like the presentation of conflicting theoretical paradigms is in fact a powerful rejection of the essentialism of law, identity, community and citizenship. In this regard the potential of recognizing the complex and diverse experiences of

women's lives justifies the expansive review of literature. In the following chapter we explore the research methodology adopted in the study.

CHAPTER 2

METHOD AND METHODOLOGY: 'STANDPOINT', 'DIFFERENCE' AND 'FEMINIST' RESEARCH

2.1 Introduction

This chapter discusses the research methodology adopted in the study. It explores the methodological dilemmas in accessing, collecting and analysing data in an area of study that is confined to the 'private' sphere, that is traditionally defined as non-legal and that remains largely under-researched. Moreover, it questions whether these issues raise a specific set of ethical and methodological challenges for the socio-legal researcher. The chapter is grounded in a feminist discourse to explore the nature and process of social research. While seeking to explore the ontological and epistemological tensions presented by feminist standpoint theory with cultural difference, it reflects on the notion of 'standpoint differences' to consider the need to adopt a multi-faceted approach to conducting research within diasporic minority communities in Britain.

The chapter addresses three main issues. The first draws upon debates on 'reflexivity' and the 'self' to analyse the role of the researcher within the ethnographic research process.³⁵ Here it explores debates on identity and cultural difference to consider how 'differences' may affect the research process.³⁶ It draws upon the concept of 'positioning(s)' to consider the limitations of categories such as 'insider/outsider' that fail to capture not only the complex and varied experiences within the various groups under study, but also obscures the richness and diverse experiences between the researcher and the researched (Song and Parker 1998:112).

The second examines issues concerning 'access', 'consent' and 'disclosure' and questions whether traditional research methods (in this case in-depth interviewing and participant observation) need to be used in specific ways when faced with a

³⁵ This has been described as the 'politics and ethics' of social research. For an introduction to these debates see P. Atkinson and D. Silverman (1997: 304-25).

³⁶ For a fascinating analysis see McCorkel (2003: 199-231).

particular set of methodological issues.³⁷ It explores, for example, whether sharing a gender, ethnic or religious commonality with the interviewee led to any difficulties and/or advantages. This issue also relates to questions surrounding the centrality of privacy, the relationship between public and private ‘space’ and the situation where the researcher has little control over the research process.

The final part of the chapter addresses the issue of the researcher ‘leaving the field’ and explores ways of managing the personal relationships formed with one’s informants (Taylor 1998). Further, if we take the view that the informants’ decision to participate in the research project may be conditional, then we must also consider the implications this may have upon interpreting and presenting the data. Hence questions can be raised about the interpretive process and the chapter concludes by briefly considering the social and political implications of writing up research deemed ‘politically sensitive’.

2.1 Defining the Research Question(s)

The central methodological questions for this study relate to formulating ways for fieldwork research with Shariah Councils and, to explore how to encourage women to share their experiences of using such a ‘privatised’ method of dispute resolution. An ethnographic research approach was chosen as it allows the researcher to “adapt the research focus to what proves available and interesting rather than imposing an outsiders sense of what is going on” (Fielding 2001:148). This approach is also useful in developing a workable and productive methodology as it allows the researcher to understand human interaction within specific contexts and to acknowledge the public/ private spheres. Preliminary fieldwork led to the selection of three methodological approaches: participant observation, in-depth qualitative interviewing and content analysis of case-files.

The first method, participant observation was chosen for a number of reasons. As discussed in chapter 1, existing research documents the development of Shariah Councils in Britain as evidence of an emerging parallel legal system (Pearl 1986,

³⁷ For an interesting discussion on the problems of conducting fieldwork on sensitive topics Lee (1999) and Coffey (1999).

Pearl and Menski 1998, Poulter 1998, Yilmaz 2001). Thus the socio-legal reality of Muslims in Britain is presented as a complex scenario whereby official and customary laws interact to produce a new set of hybrid laws. The present study attempts to problematize this approach by examining the gendered nature of the informal legal sphere(s). In doing so, it deconstructs the binary oppositions of state law and customary law and seeks instead to explore the contested spaces that Shariah Council's occupy as an empirical reality rather than a theoretical construct. Drawing upon observation data³⁸ it traces how notions of power, status and legitimacy interact with the "socio-cultural reconstruction of Islamic identity" (Yilmaz, 2001:297) that lead to the establishment of Shariah Councils in Britain. Here the central methodological questions relate to the extent to which marital disputes are settled within the context of family, home and community by non-statutory agencies such as Shariah Councils, the nature in which this form of non-state intervention may take and, finally how such mechanisms of unofficial dispute resolution mechanisms that have traditionally been defined as non-legal may co-exist alongside state law in Britain.

The second method, content analysis of Shariah Council case-files, analyses correspondence between Muslim women and the Shariah Councils. It provides an insight into the administrative procedures implemented by the Shariah Councils when issuing divorce certificates³⁹ and goes onto consider the methodological obstacles faced by the socio-legal researcher in eliciting data from documentation within the informal legal sphere.

The final method, in-depth qualitative interviews with 25 Pakistani Muslim women, explores the motivations of this sample in using a Shariah Council. It is the 'voice' of the women that the research seeks to bring out and hence a feminist approach to interviewing is adopted (Reinhaz 1992, Stanley & Wise 1998).⁴⁰ In

³⁸ This comprised of observing mediation and counselling sessions with 3 of the 4 Shariah Councils under study. See chapter 4.

³⁹ The Muslim Law (Shariah) Council based in Ealing, West London refused permission to observe mediation and counselling sessions but permitted an analysis of 25 case-files.

⁴⁰ Qualitative feminist studies explore women's accounts through in-depth interviewing, open questions and qualitative analysis. Of course there is much debate on what constitutes as 'feminist research' and for an interesting discussion see Oakley (1998:707-731).

particular, it explores experiences of marriage and analyses strategies to obtain a religious divorce. In doing so it considers how women balance social expectation based on cultural duties with religious obligations and how gender frames the relations of power on which negotiations maybe based within the family and unofficial decision making bodies (Griffiths 1997).⁴¹

2.2.1 Sampling Profile

The snowballing technique was used to forge contacts and make connections. The fieldwork was carried out over a period of 18 months between 2000-2002 in three cities Birmingham, Bradford and London. As outlined above, the fieldwork research comprised of in-depth interviews with 25 Pakistani Muslim women, interviews and observation research with 4 Shariah Councils and interviews with various Muslim community organisations.⁴² Each interview ranged between 1-2 hours and was subsequently transcribed. The women were all offered anonymity for their accounts and have been given pseudonyms in the thesis.

2.2.2 The Women

The logic of why a sample of British Pakistani Muslim women was chosen for research as opposed to 'Muslim women' as a general category is two-fold. Firstly as a result of the complex and changing nature of identity this approach provides the opportunity to explore the subtleties of cultural difference between Muslim women. In this way we are also able to provide an insight into the dynamics, representation and practice of power within Muslim communities. To categorize all British Pakistani Muslim women as belonging to a homogenous Muslim community presumes the primacy of a universal religious Muslim identity. Underlying this approach is not being able to explore ambivalence and antagonism outside the binaries of insider/outsider, muslim/non-muslim and subordinate/dominant (Bhabba 1998:35). This does not mean however that some British Pakistani Muslim women do not embrace this unifying identity that

⁴¹ This approach draws upon the work of Griffiths (1997). In this fascinating study she explores the relationship between gender relations, power, family and legal relations in Botswana.

⁴² This included interviews with the representatives of 3 Muslim organisations the 'Union of Muslim Organisations', 'The Muslim Women's Help-line' and the 'An-Nisa Society'. See chapters 4 and 5.

homogenizes cultural and religious difference, clearly some do. But, evidence also suggests that there are also unique differences between and within the category of 'Muslim women' and by focusing upon one group of women we are able to explore the conditions under which they develop strategies to obtain a Muslim divorce and participate in family and community mediation. Hence we can explore how identities maybe ambivalent, situational and strategic (Anthias 2002, Yuval-Davis 1997).

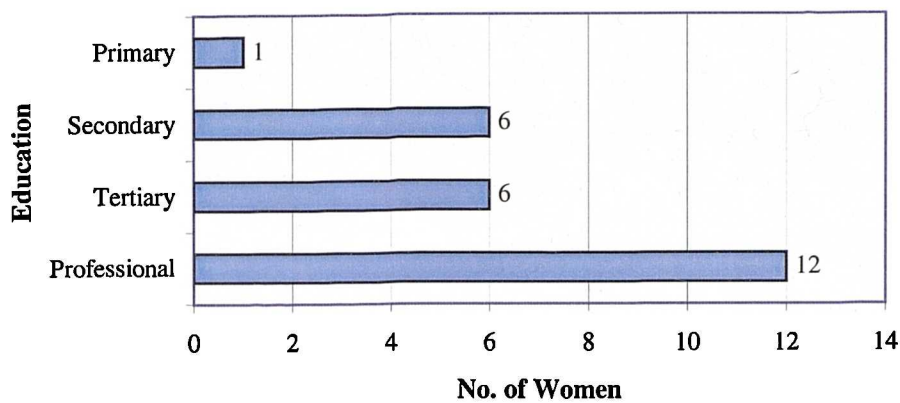
Secondly the importance of this approach lies in exploring further the claim made by Shah-Kazemi (2001) that Muslim women are in favour of official mediation/reconciliation services being developed specifically to suit their religious needs, as opposed to current practice of developing services according to race, gender and language differences. In her study of 'Muslim women, Divorce and the Shariah' Shah-Kazemi reports that the women in her sample also indicated support for the eventual introduction of a parallel legal system to govern Muslims in the sphere of Muslim personal law (2001:69-70). Again the multiplicity of Muslim identities, differentiated by gender, ethnicity, age, generation, class, sectarian affiliation and so on, allows us to interrogate this claim, the purpose of which seems to be to maintain the specificity of a religious identity with little observation to complexity, difference and ambivalence.

2.2.3 Profile of the Women

Figure 2.1, below outlines the profile of the interviewees and the variations in their background. Due to the complexity of using class as the variable against which to measure differences the study uses educational attainment. In discussing the sample of women, it should be acknowledged that problems of access and refusal to participate influenced the research design. Over a period of time, it became obvious that there was little point in trying to uncover 'a more complete' picture if access was in effect being denied. This research stance is consistent with existing research in this area, which yields very little empirical data (Menski and Pearl 1998, Yilmaz 2001, Poulter 1998, Hamilton 1995, Carroll 1997).⁴³ On the other hand, in this research project the snowballing technique did eventually lead

to a number of respondents agreeing to participate in the study and the sample of female interviewees was finally drawn from Birmingham, Bradford and London. Nevertheless this approach, highlights the practical limitations entailed in the sample. This figure illustrates how the pattern reflects a bias towards a particular educated, socio-economic group.

Figure 2.1 Educational Background



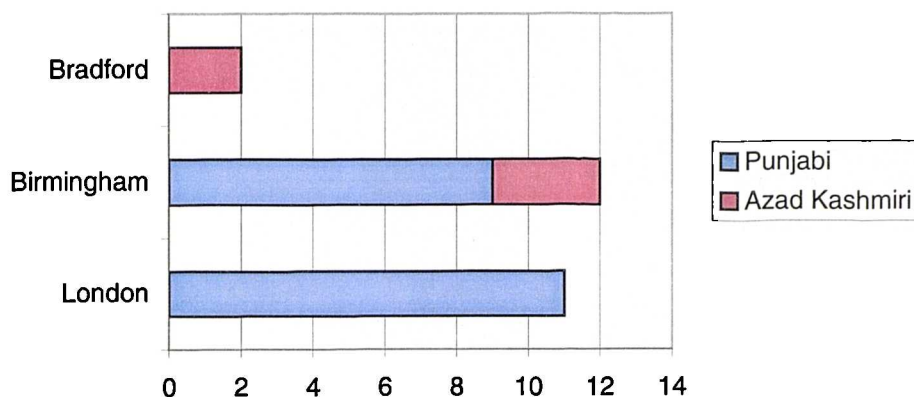
Having access to this group of women only, meant that it was difficult to establish what was 'really' happening within the Pakistani communities. The professional women, for example, all drew on similar themes of openness, discussion, independence and autonomy in discussions of marriage, divorce, familial and community expectations. Whereas, for some women in the other categories it became apparent, that there was a marked reluctance to divulge personal details and to engage in discussion. This is not to deny that the women did not all share experiences, understandings, nor frame realities, which did transcend these variables of educational attainment and class background but the emphasis on privacy and personal space did reveal a subtle difference.

Access to this group of women also raised a more fundamental limitation and one particularly pertinent to this study. This related to how the snowballing technique skewed the ethnic profile of the sample. Figure 2.2 below shows that the largest group of women, originated from a Punjabi background and based in the

⁴³ The exception is the study by Shah-Kazemi (2001).

Midlands and South-East England. This unequal distribution was in contrast to the experience of Shariah Councils who reported the largest users of Shariah Councils belonging to the Pakistani communities were of Azad Kashmiri background.

Figure 2.2 Ethnic and Regional Profile



Consequently, the complexity in defining the profile of the sample brings to the fore the task on how the analysis should proceed. Taking into account the limitations entailed within the sample we could simply prioritise an analysis based on the standpoint of education and class background. An alternative approach would be “to pursue an analysis based upon difference, in the sense that we would not prioritise any particular identity for interviewees, seeking instead to understand each account from within processes of sense-making based in highly specific and individualised contexts and drawing attention to a fragmented, shifting and indeterminate view of subjectivities, meanings and difference” (Henwood et al. 1998:6). Inevitably both approaches can produce incomplete findings and instead this study adopts the approach of ‘standpoint difference’ to explore how the cultural and religious identities of the disputants may interact with the normative structure of the Shariah Council. From the standpoints of gender, ethnic, generational, class, educational differences and regional variations we are thus able to identify key issues and report findings whilst bearing in mind the complexity of these complex, interwoven lives.

2.3 Research Design: The Ethnographic Approach

It is largely accepted that the ethnographic research process originates from early anthropological research.⁴⁴ Baszenger and Dodier outline three objectives associated with this approach which includes; the need to adopt an empirical approach; to remain open to elements in the field that cannot be codified at the time of the study; and grounding the phenomena observed in the field. One of the key elements of ethnography is to ensure that the fieldworker remains 'open' in the field to ensure that they are able to adopt different approaches to interact with those under study. Fielding (2001:6) describes the emergence of a 'new urban anthropology' that has led anthropologists to describe not only the social reality of their own social world but also to critically engage in discussions on the role of the researcher conducting the research. The ethnographic approach can therefore be described as a 'hybrid' approach whereby "the fieldworker is present in two agencies, as data gatherer and as a person involved in activities directed towards other objectives" (Baszenger and Dodier 1998:10). Yet the relationship between method and data collection as part of the ethnographic research process remains tenuous and can be fraught with difficulties. For example, Glassner and Strauss (1967) stress the need for researchers to work from the ground up using theories as examples of empirical evidence. Yet adopting a purely 'open' approach can lead to tensions in the fieldwork if method is sidelined solely in favour of openness.

Feminist ethnographers have addressed this issue in an attempt to understand the complex reality of women's lives. They critique the traditional sociological interpretations of 'knowledge' in society, which they claim are based upon patriarchal, and androcentric norms and values.⁴⁵ For Reinhaz, feminist methods must be employed to challenge existing social relations that render women's lives invisible. She explains "Ethnography is an important feminist method if it makes women's lives visible, just as interviewing is an important feminist method if it

⁴⁴ In particular the influential work of early twentieth century anthropologists including Bronislaw Malinowski, Edward Evans-Pritchard and Margaret Mead are considered the foundations of early anthropological research. For discussion on their contribution to the ethnographic approach see, Baszenger and Dodier (1998).

⁴⁵ For an introduction to these debates see Oakley (1979 46-66).

makes women's voices audible. Thus it is not ethnography per se...but ethnography in the hands of feminists that renders it feminist" (1992: 122).

This approach with its focus on agency, subjectivity and positionality privileges those voices speaking from the position of oppression and marginality.⁴⁶ Further, the complexity and multifaceted approach to feminist ethnography enables researchers to provide unique insights into the relationship between personal experience and the position of women in society.

2.3.2 Observation Research on 'Sensitive' Topics

Conducting research on 'sensitive' issues raises a specific set of ethical and methodological challenges. Sieber and Stanley define sensitive topics as those studies which involve "potential consequences or implications, either directly for the participants in the research or for the class of individuals represented by the research" (1992: 34). These include topics that involve taboos for the local community, such as sex or death or those deemed sensitive due to the socio-political context under which the research is conducted (Brewer 1990).

2.3.3 The Question of Ethics

Research on the experiences of Muslim women using 'unofficial dispute resolution processes' can be deemed 'sensitive' for a number of reasons. Firstly issues concerning marriage and divorce embody notions of familial honour and shame and are largely confined to the private sphere of the family and home. The implications of discussing private matters through what is ultimately viewed as a public forum can have detrimental effects for the women and their families. In relation to observation research with Shariah Councils a number of scholars voiced concern as to the implications of discussing personal matters of marriage and divorce 'in public' to a complete stranger. It became apparent that my presence was deemed an 'intrusive threat' by most Shariah Councils with my attempts to gain entry into areas deemed 'private' by respondents, their families and the communities to which they belonged. One religious scholar explained,

⁴⁶ For a fascinating paper on personal narratives and feminist research see Pierce (2003).

You must understand confidentiality is of utmost importance to our work. It is very difficult for our people to discuss these issues and we spend a lot of time and effort convincing them to seek our help. Divorce is shunned in our communities and rightly so. It should not be given the air of respectability but that doesn't mean we condemn those who want to divorce. Divorce is permitted in Islam and we work with Muslims to achieve the best possible situation...and to allow someone they don't know to sit through our sessions would mean they would lose our trust and confidentiality.⁴⁷

A further issue concerned the rise of Islamophobia and the perception of 'risk' associated with collaborating with the research project. The women voiced concern about the possibility of this study contributing to existing stereotypes of Muslim men as patriarchal tyrants and Muslim women as passive victims of archaic religious traditions.

Further discussions revealed concern about the possibility of such research contributing to the demonisation of Muslims, described as "the growing climate of fear in the name of Islamophobia" by one religious scholar.⁴⁸ Consequently, when access to observation research was permitted it was made clear that it was done so on the basis that as a Muslim researcher, it was expected that the data would be presented "in an appropriate way".⁴⁹ In turn discussions with religious scholars revealed concerns on the presentation of data. One scholar explained,

We discussed your request (to observe reconciliation sessions) at our weekly meeting and a number of us are concerned about what will happen to the material once you've completed your project.⁵⁰

That is to say, the representation of Muslims would be fair and accurate. What then can be said about the ethics of conducting research under such conditions? Perhaps not surprisingly what signifies the link between private experiences and public discourses is the framework under which the research is undertaken. Lee suggests that the researcher must provide a 'framework of trust' based upon confidentiality and a non-condemnatory attitude whereupon researchers can encourage those under study to confront issues that are perceived as "personally

⁴⁷ Discussion with Dr. Nasim, Birmingham Central Mosque, Birmingham, 21st July 2001.

⁴⁸ Interview with Dr Suhaib Hasan, Islamic Shariah Council, 14 October 2001.

⁴⁹ Interview with Maulana Mohammed Raza, Muslim (Law) Shariah Council, 22nd November 2000.

threatening and potentially painful” (1992:98). Moreover, we must remind ourselves that ‘sensitive’ research can only be understood as ‘sensitive’ according to the context and conditions under which it is situated. Nevertheless, the necessity presents itself for the researcher to address their own religious, moral and political beliefs that may affect the interpretation and presentation of data.

2.3.4 Access and Consent

Gaining consent and access for observation research with Shariah Councils proved difficult, lengthy and problematic. The aim of observation fieldwork is to provide a rich insight into the particular organisation under study. Yet this process can be limited when access to private organisations is controlled and in some cases blocked by its ‘gatekeepers’ (Walsh 1998). Some writers point out that the social dynamics of ‘access processes’ needs to be more fully explored. For example, Lee complains “neither has much attention been paid to patterns of access and non-access across studies, or to the potential consequences of differential accessibility to some settings rather than others” (1992:121). In this study the absence of direct measures, a result of restricted access to Shariah Councils, meant that comparisons between the bodies could not be sufficiently drawn.

This raises the question of the ways in which the gatekeeper may exercise their power to curtail or prevent access. Form points out, that this unequal relationship leads to the researcher ‘bargaining in the access situation’ (1991:23). He identifies this as the ‘politics of distrust’ which can only be overcome if there is trust between the gatekeeper and researcher, even though there may be differences of opinion. In Morrill et al (1999) the researchers points out that identifying gatekeepers provides useful analytic devices for learning about the vocabularies of structure in an organization. Second, successfully managing gatekeepers requires that one understands the vocabularies of structure in use in an organization.

For other scholars, the issue of ‘mistrust’ can only be overcome if the boundaries of the research relationship are clearly demarcated prior to the start of fieldwork.

⁵⁰ Interview with Maulana Abu Saeed, Islamic Shariah Council, 30th September 2001.

In this vein, Lofland and Lofland devise a series of questions which the researcher must address, before the research begins. These include, “am I reasonably able to get along with these people? Do I truly like a reasonable number of them, even though I disagree with their view of the world? Why did I pursue research when it became obvious that it was going to be difficult to maintain in the long run?” (1994:94). Such questions provide a useful criterion to explore the issue of ethics in fieldwork research. But we must also remain aware of a new and different set of ethical questions arising during the course of the fieldwork. For example, in this study observation research revealed a high incidence of domestic violence but the women were given very little information on the available services. Paradoxically, as a former caseworker for a women’s organisation, I had this information at my disposal but had been acutely aware that access had been granted on the basis of no contact with the women using its services. In this instance, my decision to approach the religious scholar with a list of relevant agencies proved worthy, as I was thanked for my intervention. This example illustrates, how the boundary between ethics and consent at times becomes difficult to maintain. Again it raises ethical issues concerning responsibility towards the respondents and the conflict with reporting issues from the perspective of the researcher. For Mason, the researcher has a ‘moral duty’ to overcome potential difficulties that can be achieved if the researcher is aware of which groups or individuals maybe affected by framing the research in a particular way (1996:30). The issue of trust therefore is central to gaining both consent and access into private organisations. This can be summed up by Hammersley and Atkinson who state, “Whether or not people have knowledge of social research, they are often more concerned with what kind of a person the researcher is than with the research itself. They will try and gauge how far he or she can be trusted, what he or she might be able to offer as an acquaintance or a friend, and perhaps also how easily he or she could be manipulated or exploited (1993:78). In this study, access though limited, was granted on the basis of privacy, trust and confidentiality and the informed consent of clients. For example, prior to each mediation/reconciliation session, the client was informed of my presence and if any objections were permission to observe the session was refused. Finally, it was agreed that all feedback of the study and copies of

interview transcripts would be made available to the Shariah Councils under study.

2.3.5 The ‘Self’ in the Field

One of the interesting aspects of observation fieldwork is to explore the role of the researcher in the field. Coffey describes ‘the marginality and presence’ of the researcher as critical to exploring, “how identities are constructed, reproduced, established, mediated, changed or challenged over the fieldwork process” (1999:14). Hence the identity of the researcher raises questions on how the researcher may affect the outcome of observational research.

In this study, the ways in which the dynamics of gender, race, culture, class and religious identity interacted with the social setting under study was an important focal point of analysis. For example, how the interplay of gender and power may affect the outcome of data, did my gender interact with the subjects (religious scholars and users) during observation research? In her research with Kenyan informants, Oboler (1986) found that being pregnant increased her rapport with the informants.

Yet the process of ‘identity construction’ is complex and at most times subtle. Prior to fieldwork very little thought had been given to how I should negotiate my presence during observation fieldwork. It had been assumed that my religious and cultural background as a Pakistani Muslim woman, would grant easier access. My assumptions proved to be both true and false. Over the course of the fieldwork, it became apparent that some scholars were happy for me to observe mediation sessions as they believed that Muslim women would be sympathetic to a Muslim woman conducting such research. And in some instances this was clearly the case. For example, on two occasions female clients requested that I sit next to them for support. On other occasions, however I was asked to leave the sessions when the client was visibly uncomfortable in revealing private matters in the presence of a stranger. The ‘self’ in the field, therefore raises complex issues. Coffey points out, “...who is stranger or a member, an outsider or an insider, a knower or an ignoramus is all relative and much more blurred than conventional accounts might

have us believe” (1999:22). She goes on, “It is not clear that, in practice, fieldworkers engaged in researching their ‘own culture’ actually manage to estrange themselves radically. Nor is it necessarily the case that forcing a distance from the mundane, lived, esoteric knowledge of a culture really enables relevant research questions to be posed, beyond the obvious and those devoid of cultural specificity” (1999:22).

2.4 Interviewing Pakistani Muslim Women

The interview method in social science originates from large-scale quantitative surveys conducted in Britain in the 1930’s and 1940’s. This method was viewed as the primary source in the collection of data about aspects of the respondent’s behaviour or attitudes. Later research focused on the reflexive relationship between the respondent and the interviewer and this method raises a number of interesting conceptual questions. For example how the interaction between the respondent and the interviewer may lead to bias in responses and how the process of the interview technique can itself distort the ‘real’ picture.⁵¹

2.4.1 In-Depth Qualitative Interviewing

Feminist ethnographic research emphasises notions of ‘reflexivity’ and ‘situated knowledge(s)’ where the relationship between the respondent and the interviewer is acknowledged and recognised and thus becomes part of the data and not external to it. It contests the traditional constructions of ‘knowledge’ and ‘society’ defined within a structuralist paradigm and underlined by patriarchal norms and values (see Harding 1987). The feminist approach emphasizes the personal and subjective experiences of the researched subject which can produce invaluable data. Here the researcher is encouraged to place themselves in the position of the researched in order to understand the dynamics of the relationship between the two and locate all research within a historical and contextual setting. Using her research on ‘motherhood’, Oakley (1979) argues that a subjective approach to interviewing is central to establishing a ‘rapport’ with female respondents, gaining their trust and thus enhancing their willingness to take part in the research. Reinharz, (1992) puts forward a participatory model of research that

⁵¹ For an introduction to these debates see Gilbert (1993).

aims to produce non-hierarchical, non-authoritarian and non-manipulative research relationships. This approach has led to the development of 'standpoint theories' whereby the focus of the research is on the experiences of women from the perspective of women themselves. Such research is located within a historical and political context that provides the space for potential social and political change in the lives of women. And, given the multi-faceted experiences of Pakistani Muslim women we can adopt this approach to explore issues of complexity and difference.

2.4.2 Researching across Gender, Ethnicity and Religion

There has been much discussion over the issue of race matching during interviews. The argument is rooted in realist epistemology which holds that there is some kind of 'unitary truth' that interviewers should obtain. The reasons for race matching are based on the idea that a black researcher is more able to blend in with a black interviewee and therefore get an insight that may otherwise not be possible. Constructivist theories differ from this perspective, arguing instead that all accounts from interviews must be understood in the context of the interview and any information given cannot be taken to mean the 'truth'. This raises the question of whether there are unique methodological obstacles in conducting research among minority communities (see Andersen 1993). In particular questions have arisen in relation to the unequal power relationship between a white researcher and non-white communities. It is argued that white scholars can only produce incomplete data as interviewees view them with distrust, hostility and exclusion. This view however, has been challenged by a number of theorists. Among them is the feminist writer P. Hill-Collins (1988) who develops the notion of "outsiders within". Under this model, white researchers are able to conduct research on minority communities as long as they recognise how institutional racism may have shaped and developed their research.

Therefore, the question becomes not whether white researchers should conduct research on minority communities but that their interpretation should not be considered the most authoritative. Indeed there can be both advantages and disadvantages to this type of matching. In her research on Black women

Andersen (1993) writes that she became aware that the women might not have reported the same things to her as they may have done to a black interviewer and that her data may therefore have been impartial and incomplete. Her data also revealed, however, women reporting that they were able to speak to her openly and freely without barriers, whereas they may not have been able to do so with a black interviewer. In this context she was able to adopt a self-reflexive approach to research where her role in the research was pivotal in gaining the trust of the respondents and not imbued with problems of power based on race matching. For her, “Developing analyses that are inclusive of race, class and gender also requires that discussions of race, class and gender be thoroughly integrated into debates about research process and the analysis of data. This requires an acknowledgement of the complex, multiple and contradictory identities and realities that shape our collective experience” (Andersen 1993:137).

2.4.4 ‘Insider’/‘Outsider’

This section draws upon fieldwork data to explore the limitations of interviewer/interviewee matching. In doing so, it analyses the complex ways in which the gender, ‘religious’ and ethnic positions of respondents may intersect with those of the researcher and explores how this may affect the research data. Throughout the interview process, issues of ‘commonality’ and ‘difference’ were pivotal in this study and played a significant role on the extent to which relationships were forged with female interviewees. This dichotomy of commonality and difference regarding our identities was in reality complex and intermeshed. Yet at the onset of the interviews, it had not been envisaged how the perceptions and assumptions by the interviewees would shape the interview process.

2.4.5 Negotiating Participation

Negotiations with female respondents were long and difficult. Matters concerning marriage and divorce are largely confined to the private sphere of the family and home and women are often involved in lengthy and complex negotiations in resolving marital disputes. Consequently, they may understandably be reluctant to discuss such personal issues in a ‘public forum’ as epitomised by a research

project. It is also important to remember that women from minority ethnic communities are seen as carriers of 'collective honour' in the family and community and play a central role in the symbolic reproduction of 'community' and its survival (Anthias and Yuval-Davis 1992). Matters concerning marriage and in particular divorce are closely tied to the honour of the family and the repercussions of private familial issues becoming 'public' may be far too great for some women. On the other hand all the religious scholars were all willing to be interviewed and these interviews lasted approximately between 20-30 minutes each and took place prior to the start of the observation research.

Existing research literature fails to adequately address this issue on the specific methodological obstacles faced when conducting research within diasporic minority communities in Britain. For example, it is commonly held that respondents agree to take part in a study once they are faced with the researcher (see Phoenix 1998) yet this is not always the case. In this study, consent depended upon lengthy discussions and 'assurances' on the specific ways in which the research would be used and the importance of confidentiality and anonymity. Furthermore, only 25 of the 32 women who were approached and who fitted the criteria for the study agreed to take part. The other women failed to return phone calls or said they were not ready to share their personal experiences (See Phoenix 1989). This raised enormous methodological problems regarding how contact could be made with the women and once contact had been made how to keep in touch with them.⁵²

As discussed earlier number of women revealed that they were concerned about participating in a research project that may contribute to the stereotype of Muslim women as victims of a patriarchal cultural/religious system. Some women therefore refused to take part in the research as they felt that their participation might be more damaging than beneficial. Out of 25, a total of 13 women expressed concern on the implications of divulging private details for themselves and their immediate families. One interviewee explained,

⁵² It is interesting to note that Phoenix reports similar problems in her study. See Phoenix (1994).

I have to be careful about what I say...its not that I don't trust you but I have to think about what will happen if what I say gets back to my family.

Interestingly, assurances of complete confidentiality and anonymity were not enough to convince some of the women. This raises the question as to *why* respondents choose to take part in research projects at all. Phoenix points out that respondents have their own, varied reasons that “include simple curiosity; desire to talk and to be listened to; to help with the researcher’s training or the aims of the study; to complain about the aims of the study or about the specific kinds of research” (1989:56). In this sample, the women were asked why they had chosen to contribute to this study and interestingly their responses were both diverse and conflicting. For most women it provided an opportunity to put across their viewpoints on Shariah Councils and their accounts for the reasons for the breakdown of marriage, others were keen to challenge stereotypes of Muslim women as ‘traditional’ and passive and finally, a small number of women hoped the research would hasten the introduction of Muslim family law into English law.

For the most part, the period of negotiations between the researcher and respondent to participate in the study is a formidable time. It is during this time that the respondents are in the powerful position in refusing to take part and possibly curtailing the objectives of the project (see Phoenix 1989:58). However once consent is approved, negotiations do not end. In fact discussions with the women over how the research would proceed and develop continued once the interviews had been completed. Out of 25 women, unsurprisingly perhaps, 8 expressed concern over what would happen to the interview tapes once the research had been completed. Brannen suggests, that participants respond favorably to some methods and not to others when there is an overlap between the concerns of researchers and those of participants and, “where both parties are in search of similar explanations” (1988:324).

2.4.6 Disclosure and Power in Interviews: An Unequal Relationship?

There has been much discussion in research literature over the unequal power relations between the interviewer and interviewee. Feminist writers point to the

unequal relationship with the interviewer having greater power over disclosure and instead put forward a method, which emphasizes notions of 'rapport' and 'self-disclosure' on the part of the interviewee (Reinhaz 1992, Harding 1996). Hence, through shared gender identification, female interviewers are able to establish a 'rapport' in the interview that ultimately leads to greater disclosure. However this approach has been challenged for its failure to recognise that power relations transcend gender identification. Wise points out that class, ethnic and religious factors must be taken into account (1986:56).

Similarly in this study, the researcher was positioned in different ways by the interviewees in terms of a perceived cultural, religious and gender identity. This raises interesting questions that challenge the traditional research relationship which states that the researcher is in a more powerful position. For example, how was the research process affected when I was perceived in ways in which I found objectionable? If I felt I was perceived in an objectionable way how did the interviewees respond to them being objectified? Song and Parker point out that those interviewees who are of the same ethnic or religious background are not necessarily excluded from objectification than those who share the same ethnic/racial identities (1998:13). In addition, the research process must take into account the ways in which interviewees position interviewers and how they are perceived and constructed. Researchers may feel, for various reasons, that they want to respond to positionings themselves and that this is an integral part of any interview dynamic. These positionings by both the interviewer and the interviewee are important as they may affect the research process. For example the interviewees may withhold or disclose certain kinds of information, depending upon their assumptions of the researcher; interviewees might describe aspects of their lives and their identities in terms that compare themselves to assumptions about the researcher.

Likewise this raises the question of the extent to which the interviewer ought to divulge personal details during the course of the interview. Ribbens notes, "It does seem to me that to talk about yourself completely openly in an interview situation might significantly shift what is said to you, in fairly unpredictable ways.

We need more work on the various advantages and disadvantages of such different approaches. Perhaps what we should be sensitive to, is to take our cue from the person being interviewed” (1991:579). This approach can make an important contribution to the research process. In spite of the obvious difficulties concerning confidentiality the interviewees in this project did directly and indirectly ask questions. Sometimes the discussions went on once the tape recorder had been switched off. This process is important for the researcher to illustrate their contribution and commitment to the research.

2.5 Commonalities and Differences

From a feminist perspective recognizing commonalities and differences between the researcher and the interviewee underlies the epistemological position of constructing a particular way of undertaking research and subsequently making sense of data. Thus the concepts of ‘standpoint’ and ‘difference’ explore how interviewees speak from particular positions contextualized by gender, race and class as well as the power dynamics of age, generation and positioning within the family. In this study the two important standpoint differences that emerged were religious and ethnic identity. We turn to explore these in more depth.

2.5.1 Religious Identity

Prior and during the interviews the respondents discussed at great length their own religious identity often in relation to me. For example, prior to the interview Safia explained that she was willing to take part in the research because “Muslim women need to do more research on our communities”. Being Muslim was of central importance to her and she referred to her ‘Muslim identity’ throughout the interview. Drawing upon her own experiences, Song (1998:117) explains she was put into a position whereby she found herself having to decide how far she would respond to the ‘positionings’ of her by her interviewees. Similarly, I found myself in a comparable position and pondered long and hard as to whether discussions regarding my ‘Muslim identity’ may affect their responses. This position resonates with debates on the role of the researcher as insider/outsider in the research process. For example what are the advantages and/or disadvantages of a Muslim woman conducting research on a Muslim community? How does this

type of matching actually affect the interview process itself? Are the accounts any fuller or more complete than those situations where 'matching' is not involved? In her research, Edwards (1990) discusses the expectations of the interviewees upon first meeting the interviewer whereupon the interviewer may challenge expectations and the interviewee may not know where to place the interviewer. Given the similarities in ethnic and religious background it is perhaps not surprising that interviewees would often begin answers with, "being a Muslim woman yourself..." The response to this standpoint indicates the importance some women attached to my religious background. This contrast was most vivid when on one occasion an interviewee describing her family's reaction to the breakdown of her marriage stated, "...actually I don't feel comfortable discussing this with you". When probed further she explained, "...cause you know what goes on in the community...you're Muslim... and... well...I just don't feel comfortable discussing it with you". It is of interest that this respondent considered myself as an 'insider' and was therefore unable to divulge intimate details to me. I was struck by the way that this perception, one that I did not immediately identify with, had led to limited feedback from this interviewee.

2.5.2 Ethnic Identity

My being British Pakistani also brought up issues of commonality and difference. For example Salma spoke at length about the different attitudes between Pakistanis and the English towards marriage. She explained,

We do things differently don't we? Our families have expectations of us and we have to do certain things, English people don't understand that do they? Some of them they think we're all forced into marriages but it's not like that.

More significantly differences were discussed in the context of how far I identified myself as 'Pakistani', which part of my Pakistan did my family originate from and could I speak any other languages apart from English? There were also a series of personal questions, including whether I was married and whether I had children. Upon informing them of my marriage it was interesting to note how some women related this to their own situation.

That's good being married is important for Muslim women. I don't think women are recognised in the community unless they're married". When probed further on what she meant she explained, "well when I was married I

was more accepted you know like what I said and did seemed to have more authority with the elders of the community and family. Divorce is really shunned upon and that's why I think a lot of women will only get divorced as a last resort (Mina, London).

I was asked how, why and where I got married and on more than one occasion I felt my being married was a commonality, a space in which they were comfortable to discuss their experiences of marriage and marriage breakdown. Similarly, dress code and appearance also raised questions of difference and commonality. While a few women queried as to why I did not wear the Muslim headscarf most women shared similar tastes in clothing and dress. Hina commented, "I like your scarf...you're like me, I don't wear it on my head but I always have a scarf around me". Through this commonality the women were able to share personal experiences.

2.6 Leaving the Field

We discussed earlier the ways in which relationships with informants may impinge upon the research process. Similarly, once the research has been completed, we must consider whether and if so, this relationship should proceed.⁵³ Indeed, making sense of this relationship is rooted in the possible repercussions of participants divulging private details and the responsibility of the researcher in protecting their participants. Different researchers have developed different ways of leaving the field including 'easing out' or 'drifting off' (Glaser and Strauss 1968). Miller and Humpherys point out that leaving on good terms with participants is the most important way of leaving the field as this provides the basis for research in the future (1988:12). In this study all the participants were keen to remain in touch and some of the religious scholars asked me whether I would like to contribute on their emerging research projects on Muslim personal law in Britain.

A final request from the religious scholars and some of the women was to be kept informed of any policy implications that the research may generate. Given the complexities of conducting such research this raises the question of writing up

research that may be deemed 'sensitive'. In this study it was clear from the outset that participants were concerned about the rise of Islamophobia and the possibility of this study contributing to the presentation of Islam as deterministic and patriarchal. Furthermore the interviewees were only prepared to contribute if all transcripts of interviews remained anonymous and if pseudonyms were used in the study. All the women questioned what would happen to the interview tapes once the research had been written up and 7 women requested that the interview tapes be destroyed once the research had been written up. In terms of the ethical dilemmas this may raise for writing up the research we can draw from the feminist approach of women's agency to overcome or at least limit these constraints. In presenting data as 'translating' the experiences of women we can make clear their viewpoints as they are experienced and articulated by the women positioned within concrete social and political contexts.

Conclusion

In this chapter we examined the tenuous relationship in social research between a feminist standpoint theory and cultural difference in order to explore how the researcher's 'positionality' shapes the structure and substance of the research study. The key question posed was how to explore and present complexities and tensions in data based upon cultural and religious difference within the context of feminist research? Today there is growing literature which seeks to understand identities as multiple, fluid and dynamic yet social research has lags behind in developing methodological and conceptual frameworks that are able to incorporate the divergent experiences of the respondents.

In this study we found that the gendered experiences and realities of Muslim women's lives' means that a multi-faceted approach to conducting feminist social research must be adopted. Further, the influence of the religious and gender identity of the researcher on the research process is subtle and complex. As McCarthy, Holland and Gillies (2003:12) point out, we must question how "we place ourselves as researchers, with our own sympathies and particular

⁵³ For an interesting discussion on what happens 'after the interview' a "strip" of time between the end of the formal interview and the culmination of leave-taking rituals see Warren (2003: 93-110).

perspectives, within such multiplicities?” The dichotomies of ‘insider/outsider’ are too limiting and fail to capture issues of difference and commonality when the researcher shares similar ethnic/cultural and religious identity.

Furthermore, do we need a radically different approach to conducting socio-legal research on ‘sensitive’ issues such as marriage and divorce within minority ethnic communities? Research findings in this study suggest that we need to incorporate notions of difference and diversity into the feminist analytical approach to interrogate different approaches. For example, in this study the concept of ‘standpoint differences’ allows us to draw upon different theoretical approaches while recognizing the complexity of “individual histories, shared family lives and standpoints of gender, generation, class and ethnicity...all interwoven in these related but individual accounts” (McCarthy, Holland and Gillies 2003:19). This approach allows us to interrogate what we understand as culture, community and identity as fluid, changing and contested entities which are open to social and cultural contestation within diasporic communities. As a feminist researcher in this study, I was able to draw upon these multiplicities and move away from the traditional presentation of Muslim women as subordinated and oppressed within the communities to which they may belong. My ethnic identity, as a Pakistani British woman means I was successfully able to navigate between the notions of ‘insider/outsider’ and hence situate the study within a wider historical and socio-political context.

Finally, when conducting such sensitive research it is useful to remind ourselves of the contributions made by those who participate in the study. As Coffey points out, “We incur debts during fieldwork that can never be fully repaid. We are, by and large, the great beneficiaries of our research endeavours. We develop intimate and personal friendships and, even when we do not, we remain dependant upon others for our data” (1999:161). In the end, despite the challenges such research throws up, it is not only more complex but also more meaningful.

CHAPTER 3

CITIZENSHIP AND IDENTITY: THE 'PAKISTANI MUSLIM DIASPORA' IN BRITAIN

3.1 Introduction

In chapters 1 and 2, we outlined the theoretical framework and the methodological approaches adopted in the study, in an attempt to situate the thesis within a 'socio-legal' paradigm and, to establish the relationship between theoretical development and empirical research. In chapter 3, we elaborate on the concept of 'active citizenship'⁵⁴ to consider what Anwar describes as "the status, duties and responsibilities of South Asian Muslims in Britain"(1998:6). In other words, we situate this study within the social dynamics of the 'Pakistani Muslim diaspora' in Britain. According to Ballard, the notion of '*desh pardesh*' encapsulates how South Asian Muslims reconstruct a 'home away from home' to maintain cultural and religious links with original homelands and to keep 'customs' and culture 'alive' in Britain (1996:4). Moreover it is argued, that a consequence of this development is the emergence of a parallel legal system with Muslims failing to utilise English law (Menski 1998, Poulter 1998, Pearl 1986).

Much of this literature presents 'culture', 'identity' and 'religion' as fixed, bounded and indeterminate with little analysis on diversity and dissent within the groups under study. Indeed this rather problematic approach to the study of both 'law' and 'identity' within diasporic communities leaves little room to explore issues of power, conflict and change, within family life. Cultural and legal diversity must instead be understood as complex, negotiated, contested and historically unstable. In light of this reality, dispute resolution for women within Muslim communities must also be understood in the context of complexity and ambiguity. In short, the relationship between 'social life and legal pluralism' demands closer inspection than present literature suggests.

⁵⁴ The term 'active citizenship' has been used by a number of theorists to analyse the organizational dimensions of 'diasporas'. See for example Werbner (2002: 119-133) and also Modood (2000:54).

The first section 3.2 of the chapter analyses migration and settlement patterns of South Asian Pakistani Muslims in Britain. It employs the concept of 'diaspora' to explore how the group came to be situated, to understand the distinct historical experience of the group and analyse what impact the diasporic journey may have had upon the formation of the community (Brah 1996, Soysal 1999, Werbner 2000).

The renewed visibility of South Asian Pakistanis as a 'Muslim diaspora' leads us to section, 3.3 of the chapter. Here we explore what Modood terms, "the place of Muslims in British secular multiculturalism" (2000:2). The racialisation of Muslims in Britain following events post 11 September 2001 has led to renewed discussion on the tenuous relationship between religious pluralism and citizenship in Britain and, the assertion of a new British Islamic identity. Furthermore the current debate on the rights and obligations of Muslims as minorities has also led to a number of scholars developing practical agendas for 'participatory citizenship' for Muslims in Britain (Lewis 1994; Modood 2003; Parekh 2002; Shadid and Koningsveld 1996; Werbner 2000). Hence in this section we explore the tenuous relationship between 'equality and diversity', namely the public accommodation of religious practices and the limits of liberal multiculturalism.

The final section of the chapter 3.4 shifts our attention to the lives of Pakistani Muslim women in Britain. The debate on the limits of multiculturalism has also focused on the regulation of gender relations within the family and home (Okin 1999, Shachar 2000). Drawing upon these concerns this section analyses interview data to gain an insight into how familial relationships and localised cultural practices impinge upon the process of marriage for the women in this sample (Afshar 1994:128). It moves beyond discussions of identity to explore how family concerns about 'family honour' may affect female autonomy and choice in relation to marriage.

3.2 Pakistani Muslim Settlement in Britain

The history of South Asian migration and settlement in Britain has been extensively documented (Anwar 1997; Ballard 1994; Gilliat-Ray 1992; Joly 1987;

Lewis 1996; Modood 2000; Nielsen 1998; Parekh 1998; Shaw 1988; Werbner 1988). Commonly referred to as 'New Commonwealth' migrants⁵⁵ and recruited in response to the chronic labour shortages that accompanied the post war economic expansion, public debate initially focussed on the assimilation of such groups into British society (see Rex 1989).

According to the most recent census figures, Pakistanis comprise 747,285 or 1.3 % of the total British population.⁵⁶ Of the total, 4.6 million people who belong to ethnic groups, a total of 50% comprise of Indian, Pakistani and Bangladeshi background. The census data also reveals the geographic distribution of Pakistanis in Britain and this highlights interesting settlement patterns. For example, of the total number of Pakistanis in Britain, 19% reside in London, while 21% live in the West Midlands, 20% Yorkshire and the Humber, and 16% in the North West. If we explore the reasons behind migration, we see that they are reflected in settlement patterns.

Migration from Pakistan began in the 1950's primarily from rural farming areas of the Mirpur district and some parts of Punjab,⁵⁷ to satisfy the acute shortage of labour following the post-war boom in Britain. In relation to female migration, Anthias and Yuval-Davis have shown that the commonly held view that women migrants came to Britain as mere dependants on their husbands is far from accurate. Instead, women remained important contributors to the family in terms of waged/income and unwaged work (1992:97). Perhaps not surprisingly, as with other migrant labourers, Pakistanis were originally positioned at the lowest labour stratum, employed as unskilled or semi-skilled labourers and were disproportionately represented in textiles, clothing and footwear, metal manufacture, transport and communication and the distributive trades.⁵⁸ Recent

⁵⁵ In his study Ballard points out that the presence of South Asian migration in Britain began as early as the seventeenth century (1994:8).

⁵⁶ 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>

⁵⁷ Most Pakistani's are drawn from just a few areas in Pakistan: mainly from Faisalabad and Jhelum Districts in Punjab, Mirpur District in Azad Kashmir, and the Attock District in the North Western frontier Province. See Shaw (1994) and Werbner (1988).

⁵⁸ Again settlement patterns of Pakistanis in Britain have been extensively documented. For an overview see Ballard (1994).

research indicates that Pakistanis continue to be disadvantaged with respect to unemployment and occupational and educational attainment (Blackburn et. 1997; Heath and McDonald 1997).⁵⁹

The particular circumstances under which Pakistani communities have emerged in various parts of the country, has been extensively documented in anthropological and sociological research.⁶⁰ What we can discern from this literature is that our understanding of Pakistani communities has become synonymous with the theoretical paradigms upon which such analyses are based. For example early literature on Pakistani presence in Britain continued to question their “ability to adopt Western attitudes and their tenacious retention of traditional beliefs and lifestyles” (Shaw 1988:35). And, these tendencies are described in essentialist terms, Anwar (1979) and Jeffrey (1976) point to the ‘myth of return’ while Dahya (1972) and Khan (1975) focus on the ‘imposition’ of purdah and the continued practice of Islam.

Today there is growing literature, which seeks to understand identities as multiple, fluid, dynamic and partial and which can only be understood in interaction with other identities, ethnicities and social structures (Allen 1994; Barth 1969; Macey 1996; Wallman 1986). This has led scholars to focus on the ‘cultural identity’ of the community. In her study Shaw (1994:37) examines the implications of continued traditions such as ‘biraderi’ membership, kinship migration and informal networks such as the tradition of ‘lena-dena’ with the Pakistani community in Oxford. Werbner concludes that one of the early aims of Pakistani communities was to sustain a cultural identity and, “as a culturally enclaved minority in the West, British Pakistanis are having to come to terms with an experienced, everyday loss of autonomy and cultural control which permanent settlement in Britain entails” (1994:226). In this context we have seen a proliferation of research on the formation of mosques, cultural organisations and businesses.

⁵⁹ See Blackburn, Dale and Jarman et al (1997).

⁶⁰ For a fascinating study on the processes of ‘gift-exchange’, marriage and affluent Pakistani businessmen in Manchester see Werbner (1989).

