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Sham Arun-Qayyum

Title:

People, not only societies, are multicultural: An interdisciplinary study examining how Muslims in Britain are negotiating overlapping (legal) norms, identities and traditions

Thesis submitted for the degree of PhD 2016

SOAS, University of London

Declaration for SOAS PhD thesis

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Acknowledgments

I would like to thank all the participants who took part in this study. I also want to thank my friends, family and colleagues who have helped me in different ways. I want to thank my supervisor Prof. Werner Menski. Without his help, this project would never have come to fruition.

Abstract

Despite their long presence in Britain, Muslims often continue to be portrayed as an 'alien wedge' or even the 'enemy within'; 'the other' that simply cannot be assimilated. These discourses need to be interrogated, not least since they create communitarian walls rather than multicultural bridges.

Muslims, like members of other groups, refer to norms other than those made or accepted by the state: norms that have a personal or ethnic rather than territorial validity; a situation that I call internormativity. Methodologically, this requires us to consider not only how state agencies but also Muslims on the ground are coping with diverse norms. This study finds and records a variety of responses. Depending on the issue, domain, as well as other dimensions of difference, Muslims may cut out, bypass, stitch together, or create anew to deal with the accidents and diseases of multiculturalism. For this reason I call them cultural surgeons, and the art of decision-making or management of diversity as cultural surgery. In contrast, the state has struggled to cope and embrace diversity.

Through primary and a lot of secondary research, including analysis of case law and legislation, mainly focusing on family law matters, and in particular the institution of marriage and use of shari'a councils which have become particularly contested sites in recent years, this study examines how Muslims and the state is coping with internormativity.

The study has three main objectives. First, focusing on the content of English law, to examine how far it has adapted to accommodate the beliefs of Muslims and their way of life. The concern primarily is to see whether, and to what extent, English law either explicitly or tacitly recognises 'Muslim laws'. Second, where this is not the case what has been the response of Muslims to such non-recognition? The study records strategies and tactics by which this community, and its individuals, have sought to deal with the challenges raised by the presence of conflict between differing, overlapping, normative orders. Thirdly, to obtain a fuller understanding of the decisions Muslims are making when it comes

to marriage solemnisation, in-depth qualitative interviews with 59 Muslims were conducted, to draw out the sample's motivations. It is the 'voice' and experiences of individuals that the research also seeks to bring out. In particular, we interrogate the impact that personal, ethnic, and territorial norms are having on their decisions, as well as to draw out other explanatory factors. Having adopted the actor as the point where all normative orders 'converge', and having outlined how individuals have creatively responded, the study suggests that this be the vantage point from which to look at the possible reconfiguration of the state's legal system. The study concludes by making some recommendations on how the state in particular can manage diversity more effectively.

Glossary

adat	custom; tradition; law (a word with multiple uses and meanings)
agunah	‘an anchored or chained woman’. A woman tied to a defunct marriage because her husband is unable or unwilling to release her by granting her a gett (a divorce document in Jewish law)
al-‘amal	actions
al-i’tiqaad	belief
al-qawa‘id al-fiqhiyyah	Islamic legal maxims
al-salaf al-ṣāliḥ	‘righteous or pious predecessors’
anand karaj	Sikh marriage ceremony
‘aql	intellect
Barelvi	a Sunni sect/revivalist movement within the Hanafi school of jurisprudence
be-izzeti	dishonour or shaming
bida‘ah	heretical innovation
biraderi	various, clan, kinship, tribe
dār al-harb	the abode or territory of war
dār al-Islām	the territory or abode of Islam
darura	necessity
da‘wah	call or invite people to Islam
deen	complete way of life
Deobandi	a Sunni sect/revivalist movement within Hanafi school of jurisprudence
dhabiha	prescribed method of ritual slaughter of animals making the food halal
dhirar	harm
dochakuka	global localisation
düğün	wedding feast
fardh	obligatory