More recently discussion has focussed on the complex, shifting and fragmented identities within the Pakistani diaspora. This understanding of identity, as fluid and changing⁶¹ as led many commentators to conclude that at specific times, a particular aspect of the group identity will emerge has more important than at other times (Modood 2000). In Britain empirical research suggests the emergence of a '*renewed*' Muslim religious identity within South Asian Muslim communities (Afshar 1992, Anwar 1997, Burlet & Reid 2001, Dwyer 1997, Modood 2000, Shah-Kazemi 2001, Werbner 2000). In this way the Pakistani diaspora has been transformed as part of the 'Muslim diaspora' or Muslim Umma (Castells 1997). Furthermore the loss of autonomy within local communities in the West has led to the assertion of an Islamic identity and the identification with a global Muslim community (Ahmed & Donnan 1994: 79).

This emergence of a 'Muslim subjectivity' and its challenge to citizenship has led many commentators to essentialize the 'Muslim community' or the 'Muslim Umma' as bounded, fixed and stable. 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" (1997:15). In this way the term 'community' continues to be used as a rubric to identify different collectivities in relation to ethnic and cultural difference that may provide "a sense of solidarity in the face of social and political exclusion" (Alleyne 2002:609). In doing so however, it ignores the multiple and shifting identities within these bounded communities serving to ignore uncertainty and doubt in favour of conceptualizing community as unified by faith and thus transcending national state boundaries. This shift in understanding community as being culturally and religiously bounded and fixed ignores the complex processes of globalization and differentiation (Sayyid 2000). Castells, rejects this argument and argues that though globalization may indeed be the process which best captures transformations and the development of trans-national networks⁶² it can also cause "some people to wish to retreat into a more simply conceived

⁶¹ And recognizing a distinction in group identity between a 'mode of oppression' and 'mode of being' (see Modood 1990: 56)

⁶² In fact the process of globalization, increased forms of communication and what he calls the 'world of flows' form the basis of his arguments see Castells (1997).

community as a defence against globalization's ceaseless transformations" (1997: 3-4). In this way 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: 4). Yet as Sayyid (2000) points out the Muslim 'Umma' cannot be understood in such a uniform way. While recognising the scope in this argument, the heterogeneous nature of Muslim communities coupled with social and political rivalries in reclaiming this term, reveals the ambiguities in the notion of 'Muslim Umma'. Thus the particular features of the Muslim umma are contested, debated, challenged and appropriated and this process is not always noticed in purely theoretical accounts. In this study, it enables us to ask who benefits, from this version of umma? If we accept this mobilisation of South Asian communities based on a local and national construction of a Islamic identity, we must then explore the nature of its interaction with the state. In other words we must explore how British Muslims may connect themselves to a diverse set of public spheres in order to base their claims on this renewed assertion of a religious identity. (Werbner 2000:307).⁶³

3.2.1 The Emergence of Islamophobia

The emergence of a new form of cultural racism, identified as Islamophobia and directed at Muslims provides the backdrop to understanding the relationship between citizenship rights and Muslim demands in Britain (Modood 2000). In 1997 The Runnymede Trust in their report on Islamophobia cited the stereotypical assumptions on the position of women within Islam, arranged marriages and the defining of Muslims and Muslim leaders as inherently 'fanatical' as examples of this new form of racism. More recently there have been a number of reports in Europe that document the increase of Islamophobia across Europe.⁶⁴ Underlying this discourse is a heightened sense of identifying Muslims and Islam as antithetical

⁶³ 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 1997, 2000, Dwyer 2000, Evans and Bowly 2000, Werbner 2000). For Modood, this emergence has important social policy implication. He explains, "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"(2000:134).

⁶⁴ See for example Sheridan (2002).

to the values of Europe leading to “a greater receptivity towards anti-Muslim and other xenophobic ideas and sentiments to become more tolerated” (2002:15).

Thus the root of Islamophobia lies in the perceived cultural difference between Muslims and non-Muslims. Werbner points out that is not confined merely to the press but that “some western liberals, who pride themselves on their enlightened tolerance, appear concerned about the capacity of this culturally alien presence as they see it to ‘integrate’” (2000:13). Indeed following the events of 11 September 2001 and the upsurge of ‘terrorist attacks’, we witness western liberal scholars engaging in discussions that serve to re-affirm the construction of Muslims as the Other. In this discourse Islam is presented as the new threat to western civilization and the modernity project (see Sheriff 2001). This idea of the oppositional dualism between Islam and the West has led to racist constructions of the Muslims as the Other. Allen points out, “Islamophobia, in its myriad manifestations and multi-faceted expressions, exists on a multitude of levels across society. While societal receptivity to anti-Muslim ideas and expressions was already increasing in the pre-9/11 period, the phenomenon that has emerged since will continue to shape and influence the foreseeable future” (2003:31).⁶⁵

The centrality of gender relations to this discourse is based upon the assumptions about Muslim women. Muslim dress for women is considered a sign of subservience and control, and Muslim women considered compliant, passive and unintelligent. Muslim marriage is constructed around the image of a forced marriage again those who willingly participate in the arranged marriage process are pathologized as victims. In its report on Islamophobia the human rights organisation IHRC reports, “The overwhelming picture is to dehumanise Muslims in such a way that people don’t really care if Muslims are attacked on the street. Every Muslim woman knows someone who has been at least verbally abused. We feel under siege depressed and isolated.”⁶⁶ The significance of these developments becomes evident in debates on ‘claims-making and citizenship’ to which we now turn.

⁶⁵ There have been a number of reports that highlight the increase of Islamophobia across Europe. See for example, Sheridan (2002).

3.2.2 British Muslims and ‘Participatory Citizenship’

The recent census figures reveal a total of 1.6 million Muslims resident in Britain.⁶⁷ The inclusion of the category religion in the 2001 census reveals important changes to conceptions of ethnic identity. Yet in trying to understand the emergence of a distinct Muslim identity in Britain, it seems that scholars often find themselves requiring to identify with ever-changing social contexts. For example as discussed above, if ethnic groups are so fragmented and diverse how can Muslims be perceived in such a uniform way? For many what differentiates a Muslim religious identity from others is the unique form in which this may take within the 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?” (2002:23).

3.2.3 Multiculturalism and ‘Diversity’

The growing polarity between a theoretical understanding of multiculturalism and its public incorporation into state policies and practices reveals an interesting set of dynamics in conflict. The development of multicultural policies can be traced back to the 1980’s with local state authorities developing and implementing policies to foster equality and diversity under the rubric of recognising diverse minority ethnic groups in Britain as equal to majority communities. What is striking about this approach is its emphasis upon culture whereupon ‘diversity’ is defined in essentialist and deterministic ways (Anthias and Yuval-Davis 1992). Vertevoc points out that “notions of multiculturalism convey a picture of society as a ‘mosaic’ of several bounded, nameable, individually homogenous and unmeltable minority uni-cultures which are pinned on to the backdrop of a similarly characterized majority uni-culture” (1996:51). Hence, minority groups

⁶⁶ Reported in The Guardian, 21 April 2002.

⁶⁷ Op cit. 56

were differentiated according to their cultural background which made it easier for the state to identify community leaders so that it could deal “with those who claim to both speak for and define those cultures. In so doing, the state may well increase the authority of patriarchs at the expense of individuals” (Barker 1991:50-51). In relation to South Asian communities, Ellis (1989) describes a pattern where local authorities choose to work with a specific individuals and organisations by way of addressing all the needs of the community in question. Werbner describes the role of such individuals as ‘ethnic brokers’ (1991:134). Thus in developing their policies, local authorities rely on reified constructs of community solely based upon cultural difference whereby “the use of the ‘community’ becomes completely universalised” (Anthias and Yuval-Davis 1992:167-68).⁶⁸

This form of relativism ignores the extent to which activists and members of minority ethnic communities have negotiated the contradictions and redefined meanings of culture and religion within communities. This work has been pioneered by black feminists who are critical of the emergence of the ‘community leader’ which grants men the position and status of representatives of the community as a whole often at the expense of female autonomy (see Anthias and Yuval-Davis 1992, Brah 1996, Bhachu 1992, Patel 2003).⁶⁹ For black feminist organisations such as Southall Black Sisters the traditional public/private divide inherent within the western liberal framework and espoused in multiculturalist policies has led to reluctance by state agencies such as the police and social services to intervene in matters such as domestic violence and/or forced marriages.

Conceptualizing diversity and equality as to include the notion of ‘difference’ provides the basis for understanding culture as a process of meaning rather than as a static shared system of beliefs and values (Merry 2001:39). Drawing upon her

⁶⁸ Reading this literature one is struck by the relevance of such critiques today. Current initiatives have led to proposals for the introduction of citizenship tests and a redefinition of ‘Britishness’ under the rubric of multiculturalism. See Travis (2004).

⁶⁹ Kepel, refers to these individuals as ‘community interlocutors who are able to fit into the political system and serve as a link between the two (1997:133).

fieldwork with the Muslim women's organisation *Al Masoom* Werbner (2000) illustrates how Muslim women are also able to create autonomous spaces and participate in 'transnational activities' (2000:127). In sharp contrast to the image of Muslim women as victims of archaic religious traditions, they "literally rewrote the moral terms of their citizenship- from passive to active, from disadvantaged underclass to tireless workers for the public good, from racialised minority to an elite cadre of global citizens responsible for the plight of the needy of the Islamic ummah and of their national homeland" (2000:127). In this study interviews with the representatives of the organisations, Muslim Women's Help-line⁷⁰ and the An-Nisa Society⁷¹ reveal how they are able adapt their approaches to local concerns. We explore this in more depth in chapter 5.

3.2.4 Muslim 'Civic' and 'Political' Participation

An interesting dimension to debates on citizenship is the nature and level of civic and political participation of Muslims in Britain. In his research of Muslim local councillors Purdam, found the high level of participation within the political electoral process but questions whether this welcomes Muslims into the democratic process as "Muslims invoke various interpretations and rhetoric of Islam to justify and inspire particular political strategies. They operate both inside and beyond the liberal democratic system" (1996:130).⁷² In a fascinating study of political participation of two Muslim organisations in Britain (The Muslim Parliament of Great Britain and the Islamic Party of Great Britain) Hopkins and Hopkins (2002) point out that it is impossible to speak of Muslim identity as fixed and essentialized as "Representations (that is, characterizations) of community identity are invariably bound up with claims to represent (speak for) a community. Inevitably then, identity definitions are strategically organized and the cultural commonplaces (stories, myths and concepts such as da'wah) invoked by

⁷⁰ The MWHL aims to provide any Muslim girl or woman in a crisis with a free, confidential listening service and referral to Islamic consultants, plus practical help and information where required. See <http://www.mwhl.org>

⁷¹ The An-Nisa Society is a women-managed organization working for the welfare of Muslim families.

⁷² In his research Andrews, found that Muslim participation in the British political process can be traced to political developments in India both during and post British rule. He argues, "rather than seeking explanations of current trends by referring to Islamic law, or theories of an Islamic state, it

community members as they define who they are and how they should act, are shaped by their political projects” (2002:305). This research reflects the complexity of political representation of Muslims.

More recently the visibility of political organisations such as the Muslim Council of Britain⁷³ highlights how contemporary claims for Muslim political representation must be understood as a strategic dimension to constructions of Muslim identity. Thus such organisations have strong ties across and within Muslim communities but are not representative of the varied Muslim perspectives. For Brunt (1989) representation can have two sets of meanings, thus “on the one hand, there is the issue of what the identity is, that is, what image or representation of the community is advanced? On the one hand, there is the issue of ‘who or what politically represents us, speaks and acts on our behalf?’” (1989:152). Interestingly it has been the process of resolving disputes within the community, which has led to contending visions of identity within Muslim communities. During the last two decades the demands made upon the state by Muslims communities include, state funding for voluntary aided Muslim schools, demands for the extension of the blasphemy laws to cover Islam; state initiatives to challenge the practice of forced marriages; employment rights regarding religious practice (dress, prayer and financial remuneration) and also demands for the extension of the 1976 Race Relations Act to include religious discrimination. Further the participation of Muslims in civic spaces includes the establishment of mosques, cultural centres, halal meat shops and the establishment of religious schools (see Modood 1997).

3.2.5 Islam and Citizenship Rights

This model of multiculturalism raises questions in Islamic thought and jurisprudence, on the relationship between rights and duties of Muslims living as

is perhaps better to concentrate on the way in which power became centralized within the Indian subcontinent...” (Andrews 1996:121).

⁷³ The key question therefore is how Muslim identity is represented? Post 11 September 2001 this organisation in particular has evolved to become the ‘representative’ of Muslim needs in Britain. It is an umbrella organisation with over 50 affiliated organisations and seeks to provide a unified approach to needs of Muslims in Britain. See ‘The Muslim Council of Britain- its history, structure and workings’ found at <http://www.mcb.co.uk>

minorities in non-Muslim western societies (Lewis 1994, Esposito 1988, Fadl 1994). The relevant issue here is whether the voluntary migration of Muslims to non-Muslim countries is permitted. Traditionally Muslim theorists have drawn upon the Hadith literature and employed the concepts of *dar al-Islam* (Land of Islam) and *dar al-Kufr* (Land of War) to explore the legitimacy of post-colonial migration. This has led to a confusing situation whereby some scholars permit migration but only under extreme conditions whereas others argue that it is forbidden for Muslims to migrate to non-Muslim countries unless they are fleeing as refugees. Shadid and van Koningsveld (1996) point out that this situation has been further compounded by the failure of Muslim scholars to incorporate new developments within Islamic thought. This major weakness has led to the conflation of these two terms, whereupon debate has been largely confined to the specific historical migration patterns of Muslims with little mention of the lived realities of Muslims in western societies. Instead they contend that the debate on legitimacy of migration, the conflict over the limits of religious practice and issues concerning citizenship rights and duties of Muslims must be understood as ongoing, dynamic and diverse (2000:310).

Following this approach Shadid and van Koningsveld, categorize Muslim literature into four main approaches. It is useful to outline these approaches in order for us to locate how demands for the recognition of Muslim Personal law are articulated in Britain. The first, 'pragmatic approach' encourages Muslims to fully participate as citizens in their chosen countries of migration as long as there is no conflict over religious practice. The second, the 'utopian view', "advocates the creation of a unified and legally autonomous Muslim community in Britain and the West, as part of an expansive, transnational Islamic ummah" (2000:313). This may include demands for communal self-regulation of Muslim personal law or voluntary bodies that may advise on Muslim affairs. The third category is the 'modernist approach' which advocates 'dawaa' (preaching) as opposed to understanding migration in terms of migrating to either the *dar al-Islam* (Land of Islam) and *dar al-Kufr* (Land of War). Finally the 'traditionalist approach' argues that permanent migration and settlement are both unacceptable and restrictive to the complete practice of Islam (2000:313-314). While accepting that these

categories are themselves dynamic and at times interchangeable we can see from the findings in this study how they are appropriated by different Muslim organisations at different times. We discuss this further in chapter 4.

3.3 Negotiating Identities: Pakistani Muslim Women in Britain

For the past three decades literature on Pakistani Muslim women has traced the processes of social change within the local Pakistani communities as they relate to gender. The critique of essentializing black and minority groups as classless and ungendered groups and the theorization of the relationship between race, class and gender is now commonly accepted in social science thought and this has meant a much better understanding of the complex interrelationship between religious and ethnic identities and social change within minority diasporic communities in Britain (Anthias and Yuval-Davis 1984, 1993; Allen, Anthias and Yuval-Davis 1991; Brah 1991; Anthias 1992, 1996; Afshar and Maynard 1994; Allen 1994).⁷⁴

More recent writing on gender and identity investigates the dynamics of gender relations within family households with a focus on the marriage process and, suggests not only a differentiation between religion and ethnicity as sources of identity but in particular, a strong affirmation of an Islamic identity (Butler 1995, Jacobson 1997, Bulet and Reid 1998, Hennink, Diamond and Cooper 1999). Drawing upon interview data we now explore how cultural meanings attached to the process of marriage and family honour have been transformed, under the context of 'diaspora' for the women in this sample. As such, we seek to understand how these women struggle to create a new space that challenges the stark opposition of an essentialized interpretation of marriage with their own personal experiences.

⁷⁴ Early literature drew upon a 'cultural image' of Pakistani women who were assigned the role of carriers of traditional 'cultural patterns' within the family and home. These explanations focused on the 'conflict model' with young Asian women presented as being caught between two conflicting cultures represented by the home and the school. Largely disempowered within the family and home, their lives were perceived as incompatible with the outside world. These ideas were later replaced with the idea of 'best of both worlds' where women were deemed more successful in synthesizing their lives in both the public/private spheres and were accorded more control and initiative (see Knott and Khokker 1989).

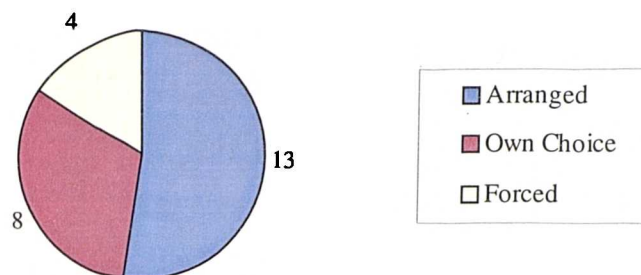
3.3.1 Combining Marriage and Family Honour

The symbiotic relationship between the individual, marriage and family honour reflects how marriage must be understood as complex and contested that comprises of intricate negotiations but which can ultimately lead to unacceptable levels of compromise and compulsion. Yet its portrayal solely in terms of power, control and coercion is not only misleading but as data analysis in this study suggests, simply inaccurate. Instead, marriage must be understood as a subjective experience of 'symbolic meanings' contextualized according to age, ethnicity and class background as well as religious practice and familial obligations and relational upon the structures of family, home and the state. These variables are interwoven, often contradictory and at times in conflict. Yet it is here within this context of 'entanglement' and contestation that we can explore marriage as a process of change and transformation for the women in this study.

3.3.2 Types of Marriage

For the purposes of this study the types of marriages have been categorised as 'arranged', 'own-choice' and 'forced' marriages. However, given the complexities involved in the marriage process we use these categories cautiously and recognise they do not allow us to explore the subtle interconnections between the different types of marriage. By way of illustration Figure 3.1 below outlines the number of marriages found in each category. Out of the 25 women, 13 described their marriages as 'arranged', 8 had chosen their own spouses (but with the approval of their families) and 4 had been 'forced' into marriage.

Figure 3.1 Type of Marriage



Whilst the analysis between the three sets of interviews did reveal a number of commonalities, it is noteworthy that attitudes to marriage did differ according to age, generation, education and class background. Most women considered marriage and having children a natural course of events but this was neither universally nor uncritically accepted and much of the discussion centered on consent in marriage and the perceived unequal power relations within the family household. For example, the women complained that male members of the family were not only given greater choice as to a possible marriage partner but also given greater flexibility as to when they should marry.

Its different for men they don't have to start thinking about marriage until a lot later. But for us it's different. Once you're at college that's it, the family starts talking about when you should get married. It doesn't mean you have to get married straight away but it's just that they start talking about it (Sameena, London).

This, seemingly unequal set of social relations within the family and household illustrates how power can be hierarchically distributed according to age and sex within the traditional Asian family structure and how the notions of 'respect', 'prestige' and honour ensure that the family structure remains intact (Anwar 1998:32). Yet the multi-faceted context of families means that these notions of respect and honour are likely to throw up a range of understandings based upon the experiences of the interviewees. Indeed the term 'family expectations' cropped up in 22 of the interviews in this study, though often disguised in subtle ways and was closely associated to the notion of 'family honour'. According to

Anthias and Yuval-Davis (1992), much of 'ethnic culture' is organised around rules relating to sexuality, marriage and the family and in this way, "...communal boundaries often use differences in the way women are socially constructed as markers" (1992:114). Such markers include expectations about honour whereby women are deemed the preservers of 'family honour'.

This notion of 'family honour' has been described as a process used to control female sexuality through restriction of movement (Afshar 1992, Anthias 1992, Bhopal 1997). In her study of the structure of female authority within Pakistani households in West Yorkshire, Afshar points out that the significance of *izzat* (honour) is the way in which women are expected to conduct themselves both in the private and public spheres. Wilson describes *izzat* as, "essentially male but it is women's lives and actions, which affect it most. A woman can have *izzat* but it is not her own, it is her husband's or father's. Her *izzat* is a reflection of the male pride of the family as a whole. (What is more) saving her *izzat* (and through that their own *izzat*) is perhaps the greatest responsibility for her parents or guardian."

The role of women as preservers of family honour means that only they can increase the honour of the family through obedience and only they can "lose it" and thus shame the family. As Anthias points out, "A significant element is to be able to control the behaviour of the women in the family, both wives and daughters, for any transgression by them is an imputation of a failure to exercise proper patriarchal control" (1992:78). Yet the precise meaning of 'family honour' is problematic and can only be understood in relation to highly specific and individualised contexts to which the women belong. In this study the significance of family honour to the marriage process raises the question of whether the commitment to marriage is contingent upon the consent of parents and the wider family. Here in microcosm we can explore the different types of marriage in the sample from the standpoint of the women while simultaneously drawing attention to the fragmented, shifting and highly individualized meanings attached to the notion of 'honour'.

3.3.4 The Reasons for Marriage

The reasons given for their decision to marry ranged from age, family expectations, 'family pressure', gaining independence to a reluctance to conduct sexual relationships outside of marriage. Perhaps not surprisingly, parents and the wider family played an important part in the process of decision-making and to this end, family concerns concentrated on when the interviewees should marry to their choice of husband. Traditionally, a woman is considered of marriageable age from her late teens until her mid-twenties (Anwar 1997) but of course, this varied considerably amongst the sample and interestingly reflected generation, age and class differences. For example, the younger women reported they had been expected to marry between the ages of 24 to 28 years whereas older women had married between the ages of 18 to 22 years. There was no discernible difference between the two groups of women from Punjabi and Azad Kashmiri backgrounds as they reported similar reasons for marriage.

I was brought up knowing that I would have to be married by the time I was 18. That's just the way it went back then. Marriage is important to Muslim families and young girls are taught this at a young age but I think most wait until they're a little older these days (Anisa, Bradford).

You can talk to lots of Asian girls at college and they'll all tell you the same, going to college is really important because it gives you a few more years of not having to get married, that's what I did (Shabana, London).

Well the thing about marriages and particularly perhaps Pakistani marriages is that there is something that is set in motion that happens when you are fairly young, perhaps 12, 13 and this process starts to happen and you're an incidental part of it (Yasmin, London).

I don't believe it's just an Asian thing because women from all backgrounds face the pressure to get married or have to consider getting married. But in our communities, marriage carries the added burden of izzat and so there's always some pressure (Hina, London).

Hence the women described the expectations to get married and the bargaining strategies they employed in an attempt to delay marriage. But perhaps the most salient finding is the fact that the interviewees were aware of the importance of preserving 'family honour' by getting married. Yet the data also revealed the shifting and entangled definitions of 'family honour' and its centrality to the marriage process.

Women of our mothers background were not in a position to challenge what was going on in terms of izzat, shutting up and staying quiet. I think one of the things we're doing is redefining what izzat means. We're claiming it back, izzat is our own. I don't agree that izzat is keeping male honour in the family. I think that's total rubbish. We all have izzat, men have izzat and they're responsible for it, it doesn't mean they can go out and have girlfriends and drink and gamble and do what they want. I think its blown out of proportion by western writers (Yasmin, London).

I suppose me getting married was important for my parents cause of the honour thing...but don't we all have this honour? I just sometimes worry that its all exaggerated you know the way izzat controls everything. Well it doesn't not in my experience anyway (Shaheen, London).

Other factors such as women occupying different positions of power within the family means that honour also operates as a different set of expectations. For parents in particular age signifies the chances of their daughter's marriage prospects.

I was the eldest and I was expected to get married. It sounds strange but I knew I had to cause of the izzat thing and that it probably wouldn't be as bad for my sisters (Noreen, Birmingham).

I was 29 and was getting a lot of pressure from my parents to get married. I was promised that I would be made the 'senior sister in law' and we thought of this as a big honour (Fauzia, London).

These extracts acknowledge the complexities involved in how 'family honour' may affect their decision to marry and thus we must understand the 'social meanings' attached to the negotiation of family expectations to gain a more nuanced understanding of 'family honour' (see Finch and Mason 1993).

3.3.4 Arranged Marriage

Clearly, as with all measures, the arranged marriage process can be measured against a set of often-conflicting variables such as the involvement of family members and the process of negotiation. In the most straightforward cases, issues of consent remain paramount upon which all negotiations are based. However, as the data below suggests, this process often occupies a difficult space between the consensual participation of both parties and forms of coercion and levels of pressure to comply. Stopes-Roe and Cochrane construct a typology of arranged marriages that outlines the differences in the arranged marriage process. These

include the 'traditional pattern', the 'modified traditional pattern' and the 'co-operative traditional pattern' and the tensions inherent within all three approaches are the underlying values of kinship patrilineal networks and 'biraderi' which result in a conflict between western norms and values of 'marriage' and the Asian customs of marriage (1999:95). This way of understanding the arranged marriage process is useful in terms of providing an insight in the different normative criteria attached to the process. However, it is also important to note that such a paradigmatic approach is unlikely to tease out the tensions and contradictions evident within the context of multi-faceted families. Because of the issues of honour, conflict, loyalty and belonging in families we need to ensure that we are able to capture divergent experiences effectively and to simply present marriage in such an either-or structuralist manner is problematic.

In this study some women expressed complete satisfaction with the arranged marriage process. For Fauzia, despite considerable uncertainty about her prospective husband, she believed that the shared values of family and cultural background, education and class position enabled her to actively participate in the process of arranging her marriage. A family friend had suggested a possible suitor and they had been introduced and her decision to keep her parents involved had been paramount to her:

He was from a middle class family. He was presented as a 'suitable match' and it was agreed we would have chaperoned meetings with a view to marriage. They were very well educated and I thought this was a environment that I would feel comfortable. I wanted to keep my parents involved as much as possible so that we could make the decision together as a family so that they know what's going on and I feel open enough to tell them what's going on with me. And also at the back of my mind if anything goes wrong you know, no one can point the finger at me and say well you went out with him alone, why didn't you find out. At least this way I felt I was being protected should anything ever happen in the future and that my parents would always be there. So I was very careful about that.

These strategies shifted the responsibility to her family and parents in order to strengthen her position in the process and in this context the interviewee was able to frame the marriage process as encompassing contradictions, inconsistencies and confirmation.

The only problem I felt a little uncomfortable about was the fact that they weren't very religious but I thought that's ok because well I don't see myself

as too religious. I mean I don't pray 5 times a day and I don't wear the hijab, I'll do other things but not those things so I thought there really won't be a problem.

Interestingly, within this framework, some women were thus able to adopt a pragmatic approach to marriage, exploring different options to accommodate their needs and the expectations of their families. Furthermore, working within this paradigm allowed the women some control over the marriage process whilst using the family as a mechanism for meeting potential marriage partners and to ensure protection against any unwanted interest and intrusion. In doing so, they were able to successfully navigate the competing demands placed upon them.

The important thing for me was that my parents listened to me. If I didn't like him, you know if we didn't have anything in common they did understand and we moved on. For me that's what an arranged marriage is, making sure your parents understand what their role is in the whole thing. Of course sometimes we all get it wrong (laughs).

Yet the extent of family involvement in the arranged marriage process did vary amongst the sample and discussion here focused on consent to marry and choice of marriage partner. The ambivalence described by the women regarding their decision to marry reflects how the categories of arranged and forced marriage maybe blurred. Some women found it difficult to disentangle the two categories whereas other women were keen to emphasize the underlying differences between them. Paradoxically, for some women who had been forced into marriage, family and in particular parental input remained vital to any future plans to re-marry.

Having an arranged marriage was the only option for me and I never thought about challenging my parents. Getting married the way I got married was like for...well for keeping the family together, you're meant to be keeping the ties together. It's meant to be like this you know some sort of guarantee that if anything goes wrong, then you've got the family there to help sort things out. I'd have another arranged marriage (Shazia, London).

The family is my bedrock, without them you don't amount to much. I mean it, I really do... it's the people in the world that care for you, that you know will always be there for you (Nasima, London).

Such congruent findings are likely to throw up a wide range of issues based upon the experiences of the individual with the arranged marriage process. As we find in this study, consensus is necessary to the arranged marriage process but the

underlying notions of honour, duty and expectation also play a pivotal role. Thus for Sameena, marriage was based on the values of family loyalty and respect.

My sisters all had arranged marriages...we all did, our parents used to say that we had to marry someone in the family, because an outsider couldn't fit in and they would cause trouble...It wasn't like people sat me down and said you should get married. I think what happened is that, my family didn't think I was going to have a career so therefore what else is there to do and as long as I'm at home the family home I'm their responsibility you know in terms honour and izzat.

Such a view lies at the paradox of the arranged marriage process whereby an individual's decision to participate in this process is influenced by the notions of duty, family honour, respect and family expectations. Hence, there were many explanations of why this group of women chose to participate in the process. Their loyalty to family and in particular parents appears to have led some women to ignore the obvious difficulties inherent with the system of arranged marriage.

I'm sure there was times when I thought do I really want this but what stopped me was thinking well I'm sure its going to work out because we're both getting married for the same reasons, we both know what its all about, well that's what I thought (Naheed, London).

In her research Bhopal, found very little evidence, which challenged the traditional practice of arranged marriages⁷⁵ in South Asian households. Her empirical findings suggest that because women are accorded less power within the family and household the arranged marriage process further disadvantages them and creates what she describes as a 'private patriarchy' (1997:67). The requirement to comply no doubt restricts the terms upon which women are able to develop strategies to challenge parental authority and limits the space upon which they are able to instigate change within the process. It is for these reasons we see the ambivalent stance taken by the women.

On the surface the arranged/forced marriage distinction seems more or less clear-cut but if we scrutinise what is understood as consent and the individual

⁷⁵ This study draws upon interviews to elicit Asian women's views on arranged marriages, including their definitions of arranged marriage, their importance within South Asian communities and, in cases where the women themselves were involved in arranged marriages, the type of contact they had with their prospective husbands. It also examines whether women would want their own daughters to have arranged marriages and their views towards women who do not have arranged marriages. See Bhopal (1997).

participation in the process, we see that the distinction becomes increasingly difficult to maintain.

It was more my uncles and aunts and the elders of my family that got together and they chose a good family in Pakistan and they approached my parents, not me. And there was a family conference and at some point I was told about this process happening and I was allowed to say yes or no (Raheela, London).

Other women did not perceive such a process to be a forced marriage as they did not feel 'compelled' to participate in the process.

My parents did the hunting down if I can call it that. I mean they looked out for people they thought were suitable, people that they thought I would get on with and I was ok with that. It was always understood that they would do that. I was told of certain people and I was allowed to meet with them if I wanted to. So you see it wasn't forced or anything and I did participate

Some women, therefore, felt that parental support was obviously of great importance. As discussed earlier, some women employed a number of strategies to delay marriage where the sanctions of the honour community could be avoided (Bradby 1999:157). By postponing entry to a family-contracted marriage, young women were able to reassess and renegotiate their role within the system rather than rejecting it in total. By preventing their behaviour from coming to the attention of their parents, it was possible for young women to engage in activities that would be defined as questionable before entering an arranged marriage (Butler 1999:134).

This discussion reveals the diversity of experiences and the multiple perspectives women adopt in their understanding of the arranged marriage process. Interestingly, the women shifted the emphasis away from coercion to notions of compromise and negotiation. In doing so, they were able to adopt a number of different strategies to participate in and make sense of the arranged marriage process. Keeping our minds open to these more complex understandings allows us to develop a more nuanced approach to what obviously remains a difficult and protracted process for many women.

3.3.5 Forced Marriage

By contrast 4 women had been forced into marriage, against their will. For these women, the overriding concern had been the potential loss of family honour for themselves and their families. They were painfully aware of family demands and were less able to resist the pressures imposed upon them. Zareena, expressed regret that her parents had forced her into marriage to a distant cousin in Pakistan, when she had been so vociferous in her opposition to the marriage. Yet she conceded that these protests were not enough to challenge parental authority and in particular her father's authority in the household, thus she explained that there had been little option for her but to accept the marriage.

Given the complexities of family honour, duty and respect it is not surprising that some women regard this as the only option. In her study Philips found that women forced into marriage are unlikely to exercise the 'exit option' of leaving the family and local community to which they belong (2003: 520). This finding was confirmed in this study particularly from younger women who were anxious of the effects their departure may have upon younger siblings.

The only girls that I knew who had left the community were bought back the next day and married off. That was my only experience of women leaving the community was that they probably went to Birmingham town centre or something and, they were bought back...so I didn't particularly want any of that (Sadia, Birmingham).

Even when some women did consider the option of leaving they were concerned about being marginalized from the community and their families.

I couldn't just leave, I knew everyone would turn their backs on me and anyway where would I have to go? I do feel constrained at home but I know being on the outside isn't all its made up to be. I know some girls who've run away and they're really alone and with no support. I couldn't do that cause...well I just couldn't live that way (Nighat, London).

Attitudes to leaving were circumscribed by living in close-knit communities where conformity is expected and women are under pressure to comply. Furthermore the costs of leaving the family and community were calculated as being too high. Most recently, we have seen a shift in focus in challenging the practice of forced marriages under the rubric of 'honour crimes'. In fact the visibility of 'honour crimes' is an important development of developing more

grounded approaches in challenging such crimes. Hossain and Welchman, describe an honour crime as “patterns of conduct cutting across communities, cultures, religions and nations manifested in a range of forms of violence directed, in the majority of cases, against women, including murder (‘honour killings’) and forced marriage” (2000:2).⁷⁶

Most recently the issue of forced marriage has been addressed at a national and increasingly international level.⁷⁷ In Britain the recent murders of young women who had been killed for refusing to marry⁷⁸ has mobilized a ‘multi-agency’ approach in tackling the problem. Apart from feminist initiatives to mobilize state resources to combat these crimes, of particular concern has been on the extent to which cultural and religious beliefs are used as partial defences in law against the charge of murder. In her extensive analysis of English case-law⁷⁹ which has sought to introduce the use of cultural defences Phillips (2003) concludes that “cultural arguments only have an effect when they resonate with mainstream views” (2003:531).⁸⁰

With regard to the ways in which these women were forced into marriage, in this study discussion centred on threats to disown them to accusations of disloyalty and the perceived lack of respect to parents. None of the women reported that they were subject to any physical abuse and/or threats but it is quite possible that they were simply unwilling to divulge such details. Simultaneously, they were concerned about the refusal of marriage may have upon parents and younger siblings.

⁷⁶ In 1999 CIMEL (Centre for Islamic and Middle Eastern Law) and INTERIGHTS (International Centre for the Legal Protection of Human Rights) began a three year project on ‘honour crimes’ which worked closely with national and international organisations to explore ways in which to develop strategies to combat the practice of honour crimes. See ‘Roundtable on strategies to address ‘Crimes of honour’ (2002:10) at <http://www.honourcrimesproject.ac.uk>

⁷⁷ In August 1999, the Home Office established a Working Group to investigate to what extent forced marriage was a problem in England and Wales and to make proposals for tackling it effectively. In its report, a forced marriage is defined as a marriage conducted without the valid consent of both parties and where duress is a factor. In January 2004, the Metropolitan Police set up a Taskforce to deal with the practice of ‘Honour Crimes’.

⁷⁸ Including, Rukhsana Naz (1999) Heshu Yones (2003), and Shafilea Ahmed (2004). See The Guardian 17th March 2004.

⁷⁹ See for example R v Bailey; R v Byfield; R v Shabir Hussain, R v Shazad, Shakeela and Iftikar Naz, R v Faqir Mohammed. For full citations see List of Cases.

⁸⁰ It is beyond the remit of this study to explore these issues in any depth.

I didn't care what they (extended family and community) thought of me, I really didn't but it's my parents...my parents will suffer so I had to think of what the community thinks for their sake.

Of these women, two had been forced into marriage in Pakistan and these women reported confusion as to the validity of their marriages conducted abroad in Pakistan and the immigration rules permitting the entrance of unwanted spouses.

I was taken to Pakistan, without knowing I'd be forced into marriage, I honestly thought we were going on holiday. Anyway I really don't want to go into it but just to say that I've written to immigration to tell them not to let him in (Zareena, Bradford).

In response to tackling this issue the Foreign and Commonwealth Office has set up special section to deal with forced marriage conducted abroad. Again due to the limits of this study this issue is not given sufficient merit for analysis.

3.3.6 'Own choice marriages'

Of the sample, 8 women had chosen their own spouses and discussion here focussed upon parental consent, the level of family involvement and community reaction to their choice of partner. Unsurprisingly perhaps, parental consent remained a central factor in their decision as to whether or not to proceed with the marriage. In fact of this group only 2 women decided to go ahead with the marriage when parental consent had not been secured. One interviewee spoke at length about the strategies she employed for her parents to accept her choice of husband.

I first told him (her father) about Naveed and he just mumbled something about 'keeping my honour' and that was it. He just expected me to be discreet, he just didn't want to think about what I might be doing (Farhana, London)

Aside from parental consent she had been concerned of the implications her decision may have upon her family, as she would be marrying an "outsider."

I did understand where my parents were coming from because in Asian communities it's the norm to marry in your own biraderi and I knew my parents were going to get a lot of stick from the community.

Invariably for some women now in the midst of divorce the decision to marry had been a source of regret.

I should have listened to them, I know that I made a mistake. I mean it's not as if they were forcing me to get married. I just thought he was the right person (Sadia, Birmingham).

3.3.7 Marriage, Islam and Family Honour

Interestingly, a number of the women in this study redefined the notion of family honour and marriage within an Islamic context. The relationship between Islam and honour is closely associated with marriage and motherhood. Some of the younger women interviewed felt that codes of behaviour explicit within the Qu'ran had been distorted in order to impose greater restrictions upon their freedom. In her research with Pakistani Muslim women in West Yorkshire, Afshar (1989) found that many young Muslim women were choosing to adopt the Islamic identity, donning the scarf as part of a universalist Islamic identity. She points out, "Amongst Muslims, women have traditionally been the appointed site of familial honour and shame and the representatives of the public face of the society's apparent commitment to its faith. Thus Muslim women are both the guardians and the guarded" (1989: 129).

However, in all cases there was consensus that forced marriage was not permitted in Islam and it was this fact which propelled them to challenge parental authority.

It took me a long time to realise that in Islam marriage is based on mutual consent, love and trust and when I'd decided that I wasn't going to take the abuse any more I took this to my parents. Of course they refused to speak to me but in my heart I know that I'm doing nothing wrong because it was wrong in the first place...it should never have happened (Yasmin, London).

As a Muslim I understand the importance of honour...I don't accept that this honour means we don't have the choice to marry the person we choose or whether we can go to college or not. That's not about honour, it's about control. In Islam we have these rights and I try to explain this to my parents (Noreen, Birmingham).

Greater concerns were expressed about community expectations upon the women and their families and that these community expectations made it harder for Muslim families to challenge what honour in Islam actually meant.

Even if my parents had given me more freedom it just would have caused them more problems. People talk about you, oh she's doing this and that. What can you do? (Rabia, Birmingham).

Thus women are deemed the custodians of the religion but it has been men who have interpreted the norms and values of Islam. Afshar explains, “Women whether they have wished it or not, have been required to reflect the religious commitment of the group in their attire and behaviour as well as in most aspects of their lives” (1989:129). This has been a problematic relationship where over time women have had to negotiate their position in relation to the patriarchal position that they find themselves in (Kandiyoti 1991). This issue is discussed further in chapter 5.

3.3.8 Reforming the Marriage Process

It is unsurprising that the most salient finding with the women in this sample was the extent to which they challenged the norms of the cultural group to which they belonged. Many of the women in the sample were actively engaged in the process of redefining the notion of ‘family honour’ and negotiations. As Bhachu points out: “...ethnic cultural values are represented as repressive traits that they must accept rather than as values they continuously adapt, choose to accept, reproduce, modify, recreate and elaborate, according to the circumstances in which they are situated” (1989:24).

The interviews revealed the complex relationship between the women and their families as Brah points out that the family “remains an area of acute ambivalence for women” as it provides women “with a sense of belonging and family support in the struggles against the onslaughts of racism” (1996:98). The multi-faceted context of families means that the women actually occupy different social positions through different ages and experiences and have different sources of power within the family. Thus for example some women reported that as the eldest of siblings they were better able to negotiate terms of marriage, as parents were more likely to listen to their concerns by virtue of their age and position in the family. Similarly a large sample of the women reported it was female members of the immediate and extended family that took the decision on whom they should marry and then went onto broker the terms of dowry and dower.⁸¹ We are thus given the impression that the different sources of power to which

women have access can result in them actively colluding in cases of forced marriage and such a view challenges the presupposition of an underlying family truth based solely upon patriarchal power. Herein lies the paradox whereby the understandings and interpretations of marriage can often appear as contradictory and complex. Furthermore existing literature pays little attention on discussion on how the arranged marriage process can itself be reformed. Nor has there been much discussion on the use of modern mechanisms in arranging marriages for example, Muslim marriage web-sites and agencies. In this study very few women used such services but this is most probably reflective of the limitations in the sample rather than indicative of the use of such methods.

In this study the women were keen to discuss the ways in which the arranged marriage process could be reformed. And, recognizing this method of marriage as a tradition based on cultural values allowed them the possibility of it being modified. In some cases the women explored the possibility of disposing of the term arranged marriage and renaming it as a 'assisted' marriage.

The term arranged marriage has got such a bad press now with all the focus in the media. I think we need to start again, where we have assisted marriage you know where parents help us...assist us in marriage (Fauzia, London)

I think its time the arranged marriage thing changed because I think a lot of the time the individual gets forgotten in the process. Like for example my cousin the arranged marriage things worked out really well, I mean they're a really successful couple, fantastic in fact and are a really good role model. But for me it just didn't work out. I think this needs to be challenged that to understand that what may be good for one individual may not be good for someone else. It's this blanket that we have to change (Anisa, Bradford).

For other women entering into the marriage process itself, limits the choice for women.

I personally don't think either systems work and for me I would just go with the system that causes the least amount of heartache to my parents and family (Raheela, London)

Conclusion

In this chapter we situated the study in relation to the experiences of Pakistani Muslim communities in Britain. Underlying this analysis was two key issues: firstly an attempt to explore how Pakistani communities have mobilized around a

⁸¹ See chapter 5.

renewed Muslim subjectivity and secondly to explore the experiences of marriage for the women in this sample. We found that the women are combining traditional and contemporary values to create a new way of being which facilitates their individual growth and aspirations within the basic family structure. Nevertheless pressure to get married remains strong and the institution of arranged marriage is often perceived as the only acceptable form of marriage, which can lead to intergenerational conflict. Thus for the majority of women, marriage remains a process of negotiation, compromise and struggle. This may suggest that parental involvement in the marriage process is far greater than studies suggest and the nature of this involvement is complex entailing material, emotional and psychological factors. Afshar points out that “Women are the perceived transmitters of cultural values and identities and are the standard-bearers of the groups public and private dignity. Yet women themselves are burdened with a diversity of values and identities which may not always converge to produce a rich entirety” (1989:129).

In the first part of the chapter we found that at a time where the relationship between Muslims and the British State is predicated on the notions of loyalty, belonging and Britishness, a culturally relativist notion of multiculturalism fails to incorporate heterogeneity within communities. Instead Muslim identities are complex, negotiated, contested and historically unstable. Purdam points out that “Muslims themselves are debating and contesting exactly what it means to be a Muslim, what Islam means and how it should be constructed and reproduced both in the West and in the rest of the world” (1996:130). We draw upon these debates and turn now to exploring how Shariah Councils constitute as unofficial dispute resolution processes in Britain.

CHAPTER 4

RESOLVING MARITAL DISPUTES: SHARIAH COUNCILS IN BRITAIN

**“Muslim law is not adversarial in nature but rather conciliatory.
We seek to bring people together, to reconcile them
rather than to create dissension between them”
(Zaki Badawi 1995:78)**

4.1 Introduction

Shariah Councils have been described as “internal regulatory frameworks” (Menski 1998:396), “complex informal networks” (Poulter 1998:61) and sites where “new *ijtihad*s”⁸² are taking place (Yilmaz 2000:1). 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 (Poulter 1998, Carroll 1997, Hamilton 1995). 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’. Shariah Councils are implicitly presented as unified with little recognition of the internal and external contestation of power. Significantly, these analyses fail to incorporate the experiences of the individual and are largely based on theoretical understandings. Thus the main thrust of this work is framed around debates on ‘legal pluralism’ and attention is paid to the failure of English law to accommodate the needs of religious communities. Yet one cannot understand the multifaceted nature of ‘law’ without drawing upon detailed empirical data (Santos 1987). Indeed, the presentation of legal discourse as structured, overarching and determinist obscures the power relations upon which dispute resolution processes

⁸² 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* (2000:3).

are based. In this way, existing literature does not give due salience to the interconnection between the Shariah Councils, forms of power and gender inequality. This thesis builds on these existing studies and draws upon detailed empirical data in its attempt to fill the gaps. The major task of this chapter, therefore, is to analyse the establishment and development of 4 Shariah Councils as 'unofficial dispute resolution mechanisms' in the areas of marriage and divorce. More importantly, the chapter investigates their approach to mediation and reconciliation.

The first section of the chapter 4.2, traces the development of Shariah Councils in Britain. The degree to which Shariah Councils have been transformed under the context of diaspora leads us to question their legitimacy under Islamic law. In this scenario, we consider how notions of 'homeland', 'belonging' and 'Muslim identity' may interact to produce a specific type of Shariah Council to accommodate the specific needs of British Muslims. Of particular importance is the relationship of Shariah Councils to mosques and we explore this in some detail.

Having supplied a historical and contextual background to Shariah Councils the chapter then goes onto investigate in sections 4.3 and 4.4 how these bodies operate in practice. In particular, it explores the interaction of 'social' and 'legal' processes involved in obtaining a Muslim divorce. With each of the 4 Shariah Councils, we see the combination of a specific set of rules procedures and language that creates a unique form of dispute resolution.

The third section 4.5 of the chapter elaborates on the key issue of mediation and reconciliation. As discussed in chapter 1, the Family Law Act (1996) has not proceeded with its provisions on mediation but the question remains whether Shariah Councils endorse such approaches. Mediation is a complex and difficult process and here the emphasis is on the relationship between gender and 'private space' to explore how these bodies partake in mediation practices and whether this leads to the unequal treatment of women. The significance of this approach is that it allows us to explore the relationship between official mediation policies and

Shariah Council mediation practices and challenge the idea that these 'internal regulatory frameworks' tend to avoid all 'officialdom' to settle disputes. Instead in matters of reconciliation and mediation we see a degree of both conflict and co-operation between state law and unofficial law.⁸³ In particular, we analyse the centrality of the religious scholar to the dispute resolution process and explore what his 'legal reasoning' is based upon.

Following this discussion, section 4.10.4 briefly examines recent arguments for the adoption of a strictly legal pluralist arrangement for Muslims in Britain and considers to what extent Shariah Councils are unified. Certainly for many religious scholars the development of Jewish legal pluralism in Britain provides a useful perspective on the relationship between multiculturalism and legal pluralism for Muslims in Britain.⁸⁴

4.2 The Development of Shariah Councils in Britain

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.⁸⁵ 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,⁸⁶ solicitors and courts. In addition to providing advice and assistance on matters of Muslim law, Shariah Councils have also been set up to promote and preserve Islam within British society (Bunt 1998:103). The process of dispute resolution therefore is produced

⁸³ A situation identified as 'internal legal pluralism' (Santos 1987:98) and 'state legal pluralism' (Woodman 1998:45).

⁸⁴ Unfortunately it is beyond the remit of this study to explore this issue in any depth. But I hope to conduct a comparative study later.

⁸⁵ 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).

⁸⁶ 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 Shariah Councils 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.

through various discursive practices. That is, Shariah Councils must be understood in relation to the locus of power in which they are embedded.

Similarly, the emergence of Shariah Councils in Britain can be traced to a diverse set of social processes. 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 (2001:299). In short, what we see in this analysis is the development of a parallel legal system in opposition to state law. Yet conceptualizing unofficial dispute resolution in this way is premised on the homogeneity of 'Muslim communities' without exploring how these bodies are constituted within local communities. Furthermore, the primacy of a Muslim identity means that we learn very little about cultural and religious practices that may affect the autonomy of women using these bodies. There is very little discussion on how such processes are contested, redefined and possibly open to change. We explore these issues in chapter 5.

The history of Shariah Councils in Britain can be traced to the development of Muslim organisations during the 1970's and 1980's. In chapter 3, we discussed the emergence of religious and ethnic diversity and the development of multicultural policies to accommodate such 'difference' (Modood 1999, Werbner 2000, Brah 1996). While some studies attribute this development to state initiatives under the context of multiculturalism others see the communities themselves taking the initiative to forge closer ties within the family and community. For example, in his analysis on the relationship between the

emergence of cultural and religious organisations and ‘ethnic governance’,⁸⁷ 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” (1996:66). The development of Shariah Councils can be understood in this context reflecting developments of the communities in which they are located. Unfortunately there are no known precise figures that can identify the precise number of Shariah Councils operating in Britain but at a recent meeting, estimates ranged between 60-70 councils across the country.⁸⁸

The development of Shariah Councils encapsulates the development of Islamic religious practice in Britain. From the initial stage of a prayer hall, to the appointment of Imams and the construction of mosques, Shariah Councils are symbolic of the cultural and religious norms which underlie these developments. In his study of Muslims in Bradford, Lewis argues that the socio-political establishment of Muslims in Britain via mosques and community organizations indicates a shift “within the migrants self-perception from being sojourners to settlers” (1996:56). In particular, it is the close relationship to mosques that has shaped the type of Shariah Councils that we see emerging in Britain.

4.2.1 The Relationship to Mosques

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. In fact, a focus on this relationship enables us to engage with current issues facing mosques and their impact upon Shariah Councils.

The establishment of mosques in Britain has been extensively documented with mosque formation being closely tied to community development (see Lewis 1994,

⁸⁷ A term he takes from Breton (1991).

⁸⁸ An audience of community leaders and religious scholars from Shariah Councils across the United Kingdom were invited to discuss the emergence of Muslim legal pluralism in Britain in the hope of increasing efforts to lobby the state for the formal introduction of a parallel legal system in Britain. “Muslim Personal Law” organized by The Islamic Shari’ah Council in association with Islamic Cultural Centre, London and Quist Solicitors, Sunday 22nd August 2004.

Werbner 2001, Eade 1996, Ballard 1994). As Lewis points out, “The creation of mosque reflects the growth, location and differential settlement patterns of distinct regional and linguistic communities” (1994:58). 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, Somalians 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 Ahamadiyya (see Lewis 1994:57). 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).

Mosques are classified as charitable religious organisations and are essentially free to develop their own policies within the framework of existing legislation. Recent figures estimate over 1,500 mosques in Britain, each reflecting the diverse ethnic profile of the local Muslim communities.⁸⁹ The mosque consists of a board of trustees and a ‘mosque committee’ that takes care of the financial interests of the mosque and its maintenance on a voluntary basis. The committee appoints the Imam whose primary role is “to lead ritual prayers for the congregation five times a day, perform marriages, funerals and other rites of passage, give religious advice and guidance to the community on their daily lives and religious rituals such as fasting during the holy month of Ramadan and pilgrimage during Hajj, collect and distribute charity, provide counselling and teaching for both adults and children” (see FAIR 2002: 12). Aside from the rituals and spiritual guidance the mosques also seek to ‘institutionalise’ Islam within local communities and therefore provide a ‘Muslim space’ where Muslims can discuss a wide range of issues from an Islamic perspective. Shadid and Koningsveld point out, “Quite logically, the

⁸⁹ Statistics compiled by the Guardian Research Department see Travis (2002). There are a number of umbrella Muslim organisations that aim to unite mosques, Imams and provide a consensus for Muslim perspectives in Britain these include the Bradford Councils of Mosques, Muslim Councils of Mosques and the Muslim Council of Great Britain.

establishment of these places of worship implied the creation of social spaces where new contacts could be made on the basis of a common religious identity” (1996:111). In this way, mosques act as a focal point for the Muslim community, identified as the “Islamization of local urban space” (Eade 1996:231) and as such, mosques are markers of “shifts in...sacred geographies (and in) the maps of meaning and profiles of power in the West” (Pieterse 1997:187). The mosque itself is symbolic of the visible presence of Muslims in Britain- an indication of their cultural and religious presence. Ahmad argues, “The mosque is by definition the heart of the community. It has to be multi-dimensional if it is to adequately succeed in harmonising all the varied elements within the community...I have always felt that mosques should be venues for issues of national importance such as racism, unemployment, the environmental crisis, education, business, the arts and sport. We are being restrictive if we keep them as prayer places alone. The strength of our mosque can only materialise with their ability to attract a larger audience. They have to utilise all the skills, abilities and talents of the community”(quoted from Raza 1996:40-41).

The growing concern of the emergence of the ‘home-grown Muslim terrorist’ post events 11 September 2001 has led to a renewed interest by the state in mosques and in particular the role of Imams. The reason for this intervention is not merely to prevent acts of terrorism but in doing so, to ensure that Muslims are fully integrated into “the British way of life”.⁹⁰ Understandably this has generated concern within communities and generated enormous discussion within Muslim newspapers and magazines where such intervention is viewed with suspicion and hostility.⁹¹

More recently, the recruitment of Imams from abroad has led to conflict within mosques and concern from the government. There are a number of institutions in Britain, which undertake the training of Imams⁹² but there is no central body

⁹⁰ See The Guardian March 17 1998.

⁹¹ See Q News 14 April 2003.

⁹² These bodies include The Muslim College in London, Darul Uloom al-Arabiya al-Islamia in Lancashire, Institute of Islamic Education in Dewsbury and the Al-Mahdi Institute in Birmingham. See FAIR Report (2002).

which oversees the training. This has led to concerns that Imams who have little understanding of the lives of British Muslims may be contributing to disaffection and alienation within local communities. Furthermore Imams are often employed from a particular area in Pakistan to ensure they reinforce these religious values imbued with localized cultural traditions, within British Pakistani communities (Bunt 1998). Understandably this has led to criticism from British Muslims who may only speak English of the language barriers and generational conflict. Geaves points out, “The imam may well not speak English but his presence becomes the focal point for legitimizing and reinforcing those customs from a particular rural locale in the subcontinent that have been transported to a few terraced streets in a British industrial city. Here the mosque functions more strongly as a means of reinforcing kinship and ethnic ties than as a means of intensifying the sense of belonging to the wider ummah whether in Britain or the Islamic world” (1996:171). Interestingly however, in his study he found that most Muslims were not aware of the different ethnic or doctrinal biases within mosques and prayed there because of convenience.

New state initiatives to provide Imams with employment rights have stipulated that Imams must be British Muslims so that they are aware of British social, cultural and political life and are subsequently able to relate to their younger congregation. This of course raises concerns outlined in chapter 3, where the use of selected Muslim organisations in dialogue with the state, ignores the diverse manifestations of Islam within communities. Furthermore the state seeks the control and preservation of communal harmony against a background of high unemployment, low educational attainment, social deprivation and social exclusion for many Muslims in Britain (Modood et al 1997). Not only does this approach fail to explore the underlying reasons why young Muslims maybe disaffected, but it also ignores the dynamics of power within communities.

Hence we can see that the task of the Imam is both challenging and complex. Apart from this national interest there has been discussion over the internal conflicts of power between different sectional interests within mosques. Raza describes this as ‘mosque politics’ and states, “mosques in Britain have become a

battle ground for power politics...It is pointless to conceal that within the last few years most of the trouble and discord have stemmed from the attitudes of some of the Ulema and Imams and these have been the reason for many of the most unpleasant scenes witnessed in the brief history of the Muslims in the United Kingdom. In some cases, the troubles have escalated to such an extent that the police have had to enforce the closure of the mosques” (1993:37). In this way we understand how mosques compete and vie for power among themselves reflecting its importance for local Muslims. All of these problems also reflect how the mosque acts as a resource for access to Muslims. A myriad of objections on the way mosques are run is commonly discussed and debated in Muslim newspapers such as Q News and Muslim News.⁹³

A second concern relates to the presence of women in mosques. This presence is marginal and defined according to the dictates of purdah which gives rise to the creation of separate space, for men and women. Mirza explains, “The installation of separate entrances, separate seating arrangements and the bifurcation of rooms by screens or awnings to create sharp, well-defined boundaries between sections of the mosque are the means by which the contours of gendered space and the pattern of restricted interaction between the sexes are produced” (2000:13). Women are not actively involved in the mosque committee, they have little input in the administrative task of running a mosque and when they are involved, they are designated to the realm of ‘women’s issues’. Yet Imams at mosques can play a central role in matters of marriage and divorce including introducing ‘suitable’ marriage partners and advising women on matters of marriage breakdown. This has led to concern from Muslim women’s organizations such as Muslim Women’s Help-line and the An-Nisa Society how such advice may be steeped in local customs and practices that may sanction intra- family inequalities such as forced marriage.⁹⁴

⁹³ Analysis of these newspapers reveals that most objections are raised against the mosque committees that are seen to be run by an older generation which has little understanding of the needs of young British Muslims. See Q-News (2003).

⁹⁴ We discuss this further in chapter 5.

In Britain the formation of mosques is closely tied to the development of Shariah Councils. In this study, 3 Shariah Councils had evolved under the guidance of an Imam from a respective mosque. Prior to the establishment of Shariah Councils, Imams provided all spiritual and religious guidance to Muslims in local mosques and this included settling marital disputes and issuing divorce certificates. In his study, Bunt (1998) found that Imams found this work to be time-consuming and taking them away from their traditional duties of providing spiritual guidance and, sermons for Friday prayers. This was confirmed by findings in this study, Dr. Nasim at the BSC, 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 an important feature of the relationship between Shariah Councils and mosques are that they continue to be based in Mosques and Imams serve as religious scholars on the Council’s body while operating from a separate room. In this study only one Shariah Council (SCUK) had little contact with a mosque all the others were closely aligned to one particular mosque. There are two important differences between mosques and Shariah Councils. Firstly, that unlike mosques, Shariah Councils are not voluntary bodies and therefore are not obliged to reveal details of their organizational structure nor their financial status. Secondly many mosques in Britain are organised on an ethnic basis reflecting the specific needs of different groups of Muslims whilst Shariah Councils aim to cater to the needs of all Muslims irrespective of ethnic, racial or national background.

Thus while some studies attribute decision-making power within the community to Imams the emergence of Shariah Councils has led to an interesting ‘separation’ in the roles of an Imam and religious scholar. In his study of informal decision-making in the Pakistani Muslim community in Birmingham, Bunt (1998) found Imams to be in a position of power, providing advice and assistance in matters of marital and intra-family conflict. Conservative in attitude, they sought to control female sexuality through forced marriages and thus prevent ‘outsiders’

threatening the stability of the Muslim family. In comparison, the religious scholars in this study that were based at Shariah Councils were keen to distinguish themselves from performing the traditional duties of Imams (though some were also Imams) but they did point to “the mutual relationship between the Imam and the Muslim scholar in resolving marital disputes” (Dr. Suhaib Hasan, ISC).

4.2.2 The Legitimacy of Shariah Councils

We can see from the discussion above that Shariah Councils emanate from mosque formations and the structuring of discourse 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 with 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. As discussed above with some mosques Imams are deliberately recruited from Pakistan to keep alive localised cultural practices.

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. Thus section 7 sub-section 4 states, “Within thirty days of the receipt of notice under sub-section (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation”. These bodies are thus appointed by the state to operate as official dispute resolution mechanisms working in tandem with civil law (Abel 1984). Of course this does not mean there is no conflicts of law scenario and there has been much discussion in Pakistani case law as regards to the nature of the notice given to the Chairman in order to determine the validity of the divorce (see Menski and Pearl 1998: 339-342).

It is clear that Shariah Councils in Britain have potential overlaps with such 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 as we shall see in this study, 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 than this analysis suggests.

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” (2002:11). He argues that “the lack of space in the English system for appropriate solutions to dilemmas facing people” has led to this confusing situation (2001:11). 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 (2001:12). 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. Secondly, the conceptual 'space' where the state law and Muslim personal law intermesh manifests in the sphere of mediation and reconciliation but what is less certain are the outcomes of such disputes for individuals and in particular women, within Muslim communities.

Shariah Councils are thus 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 and through a wide variety of discourses, economic processes, state policies and institutional practices" (Brah 1996:182). Thus some religious scholars such as Maulana Abu Saeed and Dr. Suhaib Hasan at ISC readily admit that they draw from their experiences as Imams in Pakistan. Dr. Suhaib Hasan 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 interview Dr. Badawi a scholar at MLSC was keen to distinguish between the role of a Shariah Council and its location, often within local Pakistani Muslim communities. He explained, "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 BSC 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.

This raises the question of the legitimacy of Shariah Councils in Islamic law and their legitimacy of operating in non-Muslim countries. This has been debated around the issue of voluntary migration for Muslims in Islam and has proved an area of contention and dispute amongst Muslim scholars and clerics. The early

jurists demarcated boundary lines between 'dar al-Islam' (the land of Islam) and 'dar al-kufr' (the Land of War) (see Shadid and Koningsveld 1996) and most jurists largely accept that Muslims could remain on non-Muslim lands as long as they were allowed to continue the practice of Islam. The point of contention concerned the jurisdiction of Muslim judges. For Lewis, the most important issue facing Muslims in Britain is the absence of a "communal jural autonomy in matters of personal law" something that is allowed to religious minorities or dhimmis residing in Muslim states (1994:67)

There is much debate and discussion within Islamic texts as to the role and duties of Muslims living as minorities in non-Muslim states. This area of law is both ambivalent and open to dispute (see Fadl 1994). Historically, migration for Muslims has been linked to forced migration and persecution during the time of the prophet and the two Quranic verses (4.97-100 and verse 5.44) that address this issue are both based upon forced migration and persecution. Fadl points out, "It seems that different jurists were addressing different scenarios in their expositions without specifically indicating the issue they had in mind" (1994:150). The degree of conflict between the schools of thought has also exacerbated this confusion. For example, for Malikis Muslims who find themselves as minorities must migrate to Muslim countries. Hanabali and Shi'a hold the view that migration was permitted as long as it did not conflict with the practice of Islam but living in a Muslim state was the ideal situation even if that state was despotic (see Esposito 1995). Menski is correct when he points out that, "Muslims as members of minority communities in the West today, then, have no clear authoritative, uniform Juristic guidance available to them"(1998:64).

As discussed in chapter 3 the polarization in this debate has led to new approaches that reformulate the dichotomy of 'dar al islam' (the house of Islam) and 'dar al harb' (the house of war). Shadid and Koningsveld develop the concept of dar-aldawah ('the country of mission') and dar al ahd (the country of treaty) where Muslims can live in non-Muslim lands and organise their lives in accordance with the Sharia. What becomes evident in these discussions is that Shariah Councils

must be understood as being relational upon time, space the dynamics of power and conflicting cultural and religious norms.

4.2.3 Divorce and Shariah Councils

Of the sample, all 4 Shariah Councils reported marriage breakdown and divorce to be the two most important issues dealt by Shariah Councils. In relation to divorce, female applicants contact a Shariah Council where husbands may refuse to grant them a unilateral divorce (talaq). Thus under Muslim law women are permitted a divorce without the consent of their husbands but involving the intervention of religious scholars to determine which kind of divorce is issued. Under Muslim law, 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 of approaches to divorce within these three major categories, however discussion in this thesis will be limited to the type of divorce certificate issued by the Shariah Councils and this being the khula.

Discussion on divorce, in Islamic literature often begins with a saying found in the Hadith literature, in which the Prophet explains that divorce is permissible in Islam but only as a last resort (Engineer 1992). The interesting issue here is that under Muslim law marriage is a contract and thus the different types of divorce available are based on ways in which to dissolve this contract. The different schools of tradition will therefore allow termination of this contract by “wither of the parties, by mutual agreement or by the courts” (Carroll 1986:45). Yet the different approaches in classical literature on Muslim law of divorce coupled with state law interpretations of Muslim divorce in Muslim countries has led to confusion among both scholars and lawyers.⁹⁵

Notwithstanding the diversity of literature on the issue of divorce in Muslim law we can identify two key issues for Muslim women in Britain. The first issue

⁹⁵ For example the issue of khul and mubara't has led to interesting discussion on its form and validity see for example Bharatiya (1996)

relates to a conflict of law scenario with English law regarding the extent to which Muslims are being divorced outside the official system and whether this creates a conflict of law scenario with official law.⁹⁶ And secondly, the problem of 'limping divorces' whereby a civil divorce has been obtained by the woman but her husband is refusing to grant her Muslim divorce (Menski 1999).⁹⁷ Yilmaz points out that "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" (2001:16).

The second issue is on the type of Muslim divorce granted to the women by the Shariah Councils. If a khul is granted it means that the female applicant must give up her right to dower or mehr in return for a divorce and this seems reasonably unfair. Menski describes this process as, "Usually 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" (1998:284). 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 (see Carroll 1986). Aside from this issue the Shariah Councils also deal with how the female applicant is able to retrieve her dower after her husband has willingly divorced her. Nasir points out that in theory Muslim women are entitled to the dower have exclusive right to it under the terms of the 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" (1990:103). 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 proprietary rights. They are not to bring conflict, but peace" (1992:129).

⁹⁶ Menski and Pearl (1998) draw upon cases of verbal nikah where the husband has pronounced a unilateral talaq to explore the nature of the intervention of state law to regulate this area.

⁹⁷ One effect might be that the couple are considered to be divorced in one jurisdiction but married in another. The costs upon Muslim women are particularly high as men may use their powerful position to make greater demands such as favourable financial settlements (See Hamilton 1995 Carroll 1997: 100; Badawi 1996:77).

Thus, we are dealing with a complex formulation of Muslim divorce whereby 'legal discourse' is reconfigured in the private sphere. It is to this 'process' of obtaining a divorce certificate to which we now turn, together with an analysis on how each council creates new spaces in which marital disputes are resolved.

4.3 Modus Operandi: Shariah Councils "In Action"

Much of the existing literature on Shariah Councils fails to provide an insight into how these bodies constitute as unofficial legal bodies within local Muslim communities. 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 and their interaction with state law. Against this background, it is noteworthy that we learn very little about the nature of their existence as conflict resolution mechanisms. This omission is to be viewed as significant if we are interested in understanding how they may embody a particular set of cultural practices that may affect the autonomy of Muslim women and in so doing, confer status and power within the communities in which they are located.

Drawing upon fieldwork data, this section investigates the establishment and development of 4 Shariah Councils. By directing our focus to their approach to dispute resolution we are also able to concentrate on the process of mediation and reconciliation. We then explore their attitudes to the 'formalising' Muslim family law in Britain, highlighting the initiatives developed by the Shariah Councils.

4.3.1 The 4 Shariah Councils

Before elaborating on each of the 4 Shariah Councils, it is useful to briefly explain why they were chosen for fieldwork research. As discussed in chapter 2 the research design in this study was largely influenced by access to respondents and refusals 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 hence the religious scholars were not prepared to jeopardise their credibility by the possibility of intimate facts being

revealed in public and then obviously to a stranger. Accordingly consent was withheld and the focus shifted to the larger Shariah Councils who each authorized limited access.

4.3.2 The Muslim Law (Shariah) Council (MLSC), West London

The Muslim Law (Shariah) Council (MLSC) based in West London was established in 1985. One of the first Shariah Councils to be formed in Britain, it aims to resolve disputes faced by the Muslim community and to give 'legal' opinion on various issues. According to its literature, it is also "...approached by various non-Muslim institutions, organisations and individuals seeking expert opinion according to Islamic law on current social, cultural, political and academic issues". It comprises of 21 '*ulama*' each of which reflect the different interpretations of Islam in order to represent the various schools of '*Fiqh*' in Britain. Dr. Zaki Badawi, one of its founding members explains that the aims of the Shariah Council are, "to resolve problems confronting Muslims in the light of the Qu'ran and Sunnah and according to the agreed principles of the Islamic jurists" (1992:106). The Shariah Council operates from the premises of the Muslim College in West London and is also affiliated to the Muslim Council of Great Britain. The Muslim College has charitable status and pays its staff⁹⁸ through donations. The Shariah Council is open between Monday-Thursdays between 11-2pm.

4.3.3 The B'ham Muslim Family Support Service and Shariah Council (BSC)

The Birmingham Muslim Family Support Service and Shariah Council (BSC) are both based at the Birmingham Central Mosque. The Shariah Council was set up 10 years ago to deal with the increased number of inquiries relating to issues of marriage and divorce. It comprises of 5 scholars who meet every 3 months to discuss cases, meet clients and issue divorce certificates. The mosque director, Dr. Nasim acts as the head of the Shariah Council. The Marriage Counselling Service was set up approximately 7 years ago in the hope of reconciling parties and all applicants must first meet with Dr. Saeeda, a trained counsellor and her assistant Saba, to explore the possibility of reconciliation. These sessions take place every

⁹⁸ One secretary who also performs the administrative duties of the Muslim College.

Tuesday between 2-4pm as a drop-in service and clients must attend these meetings for a minimum of 4 weeks. Once Dr. Saeeda is satisfied that the marriage is beyond reconciliation, the case-file is prepared and is put forward to the Shariah Council. The service therefore operates on a two-tier basis with the clear emphasis upon reconciliation. All those involved with the Counselling Service and the Shariah Council work on a voluntary basis with expenses covered from mosque donations.

4.3.4 The Islamic Shari'a Council (ISC), East London

From its offices in Leyton, East London 'The Islamic Shari'a Council' (ISC) is one of the oldest and most established Shariah Councils in Britain. Since its inception in 1982 and with a body of scholars drawn from ten different religious organisations in Britain⁹⁹ it deals with over 350 cases a year. It describes itself as a 'quasi-Islamic' court applying Islamic rules and principles to resolve matrimonial issues. The emphasis is not only upon the resolution of disputes but also upon the active engagement with the Muslim community by "fostering and encouraging the practice of the Muslim faith according to the Qu'ran and the Sunnah" (1995:3). The two scholars, Maulana Abu Saeed and Dr. Suhaib Hasan, offer a drop-in service twice a week. Maulana Abu Saeed works on Tuesdays between 2-4pm and Dr. Suhaib Hasan works on Thursdays between 2-4pm. In conjunction with Mr Mushtaq who works as the office secretary (on a voluntary basis), they meet clients and prepare all case-files. After the initial meeting, the scholars invite the clients to attend a series of reconciliation meetings. Once it is agreed that the clients are unwilling to reconcile the case is referred to the Shariah Council. Members of the Shariah Council meet at the Islamic Cultural Centre, at Regents Park Mosque on the last Wednesday of each month.

⁹⁹ These comprise London Central Mosque and Islamic Cultural Centre, London; Muslim World League, Matkazi Jamiat Ahl-e-hadith, UK; UK Islamic Mission; Dawatul Islam, UK; Jamia Mosque and Islamic Centre, Birmingham, Islamic Centre, Glasgow, Islamic Centre, Manchester, Jamia Masjid Hanafiya, Bradford and Muslim Welfare, London. For a complete outline on the aims and objectives of the Council see, "The Islamic Shari'a Council of Great Britain and Northern Ireland: An Introduction" (1992:3).

4.3.5 The Shariah Court of the UK (SCUK), North London

The Shariah Court of the UK (SCUK) is based in Tottenham, North London. It was set-up in 1992 and is headed by a group of local Imams who felt there were no services available in the local area to advise Muslims on marital disputes from an Islamic perspective. Situated within an industrial business complex, the Council committee of one Imam, a Muslim solicitor and 3 male witnesses (from the local mosque) meet with new and existing clients every week. All meetings with clients are run on an appointment system and an average of 4 cases are discussed at any one given session. The Council is open three days a week, from Tuesday until Thursday between 11-2pm and the staff work on a voluntary basis.

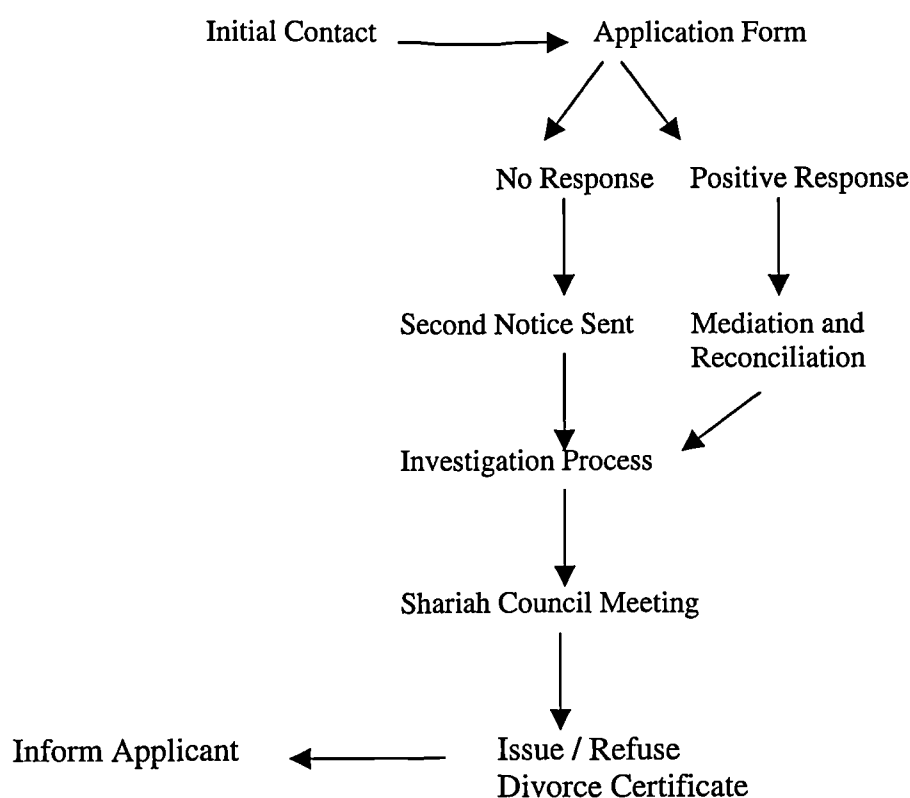
4.4 A 'Common' Approach to Dispute Resolution

In this study, the scholars described themselves variously as a 'Registrar', 'Imam', 'Sheikh', 'Maulana' or 'Qadi'. In this context each term is in essence translated into 'religious scholar' and the variation in usage depends upon what the scholars feel comfortable with and, also their general reluctance to associate the councils 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" (Dr. Nasim, BSC). For the purposes of this study, we use the term religious scholar as a general title so as to avoid any confusion between the terms.

Notwithstanding the limitations of 'differential access'¹⁰⁰ to the Shariah Councils under study, the fieldwork data collated provides an interesting insight into the strategies, procedures and practices adopted by these bodies. This allows us to gain a better understanding of how these bodies are constituted as dispute resolution mechanisms within local communities. Perhaps it should not be surprising that given the objectives of a Shariah Council that we find they adopt a strikingly similar approach to resolving disputes. In general, differences only

emerge in their approach to mediation and reconciliation and we address this in section 4.6 in this chapter. The figure 4.1 below outlines the general approach to dispute resolution. From a conceptual standpoint, we see a process that focuses on collating evidence to determine the grounds for divorce coupled with attempts to reconcile the parties. In effect, we see a constant effort to reconcile the parties and the implementation of the administrative procedures serve to reinforce this process. We turn now to analyzing the first three stages of this process-the initial contact, the application and the investigation stage.

Figure 4.1 Process of Obtaining a Divorce Certificate



4.4.1 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 the emphasis rests upon the individual to contact a

¹⁰⁰ See chapter 2.

Shariah Council for help and assistance. Described as “community organisations” that “act in good faith” while providing a service with “minimal charge and no financial gain”, (Sheikh Abdullah, SCUk) the religious scholars emphasized the importance of these bodies in resolving marital disputes within the sphere of family and Muslim community. Mohammed Raza, at the 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 is conceptualised as “the *duty* upon Muslims to abide by the requirements of the Shariah” (Badawi 1996:12) 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, the scholars were keen to identify Shariah Councils as key to strengthening a sense of belonging for Muslims within local communities and as part of the wider Muslim umma.

Data revealed that contact with the Shariah Councils had been made via telephone, through letter correspondence and via scheduled and unscheduled visits.¹⁰¹ 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 fundamental 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. where there was 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

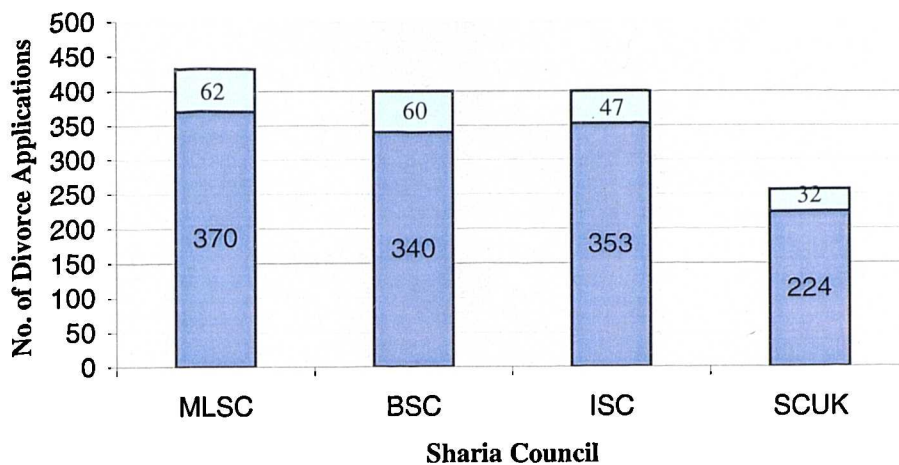
doesn't mean that we hand out divorces to anyone who requests one. We make thorough checks and act in good faith".

This approach is, however, a source of contention for some Shariah Councils. Unsurprisingly, perhaps 3 scholars argued that the presence of the client at the Shariah Council meetings 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 its important to meet with our clients, to reason with them and make sure they understand the consequences of their decisions." This approach also led to criticism that it undermines the work of other 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 remained convinced nevertheless that this approach undermines the work of other Shariah councils and in so doing challenges the validity of a Muslim divorce certificate issued by a Shariah Council who does not adopt this approach.

Returning to the initial contact made by female applicants, it is interesting to note that each council reported a steady rise in the number of cases each year. The figure 4.2 below illustrates this rise from the period December 2002 to January 2003.

¹⁰¹ 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.

**Figure 4.2 The Rise in Divorce Applications
(2002/2003)**



Unfortunately, precise figures are difficult to ascertain as records are not kept in any systematic order and hence data presented does not permit accurate measurement. Nevertheless, what we can discern from these figures are the variances in the rise between the Councils. This, coupled with the fact that Muslim women are evidently contacting Shariah Councils in ever-greater numbers. What remains unexplained in these statistics is why they are choosing to do so.

For the religious scholars, the powerful determinant for this rise centred on gender relations with the understanding that Muslim women must be protected and cherished within the Muslim family. This produced the paradoxical approach with some scholars lamenting the decline in religious values symptomatic in the renewed visibility of Muslim women in public and others advocating the increased presence of Muslim women in the public spheres that allowed them to instigate divorce in ever-greater numbers. Moreover, one of the most consistent themes was how modern western societies had led to a situation of uncertainty and doubt for all Muslims, with the effect of undermining the position of women within Muslim family. Sheikh Abdullah (SCUK) explained, “In Islam we have very clear principles on how Muslim women must be respected and protected as wives, sisters and mothers. Women nurture the Muslim family and today we see

these roles being undermined and destroyed with this emphasis on material wealth. Twenty years ago we would not have had so many young women walk away from their marriages as we see today”. Sentiments such as these reflect the meanings attached to the role of Muslim women within marriage. By contrast, Dr. Nasim at BSC, welcomed the presence and renewed visibility of Muslim women in “British life”. For him, Shariah Councils had enabled Muslim women to “challenge patriarchal cultural traditions and free themselves from unwanted marriages”. Likewise, Sheikh Abu Hassan blamed both parental pressures in forcing women into unwanted marriages and Muslim men for “failing to recognise change and moving with the times” as contributing to the rise in divorce applications.

Clearly, the key findings we can draw upon here relate to the centrality of gender relations in this process. In particular, the duties of Muslim women are juxtaposed against their individual identities and visible presence in British society. We discuss these issues in depth in the following chapter.

4.4.2 Stage Two: The Application

Once contact has been made, the next stage involves the client completing an application form which details the grounds for divorce. Unfortunately, limited access to case-files did not permit a comparative analysis of this process between the Shariah Councils. Nevertheless where access was granted we are given an insight into what the application form entails and are able to analyze the language, style, and layout of the application form. (See Appendices 1 and 2)

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. There would appear, therefore a concern that the evidence presented in this document is checked and

verified accordingly. We discuss this in more depth in the following section of this chapter.

Turning to the application process itself, 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”. It seems, therefore, a further 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)¹⁰² 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 highlight the centrality of the application form. Aside from the general details of age, address and type of marriage the form is structured around the grounds cited for divorce. It states:

¹⁰² By contrast, the SCUUK 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 and are permitted to contribute to all discussions. This is discussed in section 4.9 below.

“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 additional sheets of paper are used to describe the events leading up to the marriage, reasons for marriage breakdown 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 two cases below illustrate some of the reasons in seeking a divorce cited in the application form:

Case A

1. 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.
2. 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.
3. 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.
4. 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.
5. 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.

Case B

1. He is impotent.
2. He has been verbally and physically abusive towards me, since the day we were living together.
3. He has subjected me to mental torture and made me cry every single day.
4. He intends to go to Pakistan and remarry without my consent.
5. He has threatened to kill me on several occasions.

With each of these cases between 3-5 additional pages are attached with the application form detailing each of the grounds for divorce. Clearly, then, the applicant may use this opportunity to put forward their version of events. Similarly, for the Shariah Councils the application form acts as an indicator for the possibility of reconciling the parties. It therefore forms the basis of the investigation process whereupon the scholar attempts “to disentangle fact from fiction” (Dr. Nasim, BSC).

4.4.3 Stage Three: The Investigation

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 (See Appendix 1). 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 dispute¹⁰³ (see Shah-Kazemi 2001:11). The BSC and ISC adopt a similar set of procedures with variations on the fee charged to cover the administration costs.¹⁰⁴ 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 a difference in approach here it is largely left unchallenged and, therefore seems insignificant to the investigation process.

¹⁰³ This may include copies of certain documents, for example marriage certificates and any civil divorce proceedings documentation.

4.4.4 What is 'Evidence'?

The main task of the investigation process is to verify the version of events put forward by the applicant. Once the applicant submits the information requested on the application form, the investigation process begins. This process seeks to determine the background to marriage, the factors contributing to the breakdown of marriage and the possibility of reconciliation. Although there seems to be no foolproof means of verifying the evidence, it is generally assumed that the burden of proof falls upon the applicant to prove the grounds for divorce cited in the application form. Yet precisely how this works out in practice varies considerably among the councils. For example, though each scholar was keen to point out that the applicants' submissions are neither easily accepted and certainly not without challenge the onus is actually placed upon the husband (See Appendix 2). Thus of the sample, 2 Shariah Councils place the 'burden of proof' with the husband to challenge and/or disprove the allegations put forward by the applicant. Mohammed Raza at MLSC explains; "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".

The BSC and ISC follow a strikingly similar procedure but the SCUUK deal with this issue somewhat differently. Here, a joint meeting is arranged with the applicant and her husband to compare and discuss the evidence presented by both parties. The evidence is accepted as valid only once 3 male witnesses are able to act as witnesses to authenticate it. In spite of this imbalance of power relations, Sheikh Abdullah at SCUUK is keen to present this process as "woman-friendly" and "we abide by Islamic principles both as a moral duty and as a practical necessity".

¹⁰⁴ These range from MLSC (£75), ISC £50, BSC (£60) and SCUUK (no charge).

Where access to case files was permitted we are given an insight into this process. At MLSC, the process of gathering evidence centres on a number of notices being sent to the husband. The first notice includes three requests for the husband to:

- (i) Make every possible effort towards reconciliation urgently through your own resources;
- (ii) To grant your wife a proper Islamic divorce;
- (iii) Contact us immediately, through written correspondence only to present your own side of the case showing reasons why you should not divorce your wife.

If the husband fails to respond to this notice a second notice is sent which states:

“Please note that if these circumstances remain unchanged and you do not respond to the laws of the Shariah, the members of the Council comprising eminent scholars, Imams and Muslim barristers representing various Schools of Muslim law (Fiqh) in Britain may consider issuing a document with the effect of pronouncing your Nikah dissolved (Tanseakh) on the basis of grounds valid in the divorce laws of Ilma. We trust as a Muslim brother you will co-operate with us in resolving this dispute”.

A final divorce notice is sent if there is no response from the husband. The registrar, Mohammed Raza explains, “what happens after issuing that notice is almost different in every case. There are cases where after receiving this notice husbands act realistically they agree to a divorce or they issue a divorce. Or they can just ignore our letters they don’t think that we are an adequately constituted authority so they just throw our letters into the bin. Or they can put their defence to us and challenge all the allegations submitted by the wife in her application. So it’s a lengthy, a very sophisticated and complicated process where each case is different from the other.”

Analysis of 25 MLSC case-files revealed that in 17 cases, 2 notices were sent out to the husband and in 8 cases a total of 3 notices had been sent. There were a total of 19 responses from the applicant’s husband and most of these challenged the grounds for divorce. But it is interesting to note that in 20 cases, rather than produce any ‘evidence’ with which to challenge the grounds for divorce cited by the applicant, the husband requests some form of mediation in the hope reconciling. Yet in all cases the basis for reconciliation is often tempered with uncompromising sentiments. For example, in one case the husband states, “I am

prepared to reconcile with my wife and forgive her for what she has put me and my family through. But she must change her behaviour, she is selfish and unreasonable and puts her needs first without any regard for the rest of us”.

4.4.5 The ‘Grounds’ for Divorce

The issue of what constitutes as ‘evidence’ is administered to identify and verify the grounds for divorce. At the same time this process raises questions on the relationship between Islamic law and rules of evidence (see Nasir 1990). Though beyond the remit of this study, we can consider the extent to which Shariah Councils draw upon these principles.

Thus an important part of the investigation process involves clarifying the reasons for the breakdown of marriage and establishing the grounds for divorce. Not only does this determine whether a divorce certificate can be issued but it also acts as a pretext to the possibility of reconciling the parties.

As discussed earlier, there are 4 ways in which a nikah contract can be dissolved without the intervention of the husband. The one most commonly used by the 4 Shariah Councils is known as the *khula*. As discussed earlier, here the wife is able to instigate divorce in return for a sum of payment to her husband, which usually involves the return of the mahr. In doing so she forfeits her right to any form of maintenance. The other types of divorce that are instigated by women are *mubara’ah*, where the marriage has not been consummated due to the fault of the husband and, where both parties agree to dissolve the marriage. And finally the *faskh* or *tanseekh* where the nikah contract may stipulate the right of the woman to divorce her husband but this must involve the intervention of the religious scholar. Of course, there will inevitably be different interpretations as to the rules governing divorce by the religious scholars and this can undoubtedly lead to confusion for the female applicants. We discuss this in the following chapter.

Here we are particularly interested in analysing how the Shariah Councils establish what constitutes as evidence and the decision-making process of the religious scholar in issuing the different types of divorce certificates. The

evidence is collated at every point of the dispute resolution process from the application stage to the investigation stage, the mediation sessions and finally the Shariah Council sessions.

Case-file analysis with two Shariah Councils reveals that the grounds for divorce certificate are varied. At the ISC, a divorce can be issued on the grounds:

1. If the husband suffers certain physical defects, which are well known in the Sharia and are considered to be legal grounds for nullification of the marriage.
2. When the husband accuses the wife of unchastity. In such a case, the process of “Li’aan” is to be applied (see Surah Al-Nur).
3. When the husband is missing.
4. When the wife embraces Islam but the husband refuses to do so.
5. When the husband ill-treats the wife or fails to perform his marital obligations or does not maintain her in spite of having the means to do so.
6. When the husband does not or refuses to comply with the judge’s order to divorce his wife for one of the reasons mentioned.

With the SCUK, the following grounds form the basis for divorce:

1. If the husband causes direct harm to her i.e. bodily damage, leaving wounds & bruises or physical humiliation
2. If the husband causes indirect harm to her i.e. not providing food, shelter and clothing or oppressing/harming her children or he becomes a faajir i.e. homosexual, alcoholic etc.
3. If she hates him and cannot tolerate him anymore even if he is good towards her. This will cause harm to her as she will become sinful by not fulfilling her duties towards her husband.

These grounds include the caveat, “NB: As for the first and second grounds, the husband is not entitled to the jewellery or any dowry that has been paid and he is liable to pay the dowry or remainder of it if it has not been paid in full. As for the third ground, the husband is entitled to the jewellery and mahr that has been paid”.

Despite the subtle differences in the grounds for obtaining a divorce, it becomes clear that each Shariah Council draws upon 5 key factors to determine the outcome of obtaining a divorce certificate and these include: the validity of marriage; physical and/or emotional abuse; wider familial conflict; possibility of reconciliation and, *other* factors (for example desertion/impotence). Observation research and/or case-file analysis with all the Shariah Councils reveals that in most instances, the marriage is dissolved according to the principle of khula.

In terms of the material evidence collated to verify the grounds of divorce (including documentary evidence and witnesses), we can see how this process entails contested meanings while being deeply intertwined with the power of the religious scholar to disregard any 'unreliable evidence'. Drawing upon case-file analysis we now briefly outline some of the types of evidence religious scholars accept.

4.4.6 The Validity of Marriage

The religious scholars all reported concerns on the rise of forced marriage as one of the primary reasons for women seeking dissolution of marriage. Hence one of the most important grounds for divorce centres on the validity of marriage. Aside from understanding *why* the client had chosen to marry, the scholars were keen to explore whether the marriage was valid according to Islamic law. Dr. Nasim at BSC, explained, "In Islam we have very clear guidelines of when a marriage is a valid marriage. Unfortunately we see all too many cases of young women and men being forced into marriage in the name of Islam. This is not only morally wrong but also Un-Islamic. Parents would do well to remember that there is no compulsion in Islam". While these sentiments were shared by other religious scholars case-file analysis reveals, that the issue of forced marriage is not directly addressed by all the religious scholars in the process of collecting evidence. At this stage it is interesting to note that references to forced marriage are mostly referred to as 'alleged' in case-files. In interview Sheikh Abdullah at SCUK explains, "We have no way of verifying that the marriage was forced. We accept that some marriages are forced...but remember some women agree to the marriage but then change their minds and then claim they had been forced into marriage. Our duty is deal with the issue as we see it". However ISC have attempted to deal with this problem and have passed a resolution on what constitutes as a forced marriage (See Appendix 2).

Instead the focus moves to the marriage itself, for example where it took place. Thus each applicant is asked to produce documentary evidence in the form of a nikah certificate and/or civil registration certificate. If for some reason they are unable to provide this evidence, they are asked to provide an affidavit to

authenticate that the marriage did take place (See Appendix 3). If the marriage has not been registered and the applicant does not have a copy of the nikah certificate, videos and photographs of the wedding are required to prove that the marriage did indeed take place. This practice demonstrates the conscious attempt by the Shariah Councils to develop practical solutions to problems as they may arise and also highlights interaction with state law, an issue we return to later in this chapter.

4.4.7 Physical and/ or Emotional Abuse

Another ground for divorce is physical and emotional abuse and again the Shariah Councils require documented evidence to verify the allegations. Here case-file analysis reveals that in cases of domestic violence police reports, court injunctions and family court orders restricting access to children, are required to prove that the abuse has taken place.

4.4.8 Wider Familial Conflict

A common complaint by the women in the case-files is cited as 'family interference' and this can be summed by one client who states, "his family made everything much worse they always interfered telling him what to do and how to do things....is this allowed in Islam?" Another letter stated that the reason for pursuing a divorce was "constant taunting relating to not being a proper Muslim wife". The clients are not expected to produce evidence to verify these allegations but these claims are challenged during the mediation sessions and the religious scholars all explained that often they requested the presence of family members to "explain their behaviour".

4.4.9 Possibility of Reconciliation

The fact that mediation and reconciliation shape the process of dispute resolution within Shariah Councils means that if either of the parties is willing to reconcile at any point of the process the divorce application will not proceed. This is discussed in the following section of the chapter.

It is clear that the process of collecting evidence can be eclectic as well as complex. This is encapsulated by the assumptions of the religious scholars who have the power to accept and/or reject what constitutes as evidence. Simultaneously, the onus upon the applicant to produce documentation can result in lengthy delays. Again this process raises the question of a possible of conflicts of law scenario with English law. Such an analysis is beyond the remit of this study, but case-file analysis did reveal that the religious scholars were keen to avoid any contact with state law in relation to the collection of evidence. For example in one case a husband had followed his wife's whereabouts and taken pictures of a man entering her house. He had brought these to the Shariah Council claiming that she was lying in her application form and had in fact been committing adultery. However the Shariah Council refused to accept this as evidence on the grounds that if they did accept it there could be possible legal implications if the wife reported this to the Police. In a letter to the husband they are keen to point out that they do believe his version of events "but unfortunately the law of this country prevents us from taking any action". The nature of what this action might be is not expressed. A second finding relates to the fact that a conflict over evidence arises and cannot be resolved, the scholars choose to dissolve the marriage and the grant the female applicant the khul.

4.4.10 Case-file Analysis: The Case of X

A better illustration of the process of obtaining a divorce certificate is found with an in-depth analysis of one case-file. In this case X, a 27-year old British Pakistani woman contacts the MLSC to obtain a Muslim divorce. The applicant signs a copy of the 'letter of authority and acceptance'. In her application she states that she had been forced into marriage with a distant relative. Both parties are British citizens and have been residing in Manchester. The marriage was not registered according to civil law but a religious ceremony had taken place (the reasons for this are not given) and the marriage was subsequently consummated. The marriage has lasted for two and a half years and the couple have been 'separated' for 4 months prior to the application of a Muslim divorce.

In the application form the reasons for the breakdown of marriage are given as:

1. deception he lied about his qualifications and age.

2. consumption of alcohol.
3. gambling led to debts.
4. cannot financially support his wife.

On receipt of the application, a letter dated 29/01/02 is sent to the petitioner. It states:

Dear Sister

Assalamu Alaykum

We acknowledge the receipt of your application form for an Islamic divorce. However we note that despite our clear guidelines that were sent to you with the application form, you have not sent a copy of your Islamic marriage certificate.

We request that you send this document to us immediately otherwise your case will be delayed. If you are not in possession of your Islamic marriage certificate, then please complete the enclosed declaration form and go to the solicitor or oath commissioner where you can counter sign the declaration. Once this completed declaration has been received by us, we will initiate the proceedings for an Islamic divorce.

A week later the petitioner sends a copy of the marriage certificate to the council. A note dated 4/02/01 states, "divorce notice to be sent to Y". (Each time a divorce notice is sent to applicant's husband a short note is made in the case-file. Over a period of 8 weeks 3 divorce notices are sent).

No further action is taken on the case and the next piece of correspondence involves a letter sent by the petitioner querying the delay:

Dear Mr Raza

I had lodged an application to your organisation since 22/05/01 for an Islamic divorce. I was advised it takes about 6 months. Unfortunately I have so far not heard from your Council. Can you please update me on the proceedings?

Yours sincerely

There is no response to this letter, however a few days later, a note in the case-file states that the petitioner has again contacted the council by telephone. Though we are not informed of the contents of the telephone conversation a note states, "have informed client that Mr. Raza will call". A further note dated a few days later states that Mr Raza has telephoned 'the petitioner' to explain that the delay has been caused by her husband failing to contact the Shariah Council to put forward

his version of events. In interview, Mohammed Raza elaborates on this point further, “You see delays do occur and clients do get upset or think that we’re not doing enough...but we must try and get the husband’s version of events. In Islam evidence is only accepted if it is thoroughly checked and verified. We’re not in the business of handing out divorces to anyone who wants one”.

There is no further contact until the council is satisfied that enough time has been given for the husband’s response. Precisely 2 months later, the petitioner is sent a letter dated 16/05/02 whereupon the council have come to a decision:

Dear Sister
Assalamu Alaykum,
Your case has now been discussed by the members of the Shariah Council and in the light of the fact that your husband has refused to contact us we have decided to issue you with a divorce certificate.

A copy of this letter is sent to her husband and this propels him to contact the Shariah Council. He writes to the council a few days later stating that he will be in touch shortly with “details presenting my side of the case”. He is angry and upset that the Shariah Council have issued the divorce certificate and claims “this is an injustice and against Islamic law”.

The Shariah Council responds with writing to the applicant and informing her that the divorce certificate has consequently been suspended. The letter states, “the Council will reconsider and investigate some of the matters raised by Mr S in this respect and then to deliberate over this case.” The scholars are obliged to take this ‘evidence’ into account. But at the same time the applicant writes to the council to express her shock and dismay at the suspension of the certificate. She explains,

My husband has no intention of reconciling and no intention of putting forward his version of events. He is merely making my life more difficult. I want a divorce and he’s trying to stop it from happening for no reason but to make things even worse.

The case-file contains a letter dated two weeks later from the applicant’s husband in which he refutes all the grounds for divorce but does not provide any ‘evidence’ to verify his claims. Instead he writes, “X is the one acting

unreasonably, she has refused all offers of family mediation and has kept all the money given by my family”.

There are no other documents in the case-file apart from a brief note, dated two months later which states that a divorce certificate was eventually granted after the applicant had agreed to return the dower.

This analysis of one case-file at the MLSC provides an insight into the process of obtaining a divorce certificate for the female applicant. Despite the potential difficulties in obtaining a divorce certificate we see the ways in which the applicant engages with this process. Moreover this analysis suggests that often the motivations of the husband are to delay the process and prevent the divorce certificate from being issued. Consequently the councils issue a khula certificate which means that the applicant must give up her right of mahr. This is discussed in more depth in the following chapter.

4.5 Mediation: Aiming to Reconcile the Parties

The investigation stage is accompanied with attempts to reconcile the parties. We turn now to consider how mediation and reconciliation form a central plank in the process of unofficial dispute resolution. In marital disputes, the link between individual responsibility and state intervention raises questions on the role of unofficial dispute mechanisms providing advice and assistance to the specific needs of minority ethnic groups. Several scholars have identified the spheres of official and unofficial mediation as fixed, distinct and separate (Menski 1999, Yilmaz 2001, Shah-Kazemi 2001). Drawing upon her findings, Shah-Kazemi observes, “while the MLSC performs a mediation function through the manner in which they intervene in marital and intra-family disputes, they do not often mediate in matters that are now becoming more formally associated with mediation in England, as the organisation has a deliberate policy of not conflicting with civil law mechanisms...” (2001:55). Yet, this approach obscures the social relations upon which official and unofficial mediation are based and we learn very little of the dialectical relationship between the two. As Santos points out, at some level this dichotomy between state and non-state dispute resolution is blurred and

ultimately misleading (1987:35). In this sense, the 'emerging' relationship between private mediation practices and the move towards official mediation (as espoused by the Family Law Act 1996) reveals a more insidious, complex relationship than such literature seems to suggest. The inter-relationship between the two cannot be perceived as merely partial and incidental. If so, we risk missing the meaning attached to such processes by female users of unofficial dispute resolution mechanisms. This does not, however, mean we seek to establish a definitive link between the two approaches but merely to draw upon fieldwork data and illustrate the ways in which the two approaches find common ground and to explore this linkage between private and public spheres. With this critique we can, for example, examine the ways in which unofficial forms of mediation may facilitate official dispute resolution processes.