fasakh	annulment (judicial recission)
fatwa	legal ruling/a scholarly opinion
fiqh	understanding
fiqh al aqalliyyāt	fiqh for Muslim minorities
fiqh al-muwazanat	doctrine of balance
fiqh al-awlawiyyat	doctrine of priorities
firqah	sect
fuqaha'	jurists
ummah	community/global brotherhood of Islam
got, qom, patti,	various, descent group
tabbar	family
gurdwara	a Sikh place of worship
hajah	need
hajj	pilgrimage to mecca
halakhah	collective body Jewish laws
halal	permissible
Hanafi fiqh	one of the four Sunni schools of jurisprudence
Hanbali fiqh	one of the four Sunni schools of jurisprudence
haraam	prohibited
heer	custom
hijrah	emigrate
ibadat	worship
ijmā	consensus or agreement of the Muslim community
ijtihad	striving or exerting
ikhtilaf	difference of opinion
ikrah	duress
ilm-ul-ghaib	knowledge of the unseen
izzet	various, honour, status, prestige
Jamat-e-Islami	Islamic political organisation and social

	conservative movement founded by Abul Ala Maududi
jihad	'struggle'
jilbab	loose outer garment worn by females which covers the whole body
khat	stimulant plant native to the Horn of Africa
khul'a	a release for payment from the wife/ right of wife to divorce her husband
madhhab	school of thought within Islamic jurisprudence
mafqood al-khabr	missing husband
mahdi	guided one/awaited messiah
mahr	dower or 'nuptial gift'
makrooh	discouraged
mal	wealth or property
Maliki fiqh	one of the four Sunni schools of jurisprudence
mamzeret	illegitimate female offspring
maqasid al-shari'a	goals/purposes of shari'a
maslaha	public interest
mu'amalat	dealings and transactions between people
mubah	neutral
mufti	an expert on religious law
mujtahid	Islamic scholar who engages in ijtihad
muqallid	One who follows a mujtahid
mustahabb	recommended
muwatanah	citizenship
nafs	various, soul, ego, self
nasl	offspring
neo-ijtihad	'new reasoning'

nikah	Muslim marriage ceremony
niqab	veil covering face except the eyes
nur	a divine light
pardeshi rewaj	foreign custom
pirs	Sufi master/spiritual guides
qadi	Islamic judge
qanun wad'i	laws made by man
qiyās	analogical reasoning
qur'an	Islamic holy book
riba al-qarud	usury involving loans
rivaj	everyday notions of familial, kinship or customary norms
ṣaḥāba	the generation of the Prophet of Islam and his Companions
salat	prayer
sarva dharma sambhava	equality of religions and equal respect for religions
sawāb	reward
sawm	fasting
Shafi'i fiqh	one of the four Sunni schools of jurisprudence
shahadah	declaration that professes belief in the oneness of God, one of the five pillars of Islam
sharam	various, shame, embarrassment
shari'a	various, way of life or more narrowly Islamic law
siyāsah	government, policy
sunnah	the sayings, deeds and teachings of the Prophet Muhammad
Sunni	follower of one of the two main branches of Islam

tābi'īn	the generation that followed the Prophet and his Companions
tābi'īn al-tābi'īn	and their successors
tadrīj	principle of gradualism
tahsinat	improvements
takhayyur	selection
talaq nama	divorce certificate
talaq-i-tafwid/'esma'	a delegated right of divorce from the husband to the wife
talfiq	amalgamation
taqlid	'to follow' past legal rulings
taysir	facilitate
quam	community
ulema	body of Muslim scholars
ummat wasat	a middle nation
urf	various, custom, law
usul al-fiqh	'the roots of law', or 'principles of understanding'
vivah	Hindu marriage ceremony
wa Allahu a'lam	and Allah knows best
al-wala' wa-l-bara	loyalty and disavowal
wali	marriage guardian
wasā'iyya	moderation; the middle path
zakat	charity or alms giving
zat	caste, tribe
zina	illicit sexual relations