If we recognise this move towards private ordering and community mediation, we must question the implications of this for female users of Shariah Councils. According to Poulter (1995) Muslim women may be forced to participate in such methods of conciliation due to family pressure and concerns about damage to the 'family honour'. A result of this can be the detrimental effect upon their rights under state law and a loss of autonomy within the family and community. Viewing Shariah Councils as patriarchal and 'conservative' in nature, that serve to maintain the existing unequal power relations within the family and community, Poulter (1998) remains sceptical of their ability to deliberate on family law issues. Paradoxically he argues that if these bodies were to be formalised and given state funding this would allow state accountability and protection for those women compelled to participate in such processes and under this proposal the "full panoply of the remedies of the English legal system would still be available" (1995:86). In this context, English law would remain the preferred method of dispute resolution and Shariah Councils operate merely as a "facility for those who feel that the English courts are not responsive enough to their religious or cultural needs" (1995:86). Other scholars, however, reject the intervention of state law to define the terrain under which Muslim family law must operate. Within such a conceptual framework, the subordination and exclusion of plural legal practices assures state law control and dominance (Menski 1998, Yilmaz 2001).

Yet it is precisely this dichotomous approach that inevitably utilizes the primacy of one approach as opposed to the other and subsequently, fails to problematize the very grounds upon which these arguments are based. More precisely still, they fail to explore the active engagement of women in developing strategies, negotiations and interrogating spaces that challenge the hegemonic power inherent within both official and unofficial law. These spaces can act as sites of resistance, struggle and change.

4.5.1 Mediation in Islam

Given this critique on the limitations of the dichotomous approach, we now draw upon observation fieldwork to interrogate the practice of mediation and reconciliation in Shariah Councils. Before doing so, however, it is useful to briefly locate the importance of mediation and reconciliation within Islamic thought.

In Islam the concept of reconciliation is grounded in the two most important Islamic sources, the Qu'ran and the Hadith.¹⁰⁵ Both of these sources are instrumental in shaping the model of dispute resolution, from an Islamic perspective.

In verse 4:39 the Qu'ran states:

“if you fear a breach
Between them twain (husband and wife)
Appoint arbiters
One from his family
And the other from hers
If they wish for peace,
Allah will bring about
Their reconciliation:
For Allah hath full knowledge
And is acquainted
With all things”

And verse 4:31 states:

“Allah doth command you
To render back your Trusts
To those to whom they are due;

¹⁰⁵ Also known as the Sunnah

And when ye judge
Between man and man,
That ye judge with justice:
Verily how excellent
Is the teaching which He giveth you!
For Allah is He who heareth
And see all things”

The process of dispute resolution is also based on the principle of *tahkim* which serves to maintain ‘social order’ in Muslim societies. As Rosen points out, “in the Qu’ran the image is constantly invoked of mediation and interstitial relationships as most appropriate to handling disputes (2000:183). Indeed the Prophet is deemed the first mediator in Islam and set the precedent for resolving disputes via dialogue and communication. And, as Rosen points out this approach serves to maintain and enhance social order and control in Muslim societies- the preservation of society against chaos (*fitna*).

In terms of diasporic Muslim communities there is some dispute on the appointment of mediators and the legitimacy of their verdicts. For some scholars a mediator should comprise only of a Qadi (religious scholar) who is trained to provide Muslims with religious and spiritual guidance but for others all members of the local Muslim community have a right to intervene in the hope of reconciling the parties and, usually applying to family members. There is also disagreement among Muslim jurists about the extent of the mediator’s authority. The Hanafi and Shafi’i schools are of the opinion that mediators have no authority to issue a binding verdict. Their role is merely to recommend a solution whereupon the spouses have the right to either accept or reject it. But other jurists argue that qadi’s have full authority both in respect of reconciliation and the annulment of the marriage (see Esposito 1995).

It appears then that the resolution of marital disputes in Islam becomes paramount. We come to understand this process as an obligation upon Muslims to seek some form of arbitration in the guise of family or community mediation/reconciliation. The tone of this discussion and the verses in the Qu’ran reflects the importance attached to individual and collective responsibility and it is

important to note that this process cannot be understood merely as an alternative to the adversarial approach. It is important, therefore, to be aware of the religious principles that underpin the nature of mediation and reconciliation within Shariah Councils in Britain. Most scholars agree that according to the Shariah, every Muslim community however small its size, must be regulated, as far as possible, by Islamic legal norms, appropriately interpreted and applied by the most knowledgeable scholars residing in the community. Moreover and perhaps more importantly is the way in which such religious norms are interpreted in Shariah Councils in order to create the conditions upon which the discourses of power are structured.

4.5.2 Islam and Custody of Children

Interviews with the religious scholars Shariah Councils all reported that they do not deliberate on issues of access and custody to children. However, observation research did point to informal negotiations taking place at this space and this raises wider concerns regarding the enforcement of Muslim legal norms that may be antithetical to the rights of women enshrined in English family law. It is useful therefore to briefly outline the issue of custody in Islam prior to analysis of observation research.

The issue of custody in Islam is contentious precisely because it is not addressed in the Qu'ran and is based upon two sayings of the Prophet found in the Hadith literature. The first relates to a woman complaining to the Prophet that after divorce her ex-husband wished to remove her child, upon hearing this the Prophet commented: 'You have the first right of the child as long as you do not marry'. The second saying again relates to a woman complaining that her ex-husband wishes to take her only child away from her. On this occasion the Prophet is reported to have said: 'Child, here is your father and here is your mother; make a choice between the two as to whom you prefer' (quoted in Goolam 2001:186). Yet all 4 Sunni schools of thought, Hanafi, Maliki, Shaf'i and Hanbali rule that where possible the mother has prior claim to the custody of the child (see Engineer 1995).

There are two ways to characterize this process. On the one hand all conflict with the English law is avoided if the Maliki approach is adopted which does not involve the automatic transfer of the child at any age to their father and thus complies with s11 of the Family Law Act 1996 with its emphasis on the best interests of the child. Mufti Kadir a panel member at the at ISC states “Family courts in the UK and the West in general are broadly in conformation with Islamic Law of custody, especially the Maliki school of thought. The current priorities of English law centre on the needs of children and so does Islamic Sharia. Other perspectives reported earlier, reflect the social trend of the time. For Islamic Sharia courts choosing from the Maliki perspective is not strange especially if it reflects current social policy trends. Islamic Shariah councils have little control over custodial orders. But they have a balancing act to perform when matters are in Shariah Courts”. On the other hand the 1996 Family Law Act with its emphasis upon mediation may actually encourage settlements regarding access to children to take place in the ‘shadow of the law’, a space occupied by Shariah Councils. We explore these concerns in section below.

4.5.3 The Mediation Process

For all the Shariah Councils, the mediation process is principally an investigation into the possibility of reconciling 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 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 “We 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”.

Unsurprisingly perhaps, despite the intervention of religious scholars, 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.

4.5.4 How does Unofficial Mediation work?

It is not difficult to identify key generic traits in the mediation process with the councils under study. There are two key approaches that are distinguishable at the point of intervention. With the exception of one Shariah Council, the clients must 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 takes 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 chapter 1 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 (Foucault 1970).

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.

4.5.5 The 'qadi' as unofficial Mediator

The qadi or religious scholar seems to occupy a somewhat ambiguous position between reconciling the parties and facilitating the successful outcome of the divorce application. Overall this can perhaps be characterized by the expectations of multiple parties including the applicant, their families and the scholars themselves. Yet it is between these multiplicities that we can obtain a more valid picture of what is 'actually' emerging. At a cursory glance, the key question which emerges is the reciprocal interactions between the two approaches: to what extent are both processes overlapping, intermeshed and interconnected?

As discussed in chapter 1, official mediation is predicated on the decision-making capacity of the individual. The crucial point here is that the parties themselves retain authority and responsibility for reaching and making their own decisions (Roberts 1997:2). In this context, mediation is clearly differentiated from conciliation services as it provides the conditions upon which negotiations are based in the context of family breakdown. It embodies third party intervention but the authority of all the decisions remain with the parties themselves. McCroy (1981:56) outlines four characteristics of mediation:

- the impartiality of the mediator;
- the voluntariness of the process (because the mediator has no power to impose a settlement);

- the confidentiality of the relationship between the mediator and the parties;
- the procedural flexibility available to the mediator.

The legal context of mediation can be described as partial and confusing. At present, mediation remains outside the legal context though remains officially part of 'legal policy' as espoused by the Family Law Act 1996. There seems, however, to be a concerted move away from the dispute resolution in the legal arena and towards alternative dispute resolution processes.¹⁰⁶ For example, it is generally accepted that there has been a move towards privately negotiated settlements regarding arrangements for children (Davis et al., 1993). Hence, though not yet enshrined in English law, mediation has taken on a greater focus and couples are encouraged to pursue mediation.

Unofficial mediators, in this case religious scholars at Shariah Councils can be distinguished from official mediators in a number of ways. The most obvious distinction is the standpoint of the mediator. Here, the approach to mediation is constructed within an Islamic framework whereupon all negotiations are based upon divine revelation and drawing upon Islamic social and legal principles, as briefly discussed above. Secondly, these mediators are often senior members of the local Muslim community and therefore claim an insight into familial conflicts based upon local knowledge and experience.¹⁰⁷ And finally unofficial mediators work on a voluntary basis to ensure their autonomy and independence from state intervention. Of course, this also has the effect of avoiding state accountability and we address this later in the chapter (See also Poulter 1998). This raises the question of the extent to which this form of mediation falls into the category of community mediation as discussed in chapter 1. To what extent does the state encourage communities to intervene and resolve disputes?

¹⁰⁶ The main body which regulates the role of solicitors using mediation is the Solicitors Family Law Association. The SFLA have a code of conduct, which solicitors have to apply- basically their area set of guidelines of when mediation is or is not advocated.

¹⁰⁷ In this way a number of scholars reported they were able to mediate between parents and young women who were being forced into marriage and prevent such marriages.

4.6 The Mediation and Reconciliation Sessions

When taking a more nuanced approach, we can shift our analytical focus to two identifiable features in the mediation sessions- the role of the unofficial mediator and the nature of family intervention.

The underlying difference in approach between the four Shariah Councils is the point at which intervention to reconcile the parties, takes place. More than this, the fact that it is compulsory at BSC for all clients to attend reconciliation sessions clearly reflects the centrality of mediation to some Shariah Councils as opposed to others. Dr. Nasim, Director of BSC, explains, “we must abide by the Sharia and we must ensure that all clients understand what divorce means. There maybe difficulties in the marriage but divorce is not an easy option. We work within the guidelines of Islam...we’re a religious body and clients are aware of this when they come to us.” He goes onto justify his approach based on “a large number of clients who want to resolve their differences...coming from an Islamic perspective”. This is a view shared by scholars at the other Shariah councils. Moreover, this commitment to intervention gives the shape and form to the framework upon which the dispute resolution is based. The question however which lies behind this, concerns the extent to which women maybe compelled to use these bodies. Much of the debate on Muslim family law and ‘alternative dispute resolution’ (Shah-Kazemi 2001, Yilmaz 2002) has not developed satisfactory explanations on gender relations and power on the one hand and that the empirical reality of women’s connections to these bodies, may be very complex, contested and subject to the contingent local variations in the Councils.

While the potential for mediation and reconciliation bodies emerging within local communities has been extensively explored in literature on dispute resolution (see Abel 1979, Woodman 1998, Santos 1992, Fitzpatrick 1996) there has been little analysis on the growth of religious bodies developing these services within the private space(s). In fact the growth of typologies that allocate individuals within a theoretical space presupposes the categories of ‘sameness and difference’ (Anthias 2002:283) and fails to ignore the dynamics of power by which

individuals from one social group may exclude others. Drawing upon Foucault's analysis of power and the empirical data collected in this study, we can now explore how the exercise of different forms of power and power relations within these frameworks of unofficial dispute resolution, may affect the decision-making capacities of some female users.

Clearly in this situation, the unofficial mediator is in an all-too-powerful position to coerce the client into reconciling, making the potential consequences for women particularly disastrous. This argument appears to make a great deal of sense, particularly if there is little or no screening process to determine which cases are suitable for mediation. The Family Law Act 1996 contains provisions to ensure mediation only takes place in the interests of both parties with no risk of violence or threats of violence to either of the parties involved. Section 1 (d) states that, "any risk to one of the parties to a marriage, and to any children, of violence from the other party should, so far as reasonably practicable, be removed or diminished". This view is further given expression in the Code of Practice of the UK College of Family Mediators 1998 (see Diduck and Kaganas 2000:351-352).

We clearly need to draw upon empirical research in order to scrutinize this process of dispute resolution. One practical technique here is to turn the 'gaze' onto the religious and cultural practices characterized within these bodies.

4.6.1 The B'ham Muslim Family Support Service and Shariah Council (BSC)
The Marriage Counselling Service at BSC, forms the cornerstone of the dispute resolution process. As discussed earlier, all applicants must attend the counselling service prior to a meeting with the Shariah Council. The task of dealing with all inquiries, preparing case-files and providing counselling sessions falls upon Dr. Saeeda and her assistant Saba Malik.

4.6.2 The 1st Stage: Counselling Sessions

Observation of 6 ‘counselling’ sessions¹⁰⁸ reveals both the established process of dispute resolution and the dynamics involved in the decision-making process. While our focus is primarily on the cultural and religious norms that underpin these processes in particular, we explore how these processes interact with female users of the Council.

On average, each applicant must attend 3 counselling sessions before the case-file is sent to the Shariah Council. In other words, the role of the counsellor is pivotal to the outcome of the case. In interview, Dr. Saeeda outlines the principles upon which her distinctive approach is based, “As a Muslim woman I am aware of the need to approach reconciliation with caution. In fact the only time we don’t consider reconciliation is when the woman is facing violence and we get a lot of cases where women tell me their husbands physically abuse them. It’s not tolerated under English law and its certainly not tolerated under Islam”. This does not mean she ignores the women who wish to reconcile with violent spouses but observation research reveals how she intuitively uses her position to dissuade any attempts to reconcile.

Her approach can be described as an attempt to disentangle cultural values from religious principles. For example, she equates forced marriage, emotional and physical abuse and family dominance to be synonymous with cultural practices that in turn confers male authority and legitimation. Women are told that husbands “are unlikely to change their ways” and they are encouraged to report all incidences of violence and abuse to official bodies such as the police. At the same time Islam is presented as an empowering tool for women with its emphasis on autonomy, choice and consent. Islam is defined as being based on divine will and a supreme being who creates a complex but totally logic world for all believers. Thus, the way in which she speaks to the women reveals a great deal about the operation of power relations. Her language is one of empowerment as the following extracts from observation research of counselling sessions demonstrate:

¹⁰⁸ This involved a total of 26 cases.

You must not submit to your parents wishes. It is your life and not theirs, Islam does not compel you to marry someone against your wishes.

If he wants to re-marry let him take responsibility for the divorce. Allah knows he is the one who is sinning so let him be punished for this

Women should remember there is no compulsion in Islam. Allah knows best.

Her approach is based on this imagined Muslim community and by making gender visible in the process, she provides new insights into the dynamics of these encounters. She is clearly able to open up dialogue with the women and occupy a position of trust. She later explains, "...a lot of women tell me of the pain and suffering they go through and they're genuinely distressed. You don't contact me at the counselling service on a whim, wanting a Muslim divorce". Instead she points to family pressure as the main reason why women may be keen to reconcile. Potential compromises to this effect include women who do not wish to use the counselling service having little choice but to do so if they want to obtain a Muslim divorce.

In all 26 cases, Dr. Saeeda is keen to explore the nature of family intervention prior to the contact made with the BSC. Clearly family involvement plays a large part in the decision-making process and this is best illustrated by the fact that in 24 cases, a family member accompanies the client to the counselling session. Family members include a mother, father, sister, brother, uncle and in three cases an extended family member such as a cousin. During the sessions, each applicant must explain the reasons for family intervention in the marital dispute. Most importantly, perhaps, the language and discourse is framed around notions of family honour and shame. For example, 19 women describe divorce as shameful for their families. In one case, a client explains, "Divorce is something that families keep hidden, it's not something they celebrate".

Observation research reveals little insight, however, into the nature of such mediation in the family and home but we are given an interesting insight into family dynamics in the reconciliation sessions. This would seem to put into

question the autonomy of the women both prior to and during the mediation process. Again, it could be argued that unofficial mediation fails to provide adequate protection against unwarranted intrusion. In one instance, the brother of one client begins to explain why the applicant seeks a Muslim divorce. Perturbed by the fact that this client relies on a male family member to explain her situation, Dr Saeeda intervenes mid sentence, looks at the female client and states, “if you want an Islamic divorce why don’t you speak and tell me, you don’t need a man to speak on your behalf”. On another occasion a mother of a female client begins to speak, on the behalf of her daughter and again Dr. Saeeda immediately intervenes, “if there’s anything to tell me, she’ll do it. If I need any information from you I’ll ask you”.

These examples illustrate that Dr. Saeeda is aware of familial pressure upon women to reconcile and seeks to use these sessions for the women to clarify for themselves their desired outcomes. Furthermore it soon becomes clear that female users of the counselling service also bring along family members in order to counteract any pressure from the mediator to reconcile. Thus friends and/or family members often act as support mechanisms. Interestingly of the 6 sessions observed, only 3 women actively seek to reconcile with their husbands. Instead most women reveal at the outset of the first session that they have been involved in lengthy negotiations with their families in the hope of reconciling. In one case, Dr. Saeeda enquires about the nature of family intervention the client replies, “we tried for months and months. When we couldn’t sort things out, my parents got involved but things just didn’t work out”. When further probed about the nature of this family intervention she replied, “ well some members of my family got together, had a meeting and tried to sort things out. But they just didn’t want to know. It never worked out because they weren’t interested in sorting things out”.

We can of course question how the dictates of honour and shame may compel some women to seek family mediation even if they are unlikely to reconcile with their husbands. For example, Dr. Saeeda, explains that she understands the pressures women may be under and therefore does not compel the women to participate in reconciling, “these women have been through mediation, they have

tried to reconcile with their husbands and I believe them, that's the threshold for me".

This is a complex issue and clearly some women are distressed that they are compelled to attend these sessions and consider reconciliation. On the other hand other women actively engage in this process and are upset that family mediation has failed and they were unable to reconcile. Given these contradictions and tensions in the counselling process we can identify three aspects of this process that may raise concerns. Firstly, as discussed above, the nature of family intervention in the process; secondly the role of the husband in the counselling sessions; and finally, pressure to negotiate family law matters (such as access to children) in this 'unofficial space' with little if any protection from the state.

Observation research reveals that the second concern, the role of the husband in the reconciliation process, raises an interesting set of dilemmas for Dr. Saeeda. This relates to the fact that after the first counselling session with the client, the process of tracking down the husband for "his version of events" begins. Dr. Saeeda explains, "it's not that we don't believe what the women are saying, but in Islam, it's our duty to see what he has to say, to give him an opportunity and so, then we make an informed decision as to whether we should continue with the reconciliation". This again leads to concerns of possibly involving violent partners into this process where official mediation may deem this unsuitable and unnecessary. Even though, as indicated earlier Dr. Saeeda does not proceed with reconciliation where violence has occurred or continues to exist as a threat, nevertheless it becomes clear that once contact is made with the husband this can lead to a renewed threat, for some women. For example, in one session, the client, Rizwana, informs Dr. Saeeda that attempts to trace her husband have led to threatening phone calls from him: "I don't want a reconciliation so I don't want you to contact him. If you do, things will get worse, he's violent and I'm scared of what he might do". More worrying still is the fact that this client, due to previous incidences of violence, has an injunction order against her husband restricting contact.

In fact observation research reveals 8 women complaining to Dr. Saeeda about the subsequent intrusion from husbands once BSC contact has been made. In doing so these women challenge the claim that their violent husbands must participate in this process of them obtaining a divorce certificate. One client explains, “If you continue to write to him or speak to him, he will harass me even more. He doesn’t want me to get this divorce so he will use every opportunity to make my life even more difficult”. The presupposition that husbands must participate in this process therefore can raise serious difficulties for female clients. This is not to deny, however, that once contact is made, it becomes clear that some husbands are keen to participate in the reconciliation process. For Dr. Saeeda, contact with husbands is important is to determine why they may be refusing to grant their wives a Muslim divorce. Here explanations range from the unacceptable behaviour of their wives, failure to respect parents and a reluctance to embrace traditional interpretations of Islam. There is thus, a particular way of conceptualizing the ‘wife’ as traditional, passive and insubordinate. What makes this even more problematic is the insistence that the women ascribe to a particular set of norms and values defining their measure of social worth according to male interests in the family, home and community. This taken-for-granted assumption is challenged at the outset. For example, Dr. Saeeda makes explicit the “project for all Muslim women” to “challenge the presentation of women lives based upon ‘nashuz’ (female disobedience)”. For this reason, she transforms the discourse from one based on the duties of a Muslim wife to the responsibilities of a Muslim husband. It is difficult to doubt the sincerity of her approach but in practice it seems to have very little impact. Most husbands barely recognize her attempts and insist that reconciliation can only be achieved on their terms. In this way very little is achieved in real terms.

4.6.3 The 2nd Stage: Shariah Council Meeting

The second part of this dispute resolution process, comprises of a meeting with the Shariah Council. If reconciliation has not been achieved within a minimum of three counselling sessions, Dr Saeeda must decide whether the case should be submitted to the Shariah Council. A panel of three religious scholars must then decide whether a divorce certificate is to be issued. This meeting takes place on a

quarterly basis, on the last Wednesday of the given period, between 11.00a.m until 5.00p.m. Here observation of 2 Shariah Council meetings included a total of 24 cases being discussed.

Prior to this meeting, Dr. Saeeda sends a letter to the applicants requesting them to attend. Most clients do respond to this letter and attend the meeting and, those who fail to do so have their cases re-assigned to the next quarterly meeting. During observation of the counselling sessions, Dr. Saeeda reveals that the panel of Shariah Council members will “tell her off” at the Shariah Council meeting if she has failed fulfilled a number of tasks which include establishing the facts of the case; failure to pursue all avenues of reconciliation; and the failure to present the information in the case-file in an “orderly manner”.

After much personal lobbying, she has been granted permission by the panel to accompany the women during the meeting but under the proviso that she cannot contribute to the proceedings unless asked to do so. Thus her role is one of support for the women during the meeting. This commitment to supporting the women is best illustrated when we observe how she ‘coaches’ them on how they must present themselves to the Shariah Council members. At the counselling sessions she explains to the women whose cases she has put forward explaining how the Shariah Council works and explains, “you will have to push for your case and tell them you do not want any reconciliation” and “be prepared to answer all the questions” and that “its best to be honest”.

In theory each member of the panel is expected to read the case-files prior to the meeting, but observation research of 2 Shariah Council meetings suggests this is seldom the case.

The first part of the meeting is devoted to a quick discussion of all the cases, an exercise undertaken to approximate the time-length to be allocated, to each case. With regard to issuing divorce certificates, it seems clear that the client’s presence constitutes a further attempt by the scholars to reconcile the parties and halt the finalisation of the divorce. Because of this, the two main issues addressed in the

meetings are access/custody of children and reconciliation. In this context, the scholars are keen to explore whether the client's husband has been given access to children and if so, whether the wishes of the child have been taken into account. To this extent some members of the panel do follow the Maliki school of thought as discussed earlier. Yet we can also see how this approach is not adopted by all the members of the Shariah Council and this may present a conflict of laws scenario with state law. Part of the confusion might pertain to the assumptions held by Shariah Council members that access for fathers should be permitted in all circumstances or that the threshold for deciding such cases are based on differing social and legal principles based on Islamic law. The extract below from observation data highlights the dangers of Shariah Councils discussing issues of custody and access in this private space.

Parveen Akhtar is 26 years old and has two young children, aged 2 and 4 years, respectively. She is of Pakistani origin, born in Birmingham and describes herself as 'British Pakistani'. In 1998, she married a British Pakistani, and describes it as a 'love marriage'. Both the requirements of civil and religious marriage were fulfilled and she cites violence and 'emotional abuse' as grounds for seeking a Muslim divorce.

The scholars request that the client attend the Shariah Council meeting in order to clarify a number of 'unresolved' issues. It quickly becomes apparent that two of the scholars remain unconvinced that the client has seriously considered the option of reconciling with her husband in the interests of their children. The extract below reveals the exchange between them:

Religious Scholar: Did you consider getting back together with your husband for the sake of the children?

Client: Yes I did but we've been separated before and we tried to work things out then but it didn't happen. I just know this time it's the end its not going to work.

Religious Scholar: Why?

Client: Because he'll never change. I don't want to get back together with him. This time I want a clean break and that's why I'm here. I want a divorce, I want out.

Religious Scholar: Have you thought what effects your decision will have on your children?

Client: Yes I have but its better they don't see the violence, don't see what he does to me. I want them to grow up in a safe environment.

Religious Scholar: But...

Client: (Interrupts him) Look I understand what you're getting at. You want us to get back together and Dr. Saeeda has explained to me that in Islam you have to try and make things work before you ask for a divorce. But I'm telling you I've tried everything, I was a good wife and I am a good mother but I can't live like this. I want a divorce.

The client is visibly upset and though Dr Saeeda is relegated to the periphery of the meeting, she asks to intervene. After being given permission to do so, she explains, "Myself and Parveen have discussed these issues for weeks and weeks. There is no possibility of her reconciling with her husband and I support her one hundred per cent. If you look in the case-file you'll see my recommendation". Clearly angry with the stance of the religious scholar, she later confides that "these men have no understanding of what women go through. It makes makes me so angry! I spend so much time and effort making my recommendations to the Council but they don't even bother to read them". Frustrated by the low percentage of those successfully reconciled, it seems that the scholars readily embrace a less critical stance without considering the implications for women. By exemplifying the possibility of reconciliation as uncontentious, they fail to acknowledge the unequal power relations within the marriage.

Observation of the second Shariah Council meeting reveals long discussions regarding disputes on access to children. In one case the scholar reports that the client's husband has been in touch demanding the council intervene and negotiate some form of access to the children. A proposal he is very keen to implement. The extract below illustrates the potential dangers of this approach.

Religious Scholar: In respect of the children what arrangements have you both come too?

Client: I don't want him to have any contact with my child and the courts agree with me. I have a court order....

Religious Scholar: But what does your husband want?

Client: I have a court order (shows him the order) which says that he's not allowed any direct contact with my child, only indirect contact, he can send cards and letters but that's all.

Religious Scholar: Why did the courts come to this conclusion?

Client: Because he lied. He told them that he paid maintenance when he didn't and that he had done all these other things when he hadn't. They could see what kind of a person he is, he doesn't really want any contact he's just doing this to get back at me

Religious Scholar: Well I spoke to him this morning and he told me that he does want to see his daughter and that if he doesn't get to see her he will take other steps. He may become violent towards you and to prevent this from happening I think we should arrange for him to see his daughter at the mosque.

In this case the religious scholar is very persistent and the female client constantly interrupts him to inform him that she has a court order which clearly states that her husband is not allowed any access to her daughter. He ignores this and suggests that the mosque can be used as a neutral place where the husband may have access to his children. At this point the client gets very angry and states, "look I haven't come here to discuss my daughter, I came here to get a divorce". Dr. Saeeda intervenes, "This is wrong. There is no question of negotiation". At this point another scholar can see that the client is visibly upset and asks the client to wait outside. He explains to all the members of the Shariah Council, "We cannot issue a directive which is against the courts. Our discussion is merely academic. We have no power of enforcement". After a few more minutes of general discussion they agree that a divorce certificate should be issued and Dr. Saeeda is asked to go out and inform the client of their decision (see Appendix 3).

The most striking finding of the Shariah Council meetings, is that in many instances the particular circumstances of the female clients are simply ignored. The concomitant discussion on reconciliation and access of children to husbands creates an inappropriate perhaps even dangerous space in which to resolve such issues. Practical and pragmatic decisions in resolving marital disputes cannot be understood as devoid from the standpoint of the women themselves. Without its flexibility and openness this process loses its ability to serve as a locus for Muslim women to contribute, instigate change and for some to ultimately resolve the marital disputes.

4.7 The Muslim Law (Shariah) Council (MLSC)

An insight into the process of dispute resolution at the MLSC is based upon content analysis of 25 case-files and, interviews with the two religious scholars

Mohammed Raza and Dr. Zaki Badawi. The more overtly form of observing mediation/reconciliation sessions and Shariah Council meetings was not permitted, but this does not necessarily merit this analysis any less relevant or incomplete than the others. It simply means that this limitation was overcome and managed by the data available.

From this data two key issues arise which merit further analysis, firstly the emphasis upon mediation/reconciliation and secondly the role of solicitors (including access to children and the retrieval of dower). It is also worth highlighting the interesting dimensions of this approach to dispute resolution with the fact that solicitors actively engage in this process of reconfiguring state law to negotiate the terms of the divorce, access to children and retrieval of dower. This leads to the recognition that as discussed in chapter 1, this 'space' at the Shariah Council means that there is no longer simply 'law' in opposition to 'non-law' or personal law (Woodman 1998).

4.7.1 Mediation and Reconciliation

The 'model' for mediation and reconciliation at the MLSC can be described as embodying two key features. Firstly, a separate service exists for all clients who wish to see a Muslim counsellor and secondly, the husband is seen as key to this process. Mohammed Raza explains, "We 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".¹⁰⁹ The emphasis upon obtaining the consensus of both parties to reconcile is considered paramount, though this approach reveals a contradiction with the emphasis being placed upon the husband. Mohammed Raza goes on, "...our first priority remains reconciliation. In our notice that is sent to the husband or to the respondent we ask several things and first of those is that you as a husband must try for reconciliation. If he agrees and says fine I want to reconcile could you arrange something and then we try that". This approach is based on the understanding that most female applicants are reluctant to pursue mediation or reconciliation.

¹⁰⁹ Unfortunately permission to interview the counsellor was denied on the grounds of maintaining confidentiality.

Mohammed Raza concedes, “I think the husbands they try or they raise this question in more cases than the wives that contact us. In 95% of the applicants (who are women), they tell us right in the beginning that reconciliation is not an option for them now...when they come to us”.

Data analysis of 25 case-files reveals that the female applicants are all asked to seriously consider the option of mediation, yet only 2 applicants pursued this option.¹¹⁰ Instead evidence from the case-files suggests that the failure of ‘family mediation’ had convinced the applicants of their inability to reconcile with their husbands. Extracts from case-files illustrate how this space is challenged, contested and negotiated by the involvement of different parties.

In Case A, the female applicant applies to the Shariah Council to obtain a religious divorce. After a 4 month period (during which the reconciliation and investigation aspects of the process were completed) the religious scholar concludes that the husband should be given further time to try and resolve the marital problems and seek some form of mediation through family or local community. The female applicant is clearly angry with this decision and writes to the council to protest at their decision:

Dear Mr....

Further to our conversation of today I confirm that I am unhappy with the 3month extension that you have granted to my husband in respect of my divorce case. As explained to you, from having been told the response of his letter he has approached neither my brother or father in order to resolve the matter. No extended family or local community are involved, or have subsequently been involved. On the basis of his evidence in the letter I fail to understand why you have granted him 3 months extension for resolving the matter since I do not wish for a reconciliation and neither is my husband pursuing for one.

The applicant is clearly frustrated by the repeated attempts by the religious scholar to reconcile the parties.

¹¹⁰ Again access to observe these sessions was withheld on the grounds of confidentiality.

In Case B the applicant agrees to a reconciliation meeting at the Shariah Council on the understanding that her husband agrees to grant her a Muslim divorce. She writes to the council:

As confirmed by yourself I would like to exercise my option of a meeting being arranged with the appropriate parties concerned, and a resolution being reached with my husband signing the divorce". She states quite clearly that her husband should be made aware of her intentions. In this case the woman was very reluctant to enter into any form of mediation but felt she had little option but to do so. Her letter states, "...if we are to proceed with a meeting, then for it to be mutually beneficial my husband should be made aware of the reasons for meeting in this way.

Thus the emphasis upon reconciliation leads the women to develop strategies to participate in this process while keeping in mind their own objectives.

4.7.2 The Role of Solicitors

Case-file analysis also reveals the nature of interaction between Shariah Councils and English law. Out of 25 cases, a total of 15 documented some form of contact with solicitors and this included queries regarding the validity of marriage; progress on finalising a decree absolute; mediation; access to children and attempts to retrieve dower payment(s).

File C illustrates the nature of this interaction. In this case, C a young British Pakistani woman marries D, also a British Pakistani. They register their marriage in the UK and also have a nikah. The marriage breaks down with C arguing that she had been forced into marriage and citing violence and 'neglect' as reasons for divorce. She informs the Shariah Council that she has instructed solicitors to begin civil proceedings for divorce. As her husband is refusing to give her a Muslim divorce she inquires about the possibility of obtaining one without his consent. In her letter she states, "being a Muslim is important to me, I was married with a nikah and now that my marriage has broken down its important that I get an Islamic divorce. My husband is acting unreasonably and I want no further contact with him". He fails to respond to any of the notices sent by the Council to get his side of the story and it is decided that contact is to be made

through his solicitors before a decision is made on the divorce application. This letter states:

Dear Sirs

May we inform your client that according to Shariah law, he has to live with his wife and discharge his matrimonial duties and if it is somehow not possible, then he has to divorce her. An option of a legal separation is not approved by Islamic law...

A note dated a few weeks later in the case-file states the council has received a telephone call from the clients husband's solicitors stating that he is prepared to grant his wife an Islamic divorce but only if she accepts mediation in the hope of a reconciliation. In this letter they outline her husbands demands, which include that she must learn "to act like a proper Muslim woman".

A letter is then sent from the council to C outlining her husbands position and to clarify "whether (she) seeks a reconciliation". The applicant writes back:

I have made it clear on several occasions that I do not wish to get back together with my husband.

The council decides it is not worthwhile pursuing mediation and sends a final letter to his solicitor stating:

Your clients wife claims that the couple have separated for 7 months. In our view, after such a long time of separation, reconciliation seems to be a remote possibility. We still wish and pray for the success of any such efforts in this respect. The Council however, thinks that if your clients wife is adamant for a Islamic divorce, he is expected to act realistically and responsibly and should divorce his wife in the due course of time.

There is no further correspondence in the file and a note describes it as on going.

Case D illustrates the possible dangers of solicitors using this space as a forum for negotiating divorce settlements. In this case a solicitor writes to the Shariah Council with the proposition that if the female applicant is willing to opt for mediation and allow his client (her husband) access to the children he will agree to grant her a Muslim divorce. Content analysis of her application form to the Shariah Council for a Muslim divorce, reveals that she cites violence and emotional abuse as two of the grounds for seeking a Muslim divorce. In this

example we can see how the solicitor and his male client may use the Shariah Council as a 'space' whereupon they are able to negotiate more favourable terms for the outcome of the civil divorce. Furthermore the Shariah council does not challenge this approach, and instead writes to the female applicant informing her of her husband's wishes:

Dear Sister,
May we advise you to confirm to us through your solicitors that you have no objection in allowing regular access to Mr XX to see XX.
We await to hear from you.

A letter dated a few days later from the female applicant states:

Dear Mr Raza....I left my husband because of the violence and abuse towards myself and my two children. You can contact my solicitor YY who can let you know why I don't want my husband to have contact with my children.

Case-file analysis reveals there are a further 6 cases which illustrate the dangers of unofficial bodies acting as mediation forums to resolve issues such as access to children. This provides an insight into the ways some solicitors may use the religious divorce to negotiate acceptable terms for their clients even though this may put the applicant in a perilous situation. In this case the female applicant was able to refuse all demands and subsequently was not under any immediate threat. Negotiating such settlements in this space brings to the fore the issue of custody and access to children. Zaki Badawi explains, "Under Muslim law a divorced mother has the right to the custody of her children as long as she does not remarry. If she does remarry she "loses that automatic right". The children can only remain with her with her ex-husband's consent and he can succeed if he can prove that his mother can look after the children. The conflict can arise as under British law it is by convention that the mother be awarded the custody of the children and the husband has to prove that she is an 'unfit' mother".

In relation to negotiating dower settlements the following extracts from case-files reveal the nature of intervention from husbands and solicitors. The issue of returning the dower is central to a woman being granted a divorce. A number of letters focus on the demand of the husband that the dower be returned. Dispute

will often focus on the amount given by the husband and how much he demands back.

Dear

Following our recent telephone conversation and a very threatening letter which I received today, to which this is a response. As you mentioned in our conversation it is in my best interest that I write to you and ask to make a little request upon my dearly beloved that this marriage has come to an end due to the single mindedness of the party concerned. So for there to be an end to it all legally and morally she/her family should pay costs of the jewerelly and as soon as possible. I will be more than happy to sign anything to get rid off her. So I look forward to receiving her response.

A letter from the Council to Mrs B

We refer to your application of an Islamic divorce to the Shariah Council. The Council after contacting your husband Mr X has received an assurance from him that he will issue an Islamic divorce to you provided you return the following items of jewellery, which according to his claim, was given to you by him at the time of one year after the marriage

It also includes a list of the goods to be returned to the husband and then goes on:

If you agree to the above details of items of jewellery then according to Shariah law under the terms of the Khula you are required to return these items or its cost to your husband in return of an Islamic divorce. The Council accordingly asks you to accept these terms and co-operate with us to resolve this case. However if you dispute the details of the above mentioned items or their value, then write to us so that we can negotiate further with your husband and try to achieve an agreed list of items and their value as soon as possible.

This analysis also reveals the confusion experienced by solicitors as to the validity of Muslim marriage and divorce in Britain. For example in Case E the solicitor writes to the Council:

We have consulted by.... concerning the requirements of the Shariah Council in respect of the Islamic divorce. We have discussed with our client any potential financial claims that she might have arising from the marriage. Mrs...has instructed us to inform you that provided a divorce is pronounced by the Shariah Council within 21 days of 28th September 1998 then she will make no claims against your client in relation to financial or property matters arising from their marriage under Muslim law. We are sending a copy of this to the Shariah Council.

The Shariah Council respond:

We acknowledge the receipt of the letter. Our legal advisers advise us that Ms...and Mr....never registered their marriage in the UK. It was only an Islamic religious marriage which is not recognised as equal to a legal/civil marriage. Hence a civil divorce is not required in this case.

The content analysis of case-files highlights the tensions that exist in this process of dispute resolution and the dangers of using this space as mediation fora. In dealing with such important matters such as access to children women find themselves in a precarious position in their attempts to obtain a religious divorce.

4.8 The Islamic Shariah Council (ISC)

Aside from the similarities in approach with the other Shariah Councils, the ISC approach to mediation and reconciliation focuses upon the importance attached to family intervention in the resolution of the marital disputes. There is a deliberate attempt to involve the families of both parties who are encouraged to attend mediation sessions and participate in the process. Thus the client is expected to meet with the religious scholar for a minimum of two occasions and her husband is expected to attend at least two sessions but he can also arrange to meet with the husband separately. The aim of these sessions are to tease out any differences between the parties in the hope of reconciliation.

This approach to dispute resolution is justified by one of the religious scholars Abu Saeed on the grounds that the Islamic tradition promotes a “family orientated approach to resolving disputes” and “what differentiates the Islamic approach from other traditions is its ability to draw upon the Muslim family and the Muslim community”. We thus find policies of reconciliation pursued with vigour and determination.

4.8.1 The 1st Stage: Mediation and Reconciliation Sessions

The first stage of the dispute resolution process comprises of the mediation and reconciliation sessions and the investigation process which take place at the Shariah Council offices based in Leyton, East London. A crucial element in this process is the role of the mediator and the dynamics of power between the client and the mediator. Observation of two reconciliation sessions revealed that most

women were unwilling to engage in this process, without persuasion. Most notably, the women cited violence and the failure of previous reconciliation attempts as the reasons for this marked reluctance. Despite their protests the scholars are very keen to encourage such meetings with husbands so that “differences could be resolved or managed over a period of time” (Dr. Suhaib Hasan).

A deliberate attempt, therefore, is made to ensure that the parties actively seek to resolve their differences in the presence of a religious scholar. This approach has the obvious potential for tension between the client and the mediator which can inevitably lead to difficulties. The excerpt below is taken from observation notes of one mediation session involving a young woman and her estranged husband. While the facts of this case are applicable only to the parties involved the issues and concerns it raises are illustrative of another four observed cases.

Prior to the start of each mediation session beginning the religious scholar explained the background and facts of the case as follows: Z is 30 years old and has been previously married. She describes her current marriage as ‘forced’ and has two young children aged 6 years and 4 years old, respectively. In 2002 she married W a 35 year British Pakistani with the consent of her parents. Both parties are practising Muslims of British Pakistani ethnic background and met via the ‘Muslim Marriage Bureau’.

This extract provides an example of an exchange between the religious scholar and the applicant:

Religious Scholar: In your application you said you had asked his family to intervene and help sort out the problems?

Applicant: Yes, yes I did but they weren’t interested....not interested in sorting things out. They made things worse blaming me for everything. Everyone blames me.

Religious Scholar: Why is that?

Applicant: It’s him, he’s so clever, so manipulative, he can make anyone believe anything. Really he can, even my parents are on his side. But they don’t know what its like to live with him, its awful I can’t move out the room without him asking where I’m going.

Religious Scholar: He doesn’t trust you?

Applicant: No

Religious Scholar: Why not? Have you given him any cause not to trust you?

Applicant: No, no...I don't know why he's like that but he has so much '*shaak*' (suspicion)

Religious Scholar: Did you fulfil your duty as a Muslim wife?

Applicant: Yes, yes I did. Everything I did I did for the family and him but still I'm not allowed to go out, if I work he tells me I'm flirting with the men, it's so difficult. I feel as though I can't breathe. I've tried I really have.

Religious Scholar: Are there any specific reasons you want a divorce?

Applicant: Yes I can't stand it anymore. I can't stand him, he disgusts me and he hit me".

Unaware the applicant is informed that her husband is awaiting outside with the hope of reconciling. The client is very upset and keeps repeating that she does not want to meet with her husband and does not under any grounds seek to reconcile. She explains this to the religious scholar, "I don't want to meet with him, please don't make me. He frightens me". Yet having been assured that she did not have to meet with her husband if she did not want to she was also informed that under Muslim law the scholar had to consider the issue of mediation seriously. He explains, "Look you don't have to sit next to him, you don't have to look at him but you have made a number of allegations and I need to confront him with these allegations and get his version of events".

Hence the religious scholar is insistent that he clarifies some of the allegations she has made with him and where she is also present. The client is very reluctant but finally agrees to do so under the understanding she does not have to be seated next to him and does not have to agree to his demands. The religious scholar accepts these conditions and argues, "if he was to try and make up then we must...it is our duty to try". Once the husband joins the meeting, he refutes all the 'allegations' made by his wife and seeks to reconcile. When asked whether he was violent towards his wife he replies, "yes I admit it, once just once. I didn't mean to hit her but she made be so angry".

What these sessions reveal are the dangers of imposing reconciliation. In most cases the scholars seem aware that reconciliation is unlikely for the couple but pursue this as a 'Islamic' duty they must fulfil. In these circumstances women find themselves constrained by these dictates.

4.8.2 The 2nd Stage: The Shariah Council Meeting

Once the scholars conclude that there is little hope in the parties reconciling the case-file is sent to the Shariah Council for the scholars to consider whether a divorce certificate should be issued. There are 6 members on the Council all of whom are religious scholars and one 'administrator'. The Council meet on the last Wednesday of each month in a seminar room at the Islamic Cultural Centre, Regents Park Mosque.

Each scholar is given a sheet of paper that summarises the details of the case. Observation of one Shariah Council session reveals that a total of 24 cases were discussed in a 5-hour period. The main issues discussed are dowry, validity of an affidavit, evidence, access to children, forced marriage, domestic violence and mediation and reconciliation. A total of 3 clients attend these meetings.

Discussion on the cases reveals that often the husband places obstacles to prevent a divorce certificate from being issued. For example one letter from a husband states that his wife has been influenced by "women's organisations who are not Muslim and who favour women to live by western influences and standards". Her husband is claiming that her western way of life will have a detrimental affect upon their children and he wants the Shariah Council to intervene to convince her to adopt a more "Islamic way of life" so they can reconcile. If they are to separate he seeks the intervention of the Shariah Council to ensure that he is given access to his two children. The Council members discuss at some length their concerns over whether they should intervene on matters concerning access to children. They are aware that the courts have issued an order that states that her husband must be allowed limited access (not specified) and that she must be encouraged to comply with this. It is agreed that they cannot intervene and the husband should instead approach his solicitor to resolve the matter of access to his children. But in doing so they agree to arrange a meeting with his wife to draw "her attention to the fact that as a Muslim mother she has a duty to bring up her children as Muslims".

On occasions when clients are requested to attend these meetings the discussion focuses on reconciliation. An extract from observation research illustrates the process:

In this case the scholar requests that both the applicant and her husband attend the session. The applicant arrives with her father and is seated on one side of the room facing the scholars and her husband arrives a few minutes later and sits on the opposite side of the room to her. A series of questions are put to the applicant with the focus on reconciling the parties.

Religious Scholar: why are you refusing to reconcile with her husband?

Applicant: We've tried to make things work but its not going to work. Things have too far and he hit's me, that's why he's not allowed to see the children

Religious Scholar: Who advised you to restrict access to the children?

Applicant: Social Services...the children are scared of their father because of the violence. I have a duty to protect my children that is my priority.

Religious Scholar: Is there anything else?

Applicant: Yes I also want you to know that he has never provided for his family. I have to work and pay all the bills and the mortgage, as a Muslim man he has a duty to provide for us but he never has done.

The scholars then turn to her husband. He speaks in Urdu and argues that he does not want a divorce and claims that his wife is too dominating and taunts him constantly and must change her behaviour. He states, "she is a disgrace to what it means to be a Muslim woman and, she has 'shamed' not only herself but the whole family".

When asked to respond to the allegations the applicant argues that she has never committed adultery and it is he who is lying and is deceitful. She then produces bank statements which she argues prove that she pays the mortgage and she also produces 'police reports' which state that the police were called to their house during a domestic disturbance.

Another religious scholar then addresses both of them and explains that though he is aware that there are many problems between them as Muslims they both have a duty to try and reconcile. Both the applicant and the client remain silent. A third scholar then suggests that the three of them go now into a separate room to

discuss ways in which reconciliation can be achieved. The female applicant begins to protest but the scholar intervenes and says, “Just come and talk, it won’t take long and if you’ve really made up your mind it won’t affect it”. Unfortunately permission to observe this meeting is denied but in the meantime the scholars discuss the issue with the applicants father and ask him “why have you not attempted reconciliation?” He argues that he has several times, over the past 9 years but has now come to the conclusion that they must separate permanently in order for them both to be happy.

The religious scholar, the applicant and her husband re-emerge 45-minutes later. Nothing is said and both parties take their belongings and leave. The scholar then reports back to the council and explains that they were unlikely to reconcile because it seems “the wife has made her mind up that she no longer wants to remain in the marriage”. The Council decides that they will issue a religious divorce certificate but only once the civil procedure for divorce is completed. Once scholar states, “We’re not in a rush, let them get on with it”. They decide to write to her informing her of their decision.

Interestingly the scholars are very reluctant even at this stage to issue a divorce certificate in the hope that reconciliation can be achieved. In terms of mediation this space is used to negotiate dower settlements for husbands. One of the scholars explains: “There are cases where we have refused applications of divorce where we have discovered the man is not to be blamed and he is offering everything to the woman so without any reason why is she asking for a divorce and there is principle in the Shariah for that as well and that is in that case you have to buy your divorce from your husband. The husband has got the right to put a price on it”. We will negotiate the price where the woman is unable to prove anything against the husband we would say to her well look your case is a ‘khula’ then what are you doing, are you in a job what is your bank balances, things like that we will collect all the information and then we will call the husband and say look she doesn’t like to live with you, you cannot force a woman against her wishes so you have to divorce her, this is the price in the opinion of the Shariah council seems to be reasonable so accept it and divorce. You will get all the

jewellery back, all the expensive items back, the money you have paid as mehr it will be returned to you plus, £500, £1000 whatever is within the means. We will offer that to the husband and if he is adamant, no, no even then I won't divorce, then he will lose everything and the Shariah Council will dissolve the marriage.

There are a total of 7 cases where there are lengthy discussions on the amount of dower.

4.9 The Shari'ah Court of UK (SCUK)

The process of mediation and reconciliation at the SCUK, rests upon the participation of family members, including those who may have arranged the marriage. In these terms, the particular contribution of the 'family' underlies the paradigm upon which mediation is based and reconciliation sought. In interview, Sheikh Abdullah explained, "In Islam, marriage is the foundation of the Muslim family and we recognize that for the marriage to succeed the family plays a vital role. To that end yes, we actively seek the involvement of family members".

Observation research identified two key features. First, there is a pervasive view that marital disputes cannot be resolved without the intervention of parents. Parental consent is considered vital to the happiness of the married couple and consequently, parents are invited to participate in the process of dispute resolution. Secondly, there is a shift in approach whereby all reconciliation sessions are conducted in open with little if any opportunity for the female applicant to discuss issues in private.

From the vantage point of the religious scholar, observation research reveals his position of dominance and control. As an individual, he 'presides' over all sessions and all clients are expected to attend a minimum of three sessions before a decision on whether to issue a divorce certificate is made. In doing so, he engages implicitly in a nostalgic appeal to the past, to a situation where Islam, community and Islamic values provide the solution to the perceived increase in marital disputes. He uses this space to develop a critique of western mass culture and the modern forms of consumerism to challenge the perceived fragmentation

of Muslim belief and practice in the West. More precisely, it is the views of the scholar based upon a strict distinction between the sacred and profane that reflect the specific patterns of dispute resolution. Muslim women are associated with being mothers, wives and daughters, to be protected and cherished. As a result, they are also conceptualized as threatening the stability and continuity of the traditional Muslim family. Because western society lacks the moral values intrinsic to Islam and the Islamic way of life, the existing dangers and problems for Muslims are perceived as worsening.

During each session, a 'Muslim solicitor' and three male witnesses accompany the scholar. Though rarely at the forefront of the discussions they seem to occupy a strategic symbolic importance in fulfilling the requirements of Islamic law whereupon the evidence of Muslim women can only be verified in the presence of three male witnesses. This approach, which hinges upon a contested understanding of the rules of evidence in Islamic law, embodies both a nostalgic return to traditional Islam and illustrates the tension between an essentialized, fixed representation of Muslim women and the complex realities of their lives.

These tensions were captured during observation research of six sessions. The sessions are conducted in English and last approximately 35 minutes. We now draw upon extracts of observation fieldwork for a closer analysis of the process of mediation and reconciliation. In particular, we are interested in exploring the language and discourse on gender and dynamics of power in operation.

During the observed sessions, 12 cases are described by scholars as 'on going' with 5 new clients. Upon arrival each client is asked a series of questions to determine the reasons of why a divorce is being sought. Some women obviously welcome the opportunity to explain their situation. For example Rizwana, 26 years old, is seeking a divorce after just ten months of marriage. She is accompanied, by her father and brother and explains she had been forced into marriage against her will. She is articulate and passionate when detailing the reasons for the breakdown in marriage. She explains, "I was against getting married from the beginning but I didn't want to go against my parents wishes so I

did what I thought was right. I married him. But he couldn't cope with the responsibility of being married and my parents agree we should get divorced".

Interestingly, the most important dynamic in this process is this relationship between the scholar and male members of the client's family. The scholar does not address her directly and asks her brother and father to reply on her behalf. They do so and the session proceeds in this way. This draws attention to the fact that women occupy a very marginalized role in the whole process. By contrast, questions are directed at men and they are expected to contribute to the process.

Of the new clients, four women have not registered their marriages according to civil law and this produced a variety of discussions on the legitimacy of a Muslim marriage in Britain. A large number of women complain they had been forced into marriage and the marriages had not been registered to ensure that they had no legal protection if the marriage was to end. In all cases the scholar engaged in lengthy discussions on what he described as the 'Muslim principle' to reconcile. Moreover he explained that with enough influence from male members of the applicant's family the parties could successfully reconcile.

At the end of first session, an order is issued in all the cases for the husband to attend the next session so that the process of reconciliation can begin. This 'order' is either sent to the husband or is posted through his letterbox. In cases where his whereabouts are not known the sessions are postponed indefinitely so that there is an opportunity to locate him.

As a strategy to encourage the individuals to reconcile, family members are also encouraged to attend the sessions. If the husband refuses to attend or is unavailable he is asked to provide a male witness who can attend and bear witness to the fairness of the proceedings. Often the sessions are delayed if one male witness is late. All the female applicants are asked to produce a written submission of their claims prior to the second session and it is this submission which provides the basis for the reconciliation. Interestingly, in the second and

third sessions a large number of the husbands do attend the reconciliation sessions. In a total of 12 cases, 7 husbands attend the sessions.

The concept of reconciliation sits uncomfortably with the 'space' in which the sessions are conducted. This space is male dominated with the presence of male family members, male witnesses and the male 'judge'. It is within this context that negotiations take place and are unequivocally constructed around gendered constructions of Muslim identity and female responsibility. Reconciliation is defined primarily as the acceptance of 'Islamic moral values' and based on the metaphor of the preservation of the Muslim family whereas the failure to reconcile is equated with female disobedience. For example, in a number of cases where the clients are accompanied by parents, the judge lays the blame for the breakdown on marriage on the female clients, even in cases where they have been forced into marriage. He goes onto explain, "most women need guidance when marrying, even if they are over the age of consent, so it's the duty of parents to make that decision for them"

Observation research reveals the inherent contradictions and tensions in this process of dispute resolution. The process is embedded in "absolute relativism" (Frow 1998:57) according to an essentialist model of Muslim community insider/outsider. In particular the identity of Muslim women is ascribed to shared cultural understandings and there is little room for challenging this cultural and religious order.

During the observed sessions Sheikh Abdullah also revealed that social workers often request to attend the Shariah Council sessions to "understand Islam particularly when there are conflicts over access to children". Unfortunately this could not be verified in this study, but if this is the case then it certainly points to the dangers of practioners using this space to gain an understanding of Islam that may order to determine issues of access to children. What could be at stake is both the welfare of the children and women.

4.10 The 4 Shariah Councils: Commonalities and Differences

One of the most salient findings in this study relates to how Shariah Councils constitute themselves around structures of power that defines the group as a 'Muslim community'. In this context, the dialectic of difference is constructed as exclusionary, whereby individual identities and dissent are perceived as a threat to this model of 'community'. In this respect, the 'Muslim community' is defined by its consensus to group norms and values, a manifestation of 'identity politics'. The recognition of 'difference', therefore, is the dichotomizing of ethnic and religious communities based on discrete categories of 'religious identity', which individuals must identify with if they are to participate in this form of dispute resolution. In effect serving to "reinscribe and rigidify boundaries between social groups that in everyday lived practice could be 'fuzzy' and across which individuals might negotiate their multiple group affiliations" (Bennett 1998:12). The evidence presented above suggests that power within Shariah Councils is conceptualised in different ways, from controlling the boundaries of the 'Muslim community', homogenizing Muslim identity to sustaining the ideology of the essentialized construction of the Muslim family

It seems clear then from empirical data that such bodies are premised on the notion of community as consensus (see Smith 1988). In this way, they manifest group decisions in terms of persuasion, silencing and control. This, of course, takes us back to the normative frameworks upon which Shariah Councils are based and the cultural norms of the group. Using Foucault's conception of 'power relations', we can see how such bodies create specific self-identities that fit into the system of law in operation. Empirical data suggests that in this context, the specific forms of power serve the function of maintaining the boundaries of the organisation. The religious scholar exercises this power with his decision-making capacities and premised upon certain forms of knowledge, in this case 'Muslim family law'. Foucault points out, "Power is not possessed, it acts in the very body and over the whole surface of the social field according to a system of relays, modes of connection, transmission, distribution, etc" (1978:65). In this way, we can see how power is exercised within Shariah Councils and in particular, the ways it is exercised over women. The role of religious scholars as bearers of this

power raises issues on the ways in which unofficial mediators may influence particular outcomes. In their study of official mediators, Greatbatch and Dingwall (1993) found that mediators do not act in an objective neutral way and instead disputants are encouraged to follow a specific set of procedures, which guide them to outcomes acceptable to them. This illustrates the use of covert coercion. As Mulchany points out, "Viewed in this way, mediation substitutes the mystification of law and is more pernicious because its sources are less obvious and points of resistance concealed" (2000:141).

The normative framework of these bodies based upon a specific set of cultural and religious norms and values, do not permit alternative interpretations. The data presented in this chapter illustrates the ways in which women are both represented and excluded from this process of dispute resolution. For example, the insistence that all women should participate in reconciliation sessions may serve to reinforce inequality and disadvantage for those members of communities who may already be disempowered in the family and community (Grillo 1991). In this context, feminist concerns of negotiating settlements in such privatized spaces where women have no access to the protection of state law has led to renewed discussion on the relationship between the public/private spheres (Thornton 1991).

Yet, as the evidence presented in this study illustrates, this power does not run evenly across all the bodies in a uniform or homogeneous way. Under Foucault's conception of power, where power relations exist there are also sites of resistance, "Power relationships...depend on a multiplicity of points of resistance: these play the role of adversary, target, support or handle in power relations. The points of resistance are present everywhere in the power network" (1980:95). For example, at the BSC evidence suggests that there are sites of resistance where for example the female counsellor may challenge the power of the religious scholar, albeit in subtle ways. Yet, as demonstrated in fieldwork analysis the resistance is controlled and maintained within the boundaries of the organisation. Hence, the female counsellor is consigned to the periphery of the decision-making processes, her role reduced to that of observer rather than an active participant in the decision-making process. By contrast, the position of male religious scholars of

the Shariah Council are strategic and negotiated through the gendered cultural practices as only men are permitted to be religious scholars. Though we must also recognise of course, that female members are also implicated in power relations of the Shariah Councils which raises questions on the relationship between gender inequality, power and coercion and this is addressed in the following chapter.

This is not to deny that cultural practices within these bodies are neither contested nor remain challenged however the space in which women are able to engage with this process remains limited. Yet it is also accepted that the large numbers of women using these bodies testifies to the fact that 'cross-cultural mediation' must be seriously addressed. In her study Shah-Kazemi argues that, "negotiations within the domain of marital disputes assume a very particular complexity as the dynamics of both gender and identity- defining normative ethics shape the setting in which the negotiations take place" (2000:304). This approach challenges the very basis upon which this study is based as Shah-Kazemi argues that a western human rights approach to notions of justice, equality, choice and rights for Muslim women inevitably obscures the normative orders upon which this form of dispute resolution is based. She goes on, "members of the community who consider themselves to be practising Muslims (and the degrees of adherence vary considerably) are keen to involve the intervention of outsiders with religious authority in their marital disputes in an attempt to ensure that the dispute be resolved within a common normative framework" (2000:307). She is critical of adopting a neutral approach to mediation, "...the insistence upon 'neutrality' as a notion in mediation parlance, even when that is contrary to the common ethical framework shared by the parties, results in the imposition of outsiders as mediators to the exclusion of community members, at the expense of achieving the ideal of genuine community mediation" (2000:319). This study is invaluable for its insights into the complex dynamics of power within families and communities (see Witty 1980). Women are involved in the process of dispute resolution and the participation of family members does indeed challenge the assumed hegemonic position of the mediator. For this we are given a unique insight into the dynamics of dispute resolution within minority ethnic communities. Yet this community 'self-definition' falls into the "charybdis of

cultural relativism” (Anthias 2002:275). Clearly, this argument is premised upon fixed understandings of culture, identity and religion. It embraces Shariah Councils as creating a new discursive legal space constructed by community members but fails to engage in debates on how they may sanction power within their boundaries of community and personal law.

In this study a second finding, relates to the way in which these bodies are constituted as unofficial dispute resolution mechanisms and where they actually fit into existing ‘frameworks’ on community and family mediation. Clearly, as outlined in chapter 1, early literature on legal pluralism and community mediation embraces a rigid definition on what we understand as ‘law’ ‘mediation’ and ‘community’ and subsequently fails to take into account differences in communities in relation to gender, age, sexuality and notions of identity and belonging. Thus official community mediation programmes envisage communities as homogeneous rather than heterogeneous.

As the data analysis in this chapter suggests Shariah Councils challenge this traditional definition of community mediation and have in a sense occupied a new space in these debates. Interestingly, all 4 Shariah Councils reported little if any direct contact with official agencies but observation research and data analysis of case-files suggests that there was contact between the two ‘spheres’. Harrington (1985) points out that contact between these the formal and informal agencies are complex. In her study, she found that community mediation cases are often referred from the state agencies such as police and prosecutors, to the informal bodies to offload work from the official agencies to the unofficial. What we see happening with Shariah Councils in Britain is an interesting development. Apart from the process of dispute resolution, solicitors are using this space to negotiate favourable settlements for their clients in exchange for pronouncing a religious divorce. In this context official agencies are referring cases to Shariah Councils in the hope that ‘cultural issues’ can be resolved within this private sphere. This form of multiculturalism can inevitably reinforce inequality. Furthermore this inevitably raises the question of what interest the state may have in allowing some issues to be resolved in the private and for the state to intervene in others? As

discussed in chapter 3 the 'politics of multiculturalism' is based upon uncontested notions of identity while simultaneously recognising 'cultural difference' as fixed and bounded. Hence black feminists point to the dangers of delegating communal responsibility to community leaders under the multiculturalist rubric of 'communal autonomy' (Patel 2003). As Mulchany points out, "these concerns are exacerbated by the fact that many forms of informal resolution, community mediation included, discourage legal representation"(2000:140). Yet in this study though none of the Shariah Councils discouraged the use of state law mechanisms they did all seek to develop methods of dispute resolution consistent with 'Islamic' norms and values.

4.10.2 Co-operation between Shariah Councils

The degree of co-operation and collaboration between the 4 Shariah Councils raises interesting questions regarding the competing "cultural logics rooted in particular structures of power" (Merry 1998:44). In short the differing modes of representation and the ways in which they may engage in constructive dialogue with each other illustrates how they are constituted within local communities.

Empirical data reveals little contact between the 4 Shariah Councils and, on occasions when contact had been made it was done so merely to clarify whether a new client had approached a different Shariah Council and the reasons why the application had been refused. Of the sample, 3 Shariah Councils reported their reluctance in issuing divorce certificates if a different Shariah Council had rejected a previous application. Strikingly, though they were keen to discuss mobilization strategies in the context of Islamophobia they were reluctant to embark on unifying the different approaches to dispute resolution. Mohammed Raza at MLSC explained, "...I cannot speak on behalf of other Shariah Councils but our Shariah Council has some rules to which we are trying to self regulate ourselves. Like in our application we clearly say that if you have already applied to another Shariah Council we cannot entertain your application. If other Shariah Council complaints are lodged with us we do not entertain that at all so we do not wish to create any conflict among these Shariah Councils...they have every right to work as we have". He went on, "We are all independent from each other but

we are working for the same purpose. But definitely we don't have any regular link with each other". This viewpoint was confirmed with the scholars in the other Shariah Councils. Dr. Nasim at BSC was concerned that the different approaches adopted by the newer emerging Shariah Councils may lead to confusion for Muslims using these bodies. He explained, "I know of a few cases where women have come to us because other Shariah Councils have been unsympathetic to them and refused to grant them a divorce. This leads to confusion and our authority is undermined". This was unquestionably a concern for all the religious scholars but most were reluctant to unify the different Councils into one body. For Dr. Badawi, adjudicating responsibility to one body would merely serve to concretise the inherent diversity in Islam, he explained, "We are not one community but several communities and we should be left to compete individually and to establish our authorities individually...that would be a better and healthier approach for us". He was critical of shifting responsibility of such bodies to the State, as this would undermine their autonomy and authority in the communities in which they operate.

A further concern expressed by the scholars was the role of Imams at mosques. Mohammed Raza, explains, "...we have been reported some cases where a single Imam in a mosque is claiming to be the judge of the Muslim Supreme Court in this country...things like that are happening and perhaps the community needs to be educated about that. These things should not be handled in such a way where just one individual is doing everything because he may or maybe not be biased. It is quite easy to influence one single individual. I do not suspect the integrity of any of the Imams but it is more exposed situation whereas a board of scholars coming from all over the world seems to me a safe sort of institution". Again the religious scholars expressed similar opinions and the response to this was instigate change from within the community. Dr. Badawi explains, "We need time to educate ourselves and apply it for ourselves and that is the responsibility of the community. The responsibility of the community is to live up to Sharia because it is part of *ikaada*. So if we are going to live up to the Sharia voluntarily not by the force of law we have to resolve issues as part of the community". The function of

Shariah Councils must remain within the private sphere, under the control and auspices of the Muslim community”.

4.10.3 The Establishment of an Official Shariah Council

In chapter 1, we explored the conceptual difficulties of the term ‘legal pluralism’ and its inability to incorporate notions of identity, difference and belonging within diasporic communities in the West. A critique of literature on community dispute resolution also found that constructions of ‘community’ and ‘dispute resolution’ to be unified and articulated around the boundaries of community insider/outsider. Undoubtedly, the emergence of Shariah Councils in Britain challenges these presuppositions and we can apply the notion of ‘semi-autonomous social field’ (Moore 1973) to illustrate the existence of multiple forms of legal ordering within diasporic Muslim communities. This process is not resistant to state law and does not challenge the hegemonic dominance of state law.

Yet recent developments in Canada¹¹¹ have led to renewed calls for the official establishment of a Shariah Council in Britain, a form of state legal pluralism (Woodman 1998). This proposal recently gained momentum at a seminar entitled “Muslim Personal law” held at the Islamic Cultural Centre in London, on 22nd August 2004. At this seminar over 80 delegates from Shariah Councils across the country discussed the possibility of establishing a single Shariah Council in Britain and the possibility of Britain establishing a parallel legal system for Muslims in the sphere of family law. Those subscribing to this view included numerous local Shariah Councils, the ‘Union of Muslim Organisations’ and the ‘Muslim Parliament’ who argue that communal homogeneity provides clearer guidance and authority for British Muslims, seeking to resolve matters from an Islamic perspective. Even though they are ostensibly opposed to any state intervention in the organizational affairs of Shariah Councils, it is interesting to note that state funding and legitimacy are sought after. The reference point for all

¹¹¹ In October 2003 at a conference in Etobicoke, Ontario Canada, Muslim delegates elected a 30-member council to establish the ‘Islamic Institute of Civil Justice’. This coupled with changes to the Canadian Arbitration Act 1991 has made it possible for Muslim communities to draw upon this body and enforce ‘Muslim’ settlements. This has led to extensive debate in Canada on the rights and autonomy of Muslim women being undermined. See Rhijn (2003).

Muslims would be this new body yet there was no discussion regarding its structural power or whether enforcing this right for Muslims would mean infringing upon other the individual right that may have more value to others. Maulana Abu Saeed Chairman of the ISC and one of the organizers of the seminar stated:

After twenty-two years of existence and exercise, we are presenting ourselves to this elite audience with our evaluation of the phenomenon and vision for the future to take matters further with your invaluable suggestions, advice and cooperation. We think and hope that if concerned Muslims from legal and socio-political spectrum of society put their concerted efforts with us to persuade the British Authority to recognize Muslim Personal Law as they did in British India or in line with the recent Canadian recognition of Muslim Personal Law, or at least the British Judiciary's sympathy to the Jewish community's code of 'GET' in as far as divorce is concerned it will be a historic step and a harmonious relationship between the host and guest communities.

Those contributing to the seminar identified themselves as belonging to a 'collective religious identity' in an all-or-nothing manner. They organized themselves around the categories of 'Muslim community', 'homeland' and 'belonging' with little if any discussion on the complexities these categories may entail. For example Dr. Pasha at UMO, explained,

The Muslim community they have to be governed by Allah's order. The Muslim family law is the holy Qu'ran, there is nothing we can do about this. If a Muslim says I don't want to be governed by these laws that means they're not a Muslim and they have to get out of Islam. If they can give it to us in India why not here?

These Muslim scholars draw upon the introduction of Muslim Personal Law Codes in India introduced by the British to advocate a similar approach in Britain. In so doing they reject the argument that the use of religious personal law in India was adopted to divide communities and, remains deeply problematic in its concretisation of Islamic norms and values (see Fyzee 1963). Of course as data in this study suggests not all religious scholars are in favour of such developments. For example, 3 religious scholars revealed their deep concerns about such a development with Muslims being regulated and governed by the Shariah Law in Britain. Dr Badawi remarked, "uniformity of the law is central in ensuring that justice is served to all members of society" and "there should be just one legal

system which should be applied to all”. Similarly Sheikh Abdullah stated, “I do understand why some people want this development but it’s a small minority, more of a political slogan than anything else. You cannot incorporate two systems into one especially when they are based on two very different ideas, one is secular and the other divine”. This cautious approach was further echoed by Dr. Nasim who emphasized that the ‘legitimacy’ of the Shariah must remain in the private sphere. There was also concern that the establishment of a single Shariah Council could undermine the autonomy and independence of the Muslim community. For Dr. Badawi “the responsibility of the community is to live up to the Sharia because it is part of our ‘*ikada*’”.

Whilst these scholars emphasised the need for all Muslims to abide by the Shariah they argued that the ethics of Muslim law permitted these processes to remain within the private spheres of family, home and community. In this scenario conflicts of law may arise but their resolution would take place without the intervention of state law. Dr. Badawi explains, “what we are doing now is trying to resolve issues, to keep the identity of our community, to keep its laws, to keep it whole, while at the same time not breaking the law of the state...to use our own private language while speaking the common language” (1996:80). He argues that uniformity of the law is central in ensuring that justice is served to all members of society. He states that there should be “just one legal system which should be applied to all” and points to the practical difficulties in applying two different legal systems that are in fact based upon two completely different notions, one secular and the other based on divine law. In fact to implement and set up the Sharia would be ‘Unislamic’ as Shariah law can only be implemented in a Muslim country. Whether these disputes are resolved within a local, national or international context these debates are constructed in fairly essentialist terms. For example all the councils reported that diversity within and between Shariah Councils means that Muslims have the option to choose between the various councils available. That Muslim communities should be allowed to compete individually and to establish their authorities individually. Mohammed Raza explained, “It is impossible to bring and wait for a unified opinion on any of these

issues and I think that the attitude towards resolving these issues should always be of flexibility”.

Yet this model of Muslim unity as intensified with the emergence of the ‘Islamic Council of Europe’ (see Nielsen 1998) lobbying on behalf of the interests of Muslims at a European wide level (see Modood 2003). The emphasis here is upon the language of community, ‘difference’ and human rights guaranteeing the freedoms necessary for the full realization of the demands of the Muslim community. Freedom of religious belief and practice in the context of personal laws are thus transformed from the private realm into the civil jurisdiction and accommodation is premised on identification with the Muslim umma (community) and Muslim identity on difference (see Sarat and Berkowitz 1998: 95). In fact the very emergence of such a force reflects that the reality of plurality may prove a constraint for those deemed outside this idea of a unified Muslim umma (community).

4.10.4 The ‘Complementary Approach’

The MLSC has embarked upon developing a ‘complementary’ approach between English Family law and Muslim Personal Laws but one that avoids any conflict between the two. In doing so they have introduced a Muslim marriage contract that stipulates the grounds for divorce and the rights of Muslim women seeking divorce (See Appendix 1). This contract stipulates the rights of the Muslim woman within an Islamic framework but allows flexibility of a woman to “divorce herself if there is a need” (Badawi 1995:112). Dr. Badawi concedes however that “we are now trying to make it a standard marriage certificate all over Britain but I don’t know whether we will be successful or not. We have in this country Shariah councils and groups of scholars who are very conservative and who are not really ready to embrace to accept any change”. There have also been developments in curbing the use of talaq where the presence of two reliable witnesses is needed.

4.10.5 The Jewish Beth Din

For many scholars developments in the Jewish communities¹¹² and the 'recognition' of the rabbinical courts identified as the 'Jewish Beth Din' provides the impetus for developing a complementary approach. The London Beth Din is headed by the Chief Rabbi Dr Jonathan Sacks.

In Britain non-state dispute resolution mechanisms must operate within the ambit of the law as they are subject to civil or criminal action thus they can use state law, making their decisions subject to a binding contract in the case of the Jewish Beth Din. This court was established under Jewish religious law and stipulates that all those who wish to use its services must accept the provisions of the Arbitration Act 1979:

In Jewish Law, Jewish parties are forbidden to take their civil disputes to a secular court and are required to have those disputes adjudicated by a Beth Din. The LBD sits as an arbitral tribunal in respect of civil disputes and the parties to any such dispute are required to sign an Arbitration Agreement prior to a Hearing taking place. The effect of this is that the award given by the Beth Din has the full force of the Arbitration Award and may be enforced (with prior permission of the Beth Din) by the civil courts¹¹³.

Cownie and Bradney point out that the issue of choice over whether or not the individual wishes to use these alternative bodies is crucial as "in the case of state courts the state itself can compel the presence of one of the parties to an action but in this context it seems that parties are obliged to take part in the proceedings whether they want to or not" (1996:7). The parallels with the Muslim community are two-fold. Firstly Jewish women have had similar problems in obtaining a religious divorce the Get. And, secondly some Muslim scholars advocate a complementary approach whereby the state intervenes to resolve disputes generated by personal religious laws. For example to ensure that Jewish women are able to obtain a religious divorce from their husbands the Divorce (Religious Marriages) Act 2002 stipulates that the husband or the wife will now be able to apply for an order that a decree of divorce is not to be made absolute until they have both produced to the court a declaration that they have taken such steps as

¹¹² It is beyond the scope of this study to discuss the parallels in any depth but see Berg (1994).

are required to dissolve the marriage in accordance with Jewish law. Furthermore the court has discretion whether or not to grant such an order and will only grant it if is “satisfied that in all the circumstances of the case it is just and reasonable to do so” and the court can cancel the order at any time (see Faith and Levine 2003:13).

Religious scholars such as Dr. Nasim (BSC) and Dr.Badawi (MLSC) are in favour of such developments rather than a strict parallel legal system for Muslims. Dr Nasim explained, “The Beth Din is just like us there is no difference at all. They are local just like we are and they function in the community just like we do. We are not really courts of law in the sense that we cannot enforce our decisions but we have a moral authority and position within the community and in the sense that our people would listen to us. I mean a woman for example would never go and re-marry without a certificate from a Shariah Council to say that she is eligible for remarriage”.

4.11 Conclusion

To acquire an understanding of how Shariah Councils constitute as unofficial dispute resolution bodies in Britain we must engage with empirical research. Thus, in this chapter, we have drawn upon research data to explore the complex ways in which these processes shape the intersection of official law with unofficial law. And this intersection involves more than the fact that there may be a conflict of laws scenario. What this data reveals is that the duality of law and unofficial law is misleading and fails to capture the complex ways in which these ‘legal processes’ shape the patterns of dispute resolution for Muslims in Britain.

A very brief summary of the findings in this chapter reveals how gender relations are introduced, redefined and appropriated in a social field of power constituted by the Shariah Council. The important question about gender relations and power relates to “how particular cultural conceptions and practices become embedded” (Merry 1998:46) into these bodies. For example, the data reveals that the process of dispute resolution is ‘gendered’ to produce particular outcomes. The

¹¹³ For more information see <http://www.unitedsynagogue.org.uk/ibd.html>

contradiction of a traditional interpretation of the role of women in Islam with the complex realities of these women's lives is neither explored nor challenged by the religious scholars as the meanings of culture and religion are understood as homogeneous and fixed. At the same time, these bodies do provide the normative framework for disputes to be resolved from particular Islamic perspectives.

A second finding relates to the internal contestation of power within these bodies. As discussed in chapter 1 Yilmaz argues, "Muslims 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 states own legal system" (Yilmaz 2001:299). 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 1996:175).¹¹⁴ The fact that a Shariah Council may provide space for Muslims to resolve marital disputes away from the context of a western secular framework does not imply that these local settings predetermine a more suitable outcome. Existing literature presents the process as almost mechanical, structured and fixed. For example Pearl states that "proceedings in the English court will exacerbate the difficulties and an imposed solution will be unacceptable to the cultural expectations of the parties" with little understanding of conflict, resistance and diversity within "cultural groups" (1986:32).

This is not of course to deny that Muslims do not adhere to a complex set of unofficial Muslim laws clearly many do. However empirical research suggests this process is multifaceted and complex as different levels of adherence are not

¹¹⁴ For a fascinating account of the different Barelwi traditions practised in 3 different mosques in Birmingham see Geaves (1996:169-192).

only contextual upon factors of time, social context and the specific branches of Muslim law but also in relation to gender and identity. Identities must be understood as dynamic, fluid and contested within Muslim communities, especially relating to women and the laws of marriage and divorce. The dichotomous approach that posits 'law' and unofficial law as opposite and in conflict consequently it 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. This leads us to the final chapter in the study drawing upon interview data to explore the experiences of 25 Pakistani Muslim women using Shariah Councils in Britain to obtain a religious divorce.

CHAPTER 5

MUSLIM MARRIAGE, DIVORCE AND SHARIAH COUNCILS: THE EXPERIENCE OF BRITISH PAKISTANI MUSLIM WOMEN

5.1 Introduction

In chapter 4, we drew upon empirical findings to identify the significance of Shariah Councils operating as unofficial dispute resolution mechanisms within local Muslim communities. Rather than just try to establish a detailed analyses of each Shariah Council, the chapter scrutinised the process of dispute resolution with particular emphasis on the practice of mediation and reconciliation, to consider whether this led to the unequal treatment of women. Indeed what emerges from this discussion is the contradictory and at times ambiguous position women seem to occupy in this process. It would seem that in this context, the ‘meaning’ of reconciliation becomes less a matter of resolving the marital dispute, and more a process to establish the grounds for divorce. The concern here, however, is that we fail to analyse this process from the perspective of female users. The primary task of this chapter therefore is to draw upon interview data with 25 Pakistani Muslim women to analyse their experiences of using a Shariah Council to obtain a Muslim divorce.

This chapter is divided into three sections. The first section 5.2 focuses on the Islamic marriage process, the nikah. In chapter 3 we drew upon interview data to analyse the types of marriages found in this sample. Within each category of marriage we discovered that the decision-making power of women to be located in the family and home and often dependant upon a number of different and conflicting set of factors. Here we draw our attention to the meanings attached to the Muslim marriage, in order to evaluate its importance from the standpoint of the women. In particular we explore how women are able to mobilize cultural and religious resources in the diasporic space of ‘Muslim marriage’ and analyse the ‘symbolic power’ associated with the nikah (Baudrillard 1998). A related matter, of course, involves exploring the reasons why such marriages may not be registered according to civil law and we go onto outline the statutory provisions available in dealing with Muslim marriages.

Following these discussions on Muslim marriage, section 5.4 explores the reasons for marriage breakdown and divorce. An understanding of the factors involved allow us to assess the ways in which the 'family' and 'community' may seek to prevent and/or facilitate this process. Official dispute resolution services, include the option of family mediation, available to all.¹¹⁵ Yet this form of family mediation embodies a hegemonic set of practices produced to uncover similar deep underlying issues that keep the dispute manageable and confined. Consequently, one way of reading the discourse on dispute resolution is this perceived juxtaposition between official and unofficial processes, neatly parcelled into the public/private divide. Very little is said on the privatized form of 'family mediation', which takes place in the private sphere of family and home and its interaction with the state. In focussing merely on official family mediation, there is a danger of a partial analysis which privileges public space and ignores the multiple subjective experiences of women utilising privatized forms of family mediation. Accordingly we have very little understanding of how the women engage in this 'diasporic space' represented by the Shariah Council.

The final section moves onto analyse the experiences of 25 Pakistani Muslim women using Shariah Councils to obtain a Muslim divorce.¹¹⁶ We explore the reasons why contact was made with a Shariah Council(s), examine the nature of this contact and most importantly consider whether this process affected the autonomy of the women in any way. In particular we focus on the bargaining strategies adopted by the women during the process of mediation and reconciliation. This leads us on to briefly explore the ways in which the religious divorce process interacts with civil law procedures of dissolution of marriage. In doing so, it moves beyond discussions of 'legal pluralism' to consider the practical implications of resolving family law matters under the 'shadow of the law' (Griffiths 1997:10). If we understand this unique process of dispute

¹¹⁵ The main body which regulates the role of solicitors using mediation is the Solicitors Family Law Association. The SFLA have a code of conduct a set of guidelines of when mediation is to be applied.

¹¹⁶ As discussed in chapter 3 most South Asian Muslims in Britain belong to the Hanafi school of thought and this was reflected in the sample of women. The issue of marriage and divorce under Islamic law will draw primarily from this school of thought.

resolution, as one that is based on a variety of cultural and religious values and practices, culminating in differing 'cultural translations' (Bhabha 1997:130) we are able to conceptualise the experiences of these women beyond the particularities of belonging to an ethnic and religious collective. As Bhabha points out, "Ambivalence and antagonism accompany any act of cultural translation because negotiating with the 'difference of the other' reveals the radical insufficiency of our own systems of meaning and application" (1997:133).

5.2 The 'nikah' (Muslim Marriage)

In order to understand the complexities of the nikah process, we must draw upon the expansive and wide-ranging literature from within the disciplines of Muslim theology, jurisprudence, philosophy and Muslim Family Law (see Rahman 1983, Nasir 1990, Esposito 1987, Engineer 1994, Welchman 2000). This literature, traces developments of the nikah in the different schools of Islamic thought to its judicial interpretation in jurisdictions ranging from North Africa, South Asia to the Middle East. Of course it is beyond the remit of this study to engage in these debates in any depth but what we can discern from this literature is that the nikah is neither homogeneous in theory nor unified in practice (see also Ali 2001). What is not in doubt however, is the centrality of the nikah in the construction of the 'Muslim family' (see Nasir 1990, Ali 2000).

Most commentators agree that the nikah contract provides the framework for procreation and children (Mulla 1995:387). Ali points out, "The central idea in Muslim Family law in 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" (2002:157). Thus the intersection of religion and law under Islam has been described as a 'symbiotic relationship' (Siddiqui 1996:46). The requisites of a valid nikah contract include 'legal capacity' (individual to be of sound mind and has reached puberty), consent, acceptance and the dower or mahr.¹¹⁷

In Britain, the *nikah* encapsulates a contested space where 'religion' and 'law' interact and highlight the complex realities of the process of marriage for British Pakistani Muslims. Existing literature, however, posits official law against unofficial law and as such, documents the conflicts of law scenario between the two 'systems' while outlining the concessions granted by English law (Menski and Pearl 1998, Poulter 1998, Yilmaz 2001). Yet this conceptualisation rarely explores the dynamics, which underpin this process. In this context, the religious marriage and divorce are pushed to the periphery where state law fails to recognise their importance and influence in the lives of Muslims in Britain. Indeed by assuming that all religious personal laws are bound by a similar set of religious norms and cultural practices, ignores the diversity and multifaceted nature this process entails. As we shall see the experiences of Muslim women participating in this 'diasporic space', articulates with a complex web of relations based upon notions of belonging and resistance to the disjunctures of time, place and tradition (Bhabba 1994: 127; see also Hall 1996).

5.2.1 Validity of the *nikah* under English Law

Before we analyse the subjective experiences of the women, it is useful to briefly outline the validity of the Muslim marriage under English law. In a context where women engage in a plural set of legal 'practices' the ambiguity surrounding the legitimacy of religious marriage in Britain can have adverse consequences for them, as discussed later in section 5.7 of this chapter.

At present all marriages, which take place in Britain, must be conducted within the framework of the Marriage Acts 1949-1994. Under this framework, Jews and Quakers are afforded special treatment whereby they retain the right to determine who should marry couples, when and where, leading to concern that other minority groups are denied equal recognition (Poulter 1998). In response, the government has published a White Paper with proposals to put all non-Anglican marriages on an equal footing.¹¹⁸

¹¹⁷ For discussion on the elements within a Muslim marriage contract see Doi (1984:56).

According to most scholars, the Muslim marriage contract, the nikah, contracted in England is not recognised as a valid marriage (Ahsan 1995:22, Menski and Pearl 1998:167) even if the parties believed the marriage to be valid (Yilmaz 2000:4). Yet as Probert (2000: 399-400)¹¹⁹ demonstrates, recent developments in case law have brought to the fore the contentious issue of when a religious marriage is deemed valid, void, non-existent or presumed in English law. She questions, “How strong is the presumption in favour of marriage at the start of the twenty-first century? Is it possible to presume that a valid marriage has taken place where there is evidence that the only known ceremony was invalid?” (2002:399). In other words, what status should be given to marriages that are celebrated outside the provisions of the Marriage Act 1949 but where the parties believe the marriages to be valid?

Recent case law has raised conflicting issues regarding the validity of a religious marriage. In *Chief Adjudication Officer v Bath*¹²⁰ the courts addressed the issue of the validity of a religious marriage in an unlicensed building. In *A-M v A-M*¹²¹ and *Gandhi v Patel*¹²² the courts discussed the validity of polygamous ceremonies in the private sphere, challenging the basis upon what constitutes as a valid marriage. Probert points out that both rulings have only further increased the confusion as to what is deemed as a valid religious marriage. For example in *Bath* the courts ruled the marriage was valid on the basis that there was no “provisions invalidating it” (Probert 2002:401). Hence due to the fact that the marriage could not be deemed void it was concluded to be a valid marriage. This contrasts with ruling in *Gandhi v Patel* and *A-M*, where it was held the applicants had “failed in multiple respects to comply with the formal requirements of the Marriage Acts, and therefore...was incapable of creating a marriage recognised as such under English law” (Probert 2002: 403). Such case law, on the validity of a religious

¹¹⁸ See White Paper “Civil Registration: Vital Change- Birth, Marriage and Death Registration in the Twenty-First Century” (Cm5355, 2002) 1992.

¹¹⁹ Probert provides a fascinating historical account of the British institution of marriage in and how it continues to be deeply influenced by English history to maintain its privileged status.

¹²⁰ (2000) 1 FLR 8.

¹²¹ (2001) 2 FLR 6.

¹²² (2001) 1 FLR 603.

marriage demonstrates that this area of law continues to be ambiguous and unclarified.

Presently, all religious marriages taking place at unlicensed buildings must have their marriage registered to give it legal validity. One requirement here is that in order for the building to qualify, it must be a 'separate building' and 'a place of meeting for religious worship'.¹²³ Consequently the majority of mosques have been excluded from this process, as many mosques are part of larger buildings, that include community centres. Thus in 1998 there were only 109 mosques in which a marriage could take place, out of 561 that were certified as public places of worship. Thus, only 189 Muslim marriages were recorded as taking place in 1998 (see Probert 2002:408).¹²⁴

There is another interesting development regarding the validity of nikah under English law and this relates to marriages conducted abroad. For application of law in relation to personal matters it is the law of the domicile, which is taken into account under the English legal system (see Hamilton 1997). In this sample, there were 5 marriages conducted in Pakistan and upon return to Britain 3 women, chose to register their marriages according to civil law with the remaining 2 choosing not to do so. This situation has led to a conflict of laws scenario whereby individuals and practitioners are confused as to the validity of a religious marriage conducted abroad. In his study Warraich (2001) points out that for British Pakistanis the nikah contracted in Pakistan is a valid form of marriage and that second generation Pakistanis are under Pakistani Law dual nationals. Alongside the failure of English family law to recognize the pace of social change in South Asia (in its understanding of Muslim family law) he emphasizes the rigid application of forced marriages within diasporic communities that have contributed to this confusing situation as to when a religious marriage is a valid marriage (2001:13).¹²⁵ In an attempt to clarify the issue he points out that if a woman has not registered her marriage in the UK she "can seek to have her

¹²³ Marriage Act s.41(1).

¹²⁴ These statistics have been taken from ONS Marriage, divorce and adoption statistics, 1998 (London: Stationery Office, 2000) Tables, 3.43 and 3.42.

¹²⁵ English Civil marriages are recognized as valid in Pakistan.

marriage validated in Pakistan because non mere registration of marriage can be done at any time” (2001:46). What we can discern from this study is the link between local, national and global legal processes, interacting and intermeshing in this space of religious marriage. Empirically there are grounds to suggest that some women are willing to access remedies in other jurisdictions such as Pakistan, where the marriage may have taken place. And, as data in this study suggests women are actively involved in developing strategies to remedy their situation(s). Nevertheless it would be wrong to conclude that reconceptualizing these conflicts from one legal sphere in Britain to that of Pakistan necessarily provides a solution to these problems. These issues must instead be understood as part of the entanglement of law, identity and belonging and must take into account the complex social dynamics and identifications associated with the marriage process. For example, in this study of those women who married in Pakistan, 4 categorically stated they did not wish to use remedies available in Pakistan for a number of reasons. As one interviewee put it,

This is my home, I’m British and this is where I want the law to help me. I don’t want to go back to Pakistan certainly not after what I’ve been out through.¹²⁶

5.2.2 Locating the ‘Self’ in the nikah

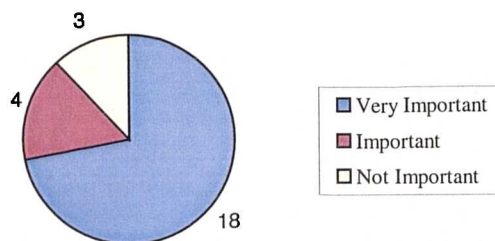
In this section, we discuss the experiences of the women in one aspect of the Muslim marriage process, the nikah. In doing so we interrogate this space of religious marriage to explore how the women in this sample, were able to challenge, resist, accept, redefine or displace its ‘boundaries’. It is the underlying notions of power that we are particularly interested in. The fact that women inhabit a pivotal space in this process of religious marriage means we are able to explore their relationship in the context of the social, discursive and individual relations of power. For example, how did they perceive the functional aspect of the nikah, what procedures do they rely upon and what outcomes did their participation produce? It is from this perspective that we critique the limitations of existing literature that describes such a complex process as merely fulfilling the

¹²⁶ This raises a different set of questions on utilizing national and international legal remedies that cannot be addressed here.

requirements of Muslim marriage from a religious and cultural perspective (see Mirza 1989, Hiro 1991:159; and Hamilton 1995:74 Menski 1999, Yilmaz 2003).

Of the sample, 22 women emphasised the ‘importance’ of participating in the nikah process. This is outlined in the figure 5.1 below and while bearing in mind that this chart does not capture the complexities of *why* the nikah was described in such terms, it serves as a useful starting point for a closer analysis.

Figure 5.1 The Nikah Ceremony



The framing of this discussion in terms of ‘importance’ reflects its perception with the women in this sample. While it seems that for some women being married ‘under the eyes of God’ not only represented an important symbolic marker of their religious identity but also publicly displayed their membership to the Muslim ‘Umma’ (Muslim community), other women did not conceive the nikah in such terms.

I’ve never questioned it, its all part of being a Muslim. If you’re a Muslim you would have one... it doesn’t even have to be that you’re really religious. Getting married in God’s eyes is more important than getting married for English law (Raheela, London).

I very much saw the civil side of it as something that we just had to do. Had I never had that I would have still felt very married because I had the nikah because that’s a very sombre, a very real experience (Anisa, Bradford).

The registry marriage was a formality, it was the nikah that was important. It’s the ‘nikah’ that’s binding in the Islamic setting and its at that point whether you have the registry marriage or not that you’re considered to be married by people in the family, the community you know people who know

you, know your family. Were all Muslims and we know what's important to us (Sameena, Birmingham).

Well the Islamic marriage is very important for me. I could get married in a civil registry office and not regard myself as married, I might be legally married but I wouldn't be married in my heart and in my mind (Fauzia, London).

The nikah was very important to me and it was at that point I felt married. But we did both feel it was important for us to also register the marriage. I'm a British Muslim so in a way both ceremonies kind of represent who I am. For me it completed my marriage...and of course the law gave me protection, I understood that (Noreen, Birmingham).

It's difficult to explain what it means. Its not the most crucial thing for Muslims but I guess we all do it cause that's just the way it works. I mean it doesn't make me feel any more Muslim than I already feel...if that's what you mean? (Farhana, Birmingham).

Thus for many interviewees the nikah was seen to encapsulate a part of their religious identities as Muslims in Britain. However, for some it was simply fulfilling the requirements of Muslim Law, whereas for others it held great significance and formed an integral part of their Muslim identity. Yet most women also acknowledged ambivalence as to the practical requirements of the nikah and we now draw upon interview data to explore the relationship between autonomy and the space during the nikah ceremony.

5.2.3 The nikah Ceremony

In her study, Mirza describes the marriage process for Muslims in Britain as "...a series of discrete events each with a particular function, with its own customs and traditions, all contained within a firm but not unvariable order. Many of these events have a well-established lineage and, crossing geographical and cultural boundaries, have retained similarities across very different contemporary Muslim societies" (2000:4). She goes on to analyse the changes and transformations of the marriage process for the British Muslim diaspora in Britain and, this includes the extra dimension of the register office ceremony (2000:4). Thus from this perspective the marriage process is more than merely tautological and is construed as embodying socially transformative norms. The 'sites' of religious and civil

marriage are transformed by the emergence of hybrid cultural and religious practices and the process is open to change, contestation and interpretation.

Moreover, the nikah ceremony itself only constitutes one aspect of the Pakistani marriage process. Werbner, drawing on her extensive work with British Pakistanis in Manchester, outlines the marriage process as four-fold: the Mehdi, the nikah, the Rukhsati and finally the Valima with each step constituting a move away from sexual chastity and moving towards sexuality (1990:46). Mirza explains, "Each step marks a further stage in the alteration of the condition of the bride and groom, as those forbidden from expressions of their sexuality, and prohibited to one another, to their recognition as sexually active individuals on the conjugal unit. The sequence of marriage events is therefore an explicitly transformative process with each stage utilising colour, space and the gaze in a specific manner, each defining and signifying the sexual state of the couple- with particular focus upon the bride- at each point in this process" (2000:9). From this perspective the marriage process embodies the confluence of the past and the present, whereby notions of 'homeland' and 'belonging' illustrate new cultural idioms in which new forms of hybridity emerge. Badawi points out that these customary ceremonials are merely customs and in reality have no place within Islamic law (1995:57).

Yet exactly what these processes symbolize to the women in this sample, raises interesting questions not only regarding how these processes create a new 'space' but also the understandings attached to the marriage process.¹²⁷ Thus while this process purports to balance family expectations and traditions on the one hand with individual choice on the other, in practice the process inhabits a gendered social space based on social and spatial divisions that constitute gendered Muslim space (Mirza 2000:19). It is within this space that we can explore the experiences of the women in this sample and in microcosm we can how see this process can both involve and sideline women.

¹²⁷ Due to the limitations of the study, we focus on one aspect of the marriage process only, the nikah.

5.2.4 Consent in nikah

As discussed above, one of the essential elements in the nikah contract is the free consent of the individual contracting into marriage. Ali explains the significance of this consent as, "...the focal point on which this entire debate rests appears to be the legal competence of the adult female, a capacity which is considered suspect" (2001:165). Even bearing in mind that of the four Sunni schools of thought in Islam, the Hanafi's advocate an adult woman to marry in her own right, this creates a sense of ambiguity and confusion as to what is understood as consent. As discussed in chapters 3 and 4, in Britain most Pakistani's are of Sunni origin and belong to Hanafi school of thought, hence the implication of such ambiguities being transmitted to Pakistani Muslim women in relation to marriage are potentially huge.

In Islamic law, the issue of consent in marriage has largely been discussed in the context of marriage "of a minor and the role of the guardian" and the way in which consent may be assured is problematic" (Siddiqui 1996:52).¹²⁸ It is accepted that a lack of consent from the woman invalidates the marriage and the principle of *Kafa'a*¹²⁹ which is the principle of compatibility and/or equality, may give the power to the guardian to apply to a Qadi to set aside the marriage. Siddiqui points out that, "There is a tension running through the Hanafi arguments; family involvement in the arrangement of marriages is part of the social fabric and yet men and women, having reached legal majority, have the right to choose their own partners" (1996:53). Hence under the laws of marriage a woman may be given the right to choice and demand consent in marriage but that her position is ultimately subordinate to that of her father or guardian and that "the ties that bind a woman to her male relatives ensure both her protection and subjugation" (Siddiqui 1996:53). This analysis seems to suggest that the principle of consent in Muslim family law maybe counterposed to the complex lived

¹²⁸ For example a refusal or abstention to the marriage may constitute as consent. See Welchman (2000).

¹²⁹ This takes into account six considerations including, descent, Islam, profession, freedom, good character and wealth. It effectively means that a Muslim women may only marry to someone her equal and not of lower status. See Siddiqui (1996).

realities of Muslim women's lives. And, consequently we are engaging with a complex understanding of consent in marriage.

With regard to findings in this study as discussed in chapter 3, marriage embodies a wide range of experiences for Pakistani Muslim women, based upon practical compromises to social strategies and for some, coercion and compulsion to marry. It is within this dynamic lived experience, closely related to their identities as British Pakistani Muslim women that we can explore what consent in Muslim marriage means to them and how it interacts with the process of nikah.

Within this context all the women underlined the importance of the principle of consent to marry in Islam. They often used expressions of "being empowered" and "belonging" with the emphasis on the equality between the sexes in Islam. Here, differences did emerge in the sample of women in relation to those who saw themselves on a spiritual quest and thus drawing upon Islamic thought, to those who were less practicing but still identified themselves as Muslims. There were however no discernable differences between those women of a Punjabi or Azad Kashmiri background, and discussion focused on developing a fuller understanding of marriage in Islam.

When my parents starting talking about getting married I started reading around what marriage in Islam actually means. What I read made sense to me. As a Muslim woman I have the choice to marry whoever I want as long as he's a Muslim. My parents wanted me to have an arranged marriage because that's what Pakistanis do and I understood that was important to them. I'm not saying that culture isn't important to me, cause I love speaking Punjabi and everything else but I wanted to choose who I could marry and Islam gave me that (Sadia, Birmingham).

I've read quite a bit around Islam and Muslim women and rights in marriage and all that...I understand its very important to make sure a woman gives her consent. But I think most parents still want to give their consent to who you marry, even if they're a Muslim, they still think that's the most important thing. So I had to sit my parents down and talk to them, you know, explain that it's my consent that matters! (Shabana, London).