Table of Contents

Declaration for SOAS PhD thesis.....	2
Acknowledgments.....	3
Abstract.....	4
Glossary.....	6
Table of Contents.....	11
Table of Statutes.....	13
Table of Cases.....	16
Introduction.....	20
1.1 The challenge of normative and legal plurality: The need to make decisions.....	20
1.2 Perceptions and realities.....	26
1.3 Chapter outline.....	30
Chapter 2: Muslims in Britain.....	38
2.1 Defining Muslims.....	38
2.2 The development of Muslim presence in Britain.....	46
2.3 The demographic profile of Muslims in Britain.....	50
2.4 What did the migrants bring with them?.....	56
2.5 How should they adapt?.....	66
2.6 What guidance does Islamic jurisprudence provide?.....	76
2.7 The reconstruction of Muslim identity and norms.....	86
Chapter 3: How legal pluralism can help us see how Muslims read their daily world.....	93
3.1 Why legal 'legal modernity' is unhelpful.....	93
3.2 Why 'legal pluralism' is more helpful.....	104
3.3 An overview of legal pluralism studies.....	106
3.4 Theoretical issues related to legal pluralism.....	112
3.4.1 Demarcating the legal from the non-legal.....	112
3.4.2 Are we dealing with a body of norms, orderings or systems?.....	116
3.4.3 Can the multiplicity of orderings be placed into a hierarchy?.....	117
3.5 Towards exploring interactivity, hybridity, inter-legality.....	121
3.6 Legal pluralism in subjectivity.....	126

Chapter 4: The interaction of English law and Muslim 'laws'	131
4.1 The ideological position of the English legal system.....	131
4.2 The official legal response to Muslims and Muslim (legal) norms	137
4.2.1 The legal validity of the nikah in various scenarios	147
4.3 Muslim responses to a situation of legal pluralism	175
4.3.1 Strategy one: reform of an ordering so as to take account of another	176
4.3.2 Strategy two: combining the norms of two or more orderings to create something new	186
4.3.3 Strategy three: adherence to one ordering and avoiding the other(s).....	201
Chapter 5: Understanding choice outcomes	204
5.1 Towards a thick description of Muslim decision-making.....	204
5.2 Research methodology	204
5.3 Observations	210
5.3.1 How are Muslims getting married?	211
5.3.2 How many did not register their marriage?	212
5.4.4 Examining the reasons for the variety of current social practices	213
Chapter 6: Conclusions	226
6.1 Observations	227
6.2 Looking to the future	236
6.2.1 Facilitation of choice and the protection of consent	240
6.2.2 Acknowledging more substantially the right to be different	243
Appendix	247
Bibliography	251

Table of Statutes

Act of Supremacy 1534	149
Adoption and Children Act 2002.....	142
Anti-social Behaviour, Crime and Policing Act 2004.....	160
Arbitration Act 1996	197
Arbitration and Mediation Services (Equality) Act 2015-16.....	197
Asylum and Immigration (Treatment of Claimants, etc.) Act 2004	50
Asylum and Immigration Act 1996	50
Asylum and Immigration Appeals Act 1993.....	50
Commonwealth Immigrants Act 1962	47
Commonwealth Immigrants Act 1968.....	48
Council Directive (EC) 2000/78/EC	180
Council Regulation (EC) No 1099/2009.....	142
Counter-Terrorism and Security Act 2015	197
Cremation Act 1902	141
Criminal Justice Act 1998.....	141
Criminal Justice and Immigration Act 2008	143
Education Reform Act 1988	143
Elementary Education Act 1880.....	143
Employment Act 1989.....	141
Employment Equality (Religion or Belief) Regulations 2003	180
Environmental Permitting (England and Wales) Regulations 2010.....	141

Equality Act 2010	55
Fair Employment Act 1976.....	180
Fair Employment and Treatment (Northern Ireland) Order 1998.....	180
Family Law Act 1986	139
Forced Marriage (Civil Protection) Act 2007	159
Human Rights Act 1998.....	176
Immigration Act 1988	157
Immigration Act 2014	232
Immigration and Asylum Act 1999	50
Immigration, Asylum and Nationality Act 2006.....	50
Marriage (Prohibited Degrees of Relationship) Act 1986.....	154
Marriage (Registration of Buildings) Act 1990.....	152
Marriage (Same Sex Couples) Act 2013.....	154, 155
Marriage Act 1836	98
Marriage Act 1949	161
Marriage Act 1994	152
Marriage Duty Act 1695.....	149
Matrimonial Causes Act 1973	156
Misuse of Drugs Act 1971	232
Nationality, Immigration and Asylum Act 2002.....	50
Offences Against the Person Act 1861	156
Places of Worship Act 1855	153
Race Relations Act 1965.....	49

Race Relations Act 1968.....	49
Race Relations Act 1976.....	180
Racial and Religious Hatred Act 2006	143
Recognition of Divorces and Legal Separations Act 1971	139
Road Traffic Act 1988.....	141
School Standards Framework Act 1998	143
Sexual Offences Act 1956	158
Sexual Offences Act 2003	158
Slaughter of Animals (Scotland) Act 1928	142
Slaughter of Animals Act 1933.....	142
Slaughter of Poultry Act 1967	142
Slaughterhouses Act 1974	142
The Private International Law (Miscellaneous Provisions) Act 1995	157
The Water Act 1989	141
The Welfare of Animals (Slaughter or Killing) Regulations 1995	142

Table of Cases

A v J (Nullity) [1989] 1 FLR 110	171
AAA v ASH, The Registrar General for England and Wales and the Secretary of State for Justice [2009] EWHC 636 (Fam), [2010] 1 FLR 1.....	164
Ahmad v UK [1981] 4 EHRR 126	145
Alhaji Mohamed v Knott [1969] 1 QB 1.....	138
Ali v Ali (2001) Unreported	173
Al-Saedy v Musawi [2010] EWHC 3293	167
A-M v A-M (Decree: Jurisdiction: Validity of Marriage) [2001] 2 FLR 6.....	161
Azmi v Kirklees Metropolitan Borough Council [2007] IRLR 434 EAT	180
Baindail (otherwise Lawson) v Baindail [1946] 1 A11 ER 342 CA.....	68
Bakhitiari (Leila) v Zoological Society of London [1992] CLY 1689	145
Banik v Banik [1973] 3 A11 ER 45	139
Brett v Brett [1969] 1 A11 ER 1007	172
Captain de Thoern v. A.- G. (1876) 1 App. Cas. 686	166
Cha'are Shalom Ve Tsedek v France [2000] ECtHR (No. 27417/95).....	78
Chaudhary v Chaudhary [1984] 3 A11 ER 1017.....	139
Cheni v Cheni [1962] 3 A11 ER 873.....	138
Cherfi v G4S Security Services [2011] UKEAT 0379/10.....	145
Chief Adjudication Officer v Bath [2000] 1 FLR 8.....	166
Commission for Racial Equality v Dutton [1989] 1 A11 ER 306	142
Copsey v WBB Devons Clays Ltd [2005] ICR 1789	145