Retaining an understanding of marriage and Islam the women were thus able to interrogate and in some cases challenge the existing power relations in the family and home. In this way it was critically important for them to engage with the negotiation process and to see solutions through various kinds of religious

appropriation (see Merry 2001:50). Ali, points out that under Muslim law a Muslim woman does have the capacity to enter into a marriage contract without the consent of her parents but she accepts that “the notion of a woman being able to exercise her choice by entering into a contract of marriage is seen as an affront to the male honour as she is considered the izzat of the family and negotiating a marriage contract with a male without an intermediary poses a threat to existing social structures” (2002:167). This was confirmed by findings in this study. For example the women emphasized how their decision-making abilities to negotiate were limited within the cultural framework of the family but that Islam provided clearer guidance. With some interviews this led to discussion on how full religious observation and how wearing the hijab had enabled the women to create a space to challenge marriages arranged by parents (see Afshar 1994). Of the sample 2 women wore the hijab and these women did not identify themselves as Pakistanis but as Muslims and instead only drew upon their cultural backgrounds to forge links with family and local communities.

More importantly, for those women who had been forced into marriage the strength of redefining marriage according to the tenets of Islam lay in the struggle between a search for transforming oppressive cultural practices and seeking to express themselves as British Muslims. As one interviewee explained,

I wasn't allowed to say no, so no my permission wasn't even a factor. For me, Islam was a way of telling my parents that I did have rights as a woman. As a Muslim woman, I have the right to choose (Zareena, Bradford).

The issue of forced marriage under Muslim family law in Muslim literature has been discussed around the principle of the ‘option of puberty’ (*khiyar-al-bulugh*) a measure designed to free those women who have been forced into marriage. There is no divine revelation on this issue but has been discussed among the various Islamic schools of thought (See Engineer 1992). In Hanafi law, if a young woman is forcibly married prior to puberty she can repudiate this contract once she reaches puberty. Other Sunni law schools recognise this option in the case of jest or duress (see Nasir 1990). Women are central to these debates and those women who remain virgins are under the dictates of their fathers who are seen as their guardians. As Menski and Pearl point out, “The woman only becomes

capable of contracting herself in marriage when she ceases to be a virgin by reason of a consummated marriage or an illicit sexual relationship” (1998:142). Understanding how the issue of consent translates in this ‘hybrid space’ the interview data reveals a reciprocal relationship between autonomy and control. On the one hand the process can be described as managed and confined with little input from the women. Yet at the same time the nikah contract, which forms the basis of the nikah ceremony does assign women rights in marriage and divorce and at this stage women are encouraged to enter into negotiations. We discuss the practical realities of this aspect of the nikah ceremony in the next section.

In terms of where the nikah was performed it is useful to note that in Islam there are no restrictions on where it can take place and in this study the nikah was performed in the family home, the ‘wedding hall’ and the local mosque. Interestingly there were no marriages performed in a licensed mosque according to the Places of Worship Registration Act (1855) and only one interviewee had checked prior to the religious marriage as to whether the mosque had been registered as a licensed building. Unable to clarify this, she had gone ahead with the nikah at the mosque, on the understanding that the marriage was due to be registered, shortly afterwards. Again with this finding there was little differentiation according to class, education and/or sectarian differences. Eade (1996) points out that the differences in the ‘space’ of where a nikah is conducted largely depends upon family and cultural traditions and is created “purely by ritual and sanctioned practice and is not dependant upon the creation of any juridically claimed territory or formally consecrated space, or indeed, the production of architecturally specific place” (1996: 231). At one level, this was confirmed by findings in this study. A number of the women reported that the decision as to where the nikah should take place was taken after lengthy discussions with immediate and extended members of their family. It often rested on the dictates of family and cultural traditions, at times both in Britain and Pakistan. Some women described in great length the involvement of family and family friends in the arranging the nikah ceremony which included the length of the ceremony, the role of family members and the terms of the marriage contract but for others their was little negotiation.

My mum made it pretty clear that the nikah was going to happen in our house. Apparently that's the way it's always been done in our family and yes I was ok with that. She discussed it with me and I was ok with it (Nighat, London).

We had the nikah first. My parents did that. We had it in the wedding hall and the Imam came from his aunt. I think traditionally the Imam who conducts the ceremony is meant to come from the groom's side they're meant to provide you with the Imam. So the Imam came from the aunt and he was known to the family for about 30- 40 years. He had done their aunts marriage and all her brothers and sisters marriage in Pakistan (Fauzia, London).

In terms of the length of the ceremony the experiences were all described as being 'quick' and 'short' and involved their minimum participation of the women in the process. The extracts below from interview data illustrate this:

It was really quick, over in like 2 minutes. He asked me (the Imam) whether I gave my consent and I said yes, I mean he only asked me once, which I don't think is right. Then he said something in Arabic and that was it really. All over in 2 minutes in my parent's front room (Sameena, Birmingham)

I don't remember much about it cause it happened so quickly but then I think its meant to be like that in Islam, you know marriage is just a contract, somebody asks you, you say yes and then that's it (Zareena Bradford).

Maybe I would have liked more involvement but I don't think its meant to be a long and drawn out... practical thing, its more symbolic and that's what it was, symbolic (Naheed, London)

However, the presence of witnesses at the nikah ceremony did generate interesting discussion. Under Hanafi law, a contract can only be fulfilled in the presence of witnesses, which can be either two males or one male and two females (see Nasir 1990). More generally this process highlights the cultural significance and the symbolic representation of the marriage process. Thus Mirza, points out that "the presence of the witnesses is essential for the valid solemnization of a marriage as their attendance ensures publicity, this being the decisive symbol that demarcates the line between lawful wedlock and fornication or zina"(2000:14). There is little question then, of the significance of witnesses as they evoke a symbolic meaning as well as constituting a physical presence in the nikah ceremony.

In this study, the witnesses in the nikah ceremony comprised of male members of the family, including fathers, uncles and brothers. By contrast, female witnesses

were involved in only two cases, involving female family friends. For the purposes of this study by exploring the individual meanings attached to the nikah we can begin to analyse the significance of the nikah contract for the women.

The husband and wife are not supposed to be in the same room. Basically they pray and everything and make 'dawah'. There must be 3 witnesses present and when he is ready they ask him, do you want to marry this woman 3 times and he says yes and then he signs the certificate to make sure he agrees and he's happy with the marriage. After that they come to me and I was at my mum's house, 3 men come, 3 witnesses and they ask me d'you want to marry this man and I said yes I do 3 times and then you sign the book (Fareeda, Birmingham).

There's 2 witnesses from his side, 1 witness from my side. My witness was my uncle and his witnesses was his 2 uncles. My part of it was that before they come and do the nikah bit in the mosque they come and ask me whether I agree to the marriage. I was at home and they came over, they asked me, well they basically said you are getting married to such and such person and do you agree to it and you have to say geehaa (yes) three times and that was that, done. Then they go to him I'm not sure what happens in the mosque but basically they ask him the same question. I think they do a lot of prayers (Salma, London).

Women aren't allowed in the mosque so it was upstairs in my mum's house and it was just us ladies in the room. Then they went to the mosque where he was and they said to the maulvi the girl has said yes three times and she signed this paper and that was the marriage certificate. Then he went through more or less the procedure but its just a bit longer because what they do before is give a bit of a lecture before the nikah itself you know they just tell him about how they should look after a wife etc. After they ask him what they asked me and I think the men have to say yes twice, I think so I'm not quite sure and then basically then everyone congratulated him and then he came to the hall where the reception took place. And that's it basically everyone eats (Shabana, London).

I can't say its religious really because he didn't actually read anything from the Qu'ran or give a sermon, like my brother got married recently it was quite different and the chap who married them was from the London mosque and he prepared a special sermon and made it quite a special occasion and he's known for this. That's why it's so very different, each sermon or each marriage contract is so different according to what the mullah is doing it (Rabia, Birmingham).

Initially the Imam didn't ask me 3 times so my mum had to ask him to do what he hadn't. He asked me just once and my mum had to go and get him to do it properly and then he came and asked me 3 times (Fauzia, London).

On one level, these experiences symbolize the ambivalence associated with the nikah as the process is neither straightforward nor unproblematic. The site of the

nikah marks the physical presence of different parties including male witnesses, the Imam, parents and family members. For some women this was difficult and complex, as they did not feel involved in the process and the shared space. For others, it simply involved their presence at this site and the meaning of nikah was symbolic, on a deeply personal level. Yet all the women in this study did interact, engage and identify with the nikah. Significantly for those women who had been forced into marriage the nikah ceremony certainly marked the end of their attempt to avoid marriage and was thus closely associated as a marker of discipline and control. These women were more disengaged with the process than those women who had participated in arranged marriage or chosen their own spouses. For the women in the latter group the nikah was the most distinctive part of the Muslim marriage process and they were able to move onto new sites and spaces.

It sort of marked a different status in the eyes of people. It was from then on that I had the status of coming into the family. I mean lots of doors opened then, I mean socially and community wise that I wouldn't have had otherwise (Anisa, Bradford).

Yet the discursive framework of the nikah is based on the specific gender relations that underpin this process. The formal aspect of this process, the nikah contract creates a more interesting space in which to challenge the unequal cultural norms that maybe embedded in this ceremony.

5.2.5 Dower in the nikah

A final element of a nikah contract is the dower which has been described as “a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage” (Mulla 1995 at 387 quoted in Ali 2001:158). The characteristics of what constitutes as the dower are however open to dispute and as Ali points out, that rather than perceived as a form of consideration it is largely understood as a debt to repaid to the wife by the husband in event of death (2001:158). In this way the dower is understood as an effect of the marriage contract and not an exchange for the marriage. The amount

of dower is expressly stipulated in the nikah contract and is classified as either deferred or prompt.¹³⁰

Before we analyse the experiences of the women in this study, it is useful to briefly draw upon Muslim feminist literature to explore the underlying premise upon which the relationship between dower, Muslim women and the nikah contract is based. Such aspects are of course bound up with the positionality of the women within the socio-cultural setting of the marriage process and the family but these critiques identify this relationship as interrelated rather than discrete from the underlying relations of power. This approach opens up new avenues on the symbolic space that the nikah constitutes.

It is largely accepted that the nikah in theory allows women “some legal autonomy in order to bargain over her own destiny” (Haeri1990:57). Yet the nature of this contract is subject to extensive critique with the underlying assumptions of ownership and purchase within the contract and its legitimacy of a patriarchal understanding of the male-female relationship. Thus it becomes evident that for Muslim feminist scholars the concern is how the body becomes an obvious site for sacrifice, discipline and control (see El-Nimr 1996, Abu-Odeh 1996). Coulson argues that the nikah contract constitutes a sale due to the ‘transfer of an absolute propriety’ (1964:111). This is accepted by Haeri (1990) who argues that the nikah embodies an inherent determinism which acts as a justification for the existing sexual inequalities and explains, “Because marriage is a contract from an Islamic point of view, the phenomenon of intercourse, *vatye*, is inevitably intertwined with monetary exchanges. The underlying assumption here is two-fold. First, as ‘purchasers’ in a contract of marriage, men are ‘in charge’ of their wives because they pay for them and, naturally they ought to be able to control their wives’ activities. Secondly, women are required to submit that for which they have been paid for, or promised to be paid. It follows therefore that women ought to be obedient to their husbands” (Haeri1990:58). It is evident therefore that the symbolic significance of the dower must be situated within the

¹³⁰ According to Islamic legal principles this payment can be paid promptly at the point of marriage or deferred and to be paid after the breakdown of marriage. See Engineer 1992.

context of the ideological construction of women in Islam. A construction that is of course challenged by Muslim feminists (see Yai Mamani 1996).

If we move from this general discussion of dower to an analysis of the experiences of the women in this sample, we can see how this process generates a number of interesting outcomes. There are three key issues that emerge from data analysis, firstly the confusion between the dower and dowry, secondly the failure to negotiate a 'reasonable' amount of dower in the nikah contract and, finally the limited use of the nikah contract to retrieve the dower upon breakdown of marriage and divorce.

In this study only 13 women had obtained a copy of the nikah contract. This document included personal details such as name, age, address, date of birth, the date of marriage and the signature of witnesses. In terms of the dower all the women reported that they had received a nominal sum, ranging between £100-200. Thus for most women the nikah contract became synonymous with the nikah ceremony rather than a formal document which they would consider invoking during the breakdown of marriage. Yet this finding must be met with some caution as the nikah contract was accepted by some women as being of importance on par with formal documentation. This was particularly the case with those women whose marriages had not been registered according to civil law. This leads to a different reflection on the interconnectedness of this document in the lives of these women in terms of providing them with legal redress. Clearly the nikah contract is then, firmly rooted in the space of 'justice' for the women who actively engage in strategies deriving from an Islamic perspective and utilising state law mechanisms. Thus the presence of the nikah contract serves as a useful mechanism, in which the marriage breakdown and divorce can be in some ways be managed, confined and justified.

In terms of what the women understood as the dower what we see is a conflation of terms with the term dowry and it was described as 'haq mehr', 'jahez', 'dower' and 'dowry'. To an extent this complicates the way in which the nikah contract

provides a space for 'justice' for the women. The extracts below highlight what the women understood as dower.

Haq mehr is the property or the sum of money or whatever you want it to be which the woman can ask for from her husband at any time during the marriage but at the divorce it has to be passed over. I know from other people's wedding that things can stop there for hours and hours. Because there's a problem with the 'haq mehr' like the guys side is saying you know we thought we'd get something else, and the girl's side thinks that something else has been arranged. Or sometimes it's so enormous the sum the girl couldn't get out of the marriage because the guy's side wouldn't be able to pay that. There's a lot of politics around the amount that you put forward. But Islamic law says it should be something like for 3 months or something like that (Shabana, London).

The whole idea of the mehr is that you show the value of that particular individual. It has to be a reasonable amount of money as well that's the other thing that I was aware of as well, it can't just be something that's a throwaway sum of money that's not going to cause any hardship to the man if there is a divorce. Its got to be something that means something to him not that's something that's just done for the sake of doing it. For me it's a form of protection and I was quite definite on that (Fauzia, London).

The Imam was in the room with my father and some men and he talked to my father about whether he was happy giving me away and what the haq mehr should be. You know we hadn't even discussed it before. I didn't know what it meant and I don't know what they decided (Rubina, Birmingham).

The problem that arose at the time of the nikah was we were talking about what was going to happen and all the procedures. But they hadn't mentioned anything about the mehr or clothes, you know exchanging of gifts and we were beginning to think this was a bit strange. My mum was getting a little worried because it had come up to 2 weeks before the wedding and still nothing had been mentioned. In our family its important for the girl to be given clothes before she gets married. My mother told my future mother in law and the response was well as far as the mehr is concerned we're going to set it at the same amount as we set our other son's and I can't allow her to have a higher mehr than my other daughter in law. As far as I'm concerned they're equal (Sameena, London).

Nothing, I have nothing to show that's its an Islamic marriage. I don't even have a certificate. I think he did make a certificate and he said come next week but I never went back. At that point I didn't think it was important so I don't know what the dower was for my marriage but I think they gave us some clothes (Nasima, London).

Of course this confusion between dower and dowry does not deny the value the women placed upon the nikah contract and the dower. Instead what we see in

evidence is the interwoven religious marriage process interacting with a cultural setting, to shape the temporal and spatial boundaries of the nikah ceremony (Bhabba 1994). In this way some women were able to distinguish between religious and cultural practices to draw attention to the power relations that underpin the nikah ceremony and contract. Yet most women were at the margins of negotiating the terms to be included in the nikah contract but interestingly they called into question their own lack of knowledge and ignorance of Islam that had led to this situation:

For me to get the nikah right was really important. But I didn't know I was really stupid at the time I really didn't know everything. I knew some of what I was entitled too but I really didn't know the level of my rights. For instance I didn't know I could stipulate terms of divorce at the time of the nikah. I didn't know I could ask for the rights to divorce at that time or I didn't know I could stipulate various other things at the time of the contract. I just went as far as saying that look if you're going to give a mehr it has to be a reasonable amount and it has to be an agreement between me and him not your parents or not your aunts or anyone else (Fauzia, London).

I did not know much about it actually I think I learnt more about the nikah after I got divorced. Like for example that in Islam you can have a pre-nuptial arrangements, you don't have to change your name when you get married in fact its better to keep your own name, you don't have to agree to agree to live with the guy's parents. Its up to him to look after his family but he's got no right to impose it on you, things like that. So I found out things like that and I was surprised really. I could have said that before I married him but I didn't because I don't think it's the right way of starting a relationship by splitting him from his family. If he doesn't want to do that I didn't want to come between them but I didn't make that as a condition. I now know a lot of girls who do that these days (Salma, London).

When the Imam was conducting the ceremony and although he had written the correct amount of the mehr on the certificate that he had, after I said yes 3 times and I was seated officially next to my husband and when they got me to sign the thing I noticed on the certificate next to the mehr amount they had written deferred and I didn't know what that meant. And I saw it and I thought well I didn't agree to this but I there was about 100 people there and I couldn't say anything. I just noted it and I thought well it shouldn't really mean anything so I just signed my name to it but no-one had consulted me as to whether this mehr was deferred or not because the understanding behind the haq mehr is that its supposed to paid to the wife preferably before the marriage is consummated. There wasn't any mention of it being paid. I mean it doesn't have to be paid but at least I could have been spoken to about why a deferred term was included in the contact (Naheed, London).

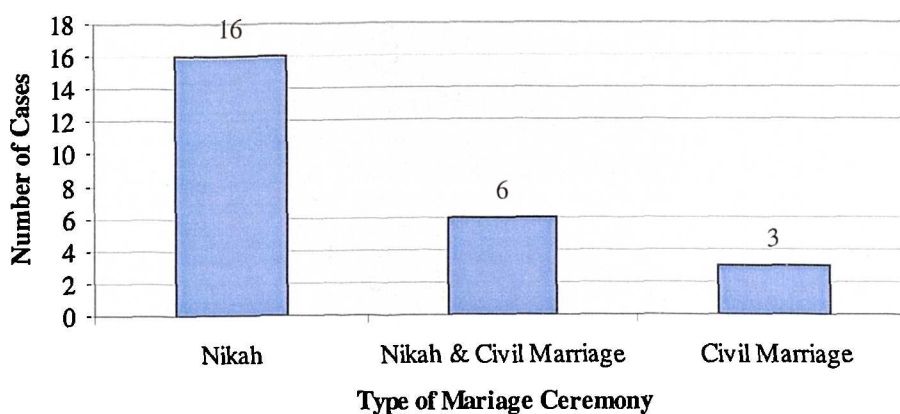
It is clear that for these women, a lack of understanding of the nikah contract coupled with the gendered relations underpinning the nikah process had denied

them a context in which they were able to engage with a process to negotiate their terms for the nikah contract. Yet we must not lose sight of the fact that there was by no means, a taken for granted consensus over what signifies as the nikah contract or the importance of the dower. Certainly the interview data reveals that the nikah contract became of increased importance for those women whose marriages had not been registered. And, as discussed in chapter 4, this has led to attempts by some religious scholars to strengthen the nikah contract by introducing a single nikah contract for all Muslims in Britain. We discuss this proposal in a later section of this chapter.

5.3 Civil Registration of Marriage

The figure 5.2 below presents results of the number of marriages in this study that complied with the Marriage Acts 1949-94 and those who went through the nikah ceremony only. Less than half the sample who had married with a partner domiciled in England had registered their marriages, meaning that the largest group in this sample was women who were in effect deemed unmarried according to English family law.

Figure 5.2 Types of Marriage Ceremonies



As indicated in chapters 1, 3 and 4 there are long-standing debates in social, legal and political theory over the extent to which religious personal laws should be accommodated within the framework of existing English law. The essence of

these arguments are predicated on raising our awareness to the fact that Muslim women are choosing not to register their marriages according to the formalities of civil law and, thus reinforcing the argument for the introduction of some kind of parallel legal system to accommodate the needs of Muslims in Britain. At first glance, the absence of formal registration of marriage does seem to legitimize such arguments but on closer inspection we see that the picture maybe a little more complex than at first envisaged. What becomes clear is that such outcomes must be understood in relation to the situated positionings of the women in family and marriage relationships (Anthias 2002). Equally it is difficult to ignore the relations of power and the gendered cultural norms and values that underpin these decisions. Hence for the women the level of negotiations in this study did depend upon their position within their family, their husband's families and contextualized by a particular gendered construction of disempowerment and lack of autonomy in the marriage process. Thus the women usually relied upon a level of trust and reciprocity from their husbands that the marriages would be registered and in cases where this trust had been violated the marriages they had not been. One interviewee explained,

I think a lot of people are naïve they just trust their husbands in that they will get a registered marriage. Its not that they don't know about registry or that they don't want it, they are just naïve in believing their husbands. I tell all my friends now that you must have a legal marriage first because if you have an Islamic marriage first then they will not agree to do a civil marriage. I mean you can do it on the same day there's nothing stopping you doing that. Because I really think that guys would begin to take marriages more seriously (Salma, London).

As the nikah is not recognised as a valid form of marriage in Britain this led to a commitment to cultural relativism by some women who advocated the introduction of a parallel legal system as a means of redressing their situations. The extracts below from interview data reveal the underlying reasons of why marriages were not registered according to civil law:

Well to tell you the truth I honestly thought that the Muslim marriage certificate would be recognised I was quite shocked when I found out that it wasn't. I thought hold on a minute we got married didn't we? I had a massive wedding I've got the wedding photos to prove it, the wedding cassette to prove it. I have all this to prove it so how can they turn round and say to me that sorry no it's not recognised. The only difference is...the only thing that we didn't do is swap some vows in the registry office. I mean that's the only difference (Mina, London).

Well I understand that Islamically it says that you have to have a nikah in order for your marriage to be recognised but I would have been happy if it had been registered straight away then I would have felt that I am on the safe side that at the end of the day. I'm not happy with what happened to my marriage at all, my marriage was planned and the breakdown of my marriage was planned (Shazia, London).

I said to him we need to get registered and he said oh no we don't cause the Muslim certificate is recognised now and I was so naïve I believed him so I thought oh well it must be. He said yeah well I thought it wasn't as well and last time I got registered it was just a big hassle to divorced and I believed him (Sadia, Birmingham).

What happened was when I got engaged he promised me we'd get registered, we'll get a house of our own, we'll do everything. When I got into our marriage because they had a bad family name, in that they treat the daughter in laws so badly that's the reason why they refused to let us get registered. I said to my husband no we have to get registered cause it's the law in this country that we get registered but he kept saying yeah, yeah we'll do it but he never would. Anyway a year later I started getting worried cause I thought if something happens then I would have nothing. I said to him you know I'm worried what if your mother says oh you know kick her out I just don't feel safe and he said oh no nothing's gonna happen like that. Islamically we're married we don't believe in getting registered that's just this country's law he turned round and said that our family only believe in the nikah and that's it. So he just refused and they were just playing it cleverly (Parveen, Birmingham).

Before I married him I did say I'd like to get registered and he said we'll do it after we get the nikah done, that's what more important and personally that is how I saw it then too but I see it differently now, obviously. At the time for me Islam was number one, I was more bothered about Islam rather than anything else really but that doesn't mean I didn't want to get the marriage registered. I did and I knew that I may not be protected with just having a nikah. It was exactly a week after we got married I got a little concerned and I asked him when are we going to get registered and he said well no we're not and I said well why and he said cause if we split up you'll want half of everything that's mine and I went oh is that what you think. I was absolutely gutted because that wasn't my reason. I did not marry him with the intention of splitting whereas he had looked that far ahead (Sabia, London).

It is noteworthy that these extracts reveal the precarious situation in which the women found themselves. For example of the sample only two women had not been aware of the validity of the nikah under English law and believed they were legally married. A further two women had agreed with their husbands to forego civil registration for financial reasons. But the largest group of women involved were those who were aware of the need to register their marriage according to

civil law and had expected their marriages to be formalised. Hence the consequences for the women of being intentionally misled led them to facing a multitude of social and legal problems.

Those women who had believed that their nikah had been a legally recognised form of marriage also speculated on the lack of available information for their misunderstanding. Blame had been directed towards Imams and community leaders.

I think the Imam who married us should take the blame because surely it's his duty to explain everything to us before we go through with it. Surely Imams should know that the nikah isn't recognised in this country (Mina, London).

I find it shocking that Pakistanis have been in this country for decades and decades and still no-one seems to know if the nikah in England is recognised or not? Solicitors and the community need to be trained, especially the Imams we go to them for advice so its really important they know at least what's going on (Shazia, London).

We return to this issue in section 5.8 of this chapter.

5.4 Muslim Divorce

In his study of Muslim legal pluralism Menski points to what he describes as “the legal de-recognition of Muslim divorces...in the United Kingdom”(1998:382). By this he means the lack of provisions in English law to recognise religious law as an official form of divorce. In the present, revised English family law there is only one way to obtain a divorce, on the grounds that the marriage has irretrievably broken down, after a two-year separation where the decree is made absolute. Muslim divorces granted through a “non-judicial process” (talaq) (Poulter 1986:98) in Britain are generally not recognised as valid, a situation which has led to the creation of “limping marriages” (Menski and Pearl 1998:383). This has meant that women who may have been divorced through civil procedure continue to be married under Muslim religious law and those who may have been divorced abroad may not be legally recognised in this country as divorced and thus continue to be legally married. Consequently this has led to a conflict of laws scenario.

As discussed in chapter 4 under Muslim law, a divorce can be obtained in a number of different ways:

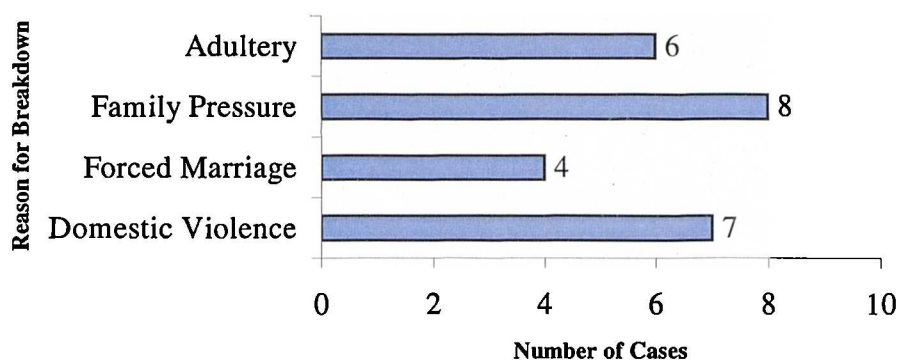
- *Talaq* (unilateral repudiation by the husband),
- *Khul* (divorce at the instance of the wife with her husband's agreement, and on condition that she will forego her right to the *mehr* and
- *Ubara'at* (divorce by mutual consent).

In this study obtaining a Muslim divorce was important to all the women. Given the fact that the issue of divorce is fraught with difficulties and tension for women within South Asian Muslim communities, we focus upon the strategies adopted in obtaining a divorce certificate. Hence many questions can be raised about the processes involved in obtaining a divorce from the perspective of female users of Shariah Councils. These relate to issues concerning negotiations, conflict and decision-making both within the family, community and via unofficial dispute resolution bodies such as Shariah Councils. So how did this sample of women negotiate issues of marriage breakdown and divorce within the family, home and community? And at what point was contact made with a Shariah Council? We have already highlighted the fact that most women contact a Shariah Council for the purposes of obtaining a divorce, a consequence of the husband's refusal to consent to divorce.

5.4.1 Marriage Breakdown

The reasons for breakdown of marriage in this sample were cited as forced marriage, family interference, 'clash of upbringing', adultery and domestic violence. A staggering 18 women reported that they had experienced some form of emotional, sexual and/or physical abuse during their marriages and a small percentage of women continued to face this threat (see Kelly and Radford 1996). The figure 5.3 below highlights 'domestic violence', 'forced marriage' and 'family pressure' as the three key factors in the breakdown of marriage.

Figure 5.3 Reasons for Marriage Breakdown



The reasons for breakdown in marriage were premised upon inter-family inequalities with discussion focussing on issues of power, negotiation and struggle. In relation to ‘family pressure’ the women described relationships with in-laws as being particularly difficult and fraught. Those who opposed or challenged their authority were ostracized and alienated from other members of the family. For other women the control of their physical movements meant they were given very little space to assert their independence within the family context. In three cases this had led to increased levels of domestic violence. The extracts below provide a brief snapshot of the effects on the women:

It wasn't that bad in the beginning but over time he became very violent and by the end I wasn't allowed to go out by myself (Mina, London).

I tried to commit suicide. I used to go to my doctor and I used to complain to him all the time. He told me to leave. At one time I never used to eat (Sadia, Birmingham).

My dad was never on my side, when he found out about the problems he always used to shout at me saying that I must do everything they tell me to do. He only said that cause he was scared that I was going to end up divorced and he kept saying don't get divorced, don't get divorced (Zareena, Bradford).

Patel (2003) identifies the control of women within minority communities, as an issue that needs greater attention. Leaving aside the issue of control within the family, she argues the state affords black women little protection. In response

women's organisations such as Southall Black Sisters¹³¹ and Newham Asian Women's Project¹³² have developed critiques on state accountability and strategies to support vulnerable women. Like so many of the women leaving proved a difficult and traumatic experience. One interviewee, Sameena explained the lengths she underwent prior to leaving the marriage,

I knew I had to be really careful because they wouldn't have let me go. But one day when they were all out I just left and took my children without any belongings. I went to the health officer and they put me into a bed and breakfast.

5.4.2 Marriages conducted in Pakistan

For those women whose marriages had been conducted abroad in Pakistan factors such as forced marriage and "a conflict of upbringing" were cited as the two main reasons for breakdown of marriage. One interviewee explained,

I think there's a conflict with women who are brought up here and men who come from Pakistan to get married. We just saw things differently. For him it was a problem that I wanted to work, that I was pretty independent and this was important to me. It didn't mean I couldn't be a good wife but he just couldn't see things from my point of view (Zareena, Bradford).

In her report Shah-Kazemi (2001) found immigration regulations to be a significant 'equation' in the breakdown of marriage and had these regulations not been in place the outcome of the marriage would have been very different. She points out that, "If immigration regulations were not in existence, and unrelated to marriage, men would not be interested in exploiting women solely for the purpose of immigration, women would not be vulnerable to the pressure to allow the marriages to continue, nor indeed would the women go through the hardship of having to wait for their husbands..." (2001:33-34). It was evident from findings in this study that the women who had been forced into marriage in Pakistan believed they had little option but to use immigration legislation to prevent their husbands from gaining entry into the country. It was also clear that in two cases where entry had been permitted the interviewees had sought the advice of police

¹³¹ Southall Black Sisters was set up in 1979 to meet the needs of Asian and African-Caribbean women. See SBS 2003.

¹³² Newham Asian Women's Project was set up in 1983 to meet the needs of Asian women in East London.

and the home office in their attempts to deport their husbands. One interviewee explained,

For the past 3 years he's made our lives hell. He constantly harasses us and his family used us so he could come into this country. I want him out and I'll do everything in my power to make sure it happens (Nasima, Birmingham).

In both cases the women reported little success. While it is easy to condemn these strategies which effectively give the state a further opportunity to introduce even tighter controls and restrict immigration in Britain (see Patel 1999) we need to explore the underlying issues which compel women to resort to such drastic tactics.

5.4.3 The Decision to Leave

Unsurprisingly perhaps there was a close association between the decision to leave the marriage and financial independence. Those women financially dependent upon their husbands were more likely to have remained in the marriage when compared to those who were not.

Fauzia confirmed that her decision to leave was made easier with the knowledge that her family could provide her with financial support. In turn, Salma drew attention to the "assumed link between tradition and being backward".

I am traditional and that's important to me. I like to wear Asian clothes and you know do Asian things but people make assumptions. Like my in-laws they thought that my parents would never want me back if they treated me badly and if I wanted to leave, just because of my religion and the way I was. I felt as though I was tricked into the marriage and when I told his family they said well so what? As if I would just stay in the marriage.

She left to return to her parent's home. It is also useful to know that those women educated to university level, mentioned education as a contributory factor in the breakdown of marriage. Parveen described how the difficulties in the marriage were compounded by the fact that she was perceived as being too educated and hence "too independent".

I did everything they wanted me to do, I cooked, I cleaned I looked after them as well as my husband but still it was never enough. Just the fact that I'd been to college that I had an education was a problem for them.

At the same time, the interviews revealed that the women experienced specific problems relating to “being too westernised”. Interestingly these views did not transcend class and education differences and a number of the interviewees were keen to discuss familial expectations.

I could never win in the eyes of my in-laws, never. I could never do right, that’s how it always felt...I wasn’t traditional enough, I just didn’t fit the mould of a traditional girl and that’s what my mother in law really wanted (Shabana, London).

He started imposing things on me like you have to wear a scarf and I’m not really comfortable with it you know and I told him well I’m not really comfortable with it and I don’t believe I should do something that someone is making me do it. Islam is within myself, I do it because I want to do it. I’m not saying I don’t have any intention of it, I will do it but not just yet and he was more worried about his dad than himself. The impression I got was that he wasn’t really that bothered himself he was more bothered about his family (Nighat, London).

But in my in-laws family it was like you can’t go out, you can’t do this, you have to wear a scarf all the time, you have to wear shalwar kameez all the time, you can’t wear anything else. So I thought oh my God I can’t live like this! (Yasmin, London).

Eventually I spoke to a friend of mine, she’s quite religious and what she told me was that women couldn’t be compelled to do things in Islam its wrong and its Unislamic (Humeira, London).

In Islam we need women’s voice to be heard. Not just talk about the need for change but actual change towards the acceptance of recognizing women as equals (Anisa, Bradford).

I always did what they told me cause my parents taught me that when you get married you should never speak in front of your mother in laws. But in this family they really used Islam against us. If we argued and said something was wrong they would just bring Islam into it, saying Islam says this and Islam says that but whenever they did anything bad to me they brushed Islam under the carpet and do what they want cause Islam never said you can treat your wife like that Islam says that a wife is equal to your mum but I was never treated like that (Sadiah, Birmingham).

The descriptions of ‘being controlled’ eventually proved a catalyst for these women to seek change in their lives. This analysis demonstrates how the patterns of family dominance and control within the framework of marriage led some of the interviewees to question whether they had a right to assert their independence in Islam and the right to be respected as equals. We return to this issue later in the chapter.

5.4.4 Unofficial Family Mediation

Family mediation was the central cornerstone to Part II of the Family Law Act 1996 with its emphasis upon the responsibility of managing divorce moving back to the parties themselves and the state redefining its role in the whole process.¹³³ This piece of legislation aimed to provide separating parties with greater responsibility in negotiating their separation and divorce whereupon the preconditions of information meetings and mediation reflects, a subtle but fundamental change in the state involvement of family disputes. Roberts argues that such changes inherently challenge the centralist power of state law and consequently the state simply lacked the political will to introduce such wide-ranging changes, “All of these provisions could be seen as a development of a particular style of government and made the Act vulnerable to critique as an archetypal instrument of ‘informal justice’” (2001:256).¹³⁴ In terms of the existing provisions an on-going debate exists over the extent to which the state should intervene in matters of marriage breakdown, separation and divorce (see Roberts 2001:271, Davis 2001:371, Furniss 2000: 255; Maclean 2000:24, Eekelaar and Maclean 1986, Eekelaar 2000, Freeman 1998, Olsen 1985. Cretney 1995). However few studies explore the nature of ‘unofficial family mediation’ in the context of family and home within minority ethnic communities in Britain.¹³⁵ In this vein, the gap between the two constitutes an opportunity to draw upon interview data and explore this ‘space’ in more depth.

In this study as well as arranging the marriage the family played a vital role in organising and facilitating attempts to reconcile the parties. The interview data revealed the inevitable conflicts and disputes generated by the breakdown of marriage but of the sample, 20 women explained they had been involved in lengthy discussions with their families prior to any contact with a Shariah Council. Shah-Kazemi (2000:312) points out that family mediation takes on a particular significance for minority ethnic communities and this was confirmed in this study as it seems that the importance of this intervention is closely associated

¹³³ See The White Paper, Looking to the Future: Mediation and the Ground for Divorce (1995) Cm2799, at para 5.3

¹³⁴ See chapters 1 and 4 for discussion on the relationship between law and community.

¹³⁵ For a study on the Hindu Gujarati community in Leicester see Goodwin et al (1997).

to the families arranging the marriage. It seems that this gives rise to a set of obligations and responsibilities for both parties.

The thing with arranged marriages is that when it breaks down you're not really left alone. It's the family that arranges it so when it breaks down they go into this motion of trying to sort things out (Shazia, London).

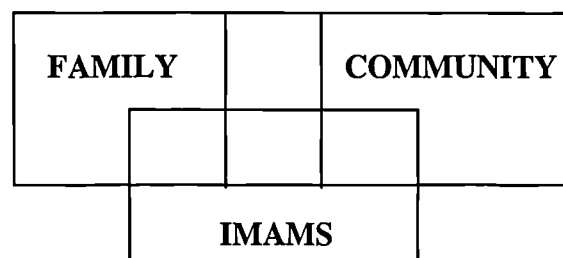
Yes I did expect my family to help me and yeah I do think it was because I had an arranged marriage. I suppose the way I got married was different to how my English friends get married and they probably don't expect the kind of help that I got (Humeira, London).

Well there is a system to prevent breakdown and it's a very invisible one, a very subtle one and it starts with your own family the community at large are prepared to play a reinforcing part and what your family is doing is they say are you alright and you're expected to say yes, how are you you're expected to say I'm fine and what you do is you make sure that everything that happens in your household remains there nothing goes outside of that (Nasima, Birmingham).

When I eventually decided to leave home and I called my family together. My family had no idea what had been going on and how abusive he had been and all the neglect and all the treatment that myself and my daughter had had because why should they? Because he never made it public and also I think people let things go because they don't want to know. But they were very upset that I hadn't told them (Rubina, Birmingham).

The interview data reveals 3 types of family mediation see figure 5.4 below. These can be broadly categorized as the intervention of the immediate and extended family, the involvement of community members and family friends and, finally advice from the local Imam.

Figure 5.4 **Types of Unofficial Family Mediation**



In their management of the marital dispute the interviewees were involved in a complex and shifting process of fulfilling social and cultural expectations while negotiating their terms for reconciliation. This demonstrates the dilemmas and conflicts that women's identities as individuals and as members of the family

group may give rise too (see Hellum 1999:88). As discussed in chapter 3 the plurality of shifting identities for women in South Asian Muslim communities provides an insight into complex relations in the home, family and community.

Well initially I told no-one cause I didn't want my parents to get involved and then you know for things to get worse, the more people that get involved then things can get out of hand. I was a bit scared anyway because I hadn't been married that long and if I say I've got problems, they'd be really really worried about it...It was too difficult I was expected to make it work so it really had to get bad before I could tell them (Farhana, Birmingham).

I spoke to one of my uncles but I made him promise me that he wouldn't tell my parents because they'd be really, really upset about it so I said to him I want you to help me sort out this mess because he had been involved in getting me together with my husband. So they came over and they had a word and they said well you know its not fair that you're doing this. I was in real state. (Sabia, London).

Well not my side of the family but his side of the family did get involved. His eldest sister in law did give me a lot of support. She said this is not right something has to be done and then she told her husband and they talked within the family and they told me they did speak to him but I don't know what was said (Shaheen, London).

It was hard for me to go to my parents they didn't want me to marry this guy so when things started to go wrong I tried to deal with it myself. But then it got pretty bad, you know he hit me and stuff so then I called them. They were really upset at the start but then they were OK they helped me sort things out (Mina, London).

As discussed in chapter 3 the dilemma of preserving the 'family honour' can limit the decision-making abilities of women within the home and family. Thus the issue of 'leaving' the marriage was neither easily resolved nor uncritically accepted and some women grappled with the pressures of maintaining the "izzat of the family" (family honour) while others expressed ambivalence.

I couldn't tell my parents straight away cause of the izzat thing. They were always saying that my marriage had kept the izzat of the family, so when things started to go wrong it was difficult for me to explain to them how I was feeling and what I wanted to do about the situation (Nasima, London).

None of my family wanted me to get divorced but in a way it was easier for them to accept that it was over, that it hadn't worked out but that I had tried to make it work. They blamed my husband for a lot of what was going on, so they didn't talk in terms of izzat or sharam (shame) when I said I wanted to leave. We spoke about what was right and wrong and what he did was wrong. So no I wasn't worried about losing the family honour (Shaheen, London).

I never once felt that I was in some way losing the honour of the family, how absurd! Talk to him if you want to know about no honour, it's him and his family who have lost the family honour...if they ever had any (Fauzia, London).

My parents aren't educated and we're not middle-class....But we're Muslims and they understand right from wrong. I wanted their help to sort things out and in Islam they have a duty to support me in my time of need. We discussed things together and only when they came to the conclusion that things wouldn't change did I make up my mind that it was time to go (Zareena, Bradford).

These findings suggest that some women were able to challenge the notion of family honour, reconceptualize it's meaning, reject its imposition in determining their decision to leave and were able to transfer this 'responsibility' to their husbands. In this way family honour was characterized, as an obligation to fulfil social and cultural expectations during the process of marriage and, in some cases this shift challenges the potency of the argument that women are reluctant to leave, due to concerns of preserving the family honour. Yet the interview data also revealed the close connection between family intervention and the decision to reconcile. The failure of the family to resolve the marital difficulties was then, for some a source of regret.

Thus at one level the women engaged in complex negotiations with parents and wider family to either justify their decision to leave or to establish the grounds upon which divorce should be sought. In addition, the support generated by female members of the family was of particular importance and this for many women had been a significant factor in their decision to leave. In this way the women were able to create alliances with mothers and sisters, highlighting the importance of inter-woven solidarity between them and thus challenging the dynamics of patriarchal power inherent within the family (Bhopal 1997). Notwithstanding the obvious value of these relationships, at the same time this 'collective approach' reveals a number of ambiguities and contradictions, as this form of 'strategic essentialism' is imbued with possibilities and limitations. It is true that the women were able to gain support and strength but in doing so many reported they had to respond with an axiomatic acceptance of arranged marriages. Even though ostensibly opposed to re-marrying some women accepted a new

marriage to be arranged on their behalf by parents in exchange for exit out of the present marriage. In what at first seems like a new space of dialogue and autonomy in the family can in some cases rely on the traditional framework of power (Anthias 2002). For some therefore, the impact of family mediation was a distressing experience. Nabila complained that her parents had been unwilling to accept that her marriage was over and her subsequent refusal for family mediation was met with stern opposition. This had led to a deterioration of relations with her husband and family, culminating in her parents blaming her for the breakdown of the marriage. It has been simply assumed that this process takes place unhindered by any forms of pressure or coercion. Regrettably in this sample, pressure to return to the family home led to the increased risk of physical and emotional abuse for some women.

This form of family mediation is legitimated under the public/private distinction (see Roberts 1997). Eekelaar, describes this in terms of the relationship between social and legal norms, “there exists within society a network of social norms which is formally independent of the legal system, but which is in constant interaction with it. Formal law sometimes seeks to strengthen the social norms. Sometimes it allows them to serve its purposes without the necessity of direct intervention; sometimes it tries to weaken or destroy them and sometimes it withdraws from enforcement, not in an attempt to subvert them, but because countervailing values make conflicts better resolved outside the legal arena” (2000:8). Feminists have extensively critiqued this tenuous relationship between family and state intervention across a wide spectrum of disciplines (see for example O’Donovan 1985, Bunch 1995, Connors 1989, Corrin 1996, Dobash and Dobash 1980, Gelles 1997). In particular the criminalization of domestic violence has to some extent shaped the nature of state intervention over the past decade and these sites continue to be contested in debates recognising cultural autonomy for minority groups. Thornton also points out that unofficial family mediation ensures the state absolves responsibility. She explains, “In mediating interests which appear to be irreconcilable, the task of the liberal state is made easier if there are some areas conceptualized as ‘private’ with which it does not have to grapple” (1991:167).

Clearly, unofficial family mediation demonstrates the complicated ways in which power is expressed via the family idiom. There is little mention in writings of official family mediation of the ways in which families organise dispute resolution within the private sphere of the family and home and thus raising the question of why some women may choose not to opt for official mediation. The findings in this study suggest that the interconnected and mutual values of family honour and shame can impose upon some women to comply with this traditional mode of dispute resolution. Whereas other women embrace this form of family mediation, reformulate it to suit their needs and which then provides them with the 'space' upon which to challenge abusive relationships. Thus this process needs to be understood as ambiguous and in constant flux as families are structured by multiple differences with multiple experiences reflecting their different normative frameworks. Thus data analysis in this study reveals a plethora of experiences.

Yet it is precisely these divergent experiences that render proposals to develop family mediation to suit the specific needs of minority ethnic communities problematic (see Shah Kazemi 2000, 2001). There is an inherent conflict with recognizing identities as multiple and fluid and formulating social policy initiatives that are based upon specific cultural practices as cultural and religious practices are open to change, contestation and interpretation. At the very least we must ensure mechanisms are in place to ensure those who wish not to partake part in such processes are not compelled to do so. It is within this context that concerns have been raised about how such proposals can lead to delegating rights to communities in regulating family law matters, effectively a move towards some form of cultural autonomy. Maclean rightly questions, "What are the implications for family justice of this move towards private ordering? Is this form of 'privatization' safe?" (2001:137). Undoubtedly in this context formal law provides protection against abuse in the 'private' sphere in which this legal ordering operates. Maclean questions, "...is it dangerous to remove disputes from the legal system with the advantage of due process, plus protection of those at the wrong end of the far from level playing field, and visible negotiation and

settlement which takes place of not in court than in the shadow of the law?” (2001:136). We return to this issue later in the chapter.

5.4.5 Community Intervention

In this study, unofficial family mediation was also shaped by the involvement of local community members. Many of those involved comprised of family friends but interestingly data analysis also reveals the intervention of Imams, as particularly significant. With the perceived weakening of family ties parents in particular encouraged the intervention of Imams from local mosques to resolve the marital disputes. Once admitted into this process it is interesting to explore how they may influence the outcome. Furthermore this aspect of reconciliation reveals the changing and interconnected understandings of positioning and belonging of the women within local communities. Again as discussed in chapter 3 in order to analyse the experiences of the women in this sample it is important to avoid essentializing either community, culture or family. Retaining an understanding of identity, culture and religion as diverse and multiple enables us critically situate these experiences in relation to different positional conditions.

The decision to invest in community resources lay with parents, the wider family and the women themselves. In defining the problem via the local community and seeing solutions through various kinds of cultural and religious mechanisms some of the women were able to mitigate the effects of divorce for themselves and their families. Hence utilizing the local community eased the pressure and in some cases strengthened fragile relationships with local community members.

My dad is quite well known in the community and the community did know that if I came back there's a good reason for it so not really know. I mean people talk but you can't do anything about that (Fauzia, London).

When I came back everyone was looking at me thinking that well all of us go through hard times right but at the end of the day you could have tried a bit harder. The community were badmouthing me they were looking at me, look at me in a degrading way like I was second class basically. But I just said well accept it, I mean if I had let it get to me it would have mentally affected me (Zareena, Birmingham).

It really helped my parents that they were able to talk to their friends. I know they got a lot of support from them and that kind of eased the pressure of me (Nighat, London).

Well they went to see our Imam and explained everything to him, what I had been through and how my parents had tried to help, tried to talk to his family but were shoved away. So it really helped them to know that under Islam we had done nothing wrong, that it wasn't my fault or their fault and they had nothing to feel ashamed about (Shabana, London).

We were really surprised that we got so much support. It was good...good for my parents, its been harder for them cause they've had a lot to deal with...especially when no-one in our family has ever been divorced before (Parveen, Birmingham).

The significance of community involvement in the early stages of the marital dispute raises the question of whether these women were establishing “new more inclusive collective ethnic identifications” (Alexander 2000:144) and if so what these identifications were premised upon. The equation of community with terms such as ‘belonging’ and ‘dialogue’ reflects how the women were able to self-consciously reconceptualize constructions of community as fluid and changing. In reality they were self-consciously aware of belonging in the community as a contested position and were thus able to manipulate both its’ resources and at times side-step its obvious constraints. Both as Pakistani women and as Muslims the women in this sample were aware that their position had to be constituted and negotiated within their communities and families.

There's a huge sense of belonging within the community. I've grown up in the Muslim community and it's important for me to feel that I'm part of the community (Nadia, Birmingham).

If you had a love marriage and it failed you would have a divorce and then you would be likely to be rejected by the community. You would have nowhere to go (Mina, London).

I worked very hard at perfecting my community role whether that was as a daughter as a niece or as a wife or as a mother or as someone who did the ‘tabliq’ work or whatever it was. I did all of that because I knew how to do it cause someone before me had done it (Yasmin, London).

It took me a long time to get the strength to do what was right. My dad goes to the mosque a lot and he spoke to one of the maulvis there and he came back to me and said that only my husband could divorce me and that I should stay with him to make it work (Zareena, Bradford).

The community doesn't particularly care... it just fills up the gaps so as long as his seen in the mosque as long as his seen fairly respectability cause most

of the marriages are judged by how the women behave as well and how the children are so therefore we have this façade (Parveen, Birmingham).

It was difficult because my family used to say to me well you're away from home, you're away from the community so you don't have to listen to this but we do. I would say to my family ignore them but they can't because they live in the community and that's their life, that's their lifestyle. I felt as though people were judging me and my family. I felt really sad because my parent are basically good people. They're good Muslims that have never hurt anybody, they didn't deserve it. (Rabia, Birmingham).

Hence whilst the women speculated on precisely the role of the community it seemed many were simply reluctant to opt out or what commentators refer to as exercising the 'exit option' (Phillips 2003, Chambers 2002). The point, however, which seems to be crucial, is that the women were able to draw upon the community for support while also criticising its lack of resolve in challenging cultural practices deemed oppressive and 'Un-Islamic'. Thus for some women the community acted as a support mechanism, even if this meant they did not always agree with its position. Yet all the women were reticent in identifying themselves as 'outsiders' and participated in developing ways in which they could fulfil expectations of the community while the idea of 'community expectations' was also challenged and resisted in different ways.