Crown Suppliers (Property Service Agency) v Dawkins [1993] ICR 517, sub nom Dawkins v Department of the Environment [1993] IRLR 284, CA	142
Dukali v Lamrani [2012] EWHC 1748 (Fam)	164
El Gamal v Al Maktoum, [2011] EWHC B27 Fam	164
Gereis v Yaqoub [1997] 1 FLR 854	162
Gandhi v Patel [2002] 1 FLR 603	162
H v H [2005] Fam LR 80	172
Hirani v Hirani [1983] 4 FLR 232	159
Hudson v Leigh [2007] EWHC 1306 (Fam)	162
Hussain v Hussain [1982] 1 A11 ER 369	157
Hyde v Hyde and Woodmansee [1866] LR 1 P & D 130	155
Imam Din v National Assistance Board [1967] 2 QB 213.....	138
Kaur v Singh [1972] 1 A11 ER 292.....	171
KC v City of Westminster Social and Community Services Department (2007) EWHC 3096 (Fam).....	153
KC v City of Westminster Social and Community Services Department (2008) EWCA Civ 198.....	153
Lyle v Ellwood [1874] LR 19 EQ 98	166
MA and JA v Her Majesty's Attorney General [2012] EWHC 2219 (Fam).....	165
Mahadervan v Mahadervan [1964] P 233	166
Mahmud v Mahmud [1994] SLT 599.....	159
Mandla v Dowell Lee and Another [1982] 3 A11 ER 1108 CA	142
Mirza Waheed Baig v. Entry Clearance Officer, Islamabad, [2002] UKIAT 04229	139

Morgan v Civil Service Commission and the British Library (Case no. 19177/89), EOR Discrimination Case Law Digest 19177/89, (6) Winter 1990.....	141
Nachimson v Nachimson [1930] P 217	156
Onobrauche v Onobrauche [1978] 8 Fam Law 107.....	156
Printing and Numerical Registering Co v Sampson [1875] 19 Eq 462	98
Quila and Bibi v Secretary of State for the Home Department [2011] UKSC 45	158
Qureshi v Qureshi [1971] 1 All ER 325.....	138
R (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants) [2006] UKHL.....	179
R (on the application of Ghai) v Newcastle City Councils & Others [2010] EWCA Civ 59...	141
R (on the application of Quila & Another) (FC) (Appellants) v SSHD [2011] 6 UKSC 45	160
R (Bibi & Another) v Secretary of State for the Home Department [2011] UKSC 45.....	160
R v Bham [1965] 1 QB 159	160
R v Bibi [1980] 1 WLR 1193	145
R v Chief Metropolitan Stipendiary Magistrate, ex p. Choudhury [1991] 1 All ER 306.	143
R v Dorset County Council, ex parte Rolls and another [1994] 2 WLR 1151	142
R v Gloucestershire County Council, ex parte Barry [1997] AC 584	142
R v Horseferry Road Magistrate Metropolitan Stipendiary Magistrate ex parte Siadatan [1991] 1 All ER 324	143
R v MC [2002] 1 Cr App R (S.) 80	145
R v Mohamed Ali [1964] 2 QB 352	160
R v R [1991] 4 All ER 481 at 483	138
R v South Hampshire District Council, ex parte Gibb [1994] 3 WLR 1151.....	142

R v Z (2009) 2 Cr App R (S.) 32.....	137
R(on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others [2009] UKSC 15.....	142
Re Bethell [1888] 38 Ch. D. 220.....	156
Re Naquib [1917] 1 KB 359	156
Seemi v Seemi 1990 NLJ 747	146
Seide v Gillette Industries Ltd [1980] IRLR 427 EAT.....	142
Shahnaz v Rizwan [1964] 3 WLR 1506	138
Singh v Kaur [1981] 11 Fam. Law 152.....	159
Singh v Singh [1971] 2 A11 ER 828	159
Srini Vasan (otherwise Clayton) v Srini Vasan and Baindail (otherwise Lawson) v Baindail [1946] 1 A11 ER 342.....	156
St. Stephen's College v. University of Delhi, AIR 1992 SC 1630,	245
Stedman v UK [1997] 23 EHRR CD 168	145
Tariq v Young and others (Case No. 24773/88, EOR Discrimination Case Law, (2) Winter 1989).....	141
Uddin v Choudhury [2009] EWCA (Civ) 1205.....	186
Varanand v Varanand [1964] 108 SJ 693	138