5.4.6 The Intervention of Imams

Interview data reveals a protracted and ambivalent relationship between the women and Imams. On the one hand the Imams were deemed pivotal to the consultation process, negotiating the terms for reconciliation. But on the other hand there was also a deep anxiety attached to the nature of their intervention and this related to concerns over the pressure to reconcile and for them to accept the terms of the reconciliation negotiated on their behalf. For example 8 women talked in terms of 'persuasion' when discussing the reasons why Imams intervene in cases of marital conflict. Similarly, a further 5 women explained they were unable to be completely honest with the Imam as they had been appointed by family members, in most cases parents. As Shazia explained, "The role of the family particularly and the community at large is to make sure that you stay together". To this end she felt that although her opinion was taken into account

her viewpoint might not prevail because of her limited decision-making rights. In his research Bunt (1998) found that informal dispute resolution processes were largely based in mosques where the Imam played a critical role in the nature of the advice given. His findings reveal Imams to be 'conservative' in nature and encouraging Muslim parents to arrange 'quick' marriages for their daughters so as to maintain the stability and honour of the family and community.

In this study, not all the women were critical of the intervention of Imams. For Shabana, dispute resolution in the family and home, provided the space whereupon she was able to challenge parental pressure to reconcile. At the same time, she was coming to terms with the end of her marriage. She explained,

He was really good. I explained the situation to him and he told me that its not God's intention that you sit in that unhappiness, you need to have a decent husband and I don't think you'll find it in this relationship. It won't be any shame on you to leave and end it.

In this context she was able to exit the marriage without her family pointing the accusatory finger of blame towards her. Morally the women were also able to garner considerable support from Imams to convince parents that divorce was permissible in Islam. As Rabia explained,

My parents are strict Muslims...They thought he's a good and decent man so it was important for me to explain everything to him so that he could make my parents understand that it was ok to get divorced and also...you know how to deal with the community who would definitely be gossiping.

This approach echoes the stance of Fauzia who described the Imam as being able to successfully mediate between the two families in redistributing financial assets and differences relating to the return of the 'dowry'. On this occasion the Imam had travelled to Manchester to return monies acquired upon marriage. At the very least, this shows that some women in this sample were able to maintain their autonomy during this 'privatized' form of dispute resolution. Yet this intervention takes on various forms and as discussed earlier can in some cases lead to coercion to reconcile.

Because of the various ways in which the women are positioned in their families this reflects their relationship with the local communities. What the data analysis

highlights is how culture is socially constructed, contested and transformed (Griffiths 2001:119). So for example some women were very critical of community intervention and the relationship was clearly difficult and fraught yet in this specific context they were able engage with this process to support themselves and their families. In her work on Kwena women Griffiths (1997) points out that women engage in this process "...from an understanding of themselves as forming a part of the same society as that of Kwena men. Their primary aim is not to subvert or radically alter the premises of society but seek to transform its practices in a direction more responsive to their needs" (2001:119). As one interviewee put it, "Divorce brings shame onto the family and my parents would have to bear the brunt of that".

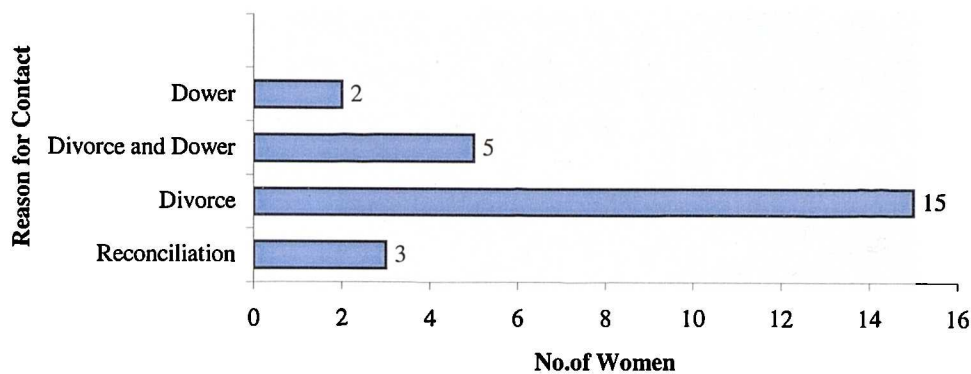
5.5 Contact with Shariah Councils

With the exception of one interviewee all the women had contacted a Shariah Council voluntarily, notwithstanding guidance from family, friends and the local Imam. In most cases initial contact had been made via telephone and this was followed up with an application form citing the reasons for seeking a religious dissolution of marriage. The most obvious question for us concerns the autonomy and independence of the women during this process. In particular we are interested in assessing the effectiveness of mediation and evaluating the response of the women towards reconciliation practices. Existing literature does not present consistent evidence to support the view that women are marginalised and denied equal bargaining power during official mediation processes (Davis and Roberts 1988). On the other hand there is evidence, which runs flatly counter to this view and reveals a deep anxiety of all women at the prospect at and during official and unofficial mediation (Bottomley 1983, Roberts 1997). As we have seen in chapter 4, reconciliation remains a central tenant to the process of dispute resolution within Shariah Councils and the experiences of women within minority ethnic communities must also be understood in relation to this unique form of privatized dispute resolution. It seems that wider issues concerning the rights, autonomy and the voice of women appear to have been lost in existing literature.

5.5.1 Reasons for Contact

As can be seen from figure 5.5 below, the reasons for contacting a Shariah Council varied but for most women it was to obtain a religious divorce. Of the sample only 3 women elicited the help of a Shariah Council in the hope of reconciling with their husbands. However we should not lose sight of the fact that the women were all encouraged to participate in unofficial family mediation prior to obtaining a divorce certificate.

Figure 5.5 Reasons for Contact with Shariah Council



As discussed in the above section, prior to the involvement of a Shariah Council there would appear to be a number of different parties involved in attempting to reconcile the parties. In particular the intervention of family members and the Imam would seem to suggest that the decision of whether to contact a Shariah Council and if so which one, may not have been entirely the women's own. All the respondents in the research agreed that they had little if any knowledge of the existence of Shariah Councils prior to seeking a religious divorce. In fact often it was family members who had made initial contact with the Shariah Council providing an address or telephone number. One interviewee explained,

The family got me the address for the Shariah Council. I didn't know the process, I had an aunt who is like one of the eldest in the family and takes care of these things. She said to me I had to write to them and tell them my case and ask for a *khula* (Sameena, Birmingham).

Despite these initial reservations the women were surprised to discover that under Islamic law they did have the right to instigate divorce. One interviewee recalled,

I remember saying to my uncle why didn't you ever tell me about this before and he said well you know...it wasn't really important that a woman can divorce her husband in the first place. But for me it was (Yasmin, London).

Thus aside from the local mosque acting as a place for spiritual guidance they relied on elder members of the family or friends for information on the services available within the local community.

5.5 2 Initial Contact

Initial contact with a Shariah Council had been made via telephone and/or letter. Of the sample of women, 18 had made a telephone inquiry, 4 had written to the Shariah Council and three women approached the organisation in person. As discussed in the previous chapter, at this stage a successful outcome for the scholars was to dissuade the women from going ahead with the religious divorce. So how did the women respond to the initial advice given to them? One might, for example, anticipate a tension between the objectives of the applicant in contrast to the outcome sought by religious scholars and family members. Indeed differences emerged albeit more subtle than envisaged and often dependant upon which Shariah Councils the women had contacted. Thus for some women the initial advice given was described as helpful and sympathetic which enabled them to pursue the divorce whilst others were critical of the initial perception formed by the scholars at these bodies. Sameena explained,

I rang the number of this Shariah Council that our Maulvi had given to us. I told them what had happened to me and that I wanted to divorce my husband but that he wasn't happy with it and wouldn't agree to it. They were very helpful, they explained that divorce was wrong but that in Islam in some circumstances it was allowed...they took my address and contact details and told me they would send me some forms to fill in and then decide whether it would be possible.

Likewise, 13 women reported that they were pleased with the initial advice as it had helped to convince their parents that divorce was permissible under Islam and their husband's consent was not required.

Unsurprisingly perhaps, some women were critical about the initial advice given to them. For example 4 women reported that after the initial contact they had been left with the impression that in some way they were at fault for the

breakdown of marriage, even when they had failed to disclose the facts of the case. Similarly Yasmin stated that at one Shariah Council she was informed that “they did not represent bad girls”. As discussed in chapter 4 fieldwork data suggests that some Shariah Councils adopt a conservative, male centred approach to dispute resolution while others seek to deliver a more ‘woman-centred approach’. Unwilling to accept this some women were left with little choice but to contact a different Shariah council, one which they perceived as more flexible and sympathetic to their needs. Demonstrating therefore, their potential to challenge conservative interpretations of Islam, which may bear little relevance to their own identifications as British Muslim women in Britain.

5.6 Obtaining a Muslim Divorce: The Process

The process of obtaining a Muslim divorce certificate was almost invariably described as complex, protracted and complicated. More specifically, it was compounded by the reluctance of some religious scholars to accept the applicants’ version of events and their insistence upon reconciling the parties. It is clear from the analysis in chapter 4 that compliance to mediation and reconciliation within Shariah Councils can render some women vulnerable to physical and emotional abuse. If, however, as Shah-Kazemi (2001) argues, women choose to participate in such privatized forms of unofficial dispute resolution then it becomes crucial to analyse this process from the perspective of women themselves. We now draw upon interview data to explore this in more depth.

5.6.1 The Investigation

In the previous chapter we found that the main objective of the investigation process is to collate all the information relating to the validity of the marriage from both parties in order to establish and verify the grounds for divorce. This is done in order to attempt to reconcile the parties or if this fails, to determine the type of divorce certificate to be issued. We also found that the applicants cannot assume that a divorce certificate will be granted unconditionally, and on occasions the Shariah Councils have rejected applications altogether.

From the experiences of the women in this sample, it becomes clear that the lengthy investigation process can cause confusion and resentment. As discussed in chapter 4 this includes information and an application form. Fauzia explained,

They sent me some forms to fill in. They wanted to have copies of my marriage certificate my nikah certificate, copies of petition and a copy of the decree absolute and a cheque for £50. I also had to fill in some of their forms which stated why I wanted to have a divorce, what were my reasons.

In cases where documents such as proof of marriage (a copy of the nikah certificate or civil marriage) were unavailable the women were required to provide an affidavit to confirm that the marriage had taken place. Notably most women did not have a copy of the nikah certificate and in these cases they did provide an affidavit. Unsurprisingly perhaps, what we ascertain quickly from the interview data is the desire of all the women to complete the process with minimal disruption and conflict. Despite this, a total of 23 women complained of the process being inchoate, time-consuming and at odds with Shariah Council claims of being sympathetic to needs of women.

They heard his side of the story and then I heard nothing, nothing months and months passed. And I wrote them reminders but nothing (Sadia, Birmingham)

I got a letter back from them saying they were looking into the case and in the meantime I think they had met with my husband and heard his side of the story. But I'm not sure everytime I asked what was going on I never got an answer (Rabia, Birmingham).

At the same time the women reported understanding the need to verify their version of events according to Islamic law. Even so, the popular view was that the Shariah Councils relied too heavily on their husband's willingness to participate in the process when it was quite obvious to them that some husbands were deliberately creating obstacles and adopting 'delaying tactics' to delay the divorce certificate from being issued.

It's not as though its my fault. I know he's making it harder than it has to be. Of course he is, he just didn't want me to get my Muslim divorce and now that he knows I'll get it without him he's just trying to make things more difficult (Hina, London).

In this case as with several others her husband had refused to communicate with the Shariah Council consequently delaying the outcome of the application by

several months. As discussed in chapter 4, the scholars conduct the investigation in this way so as not only to ensure that it is consistent with the requirements of Islamic law but also to ensure that the disputant is able to contribute to what was essentially a form of dispute resolution. Another reason for the delay in the investigation process included awaiting the outcome of a civil dissolution of marriage (with some cases this led to delays of up to a year). Another interviewee complained that they were not taking her case seriously enough.

I had no sense of what was happening with the case, whether they that meant they were proceeding with it or not then one day I phoned them and I spoke to someone I don't know who it was and they said that they were really not happy with my case because obviously I had behaved very badly, that they weren't there to represent bad women and they were only there to represent good women (Humeira, London).

Appalled with this response she eventually asked her aunt to intervene.

My aunt was furious and she told them she knew someone on the committee, she then spoke to someone more senior, she told this guy that I'm going to be writing to so and so and speaking to so and so and miraculously they find my file and said oh we think there's been a misunderstanding. We had seen this case and we had agreed that yeah obviously she should be divorced and its all been sorted and you have our blessing and agreement that this has happened. So it all got sorted in a matter of days with a phone call and I got a letter saying it was all done.

Clearly, the important issues here relate to the lengthy bureaucratic approach adopted by the Shariah Councils, leading to long delays in issuing divorce certificates. As an illustration of this point it was interesting to note that a number of women remained sceptical of the motives of the Shariah Council at this stage of the process, summed up by one interviewee,

I think they were kind of holding out...hoping that we'd get together and sort things out (Rubina, Birmingham).

As discussed in chapter 4 the process of mediation and reconciliation is central to the process of dispute resolution at Shariah Councils. We now explore the experiences of the women in this sample.

5.6.2 Mediation and Reconciliation

As discussed earlier, under present family law proposals, there has been much debate on the "delegalized family obligations" that has led to "a retreat from legal

intervention into private family arrangements” (Maclean 1997: 156). One of the key objectives is the move towards resolving family disputes away from the public sphere and towards this form of ‘private ordering’. In particular, the ways in which Shariah Councils have occupied this space reflects concerns of ‘justice’ being administered in the private and under the ‘shadow of law’. Thus under the current climate whereby individuals are encouraged towards informal settlements achieved through negotiation, conciliation or mediation we explore these sites of ‘privatized dispute resolution’ from the perspective of the women. Before we do so it is useful to outline some of the findings in chapter 4, as data analysis suggests that unofficial mediation and reconciliation practices are far more complex than previously envisaged. Notwithstanding the difference in approach between the councils we see that an important function of the Shariah Council is to reconcile the parties. This is principally achieved through establishing a dialogue with the female applicant and her husband. It is primarily via this dialogic relationship that we see evidence of some women being put at risk of violence and abuse, from their estranged husbands. This contentious approach continues with the intervention of some solicitors contacting Shariah Councils to negotiate more favourable terms on behalf of their male clients, in return for a Talaq. In most cases these negotiations involve securing increased access to children even in cases where an injunction has been issued to prevent further access. Furthermore under the rubric of ‘diversity’ one Shariah Council reported social workers attending reconciliation sessions to understand how “Islam works” in cases where access to children is contested.

Therein lie at least, the seeds of the argument that the autonomy of the women using these services may be undermined or curtailed to some degree. Closely connected to these debates, are calls for the development of mediation and reconciliation services suited specifically to cater to the needs of religious minority communities. As we shall see, the wide-ranging disparities in approach to unofficial mediation and reconciliation may render this approach problematic. These findings are not necessarily inconsistent with existing research (see Shah-Kazemi 2001:55) but it is not of course the same as arguing that Shariah councils successfully avoid any conflict with civil-law mechanisms.

Interview data with this sample of women, confirms the findings in chapter 4 that the significance of mediation and reconciliation becomes pivotal during the investigation process. Similarly, it illustrates the centrality of gender relations in the process of dispute resolution but also that this site is negotiated, contested, challenged and resisted by the women. For example through this process some women were able to explore the relationship between power/knowledge (Erasmus 2001:194) where cultural practices such as forced marriage were challenged as “Un-Islamic” and antithetical to the values of “being a Muslim”.

A number of women expressed ambivalence about the reconciliation sessions and in fact opinions ranged from indifference, outrage to one of genuine commitment.

The extracts from interview data illustrate this varied experience:

They wanted me to meet with my husband. In fact they said that I couldn't have a divorce unless we both met with the Imam. But it wasn't as bad as I thought. My husband took it very seriously...what the Imam was saying. I think he needed a religious person to explain to him where he was going wrong and why I was leaving him (Sabia, London)

I needed to explore the possibility of us getting back together from an Islamic perspective. I'm a Muslim so it helps if you can get advice and assistance from another Muslim. I think a Muslim woman would have been able to understand where I was coming from (Humeira, London).

Well at the end of the day we had the responsibility to make it work so I can't blame those who were trying to help us. Besides by that stage it was too late to get back together we'd been through too much and our families weren't even speaking to each other (Noreen, Birmingham).

I agreed to three sessions where basically the Imam wanted us to discuss everything, just so we understood what divorce meant and also I think to try and get us back together again. I was ok with that...only I felt as though he wasn't really listening to what I had to say. My husband spoke and then the Imam spoke to me, you know explained to me what I should be doing as a Muslim wife (Parveen, Birmingham).

Yet as confirmed in chapter 4, this process takes place in a space that is preoccupied with reconciling the parties, male dominated and often imbued with conservative interpretations regarding the position of women in Islam. Interview data reveals that this can create discomfort and unease for some women who were regarded as the potentially dangerous participant in the process. Here the central

focus of contention is the lack of opportunity the women may have participating in the process. One interviewee explained, “it was weird but it felt as though I was the one being told off and when I tried to put across what I thought was wrong...its as though he didn’t want to hear it”.

In this way her position and participation in the process was predominantly characterized in relation to her gender. This was confirmed by other interviews and is a crucial observation for our understanding of how the reconciliation sessions can marginalize women. Again the extracts below illustrate this:

No I didn’t find it was helpful at all. Just the way it was set-up meant that things weren’t going to change (Shabana, London).

They were right from the beginning on his side they didn’t even listen to what I was saying. I mean I do read books. I don’t go into it that much but I do know the basics you know what a husband as to do. I was really disappointed with the mulana’s because he just wouldn’t blame my ex-husband (Mina, London).

To be honest I didn’t understand the point of it. I told the Sheikh that I didn’t want to be in the same room as my husband, that he might lash out cause that’s what he’s like, he’s unpredictable. But he was insistent, that we had to both be in the same room, that that’s how it’s done in Islam (Raheela, London).

Perhaps a more troubling finding related to how 10 women reported that they were coaxed into reconciliation sessions with their husbands even though they were reluctant to do so. More worrying still 4 of these women reported that they had existing injunctions issued against their husbands on the grounds of violence. Again an extract of interviews reveals how potentially dangerous this maybe for women and illustrates how husbands may use this opportunity to negotiate access to children and in some cases financial settlements, which are in effect being discussed under the shadow of law.

I told him that I left him because he was violent but he started saying things like oh how violent was that because in Islam a man is allowed to beat his wife! I mean I was so shocked. He said it depends on whether he really hurt me! I was really shocked because I thought he was there to understand but he was trying to make me admit that somehow I had done wrong (Shazia, London).

I was very upset, in tears, holding my friends hand. It was awful but apparently that’s what it says in Islam, the husband and wife have to meet

like this. I didn't want to but I didn't really have a choice. As a Muslim I wanted to do the right thing, in God's eyes (Farah, London).

Feminist scholars have warned of the dangers of resolving marital disputes away from protection of formal law. This may include situations where "cultural norms deny women decision-making authority" (Roberts 1997:129) and where the mediator is not neutral and provides the "normative framework for discussion" (Roberts 1983: 549) which can transform the nature of the discussion and curtail the autonomy of the disputant. Brunch raises concerns that negotiations occur in private "without the presence of partisan lawyers and without access to appeal (Brunch 1988:120). Numerous studies point to the fact that official mediation places women in a weak bargaining position encouraged to accept a settlement considerably less than had they gone through adversarial process. In their study of mediation and divorce Greatbach and Dingwall found that mediators do not act in a neutral way and enter the mediation process guiding the participants to particular outcomes (1993:208). There is a strong imbalance of power and the parties are not equal and do not respond in a fair way. Furthermore Bottomley reminds us that conciliation "has not arisen in a vacuum and is not practised in one" and we need to explore the dynamics of power, which underpin this process (1984: 45).

Hence mediation promotes a particular familial ideology that is based upon social control and patriarchal norms and values. In operation it subliminally covertly forms of power and coercion. In this context formal law provides protection against abuse in the private sphere. In response to the move towards private legal ordering critics argue mediation fails to deliver on the key issue of 'justice'.

On a practical level the development of mediation practices has been led by the Solicitors Family Law Association. The issue of mediation was also at the forefront of the government White paper in its attempt to challenge the traditional linkage between lawyers, courts and divorce based on the idea that divorce should become a non- adversarial, non- state procedure. The White Paper was primarily concerned about cost and whether the courts and lawyers are the most appropriate forums for resolving family issues instead of how mediation can play a most

effective role. The issue of access to justice is central to debates on mediation-justice must be achieved through both the process and outcome. It was therefore concerned about results rather than justice. Diduck and Kaganas (2000) point out that in fact there are practical and financial considerations such as the need to reduce soaring court costs, which must be taken into account.¹³⁶

Of the sample, one interviewee opted for counselling sessions with a Shariah Councils in the hope of reconciling with their husbands. The Shariah Council in question did not form part of this study.

5.6.3 Case A

A is 34-years old from Birmingham and has two young children, aged 2 and 3 years old. In 1997 her parents arranged her marriage to S, whom she later married that year. The marriage had not been registered on his insistence and in 2002 he left the marital home. Up until the present time he has refused to grant A, a Muslim divorce which she believes is an indication of his willingness to reconcile. If not, then she seeks a divorce. She has gained permission from the Shariah Council for one counselling session to be observed, but on the strict undertaking that the Shariah Council remains anonymous and is not used as part of the study.¹³⁷ Here we explore the underlying relations of power in a session prior to where both parties will attend.

The session opens with the counsellor informing A that her husband has been in touch and wishes to reconcile and will attend the next session. Significantly, the session begins with Islam presented to the client as essentialist, clearly bounded and internally homogenous, with little room for challenging the dominant discourse presented by the mediator. Here diversity is presented as a problem. Interestingly the client is unwilling to accept the framework on which the discussion is based, shifting attention instead from a general discussion on Islam

¹³⁶ Maclean outlines two reasons as to why this may be a dangerous precedent. Firstly, it is not only the interests of the divorcing parties that must be addressed but also the needs of the child and secondly we must consider the financial implications for the weaker financial parties- often the women (1997:140).

¹³⁷ The religious scholar has not gained the consent of the committee which makes up the council and is therefore reluctant for the council being used as part of the study.

to focussing on the practical realities of her life. Inspired by her readings on women and Islam she is able to raise new questions and transcend certain impasses.

Religious Scholar: In Islam it is a wife's duty to listen carefully to the needs of her husband, she must respect him and not argue with him...

Client: I understand that but he has to make it work too. He just left, left his children...

Religious Scholar: Well I've spoken to him on the telephone and he tells me a different story, that you would taunt him and belittle him. In Islam women must obey their husbands, the relationship must be based on love, understanding and respect...

Client: He has walked out and just left us because he couldn't cope? How am I to cope by myself?

Religious Scholar: A woman must support her husband and...

Client: I did support him and I understand there were problems but we have to sort them out together. I've been reading books on Islam and a husband also has duties to his wife.

The mediator then subtly alters the tension between the traditional discourse on the position of women in Islam to the demands of the present. Rather than focussing on the contradictions presented in the lifestyle choice of the client he then attempts to negotiate her experience and expectations and still maintain a consistent attitude on attempting to resolve the marital dispute from an Islamic perspective. Moreover, in the hope of adopting a sympathetic approach the mediator presents this site as a forum for empowering Muslim women and ultimately advising a more favourable outcome. A striking feature in the cases is the engagement of the female client in the process.

However, as discussed above, during the investigation, all the women had participated in some form of mediation and reconciliation. Hence there would appear to be no clear and consistent approach to reconciliation with Shariah Councils. For example some women reported that mediation involved no discussion of financial matters or issues of custody and access, whilst other councils were keen to intervene and reconcile parties and if not then contribute to other family law matters such as custody and access to children.

5.6.4 Retrieving the Dower

In section 5.2.5 we discussed the centrality of the dower in the Nikah contract. In this study it became apparent that for various reasons most women had not attached any importance to the dower. Upon breakdown of marriage and in complicated ways this situation had radically changed. It prompted a number of the women to concentrate their efforts in retrieving the dower for two reasons. Firstly for women whose marriages had not been registered according to civil law, the importance of this approach lay in the belief that they were entitled to some kind of financial redress upon breakdown of marriage. Secondly where the Nikah contract had been a focal point of negotiations prior to marriage, the women concentrated their efforts on keeping any financial monies or goods received upon marriage while also seeking to obtain a Muslim divorce. In this way the Shariah Councils opened avenues for strategic action within the contested space of 'personal law' and in so doing these women transformed this 'space' of reconciliation into a site of mediation and negotiations for settlement of financial matters.

However given the fact that the terms dower and dowry were used interchangeably it often meant that such demands were reframed within the context of culture rather than the application of religious personal law. And, given the fact that this site embodies the intermeshing of cultural and religious practices it is useful to note that when some women were informed by religious scholars that upon receiving the Muslim divorce, the khula, they would be required to return the 'dower' to their husbands they proceeded to then base their claims towards those of culture and identity rather than religion. For example the terms 'haq mehr', jahez' and 'dowry' were articulated to invoke a cultural component of Muslim marriage. To this end for some women invoking cultural or religious practices became a matter of choice warranted by the unfair way they had been treated by husbands during their marriage. And, as discussed in section 5.2.5 most women expressed misgivings about the possibility of retrieving the 'haqq mehr' while questioning the motives of their husbands.

By contrast the religious scholars expressed concern with this quite obvious conflation of religious principles with cultural practice. Interviews revealed that

they believed the onus was on Muslim women to educate themselves on the principles of Muslim marriage and divorce. Mohammed Raza at the MLSC explained, “Muslim women are simply not aware of their rights at marriage, have little knowledge or understanding of dower and subsequently fail to meet their demands upon breakdown of marriage”. To remedy this situation the MLSC propose the introduction of a marriage contract agreed prior to the marriage and which stipulates the terms of both marriage and divorce. Furthermore the MLSC believe that to ensure sufficient understanding of the requirements of dower, women must not only be party to such discussions but also demand a voice and influence in the process as a whole. In theory this development not only ensures women are given ‘legal protection’ but in doing so they gain greater control over matters concerning divorce and separation.

For these reasons it would appear that the women in this sample, support the introduction of a marriage contract. Their response to the proposed duty on all parties to negotiate terms prior to marriage suggests that at the very least they demand autonomy and respect in this process of decision-making. One interviewee explained,

I wasn’t aware that I could demand my rights when I got married. I didn’t even know that if the marriage broke down and it wasn’t my fault I could demand maintenance under Islamic law. I don’t understand that has Muslim women we’re not taught this, why not? We didn’t register the marriage and when he walked away I was left with nothing (Salma, London).

Therein lies the argument as to why some women were more concerned about the recognition of Muslim family law in Britain than others. In sum those women whose marriages had not been registered faced greater obstacles for redress under both English and Islamic law. Subsequently they were particularly aggrieved by the circumstances in which they found themselves and used this situation to legitimise arguments for the recognition of Muslim family law in Britain. Of the 15 women who had not registered their marriages, a total of 12 women had contacted a solicitor to clarify their position relating to the validity of the nikah ceremony and the possibility of maintenance. Of this group one woman was involved in litigation suing her husbands under contract law to claim the dower.

5.6.5 Type of Divorce Certificate Obtained

In this sample, a third of the women were awaiting a decision on the outcome of their divorce application while the majority who contacted a Shariah Council for a divorce certificate had successfully obtained the khula. The women in the former category were more likely to be critical of Shariah Councils primarily because of the lengthy delays in the process exacerbated by husbands deliberately placing obstacles in order to prevent the divorce certificate from being issued. It was notable that those women who had applied for a divorce at more established Shariah Councils such as the BSC, ISC or MLSC, were less critical than those who had gone to small Shariah Councils based at local mosques. One interviewee explained,

When I first tried to find out about getting a Muslim divorce it was awful, I went to 6 different mosques and they all told me something different. Some said not it just wasn't possible that I had to try and make my marriage work, you know divorce is wrong in Islam. Others explained that it was possible but I had to give back all my dowry. It was so confusing I just didn't know what to think. But then someone told me about Dr. Saeeda they had seen a TV programme on her and what she does and when I went to see her it began to make a lot more sense (Farhana, Birmingham).

For the majority of women who had obtained a divorce certificate it was the khula. As discussed earlier a key condition with this type of divorce is for the wife to forego her dower. And, while in practical terms there were slight variations in the amount of dower stipulated in the Nikah contract two particular criticisms related to this type of divorce being issued. Firstly the women were financially disadvantaged in having to return the dower and dowry when they passionately believed that they had not been at fault for the breakdown of the marriage. Given the deliberate obstacles placed by husbands to prevent any kind of divorce being issued (by continually challenging the evidence put forward by the applicant) the second criticism related to religious scholars failing to challenge their husbands behaviour and too readily resorting to issuing the khula.

Just the fact that I'm the one who has instigated the legal proceedings that goes against me even though its not my fault. Even though they gave my husband the opportunity to divorce me and he didn't meant that he was holding me in a kind of 'limping marriage' being a twilight zone of being neither here nor there. Which I believe was a deliberate ploy (Rubina, Birmingham).

Men are keen in blackmailing their wives for divorce you know as long as you give up the jewellery and return the mehr I will give you a divorce. And this is what happened with me, this is what my husband said that if I returned all of those wedding gifts he would give me a divorce and I refused (Fauzia, London).

In the majority of cases the women had been asked to partake in negotiations at the Shariah Council to determine the amount of dower and dowry to be returned. The first observation to make of this outcome is the conflation between the dower and dowry. It seems that in most cases because the dower only reflected the nominal sum stipulated on the nikah contract (the average being £100) this was consequently largely ignored and, instead the basis for negotiations moved towards the dowry which involved much larger sums of money, including clothing and jewellery. Thus the intermeshing of cultural and religious practices condoned by the religious scholars was met with considerable hostility from the women. Sadia exclaimed, "I couldn't understand their decision, it wasn't my fault but in effect I was having to pay him to divorce me! That's not right." Analysis of case-files in chapter 4 confirms this.

This outcome was accepted by the religious scholars as being unsatisfactory but was justified on the grounds that religious practices had to be reformulated to meet the needs of local Muslim communities and often this meant taking into account traditional cultural practices. Dr. Suhaib Hasan at ISC explained, "we do recognize that some women are reluctant to give up their dower and in some cases the dowry, but this is a precarious situation and we have to think of the welfare of all the parties involved. You see if we keep the proceedings dragging on it affects all the parties, including the children so its best to sort things out as quickly and easily as possible. In cases where we feel the husband is not at fault then the applicant must decide if she wants the khula and under Islamic law she has every right to do so".

5.7 Interaction with State Law

Earlier we drew attention to the fact that of the sample, only 10 women had registered their marriages according to civil law and had also obtained the nikah contract. For this group of women there was the added dimension of obtaining a

civil divorce. And, as discussed in chapter 4 religious scholars often demand that where required to do so applicants obtain a civil divorce prior to an application for a religious divorce is considered, in an attempt to avoid a conflicts of law scenario (see also Shah-Kazemi 2001). This process raises an interesting set of questions relating to the ways in which the law defines religious personal laws and the ways in which such 'legal processes' share a similar set of beliefs, ideas and approaches to the dissolution of marriage. For the purposes of this study however, we are interested with the second category of women in the sample, those whose marriages had not been registered according to civil law. It is clear from interview data that the emphasis upon 'justice' propelled a number of women to seek state and community intervention to clarify the validity of their marriage certificates. In particular the appropriation of solicitors dramatically introduced a new social and legal space to deal with the complexities of the situation the women confronted. As discussed in chapter 1, Moore (1978) refers to these different spaces as 'social fields' which meet, clash and grapple with each other. In this case the use of solicitors was intended to increase the protection of the women by the law and as stated above, to provide 'justice' in terms of financial redress. Thus this social field is constituted by several competing 'cultural logics' rooted in particular structures of power (Moore 1978).

In practice the use of solicitors was problematic, difficult and at times antagonistic for both parties. In her study Shah-Kazemi, found that solicitors often dispensed with erroneous legal advice as they were not aware of the validity of Islamic marriages and therefore misunderstood at what instances a civil law divorce was required (2001:53). This was confirmed by findings in this study. Moreover, the capacity of solicitors to advise and represent the women was undermined by the fact that they had little understanding on the reasons *why* a Muslim woman should choose to partake in the process of religious marriage and divorce.

The reasons for contacting a solicitor were three-fold: to clarify the validity of a religious marriage conducted in an unlicensed building in England; to determine the validity of a religious marriage conducted overseas (in this case Pakistan) and to think of strategies and avenues on the possibility of claiming back the dower

under contract law. In each case the interviewee had contacted a local solicitor specializing in family law matters. Yet in each case the interviewee had been left disappointed with the advice given. Thus complaints ranged from inadequate legal advice that drew upon racist stereotypes of Muslim women as passive and disempowered to a complete lack of understanding and empathy for their situations. Extracts from interview data reveal an interesting insight into the experiences of the women and perhaps more importantly invites attention to the inadequate legal advice from solicitors.

I was very disappointed with my solicitor because I rang him time and time again but he just couldn't understand the issues in my case. He just told me my marriage was valid when it wasn't so he obviously didn't know the law himself (Salma, London).

I said to my solicitor I want to be paid back penny that they've done to me and she said yeah fair enough you do have a case. I've spent a year in this case and I've got nothing out of it. At the beginning she said everything was ok and then a couple of months later she writes to me and says well I'm sorry we're going to have to take the divorce proceedings out of the court because its not recognised only some courts recognise islamic marriages not all the courts recognise them. So I turned around and said well why did you say to me they were recognised this was the only reason I took the case forward. And she said well I have dealt with this case before I have had a lady who has been through the same thing as you and her marriage was recognised in the courts so I thought that your case was the same thing but when we took it into court they said no its not recognized (Zareena, Bradford).

I don't think its fair that I should have to pay my solicitor to have to learn about my religion and its doctrines on divorce. I don't think its fair that I should have to pay the extra money to him so that he reads something in order to understand where I'm coming from and I don't think I should be obliged to go to a Muslim solicitor and that's one of the reasons why I went to an English one (Fauzia, London).

Why should I have to pay for solicitors who aren't even able to help me? I had to do all the chasing up, the reading and discussing with my solicitors what would be the best options. I had to do the work they couldn't do all because they just didn't know (Parveen, Birmingham).

I was really upset and I went to see one of the senior partners and I told her that I was really upset because he had given me the wrong advice. Then he eventually called and I said look at the end of the day I came to you for advice I made a lot of decisions based on what you said. Had I known that my marriage was not valid I would not have made a fool out of myself like doing a petition and all that against him. I even had to pay for it all (Nigaht, London).

What they were basically trying to say is its in your community to sort this mess out you know its nothing to do with them. Well as a Muslim woman I was quite offended with the way that these solicitors were basically badmouthing our religion. And I felt as though they were laughing at my expense which I think is wrong (Shaheen, London).

Well what they were basically saying was that if you're not going to learn to stand up for yourself then what do you expect. I was like I do stand up for myself and it was my ex-husband that gave me the problems and I did it the way I did out of respect for my parents but you know he should try to understand but basically he just did not want to know (Farhana, Birmingham).

Such experiences had left the women feeling both angry and vulnerable. Furthermore interviews with two solicitors in Bradford revealed the level of confusion among some solicitors, where in some cases petitions for divorce were being lodged where no valid marriage had taken place. One solicitor explained, "with the growing Pakistani Muslim community in Bradford, we do get a fair amount of cases when issues like this come up. I'm dealing with one at the moment and I know solicitors could do with some training so that clients aren't put in difficult situations...situations that I understand can be costly." (See Appendix 5).¹³⁸ In terms of utilizing state law to claim the dower it is beyond the remit of this study to explore these issues in any depth however one interviewee was currently in the process suing her husband under contract law to retrieve the dower. She explained, "I have been told that the chances of me winning the full amount are limited."

It is also useful to point out that 4 women were also critical of Imams for failing to register mosques as licensed buildings. One interviewee had begun a 'campaign' in Bradford to make sure mosques and Imams are taking the issue seriously. Salma explained,

If our mosque was registered than our marriage would have been recognised but our mosque wasn't registered so at the end of the day I think the muslim leaders can do a little bit more. If they got registered then this wouldn't be an issue it would be counted like an English wedding.

¹³⁸ For more discussion on training the judiciary see Judicial Studies Board, Handbook on Ethnic Minority Affairs (JSB, London 2002-2003).

Putting aside the issue of inadequate legal advice, it becomes clear from interview data that most women were able to manoeuvre effectively between the different legal processes and contested spaces in operation. However there are strong grounds to suggest that issues of custody and contact of children are in some cases being discussed and negotiated at this juncture- a space where state law interacts with personal law. In this way the Shariah Council becomes the setting in which traditional religious norms and values may be reinforced and which at the very least undermine the welfare and autonomy of these women. Of the sample 5 women reported an offer from the Shariah Council to intervene in contested cases of access to children and, 3 of these interviewees had also been sent letters from the Shariah Council promoting its role as mediating in civil law dispute. Some of the women found this incredulous and each had rejected the offer and seemed aware of the dangers of negotiating family law matters (such as access to children) in this arena.

No it never crossed my mind because if I had done that I still wouldn't have any rights with them to do stuff like that (custody). I don't know first of all, what their system is and secondly whether I would have had faith in their system. Eleven men sit around and judge whether I'm a fit mother or not...you know as much as I may complain about 2 women social workers sitting around and making un-PC, inappropriate decisions at the end of the day I could work with that system because I could also contribute (Sameena, Birmingham).

I don't think they should be sending me letters saying we need to talk about house and the possessions and the child, when actually they have no legal rights to do any of those things. I don't think they're qualified lawyers so I don't think they know what they're talking about and I don't think any of those people employed at the Shariah councils have any of those secular legal roles either (Yasmin, London).

Thus for these women without the frame of state law, safety disappears. This is not of course to deny no criticism of the official process of dispute resolution. Fauzia explained that her husband "...was going to go through the courts to give me a hard time and he did that for many years." The extent to which the official process is to some extent imposed upon them recasts the perception that the law provides equal protection and entitlements to all its citizens (Santos 1987). And, in this sample 6 women complained about the failure of state law recognizing religious differences.

I really resented all that official intervention because it was about judging me. None of them understood where I was coming from. They couldn't understand why I wanted a religious divorce (Noreen, Birmingham).

I don't necessarily think the British system, the official system is any better and I think they get very confused with trying to be PC and trying to do the right thing and knowing what the cultural etiquette's are and respecting them. There's a real fine line between trying to do the right things and actually doing the right thing and they sometimes mess up. I found that whole set-up really disturbing (Hina, London).

It would then appear that, despite an apparently more positive image of official law the women were critical of its ability to make reasoned decisions based upon their unique experiences. For Hina the problem was that the official law had no insight into what cultural and religious difference actually meant in the lives of Muslims.

If they understood where I was coming from I think I would have had more confidence in it. We do things differently because we are different in some ways.

Not surprisingly some of women were in favour of the formal recognition of the *nikah* under English law. But even here, such understandings were constantly being renegotiated. For example while some women favoured the recognition of Muslim marriage under English law, they opposed the complete transfer of power to Shariah Councils. Thus in this context where the women were obviously seeking different avenues for remedies the justifications for the recognition of Muslim family law in Britain must be understood in this context. Furthermore because the terms of the debate have been framed around constructions of 'Muslim identity' we learn very little about the power dynamics that underpin the reasons of why women may support a strictly legal pluralist arrangement.

5.8 Formalising Shariah Councils

In chapter 3, we outlined demands by some Muslim leaders for the establishment of a single Shariah Council with state recognition, to legitimize the group's autonomy in matters of family law. The growth of these demands attests to increasing attempts by some individuals and groups to unify the 'Muslim community'. In this context communal autonomy takes the form of decision-making power, which maintains the group's membership boundaries vis-à-vis the

larger society. An integral aspect to this project is the preservation of Muslim identity and it is the unique position of women within these groups as “cultural conduits” that gives rise to the problem of gender-biased norms and practices which often subordinate women (Shachar 2001:50). As discussed in chapter 1 for liberal feminists this raises a clash of values scenario which undermines the liberal principles of justice, common citizenship and equality before the law. Okin questions, “What should be done when the claims of minority cultures or religions clash with the norm of gender equality that is at least formally endorsed by liberal states (however much they continue to violate it in their practices)” (1987). She lists a number of possible clashes with Islam that include Muslim children wearing the headscarf, polygamy and clitoridectomy amongst others.¹³⁹

Yet it is precisely this dichotomous approach that posits feminism and multiculturalism as oppositional and assumes women are victims of their cultures and religions (Volp 2001:181) that renders this argument problematic. Moreover this obscures the complexities in the realities of women’s lives and privileges one form of discrimination over others (Crenshaw 1994). For example race and economic inequality are given little in any consideration and ‘race’ and ‘gender’ are perceived as oppositional and mutually exclusive (Yuval-Davis 1997, Anthias 2002, Volp 2001). As Volp points out, “The tension believed to exist between feminism and multiculturalism, or universalism and cultural relativism, not only relies upon the assumption that minority cultures are more sexist, but also assumes that those cultures are considered traditional, and made up of unchanging and long practices that warrant submission to cultural dictates. Non-western people are assumed to be governed by cultural dictates, whereas the capacity to reason is thought to characterize the West” (2001:192). Again, as discussed in chapter 1 other feminist scholars have developed a more complex nuanced approach to understanding these ‘dilemmas’. The ‘intersectionality’ approach points to the complex embeddedness in social life of race and class from patterns of gender discrimination that are construed as cumulative and intersecting (see Crenshaw 1994, Yuval-Davis 1997). More importantly the concept of ‘translocational positionality’ allows us to challenge the dichotomous approach

¹³⁹ Unfortunately she fails to explore the complexities of culture and identity. See Volpp (2001).

based on the fixed categories of insider/outsider in understanding the relationship between Asian Muslim women, family and community but allows us to introduce a more nuanced approach of the interplay of power, complexity and difference in the lived realities of women's lives.

Undoubtedly empirical findings in this study confirm the existence of intra-group inequalities such as forced marriage and, observation research in chapter 4 found that Shariah Councils construct boundaries for group membership that often rely upon traditional interpretations of the role of women in Islam as mothers, wives and daughters. Thus under such conditions the multicultural accommodation of Muslim family law in Britain may lead to the violations of citizenship rights for Muslim women. It may mean the shifting of state regulation to the private domain, thereby giving religious leaders greater power to dictate acceptable patterns of behaviour. The women in this study echoed this caution and in doing so they articulated a wide range of differing opinions from the implications of being governed by a separate legal process, to the impracticalities of bodies such as Shariah Councils administering 'justice' they explored the contradictions of group interests versus individual choice. This discursive process raised the conceptual and political dilemmas, which frame these debates. Yet they were keen to explore these issues while occupying differential positions in the family and with different levels of educational attainment. For example for 6 women who were not financially independent this kind of "religious work" deserved official recognition but this view did transcend class divisions.

This sense of belonging was articulated in different ways and the social representation of Shariah Councils was important for some women as a linkage to Muslim communities and wider British society

I'm a Muslim I identify as one and anything that helps to validate and enhance my role as a Muslim in British society obviously I welcome and I will support it (Yasmin, London).

To be Muslim is to be part of the Muslim umma. If they (Shariah Councils) are recognised, I think that's great, an important development for all Muslims (Sadiah, Birmingham).

Of particular importance for some women was the distinctiveness of Shariah Councils from other community bodies as a focal point of reference to belonging to a wider Muslim Umma. Seen in this way, some women defined their role as bridging the gap between older and younger generations and, challenging intra-family inequalities such as forced marriage. It is worth noting a general point here that in principle initiatives that did facilitate relations between individuals and their families were welcomed by all the women yet, at the same time the women expressed a desire to choose whether or not they would wish to use these services.

They serve a useful purpose but really when people ask for these councils to be formally recognised, alarm bells go off in my head. When you start bringing in special things I think there's two things that can happen. One I think you can have ghettotization you have a community within a community that is ostracised and marginalised and you then become a target for many other things. Secondly I think why? Why would you need it? (Anisa, Bradford).

In some ways I think it would help the British system to wash their hands of us and say oh there you go deal with it yourself, look after these problems within your own community and that's just a way of getting out of it. We are here and we pay our taxes and we have our rights so therefore we want to be taken seriously. Don't tell us to go to go and sort our own problems out (Yasmin, London).

I do identify myself as both British and Muslim, so I don't want to support initiatives that mean that I have to choose between one kind of legal system and you know choose whether I'm British or not and then which legal system to go too. It's just not feasible and anyway it's not right. Reality is a lot more difficult than choosing between one or the other! (Parveen, Birmingham).

I don't know what their terms of reference would be and I don't know how they would set the parameters for their own jurisdiction. I don't know who would be the best authority to do it. I don't know how legally binding it is, there's still so many things yet to be sorted (Noreen, Birmingham).

I still think it would be very, very male dominated and therefore how experienced and relevant is their life experience to interpreting my life which they would do. And when I've met women who have been involved with Shariah Councils I don't think they have much autonomy within the system and I think you have to be a certain kind of woman to be eligible and I think being married and coming from certain structures I think are very, very important. So I worry about the practicalities of it not so much their motivation (Raheela, London).

If the group of men at the Shariah council are to sit and decide my life it terrifies me on what their criteria and what their checklist should be. I think

it would be very different to what I would think my life should be and that's no less Islamic. And also they do a lot of things in the name of Islam when absolutely are one hundred per cent pure culture and I find that really upsetting that Islam is used to do that and if we as a community can't make sense of that then we can't ask another system to come in and develop new laws when we can't actually distinguish...I mean who appointed them, how would they qualify what have they done to make them know more. Do they even work in Shariah law? (Shazia, London).

Well at the moment I don't think they work because there is no one to tell them off if they do something wrong, like this man was telling me he was the president of the Shariah Council and he could do anything. So one person shouldn't have that much power anyway (Mina, London).

If it's about community control I think they (Shariah Councils) should be honest about that but I don't know if it is. I mean women want the Islamic divorce and I guess they are providing a service. Its just the way some of them do it that's the problem (Sabia, London).

Hence the observation that such bodies may in fact fail to capture the complex realities of the women's lives and, consequently unfairly situate Muslims on the periphery of British society. From this perspective formalising Shariah Councils may serve to essentialise their social and legal identities as fixed and unchanging. Moreover, these extracts demonstrate that the women expressed confusion as to the limits of the powers of these bodies.

I couldn't understand...they wrote me a letter saying that there was issues to be taken into account that was about child custody, which was about the house, which was about possessions, which was about...all kinds of things. I thought, hold on what jurisdiction do they have? I've already been through the courts what do I have to go through a set of Islamic courts? Do I have to go through them again its all been done and what if it means I can't have custody? Who wins English law or the Islamic Shariah Council? (Yasmin, London).

Of particular concern was the lack of female representation on these bodies. In fact most women were in favour of developing specific services such as Muslim counselling to meet the needs of Muslims in Britain but emphasised the need to involve women to ensure that all women were not compelled to use the services.

I think that women's organisations should be taken seriously as well, whether they're Muslim women or Asian women. They know the lifestyle of women within Britain today, having been brought up as Asian women and being British themselves so I think they're more than qualified (Nasima, Bradford).

When was the last time a women's organisation was invited to contribute to the legal system in order to analyse for example the impact of marital breakdown in Shariah Councils and the courts, I just don't think it happens and yet a British Muslim women is more of an expert than the imams I can think of (Naheed, London).

Undoubtedly the site of Shariah Councils makes gender visible and in this context the women who use its services identify themselves as Muslims and Muslim women. This is particularly significant for Muslim women's organisations such as Muslim Women's Help-line (MWHL) and the 'An-Nisa Society' both of whom advocate the development of social policy initiatives to meet the needs of religious communities based upon their religious identities rather than focussing upon the categories of race, gender and cultural differences. These approaches acknowledge the power and presence of Muslim women as actively instigating change within communities. As Parker points out, "Exploring these experiences in a particular setting demonstrates that an understanding of multiculturalism requires a much closer specification of the perspective from which it is being understood" (2000:93).

In this way the MWHL have successfully created an interesting space within Muslim communal politics and women's activism, while developing strategies meet the needs of Muslim women. Such strategies include providing pre-marital counselling based upon Islamic perspectives, training Imams and community leaders to challenge the practice of forced marriage and setting up Muslim refuges for Muslim women escaping domestic violence. However MWHL warn of the dangers of relying on rudimentary Islamic principles¹⁴⁰ and instead advocate education and discussion within Muslim communities with Muslim women being at the forefront of these debates. In terms of challenging the unequal cultural norms imbued within Shariah Councils they have produced a guide entitled "Marriage and Dissolution of Marriage According to the Principles of Shariah" which draws upon the work of Muslims feminists and scholars.¹⁴¹ Ms Sheriff states,

¹⁴⁰ For more discussion on this see Shah-Kazemi 2001:75.

¹⁴¹ The MWHL has been actively engaged in calling for the regulation of Shariah Councils and consultation between Shariah bodies and civil legal authorities. See Muslim News, "Islamic and Civil legal Structures need to interface" Friday 19th December 2003. On 18th May 2003 they held a

It is high time that our leadership bodies got to grips with such problems and provided clear and effective leadership and more importantly were seen to publicly support the victims of unscrupulous behaviour at individual and institutional level. But the responsibility lies not just with the Establishment and the community. In the middle of these two are the Muslim and civil legal structures which urgently need to talk to each other and ensure that they are better informed so that vulnerable people, particularly women, are at least not misled as to their rights. Awareness and training is one such step that is needed, but there is so much more that needs to be done.

5.9 Conclusion

The process of Muslim marriage and divorce in Britain, encapsulates an interesting set of cultural formations. Existing research seems to promise heterogeneity but clearly marks this practice of Muslim personal laws in Britain as homogeneous, a narrow particularism, which ignores the subjective experiences of women and the articulation of power in this diasporic space. This conflation of what is cultural practice and what is state law attempts to make the experience and outcome of the process as one for all and unified in the Muslim community. Clearly this is not the case. What these commentators have succeeded in doing is privileging a particular religious practice as part of a specific Muslim identity. The problem with this approach is it tends to ignore the possibility of alternative narratives. Clearly in this sample, for example, there was a sense of belonging to a Muslim community, which the women expressed. Yet these descriptions of belonging, community, and homeland were articulated in different ways, disrupted, challenged, resisted and accepted. Some women had been marginalized, others occupied a closer position to the acceptable dictates of community expectations. It is the strategic use of this diasporic space that is important to explore.

Thus the management of the marital dispute gives rise to a different set of responsibilities and obligations. Women, who participated in this process, viewed themselves as not only individuals but also as members of families and communities. In a situation where notions of religious identity, belonging and

symposium at their premises to discuss the issue of Muslim marriage and divorce in Britain and have also held meetings on forced marriages.

familial norms and values interact with the values of individual choice and consent, we see that some women were successfully able to negotiate between the plurality of norms and values that exist within the context of family, home and Shariah Councils. An important aspect of such findings, therefore, is to challenge the perceived inherent marginality of women in this process. For example, it is interesting to note that several women reported that they were aware that the meanings and interpretations of some Islamic perspectives put forward by religious scholars, were contested and therefore open to change. In this way they were able to disregard them and were fully aware of the need to utilise state law for protection and entitlement of rights. For this reason they were able to challenge their weak bargaining position in the marriage, to occupying a space at the Shariah Council as a basis for entering into negotiation, dialogue and possible change. In such a situation some women participated in the reconciliation process as a strategic manoeuvre to challenge conflicting interests. Yet this shift of dispute resolution from the public to the private sphere raises serious concerns on how power is effectively reconfigured from the state to the family and community. From such a perspective the differential treatment of women in the process of marriage and divorce, can lead to a conflict between equality and autonomy and the conflicting interests of the protection of family, culture and religion as enshrined by the norms and values of Shariah Councils.

CHAPTER 6

CONCLUSION

6.1 Introduction

In conclusion we return to the two key questions posed in this study: how do Shariah Councils constitute as unofficial dispute resolution mechanisms? And, what are the experiences of Pakistani Muslim women using such 'privatized' forms of dispute resolution to obtain a Muslim divorce? While the discursive focus in this study has been on the socio-cultural and religious practices underpinning these processes of dispute resolution, we have also drawn upon debates on citizenship, multiculturalism and identity. Simultaneously, the new discursive legal space where formal and informal law meet, provides the opportunity to conceptualise the emergence of 'informalism' in the form of unofficial mediation operating as part of the 'semi-autonomous social field' (Moore 1978). This intellectual strategy of drawing upon different theoretical paradigms illustrates not only the 'interpenetrations' between the different approaches (Santos 1987:67), but also enables us to locate these debates within the specific lived realities of women's lives (Griffiths: 2002:120).

In Britain the recognition of these plural legal orders has led to interesting scholarly debate on what is understood as law, legal pluralism and Muslim family law (Carroll 1997, Hamilton 1995, Menski and Pearl 1998, Shah-Kazemi 2001, Yilmaz 2002). While most literature presents these developments as a reflection of cultural and religious life, we are also drawn to the conclusion that understandings of culture and religion are to be understood as fixed, bounded and indeterminate. This is particularly clear from the work of legal pluralists such as Menski (1998) and Yilmaz (2002) that present the duality of culture and religion as the underlying premise upon which this presupposed framework of dispute resolution must be understood. In turn state law is presented as overarching and universalist with the power to annihilate or accommodate difference at its whim. More interestingly still, the debate in Britain has been closely framed around the construction of a homogeneous 'Muslim identity' that leads to the demands of a parallel legal system, which presupposes a deeply felt cultural and religious

conviction, without providing adequate analysis of the complexities that identity entails. As exemplified in this study, the task of exploring the multiple ways in which British Pakistani Muslim women perceive dispute resolution, means it is necessary to engage in the analysis of gender and its intersection with culture, rights and unofficial law. Viewing these debates from an interdisciplinary perspective transforms the analytical framework from fairly essentialist terms prevalent in existing literature, to much more fluid and contradictory understandings. This gives rise to a pluralism that is neither essentialist nor relativist but provides a “stronger grounding in the conversation between theory and method” (Cowan, Dembour and Wilson 2002:20). Thus by taking into account these specificities we pose one final question in the study: does this research provide us with any new understandings?

6.2 Shariah Councils, Unofficial Mediation and Power

Surprisingly a review of literature in chapter 1 found very little attention paid to the multiplicities of law, dispute resolution, identity and diaspora in Britain. At present the dominant view of Shariah Councils is that they accommodate the needs of Muslims in Britain and define themselves according to Muslim norms and values and, Islamic legal principles. Hence we find that these developments challenge the hegemonic power of state law and, points to the possibility of these bodies effecting social, political and legal change in their engagement with multiculturalism and the rights discourse. This is particularly evident in the projection of Muslim legal pluralism by some writers as unified, harmonious and shaped by common goals and strategies. For this reason the complexity of Muslim legal pluralism is represented as oppositional to state law. Indeed while existing literature warns against determinism and ‘legal centralism’ inherent in state law, the very existence of legal pluralism is also classified and structured according to the ontological divide of state law versus personal law. For this reason, writers such as Menski (1998), Poulter (1998), Shah-Kazemi (2001) and Yilmaz (2002) locate their studies within the framework of ‘thick multiculturalism’ whereby notions of group rights, culture and religion are modelled on more or less essentialist terms. In the struggle for the recognition of diversity and pluralism identities are marked around cultural and religious boundaries and as this study

has found, deeply at odds with the complex realities of women's lives. In reality communal boundaries are continually being challenged, resisted and accepted. Not least for this reason we must be careful to avoid the pitfalls of identity politics and what Anthias terms "the Scylla of feminist fundamentalism and the charybdis of cultural relativism" (2002:275).

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 2000:14). It is clear from discussion in chapter 4 that the 'discourse of disputing' (Hirsch 1998:18) 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 (see Werbner 2000). Rather than embodying a singular set of shared cultural and religious norms the Shariah Councils in this study were imbued with differing power relations revealing internal contestation, conflict and change. In this context legal discourse reconfigures as "different levels of legality" (Santos 1987:113) and raises our attention to the paradox of there being new "interdisciplinary dialogues around questions of state power, cultural domination, resistance and hybridity" (Greenhouse and Greenwood 1998:8).

As discussed in chapters 3 and 4 the ways in which Shariah Councils constitute as unofficial dispute resolution mechanisms reflects how they are situated within local Muslim communities. Hence by simply focussing 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, remains autonomous but also recognises 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 do 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.

As discussed in chapters 1 and 4, official family mediation occupies an intermediate legal and social space at the boundary of state law and non-state forms of ordering (Santos 1987). This conceptual space between state law and personal law is contested whereupon state law and personal law struggle to establish control (see Abel 1984, Fitzpatrick 1992). This is a process whereby unofficial mediation marks the site upon which to resolve marital disputes from the perspective of Muslim personal law. Because of the centrality of gender relations in Muslim family law and in particular the position of women in relation to marriage and divorce, attempts to strengthen or develop unofficial mediation bodies raises questions on the position and autonomy of women using these bodies to resolve marital disputes.

As discussed in chapters 4 and 5 there are sharp differences between official and unofficial mediation¹⁴² but one issue addressed in this study is whether state law is

¹⁴² Critical legal literature on community justice has focussed on whether these movements can have a social transformative effect on the legal system (Santos 1979, Fitzpatrick 1983, 1988, Henry 1983). It is argued that these movements are not completely autonomous and independent from the state nor are they completely dependant upon the state thus there is a state of ambiguity

moving from a position of formalism to 'informalism' whereby power is in effect transformed to the sphere of the private and to 'informal bodies' such as Shariah Councils. At one level one could quite legitimately argue, that this debate is redundant, as under existing family law provisions couples are not required to seek mediation prior to the formal dissolution of marriage.¹⁴³ After all Part II of the 1996 Family Law Act is not enshrined in law and fieldwork data found no evidence of a formal, intertwined relationship between the two processes, obliging divorcing couples to seek official mediation. Here it is important to bear in mind that at a formal level both legal processes are keen to avoid any conflict.

Yet in practice a very different picture emerges with fieldwork data finding evidence of the multiple legal processes interacting and intermeshed. A particular cause for concern is the role of solicitors and how they may reformulate mediation and reconciliation to fit within the framework of unofficial dispute resolution epitomised by the Shariah Council. We found evidence that some solicitors encourage clients to negotiate settlements at this space, a space that provides no formal protection against those who may feel compelled to use the mediation or reconciliation services in order to obtain a Muslim divorce. Thus the complex relationship between individual, community, informal and formal law dynamically interacts in the area of mediation and reconciliation. The relationship between these four inter-linked processes increasingly raises important yet complex questions on the relationship between gender disadvantage, the public/private divide, the sphere of regulation and a sphere of non-regulation (Fletcher 2002: 145). As fieldwork data reveals these bodies may eschew gender equality in favour of religious and communal homogeneity.

6.3 Feminist Research, 'Standpoint' and 'Cultural Difference'

and this ambiguity gives the potential for a social transformative effect on the wider structure of the legal system (Henry 1987, Harrington 2000 and Merry 1988). As Cain (1985) argues the relationship can be both supportive and oppositional.

¹⁴³ But undoubtedly social policy initiatives are being developed to encourage resolution of marital disputes via mediation. This raises the two key questions: firstly whether the state may implicitly recognise religious bodies as suitable arenas for mediation and whether has led to religious bodies taking up the role of mediation bodies. In this regard a critical reading on the relationship between state, law and power analysis allows us to question the extent to which state powering this way

Drawing upon the concepts of 'standpoint' and 'difference' in chapter 2 we explored the possibility of adopting a methodological approach that is able to capture the complexity of "individual histories, shared family lives and standpoints of gender, generation, class and ethnicity...all interwoven in these related but individual accounts" (Mccarthy, Holland and Gillies 2003: 19). This approach allows us to interrogate what we understand as culture, community and identity as fluid, changing and contested entities that are open to social and cultural contestation within diasporic communities. Furthermore instead of denying the importance of the standpoint of the researcher in the field this approach demands a critical analysis of their engagement in the research process. The usefulness of this approach lies in the fact that it provides the means by which we are able to interrogate the power relations upon which the research is based.

At an intuitive level the concern of conducting research deemed 'sensitive' means that we are able to identify the importance of local context. Here it is important to bear in mind the difficulties of access to participants and the role of 'gatekeepers'. In the light of Islamaphobia and the rising number of attacks on Muslims¹⁴⁴ the benefits of contributing to research that addresses difficult questions may not understandably be of instrumental benefit to the complex Muslim demands for recognition. In the face of such difficulties in this study access to material was withheld, research observation limited and access to the female users of the Shariah Councils chosen denied. Nonetheless with the material made available we were able to provide an insight into how these bodies constitute as unofficial dispute resolution mechanisms in Britain.

The sample of British Pakistani women was not also perfectly representative but again did provide an insight into the diverse and complex experiences of obtaining a Muslim divorce. Thus the debate over accommodating cultural difference in feminist research highlights the problems with theoretical explanations of social

continues to control the dynamics of 'legal ordering' within the private spheres of the family and home under the guise of 'informal justice' (Abel 1982:11).

¹⁴⁴ Interestingly the rise of Islamaphobia is now being documented frequently in all the national newspapers. See Dodd, V and E MacAskill, "Muslims Fear Backlash" The Guardian, September 25 2004.

categories and identities of women. As Andersen points out, “Building more inclusive ways of seeing requires scholars to take multiple views of their subjects, abandoning the idea that there is a singular reality that social science can discover” (1993:43). This is not to claim that differences or cultural difference per se acts as the reference point for all experiences but that we recognise the complexities that data produces and explore the processes behind data collection. Thus universal theories on gender remain both limited and inadequate as fieldwork data in this study reveals. The dichotomies of male versus female, cultural rights versus women’s rights means that they fail to capture complex processes and uneven and social and legal change. Instead we need to adopt a more ‘grounded approach’ based on empirical studies to understand how gender relations are constituted in specific situations and processes.

6.4 Citizenship and Muslim Claims for Recognition

The emergence of anti-essentialism in scholarly debate has led to greater analysis of the relationship between community, identity and claims for recognition. Indeed, it seems that one of the most pressing questions today is whether Muslims have become a politically effective diaspora that challenges the national polity? (See Werbner 2000). More recently multicultural debates have focussed on the relationship between state intervention, non-intervention, a dialogue between majority and minority communities and the right to exit a group in cases of forced marriage (see Phillips 2002). In chapters 3 and 4 we outlined the nature of South Asian Muslim settlement in Britain and engaged in recent discussions on ‘claims and belonging’ and the relationship between the ‘local’ and the ‘trans-national’. For Soysal (1999) the fact that Muslim claims are based upon a ‘Muslim identity’ that are not only located within local particularistic claims of recognition but also framed within the context of international universal human rights has led to a process of de-coupling of rights and identity which in turn creates a different relationship between the individual and the state, than the one espoused by traditional definitions of citizenship. In this way citizenship is transformed from the homogeneous conceptions of the British nation to a more nuanced investigation of cultural difference and contemporary multiculturalism. The dynamics of these processes are imbued with differential power relations that

redefine the relations between the local, national and global Muslim umma. Thus we also see the emergence of localised identities for example the expectations of British Pakistani Muslims may differ to some extent from British Bangladeshi Muslims.

Drawing upon this approach, we found that some sections of the Muslim community in Britain would like to claim legal autonomy in matters of family law, to enable Muslim law to be applied in the 'private' sphere of family relations. If this claim were accepted in Britain, a different system of personal laws would govern Muslim citizens from those applied to the community at large. But this would raise the issue of how to deal with those individuals who do not wish to conform to the traditional customs of their communities. Clearly, such a group right is problematic if it is based on the exclusive recognition of a single common identity for all the members of the cultural and religious minority. As Montgomery points out, support for such a right rests on a number of assumptions. First, the group must have some discrete identity, which enables its members to be distinguished from outsiders. Second, the group must be essentially homogeneous in respect of its desire for the special treatment. Third, not only must the group generally want special treatment, but also the treatment must be of a nature, which creates liberties that can be exercised by all (1992:123). The claim for an exclusive or territorially based separate personal law system remains problematic since the cultural boundaries of groups is rarely unambiguous. This is because, as Verman points out, "Individual people are likely to feel part of one group in some contexts and of another in relation to different issues" (1982: 32). Boundaries are more easily defined when minorities are concentrated territorially, as is the case with indigenous minorities. A further option, the one adopted in India, is to create two parallel systems of personal law - customary/religious and civil and allow all citizens the right to choose between them.

The debate as to whether Britain should adopt a pluralist legal system to accommodate the practice of South Asian religious personal laws must be approached with great caution. Within the English legal system the rights of

minority groups have been defined through anti-discrimination legislation. At present the cultural rights of minority groups are recognised and protected in English law as long as they do not violate national and international human rights law. We have seen that this may present problems in the case of South Asian personal laws. The law must also take into account the heterogeneity of South Asian and Muslim settlers in the UK and the many different varieties of religions they practise. Clearly, no single authority can define Muslim personal law, and individuals, in line with liberal principles, would have to be able to opt for a court of their choosing. The danger of a rigid pluralism is evident: it would encourage the creation of separatist politics, ghettoising minority communities outside the mainstream legal system and thus defining them as the 'other'. As a result, instead of enhancing the rights of South Asians or Muslims in Britain, it would serve to curtail their rights and to segregate groups from one another. This would lead to a reduction of cultural and religious diversity, dynamism and pluralism, rather than enhanced integration. Thus we must move away from dealing with questions of citizenship we see how the current debate focuses on the relationship between community versus individualism, solidarity versus diversity, continuity versus change and responsibility versus duty and obligations.¹⁴⁵

6.5 Recognising Complexity and Difference: Translocational Positionality

At first glance a review of literature in chapter 1 appears to highlight the difficulties in adopting an interdisciplinary approach to the study of law, dispute resolution, gender and identity in Britain. The failure of legal pluralists in Britain to develop critiques on the internal dynamics of power within diasporic communities reflects the desire to present communities as homogenous and indeterminate. Because the emphasis here is upon group membership to the community, proponents of this position are keen to draw a sharp distinction between the public and private. As long as we accept the profound commitment to religious practice in the private sphere as fundamentally different to religious practice in the public sphere we are in a better position to analyse the operation of differing legal orders within the overarching power of state law. Thus in Britain

¹⁴⁵ In a recent and controversial essay Goodhart (2004) claims that liberals must re-think the notion of diversity to correct the eroding impact migration has had upon settled communities and the

some sections of the Muslim community have been campaigning for state funding of Islamic schools while at the same time demanding autonomy in regulating family law matters in the private spheres. This reinforces the dichotomization of the public/private spheres and has served as a useful tool for the state to define acceptable levels of intervention into the private spheres of family, home and community.

In trying to understand these socio-legal processes requires a critique of the underlying power relations within family, community and state. The concept of 'translocational positionality' (Anthias 2002:275) addresses the potential conflicts and tensions that arise in different and at times conflicting social contexts, including intra-family relations. Drawing from this concept in chapters 3, 4 and 5 we found that the experiences of marriage, divorce, family and community relationships for the women in this study, to be messy, fragmented and complex. These findings suggest that during the process of marital disputes women cannot be stereotyped as requesting no family support or going down the road of nothing but family support. Instead they are themselves negotiating the outcomes of their disputes. Pakistani Muslim women have complex views about whom and what they are and thus identity cannot be understood as a dichotomous variable of insider/outsider, muslim/non-muslim. Instead the narratives produced by the women themselves justifies attention to their participation, interaction and outcomes with these 'unofficial' bodies. The space(s) inhabited by the Shariah Council 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 in this way is a unique formation of a British diaspora. As Soysal (1999) points out this space draws upon local and transnational networks for legitimacy connecting with the global Muslim umma while developing strategies to fulfil the needs of specific local Muslims. As Mohammed Raza at MLSC explained, "We stay away from catering only to a particular group of Muslims but let me tell you, up and down the country there are lots of small local Shariah Councils who just deal with a specific groups of Muslims. For example in Leicester there is a Shariah Council that caters to the needs of Gujerati Muslims

and I hear there maybe a new one developing in Southall to cater for the needs of Somalian Muslims.”

Data in this study demonstrates the ambivalent relationship between British Muslim women and Shariah Councils. While on the one hand the women identified themselves as Muslims and recognised the importance of Shariah Councils in helping them to obtain a Muslim divorce, they were also critical of these bodies as mediation fora and the consistent attempts to reconcile them with their husbands. Yet in transcending the ethnocentric construction of Muslim female identity as ‘victims’ they were able to redefine what it means to be a Muslim woman and adjust their participation with these bodies according to the social contexts in which they were situated. This research thus reveals the dynamism of these women and in particular their capacity to shift, change and develop in response to new needs and situations. This draws upon the work of legal pluralists who have incorporated an understanding of gender relations and the dynamics of power in their work. Thus Griffiths (2001) calls for a non-essentialising pluralism which is grounded in the reality of women’s lives and which is neither universalist nor pluralist and Hellum advocates an understating based on the ‘processual’ approach that takes into account “perceptions and values in complex chains of human relationships.” (1999:96).

The very notion of difference as a site of struggle involving the contestation of meanings often imbued with internal contradictions, leads us to briefly consider how we can develop strategies that challenge intra-family inequalities and community regulation of women, while recognising identities as complex and fluid.¹⁴⁶ In a sense this brings us back full circle and the theoretical discussion in chapter 1 on the relationship between legal pluralism, identity, multiculturalism and feminism.

For most scholars the dissembling of the western human rights framework provides the means by which we are able to transform human rights from its

¹⁴⁶ It is beyond the remit of this study to engage in these complex debates hence the discussion is inevitably limited.

western hegemonic position of power to the more complex picture of rights in relation to culture, community, socio-economic conditions and localized religious practices. Undoubtedly the human rights discourse remains problematic for its universalizing approach to understanding cultural and religious difference. In her study Ali (2000) provides a fascinating legal analysis of women's human rights in Islam on the basis of sources of Islamic law. Drawing upon her extensive work in Pakistan she illustrates the multiple spaces in law, that both restrict and empower women in different contexts. The claim that Islam is antithetical to safeguarding women's human rights is effectively challenged yet the question of how we challenge intra-family inequalities within the family, home and community and based upon localized cultural and religious practice is left open. Other Muslim scholars such as An Na'im contend that local communities must engage in the process of change and renewal and dispose of oppressive cultural practices. This internal process of change can only be achieved via local dialogue within communities whereupon individuals are able to draw on their commonalities and differences, while in the process challenging oppressive cultural practices (1992). He explains, "In this way, the combination of all the processes of internal discourse and cross-cultural dialogue will, it is hoped, deepen and broaden universal cultural consensus on the concept and normative content of international human rights" (1994:174).

Yet as data in this study suggests dialogue is often imbued with power relations and is constituted in relation to controlling family and communal boundaries. For example, we found that the relationship between the female users of Shariah Councils and religious scholars are often predicated on the religious and socio-cultural terms that marginalize women (which included the female counsellor based at the Shariah Council). As Anthias points out "effective dialogue requires an already formulated mutual respect, a common communication language and a common starting point in terms of power" (2002:288). It is the 'common starting point in terms of power' that raises the dilemma of the multi-cultural question of "how then can the particular and the universal, the claims of both difference and equality be recognised?" (Hall 2000:235)

Undoubtedly we need to address these issues in the light of empirical findings rather than solutions based upon an abstract theoretical discussions. We need to incorporate debates on complexity, difference and diversity to understand the complex realities of British Pakistani Muslim women's lives. As this study demonstrates women feel the contradictory pulls which these forces exert but their narratives must be heard. Some are happy to conform others are not, some trade identities but for others there is a primacy of a Muslim identity. Many are reluctant of state intervention challenging cultural norms deemed oppressive because the state has not historically acted as the neutral arbiter of disputes (Hall 2000:238). Furthermore some women see "themselves strictly bound to submit to the dictates of Islamic law and the commands of the authorities charged with its execution" (Mayer 1999:45) and we must recognise this as their lived experience.

More importantly the argument that all Muslim cultural and religious norms inherently render women powerless and insubordinate is simply wrong. What we see today is a rigid understanding of culture and religion that endorses the idea that formal mediation is problematic and informal mediation is either acceptable or dangerous. As discussed in chapter 5 MWHL argue that such a dichotomous approach obscures how norms are challenged within a cultural and religious group, by female members of the group. Clearly to impose a blanket ban on informal mediation would prove difficult to implement and of course legitimize the idea that western conceptions of justice, equality and rights are morally superior to Islamic perspective and Muslim approaches to dispute resolution. Muslim women are actively engaging in these spaces and their voices must be heard. Findings in this study suggest that some women are in favour of using Shariah Councils as reconciliation bodies but others clearly are not. To judge the women in the latter category as in some way any less 'Islamic' than their counterparts is simply wrong. To judge the women in the former category as fundamentalist or traditional is also false. Yet the problem with current literature on legal pluralism, multiculturalism and feminism is that it employs a culturally relativist approach to challenging state power and oppressive cultural norms. The danger of this approach is that there is a growing polarity in the ways in which each of these approaches inhabits a social space that operates on the fixed

constructions of insider/outsider, those who belong and those who do not, a space that in reality bears little resemblance to the complex lives realities of women's lives.

For some Muslim women's organisations multiculturalism is understood as a strategically useful process with which to challenge state power but also the secular narratives that claim to speak on behalf of all women. In interview Ms. Sherriff co-ordinator of MWHL explained,

By recognising our needs as Muslim women does not mean that we delegate our space and power to men inside or outside of our communities. We work with young Muslim women so they are able to use Islamic principles, to be empowered to stand up and say no. It is not us who are fundamentalists but the secularists, they are fundamentalist in the way that they deny us our voice, our experience as Muslim women.

Thus the ideological differences and practical approaches espoused by Muslim women's organisations in challenging intra-family inequalities such as forced marriage or domestic violence has inevitably led to conflicts with secular women's organisations such as Southall Black Sisters (SBS). Rahila Gupta a long-serving management committee member of SBS states,

We are suspicious of developments such as the setting up of refuges for particular religious denominations like those for Muslim women. Do their experiences vary greatly from other women of other women's organisations? Or is the real reason for setting up such refuges an attempt to contain the issue of domestic violence, to ensure that women return to the marriage after a period of respite without challenging the status quo? (2003:270).

In an apparent attempt to unify women's experiences it seems that such approaches fall into the trap of 'identity politics' that liberal feminists demarcate as the space that symbolizes and brings to the fore tensions between multiculturalism and feminism and, the moral frameworks of universal rights and the politics of cultural relativism. Yuval-Davis observes with reference to feminist identity politics that identity politics are usually "perceived to constitute a basically homogeneous social grouping with the same interests" and "women's individual identities have become equated with women's collective identity" and differences are either ignored or perceived as "reflections on different stages of raised consciousness" and thus such differences appear as expressions of a deficit that will- and has to- disappear (1997: 119). Accomodating the principle of

equality to reflect the experiences of women means going beyond these distinctions.

This research demonstrates how identities are fluid, multiple and changing. The women in this study identified themselves variously as Muslims, as British and as Pakistani in different contexts. Cultural, religious and legal diversity must therefore be understood to be in flux, contested and open to change. As Hall points out, “The temptation to essentialize community has to be resisted- it is fantasy of plenitude in circumstances of imagined loss. Migrant communities bear the imprint of diaspora, ‘hybridization’ and difference in their very constitution. Their vertical integration into their traditions of origin exist side by side with their lateral linkages to other ‘communities’ of interest, practice and aspiration, real and symbolic” (2000:209).

At the outset of the twenty-first century and with the emergence of the third and fourth generations of South Asian Muslims in Britain, we must embrace this complexity, difference and transformation in an attempt to challenge oppressive cultural norms and values rather than seek to produce a common language of homogeneity from both a secular feminist or religious position. Difference is an integral part of being a British, Pakistani, Muslim woman. Furthermore difference as well as the difference that conflict generates is also part of the Muslim tradition as Muslim feminists point out (see Mernissi 1989, Siddiqui 1996, El-Saddawi 1990, Ahmed 1990, Haeri 1991).

The picture painted by legal pluralists on understanding this process as structured by the dialectic of Muslim personal law and state law is also very different from the picture emerging from the data in this study. Instead we can see how difference is constituted in multiple ways in between these differing social and legal processes (Santos 1987). This process moreover is interactional, negotiated and shaped by the specificities of the complex realities of the women’s lives. . The real conflicts are not so much the theoretical debates on multiculturalism and feminism or state law versus unofficial law but between power and how the competing voices for power and representation ignore the internal voices of

dissent and change, most often the voices of women. And, we should not forget that complexity, difference and ambiguity open up the conceptual spaces for us to explore the entanglements of law, gender, community, diaspora and identity and, the contestation over cultural and religious meanings. As Bauman points out, “From whatever side you look at it, difference is today an asset rather than a liability and those different from the dominant majority may reasonably expect to gain rather than lose” (1999:13).

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APPENDIX 1

MUSLIM (LAW) SHARIAH COUNCIL DOCUMENTS

1. Letter of Authority and Acceptance
2. Application Form
3. Islamic Divorce Certificate
4. New Marriage Contract

The Muslim Law

(SHARIAH) COUNCIL

20-22 Creffield Road - Ealing, London W5 3RP
☎0181-992 6636 / Fax 0181 993 3946

Letter of Authority & Acceptance

To be completed and returned to us

I (Name).....

Resident of (Address).....

Telephone Number.....

authorise the Muslim Law (Shariah) Council to investigate my case and then to consider my application to obtain an Islamic Divorce (Talaq) according to the rules and regulations of the Council.

1. I promise to accept the decision of the Council irrespective of my own personal interests in order to maintain the supremacy of Shariah over all other considerations. However I may withdraw my application before the Council's decision, but I understand that once the Council has initiated the proceedings I will not be able to claim the refund of the fee paid.
2. I confirm that I have not applied to any other Shariah Council/Court for my Islamic Divorce. Before I do so, I will inform the Council and withdraw this application.
3. I also promise not to enter into another marriage contract (Civil or Islamic) before the verdict of the Council.
4. I also solemnly swear that at the moment I am not violating any of the matrimonial laws of the Shariah.

Signed.....

Date...../...../..... Place.....

Witness 1 (*Must be an Imam of a Mosque or Chairman or Secretary of a Mosque Committee or Head of a Local Muslim Organisation* - if you live in an area where there is no Mosque or Muslim organisation this form may be signed by your GP or Solicitor.)

Name..... Signature.....

Mosque/Organisation Name.....

Office Held (ie Imam, Chairman, President, Secretary).....

Address of Mosque/Organisation.....

Date...../...../..... Tel No.....

Please print seal of Organisation/Mosque here.

Witness 2 (*Must be a Muslim Man/Woman over the age of 18*)

Name..... Signature.....

Address.....

The Muslim Law (Shariah) Council UK

FORM TO BE COMPLETED BY APPLICANT

(Please complete this form carefully. If it is sent to us incomplete, the proceedings may not even begin in your case).

1. Islamic Marriage (Nikah)

a) Date of Nikah/...../19..... b) Place of Nikah

2. Civil Marriage

a) Date of Registration/...../19..... b) Place of Registration

3. Separation

(The date from when you began living separately from your husband - when all conjugal relationship ceased)

a) Date of Separation/...../19.....

4. Civil Divorce

(The Divorce Decree pronounced by a Civil Court in the UK - If the Decree Absolute is yet to be pronounced, please leave this blank)

a) Date of Decree Nisi/...../19..... b) Date of Decree Absolute/...../19.....

c) Name and Place of Court
where Decrees were pronounced

5. Husband's Details - (Please do not send your application without this)

Name of Husband

Country and Date of Birth Nationality

Address of Husband (If not known, insert the address of his next of kin i.e. Parents, Brother, Sister or Uncle, etc. in the UK or Abroad)

Tel No.

Name of Applicant

Country and Date of Birth Nationality

Signature Date/...../.....

The Muslim Law (Shariah) Council UK

FORM TO BE COMPLETED BY APPLICANT

(Please complete this form carefully. If it is sent to us incomplete, the proceedings may not even begin in your case).

1. Amount of Dower (Mahr) Agreed (Please specify currency as well)

	a) How much has been paid	b) How much has been deferred
<i>Amount in figures</i>
<i>Amount in words</i>

2. Have you received items of jewellery from your husband, his parents or relatives at the time of marriage or afterwards YES/NO

If Yes, please give details below

	Item	How many	Composition (gold, platinum, diamond, etc.)	Estimated Value in Pounds Sterling
1.				
2.				
3.				
4.				
5.				
6.				
7.				

3. Details of Children from this marriage

Do you have children from this marriage YES/NO

If Yes, please give details below

	Name	Sex	Age
1.			
2.			
3.			
4.			
5.			
6.			

4. Access to Children

Do the children live with you YES/NO

Do the children live with your husband YES/NO

Will you be ready to agree regular access of those children to your husband after Islamic Divorce YES/NO

Name of Applicant

Country and Date of Birth Nationality

Signature Date/...../.....

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

THE MUSLIM LAW (SHARIAH) COUNCIL UK
20 - 22 CREFFIELD ROAD, EALING, LONDON W5 3RP

Islamic Divorce Certificate

C - 10

Case Ref. No.: [REDACTED]

Date: 30-5-2003

NOTE The grounds / reasons which are applicable to this divorce are indicated by the mark

This is to certify that the petitioner Ms [REDACTED] of
(Address) [REDACTED]
who married the respondent Mr [REDACTED] of
(Address) [REDACTED]
according to Islamic Law on 08/9/1997 in LONDON
is now divorced according to Islamic Law (Shariah) on the following grounds with the two...
conditions listed overleaf.

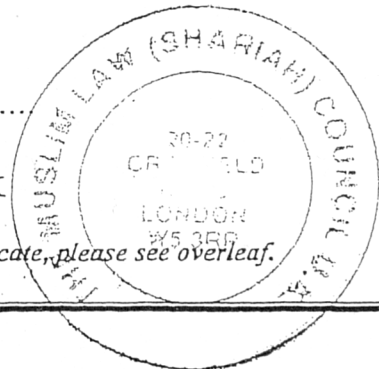
- 1 The petitioner (wife) separated from the respondent (husband) on (Date of separation) 06-12-2001..... Since then, she has had no marital relationship with him.
- 2 Since separation / marriage the respondent has not maintained or supported the petitioner at all.
- 3 During this period of separation of more than two.....years five.... months, all efforts to resolve this dispute by way of reconciliation have failed.
- 4 Despite several written requests from the Shariah Council to grant his wife (petitioner) Islamic Divorce, the respondent has not fulfilled his religious obligations.

In the light of above mentioned grounds / reasons, the Council has concluded that the marriage has irretrievably broken down. Therefore, in order to safeguard the religious and social interests of Ms. SHEREEN DAQUD....., the Nikah is hereby dissolved with immediate effect on the basis of Dhirar as per the conditions listed overleaf.

Signed [Signature]

DR. M. A. ZAKI BADAWI (Chairman)
On behalf of the Muslim Law (Shariah) Council UK

For conditions and clauses applicable to this Divorce Certificate, please see overleaf.



بِسْمِ اللّٰهِ الرَّحْمٰنِ الرَّحِیْمِ

Conditions of the Marriage Contract (Nikah)

This contract is made on the day of (month) 19.....

between (Name) (husband)

of (address)

and (Name) (wife)

of (address)

Whereas the parties to this agreement wish to enter into the contract of marriage with each other,
Whereas neither party knows of any just cause or impediment, personal or otherwise, which may prevent them entering into such a contract;
It is hereby agreed by the parties that such contract is entered into upon the following terms and conditions:

1. The parties to the marriage contract (Nikah) shall live together in a mutually agreed country and establish their matrimonial home therein. The present mutually agreed country is
2. The wife is entitled to obtain an Islamic divorce (Talaq) if her husband enters into a polygamous marriage without her written consent.
3. Failure by the husband to maintain his wife shall entitle her to obtain an Islamic divorce from a properly constituted Shariah Council
4. If the husband abandons his wife for six months without reasonable excuse the wife shall be entitled to obtain an Islamic divorce from a properly constituted Shariah Council.
5. If, after the marriage the husband suffers from any mental illness or is sent to prison for a continuous period of two years the wife is entitled to obtain an Islamic divorce from a properly constituted Shariah Council.
6. In the event of the husband becoming impotent for a period of one year continuously the wife may obtain Islamic Divorce from any properly constituted Shariah Council
7. In the event of the husband deliberately denying his wife sexual intercourse for a period of four months continuously the wife may obtain Islamic Divorce from any properly constituted Shariah Council
8. Cruelty and violence whether physical mental or emotional by any party to this marriage contract towards the other or towards the children of the marriage or children of either party, shall be one of the grounds for seeking Islamic Divorce from a properly constituted Shariah Council.
9. During the currency of the marriage the wife shall continue to perform her Islamic religious obligations without any hindrance from her husband.
10. In the event of failure to perform duties and obligations by the wife towards her husband (laid down by the Shariah) the husband, at the time of Islamic Divorce shall be entitled to an exemption of either total or part-payment of the Mehr to the wife. Such an entitlement will be judged by a properly constituted Shariah Council

Agreed and accepted.

Name..... (wife)

Name (husband)

Signature

Signature

Date/...../.....

Date/...../.....

Witness 1

Witness 2

Signature

Signature

Date/...../.....

Date/...../.....

APPENDIX 2

ISLAMIC SHARIAH COUNCIL (ISC) DOCUMENTS

1. Application Form to File a Divorce Petition (Khula)
2. Interview Form
3. Verdict on Forced Marriages
4. A copy of a letter from Applicants Husband
5. Letter of Intent
6. Solemn Declaration

In the Name of Allah, the Most Merciful, the Giver of Mercy



The Islamic Shari'a Council

مجلس الشريعة الإسلامية

34 Francis Road • Leyton • London E10 6PW • Tel: 020 8558 0581. Fax: 020 8558 7872

Our Ref.: CB..... Your Ref:..... Date

APPLICATION FORM TO FILE A DIVORCE PETITION (KHULA)

(Please read carefully and all sections of the form must be filled)

<u>WIFES DETAILS</u>	<u>HUSBANDS DETAILS</u>
1. Name: _____	1. Name: _____
2. Address: _____ _____	2. Address: _____ _____
_____ Tel: _____	_____ Tel: _____
3. Date & Place of Birth: _____	3. Date & Place of Birth: _____
4. Nationality: _____	4. Nationality: _____

5.*Date & Place of Nikah: _____

6.*Date & Place of Registration in UK: _____

7. Amount of Dower (Mahr) Agreed: _____

a) How much has been paid: _____ b) How much was deferred: _____

8. If you have received any Jewellery/Land/Money from your Husband, please give details: _____

9. Main reason for asking Divorce: _____

10. Details of Children from this marriage:

Name	Age	Name	Age
_____	_____	_____	_____
_____	_____	_____	_____

11. Date since separation from Husband: _____

12.* Have you applied for Civil Divorce? YES / NO

If YES, date of decree absolute, if applicable: _____

13. Did your Husband defend the Divorce petition in court? _____

DECLARATION:
I certify that the information given in this form is correct to the best of my knowledge.

SIGNED	DATE
--------	------

*NOTE: Please provide of all available documents, e.g. Nikah/Civil Marriage Certificates, Decree Nisi/Absolute, Solicitor's Court Document showing that the husband did not defend the divorce.

In the Name of Allah, the Most Merciful, the Giver of Mercy

The Islamic Shari'a Council



مجلس الشريعة الإسلامية

34 Francis Road • Leyton • London E10 6PW • Tel: 020 8558 0581. Fax: 020 8558 7872

Our Ref:.....Your Ref:.....Date

INTERVIEW FORM

Name of Representative: _____

Date of Interview: _____

Case Ref: CB _____

Clients Name: _____

(Please check if information on application form is correct.)

Clients Address: _____

	YES	NO	IF NO, PLEASE GIVE DETAILS
Partners Name	<input type="checkbox"/>	<input type="checkbox"/>	_____
Partners Address	<input type="checkbox"/>	<input type="checkbox"/>	_____
Clients Contact No.	<input type="checkbox"/>	<input type="checkbox"/>	_____
Clients Nationality	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____
Partners Nationality	<input type="checkbox"/>	<input type="checkbox"/>	_____
Date of Nikah	<input type="checkbox"/>	<input type="checkbox"/>	_____
Place of Nikah	<input type="checkbox"/>	<input type="checkbox"/>	_____
Date of Registration	<input type="checkbox"/>	<input type="checkbox"/>	_____
Place of Registration	<input type="checkbox"/>	<input type="checkbox"/>	_____

If you have not registered your marriage please state why?

Applied for Civil Divorce _____

Date of Decree Absolute _____

Did Husband Defend _____

IF YOU HAVE REGISTERED YOUR MARRIAGE OR YOU ARE A BRITISH CITIZEN, YOU WILL HAVE TO APPLY FOR CIVIL DIVORCE BEFORE YOUR CASE CAN CONTINUE WITH THE ISLAMIC SHARI'A COUNCIL.

Date Since Separation _____

Childrens Details _____

Have you recieved any of the folowing from your husband. If so, please give details

Money _____

Jewellery _____

Land _____

Or any other form of _____

Dower (Mahr) _____

DECLARATION

I BEAR WITNESS THAT I HAVE SUBMITTED KHULA APPLICATION HAVING FEAR OF ALLAH IN VIEW OF MY RIGHTS IN THE LIGHT OF QUR'AN & SUNNAH AND MAY ALLAH (SWT) CURSE ME IF I AM DOING WRONG OR IF I AM A LIAR.

All Information on my application form is true and if any changes occur, I will inform you in writing immediately.

Signature: _____

Representatives Signature: _____

Date: _____

Date: _____

Please quote your reference number *in the Name of Allah, the Most Merciful, the Giver of Mercy*
on all correspondence and
telephone calls.

The Islamic Shari'a Council



مجلس الشريعة الإسلامية

34 Francis Road • Leyton • London E10 6PW • Tel: 020 8558 0581. Fax: 020 8558 7872

Our Ref:..... Your Ref:..... Date

28/08/03

FORCED MARRIAGES

Wed 27th August (monthly meeting at ICC) 2003 following resolution was past:
If a women claims she was forced into marriage her claim could be accepted provided three
circumstantial evidences are found out of the following four:

1. Her parents or one of them admits either verbally or in writing that they have forced her into marriage.
2. A woman stops her husbands application for Visa as soon as she comes back from the country were marriage took place.
3. She refuses to allow consummation of marriage.
4. She provides evidence on being forced into marriage.

In this case the normal procedure of Khula is not to be followed. Instead one letter is to be sent to the husband (P26) with demand to sign the Talaq Nama.

The Islamic Shari'a Council.

RECEIVED
BY MS | DATE 12/11

786

To,
The Islamic Shari'a Council,
34, Francis Road,
Leyton,
London, E10 6PW.

To Whom It May Concern:

Assalamo Alykom wa Rahmatullah.

I've received your letter sent on 05/09/2002, regarding my wife "Saba Asghar", expressing her wish to seek Islamic divorce.

In response to your letter, I, [REDACTED], would like to inform you that my wife and me have a very good marriage relationship and have ~~two~~ kids from this marriage. Her father is my first Uncle, I would never try to break family ties and under no circumstances I would wish to divorce my wife ([REDACTED]).

Of course misunderstandings do take place in many relationships, so in ours. Her family has misled her, mainly her father. I have a very great concern about her and our children and I hope that she also has as well. If there's any misunderstanding that she or her family wish to clarify, I'll be very happy to co-operate in this regard. I really want to have my family back.

Last but not least, I repeat, "Under no circumstances I would divorce my wife "Saba Asghar".

I hope that these few words will be sufficient for your satisfaction. If you require further information regarding this matter, please do not hesitate to contact me.

Yours faithfully,
[REDACTED]

4

In the Name of Allah, the Most Merciful, the Giver of Mercy



34 Francis Road • Leyton • London E10 6PW • Tel: 020 8558 0581. Fax: 020 8558 7872

Our Ref:.....Your Ref:.....Date

LETTER OF INTENT

Dear _____,

Assalamu Alaikum,

The Islamic Shari'a Council in its recent meeting held on _____ based upon the evidence provided, has decided to dissolve your marriage.

The decision has been made after taking into consideration all aspects of Shari'a, which allow a Qadi or an authoritative Islamic body in a non-Muslim country, to accede to the request of a woman seeking divorce, providing that the grounds are found to be valid.

Prior to issuing a divorce certificate, the council would like to hear from you especially if you have any valid objections based upon Shari'a, regarding this matter.

Note: In the case of dissolution of marriage, you are entitled to receive back the dower/ jewellery from your wife which you have given her at the time of marriage. Therefore, we urgently need your detailed claim along with all the evidence, i.e, receipts etc.

The divorce certificate will be issued four weeks to date, if we do not hear from you or your objections are found to be invalid.

Wa Salam

Secretary,
Islamic Shari'a Council.

In the Name of Allah, the Most Merciful, the Giver of Mercy



34 Francis Road • Leyton • London E10 6PW • Tel/Fax 020 8558 0581

Our Ref:.....Your Ref:.....Date



Solemn Declaration

I BEAR WITNESS THAT I HAVE SUBMITTED KHULA APPLICATION HAVING FEAR OF ALLAH
IN VIEW OF MY RIGHTS IN THE LIGHT OF QUR'AN & SUNNAH AND MAY ALLAH (SWT)
CURSE ME IF I AM DOING WRONG OR IF I AM A LIAR.

All Information on my application form is true and if any changes occur, I will inform you in writing immediately.

I Testify That _____

Signature: _____ Name: _____

Reference No: CB _____ Date: _____

* False information given to obtain a Divorce certificate or Talaq Nama will result in your Certificate being revoked by The Islamic Shari'a Council.

APPENDIX 3

THE MUSLIM FAMILY SUPPORT SERVICE AND SHARIAH COUNCIL DOCUMENTS

1. Application for Divorce
2. Form for Affidavit to prove Religious Marriage

In the name of Allah, the Beneficent, the Merciful.

THE MUSLIM FAMILY SUPPORT SERVICE

180 Belgrave Road, Birmingham B12 0XS. Tel: 021-446 4157

OUR REF:

YOUR REF:

DATE:

Date:

I, *your name*, daughter of, *father's name*, have had an Islamic marriage – nikah – with, *husband's name*, son of, *father's name*, on *date*. I do not have possession of my original nikah certificate.

I did not have a civil marriage in England.

Signed: _____

Date: _____

In the name of Allah, the Beneficent, the Merciful.

THE MUSLIM FAMILY SUPPORT SERVICE

180 Belgrave Road, Birmingham B12 0XS. Tel: 021-446 4157

OUR REF:

YOUR REF:

DATE:

I, _____, would like
to apply for a khula (Islamic Divorce) from my
husband, _____ at the
Birmingham Central Mosque.

Signed: _____

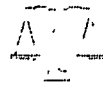
Date: _____

Witness: _____

APPENDIX 4

THE SHARIAH COURT OF THE UK DOCUMENT

1. The Islamic Verdict



Case No:

Your Ref.:

Date:

The Islamic Hokm (Verdict) regarding Khull'u (Repudiation)

The legal principle of *khull'u* in Islam is to prevent the husband harming the wife. The woman is allowed to obtain *khull'u* from her husband on one of the following grounds:

- 1- If the husband causes direct harm to her i.e. bodily damage, leaving wounds & bruises or physical humiliation.
- 2- If the husband causes indirect harm to her i.e. not providing food, shelter and clothing or oppressing/harming her children or he becomes a *faajir* e.g. homosexual, alcoholic etc.
- 3- If she hates him and cannot tolerate him anymore, even if he is good towards her. This will cause harm to her as she will become sinful by not fulfilling her duties towards her husband.

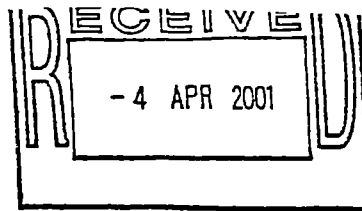
NB: As for the first and second grounds, the husband is not entitled to the jewellery or any dowry that has been paid and he is liable to pay the dowry or remainder of it if it has not been paid in full. As for the third ground, the husband is entitled to the jewellery and mahr that has been paid.

The Shari'ah Court of The UK

APPENDIX 5

Copy of Solicitors Letter

Community
Legal Services



The Old Bank Building
499 Great Horton Road
Bradford, West Yorkshire
BD7 4EG
Tel: 01274 404010
Fax: 01274 404013
E-mail: jax@stachiwj.bsserve.co.uk

Stachiw & Bashir Solicitors

4th April 2001

Mr Nadat

Faxed ~~to [redacted]~~

Dear Sirs

We have been consulted by our above named client who has now been handed by process server a copy of the Divorce Petition issued by your client on 21st September 2000.

Our client is at a loss to understand how your client is in a position to issue Divorce proceedings when in fact our respective client's did not undergo a valid ceremony of marriage.

You will no doubt be aware of the provisions of the Marriages Act 1949-1986 which quite categorically state that where parties marry disregard of certain requirements as to the formalities of marriage then the marriage is not valid under the provisions of the said act and therefore there is no marriage between our respective clients.

You will also be aware from the Marriage Certificate which has been provided to you to enable you to lodge the Divorce Petition that it is merely a piece of paper/ordinary form which is drawn up similar to that of a certified marriage certificate for the purposes of confirming that the parties have undergone Nikah ceremony (Islamic Marriage) in the Mosque concerned.

Your enquiries will no doubt reveal through the Central Register Office Marriages Section that our respective parties have not undergone a marriage under the provisions of the Marriages Act 1949. Furthermore we would ask that you make enquiries of the Blackburn and Darwin Borough Council which will no doubt confirm to you that the

Solicitors who care



Partners: Jaroslav N. Stachiw B.A. Hon. (Law)
Riaz Bashir LL.B. (Hons) (Institution of Law Society, Panel of Family Lawyers)
Conveyancing Executive: Martin Lamb
Associate Solicitors: Sukhwinder Singh Riyat LL.B. (Hons)
Inayat A. Nadat LL.B. (Hons)

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Family
LAWYERS

-2-

Mosque in which our respective clients underwent the marriage ceremony is merely registered for worship and not certified for marriages. Therefore this is not in accordance with the Marriages Act to enable them to undertake formal marriage ceremonies.

As no doubt you will be aware our client has now undergone a valid ceremony of marriage and his marriage is in fact recognised under English Law.

Under the circumstances we consider that the only steps available to you is to seek a dismissal of your client's Divorce petition on the basis that she is not in a position to undertake such proceedings and this would obviously be without any costs implications on our client.

If this is not acceptable then clearly there is going to be an unnecessary expense on our client and therefore we will seek to file an Answer for dismissal in the Blackburn County Court with an Order for costs against your client.

We would also be grateful if you would confirm whether or not your client is in receipt of Public Funding/Legal Help.

Accordingly we would be grateful if you would return back to us with your client's further instructions in this matter by close of business on Thursday 5th April 2001 to enable us to advise our client further on this matter.

We await to hear from you with some degree of urgency.

Yours faithfully


STACHIW & BASHIR