Introduction

1.1 The challenge of normative and legal plurality: The need to make decisions

Some important inroads are being made by the new academic and policy interest in 'super-diversity' and its implications (Vertovec 2007, 2010). The transition from 'diversity' to 'super-diversity' is forcing us to rethink some of the most basic concepts in social science – notions such as community, identity, and indeed citizenship (Blommaert 2013). Today's super-diversity is not just about more countries of origin, ethnic identities, languages and religions. At the heart of the concept is the recognition that there are yet additional (im)migrant¹ characteristics, (for example an immigrant's channel of migration, transnational linkages, legal status and socio-economic profile), that require close examination since they affect every day social life, interactions and integration. Few scholars, to date, have recognised 'legal consciousness' (the understandings and meanings of law circulating in social relations),² as an additional immigrant characteristic, and how the processes of migration, globalisations,³ localisation,⁴ and

¹ There are alternative positions on whether EU citizens ought to be classified as immigrants or simply migrants. The position adopted reveals the attitude the user has about the relationship between Britain and the European Union.

² Broadly speaking 'legal consciousness refers to what people do as well as say about law. It is understood to be part of a reciprocal process in which the meanings given by individuals to their world become patterned, stabilised, and objectified (Silbey 2008: 695). '[T]he study of legal consciousness traces the ways in which law is experienced and interpreted by specific individuals as they engage, avoid, or resist the law and legal meanings' (ibid). For details see Silbey (2008).

³ Though not having the same meaning for everyone, globalisation pre-eminently involves tendencies (however interpreted) towards transnational similarity or homogeneity by unifying economic, social arrangements, institutions and values (Cotterrell 2002: 43). Contrary to the usual thought of globalisation as a single process, involving the spread of Western' influence, open markets and human rights, there are a number of globalisations going on in our postmodern era. In a race to globalise, Glenn (2004: 51) identifies three main candidates: the West, Islam and Asia. In management circles, Western techniques of management and organisation are being replaced by those from Asia: see in particular, Kaplinsky & Posthuma (1994). Adding further complexity to the macro phenomena is the view that globalisation intertwines with local considerations, resulting in 'glocalisation'. To the extent that the ties and influences of globalisation are selected, processed and consumed according to the interacting local culture's needs,

synchronous technological advancements,⁵ are contributing to normative and legal plurality in Britain, and elsewhere in Europe.⁶

Immigrants in a new country of residence, whether or not they have acquired citizenship, may refer to a number of (legal) norms deriving from numerous sources: norms that have a personal or ethnic, rather than territorial, validity. The (legal) norms (or dispute-resolution mechanisms) in question might be only single norms or mechanisms, or part of a whole normative ordering that they have brought over with them. In the new country of residence these norms might take on an entirely new significance in the life of the 'minority',⁷ and may successfully pass on to the next generation. Their personal or ethnic norms may not necessarily be recognised by the sovereigntist nation state's legal system,⁸

taste and social structure (Robertson 1995). The term glocalization was popularised in the anglophone-world by the sociologist Roland Robertson. The word and idea came from the Japanese word *dochakuka*, which means global localisation. Originally referring to a way of adapting farming techniques to local conditions, *dochakuka* evolved into a marketing strategy when Japanese businessmen adopted it in the 1980s.

⁴ In contrast to globalisation the apparently contradictory process of localisation involves counter-tendencies (of whatever kind) towards appreciating difference by creating, preserving, or rediscovering conditions in which difference, diversity and autonomy of groups, nations or territories can flourish and be respected (Cotterrell 2002: 43).

⁵ One can, in particular, point to air travel, the internet and the rapid growth of the mobile phone network. Diaspora communities in particular have been able to create 'network societies' (Castells 1996) in which members can live and act in relation to long-distance 'virtual' peers, in sometimes enormous online communities.

⁶ By legal plurality I mean the factual state of affairs, within any population, where behaviour pursuant to more than one legal order occurs. By using the term legal plurality rather than legal pluralism I acknowledge the difference between fact and value. Often scholars unhelpfully mix the factual or empirical reality of legal diversity or difference on the one hand, and normative commitment to pluralism, on the other. As I see it, pluralism refers to an attitude, value system, ideology, processes that see the realities of diversity and difference as a positive, and is ready to translate them into sustainable goals, whether they are social cohesion, national integration, political stability, economic development and so on.

⁷ When thinking about minorities it is important to note that it is not a numbers game rather it is more about power relations. The lack of power is not dependent on, but is usually exacerbated by, how small the minority group is. In some circumstances the 'minority' may have become the 'majority' in local contexts. A case in point is the London Borough of Tower Hamlets, where Islam is the largest religion followed by Christianity in terms of adherents, and the 'Bangladeshi' population is the largest 'ethnic' group followed closely by 'White British' (2011 Census). For a useful discussion of how groups irrespective of their number can be legal or ideological minorities see Asad (2003).

⁸ Subject to specific conditions recognised under private international law (also often referred to as conflict of laws).

but they can be equally, if not more so, authoritative in compelling behaviour. In the new socio-legal environment migrants also become aware of host norms, including the sub-species of legal norms administered by the state's legal system. They realise that not all norms and values are shared. In fact, some personal or ethnic norms may be diametrically opposed to those of the majority and of the legal system. But stable residence in the new country means actively coping with diverse norms.

The interplay of different (legal) norms is resulting in complex, and sometimes unexpected, outcomes. Methodologically, this requires attention to be focused not only upon how courts and other official agencies cope with diverse norms, but also upon how actors 'on the ground' are dealing with the fact that they find themselves, or their act, subject to multiple normative orderings that overlap and may conflict. The Japanese jurist Masaji Chiba (1998: 228-45) referred to this situation as 'legal pluralism in conflict' and when we take an actor's perspective as legal 'pluralism in subjectivity'. Santos (2002: 347) has described interlegality, namely that our legal life is constituted by an intersection of different porous legal orders, which lead us to constant transitions and trespassing, as a feature of postmodernity.

Not all norms or values of different orderings are antagonistic or incompatible however, as is sometimes sensationally reported. It is the individual, moreover, who chooses (actively or passively) the norms in his or her life. On a daily basis actors are engaged with deciding which norm(s) they will adopt and abide by – they cannot sit on the fence, and yet surprisingly, little academic attention to date has been paid to cultural navigation or what I call 'cultural surgery' in the

context of law. I like to think of individuals who find themselves or their act subjective to multiple and overlapping traditions as cultural surgeons and their specialism as cultural surgery.

By cultural surgery I mean the specialism of actively coping with diverse norms. From becoming aware of norms to deciding how one is going to confront them. So we are focusing our attention on whether a cultural surgeon will cut out, stitch together, bypass, or create anew when dealing with multiculturalism's diseases and accidents. In other words, the process of coping with diverse norms can take different forms, such as conforming to, creatively and subtly reforming, combining,⁹ or creating anew, or openly rebelling against norms. Accordingly, norms (and at a different level – identities) are continuously being changed, or face challenge, and in the shadow of seemingly dominant norms, other norms are followed, applied and implemented. Having made their decision, individuals model their behaviour in compliance to their choice. Besides being understudied cultural surgery is a complex phenomenon. In the process of decision-making cultural surgeons have to safeguard themselves from relatives (whose quarrels threaten to rip the family apart), from strangers (who may show hostility or discriminate against them), and from the state (which may criminalise them).

In 1981 K. Benda-Beckmann's seminal article, on '*Forum Shopping and Shopping Forums – Dispute Settlement in a Minangkabau Village in West Sumatra*', was the first study to suggest a subjective notion of legal pluralism. Vanderlinden's paradigm-shifting but brief theoretical contribution in 1989 on legal pluralism

⁹ Stable residence in a new country can result in the formation of syncretic or hybrid norms. We will examine this in some detail in the English context in chapter 4, but in the French context see Rude-Antoine (1990), in the Belgian context Foblets (1994) and in the US context Zaman (2008).

focused on individuals and the choices that they are required to make between legal norms from different sources and of different content. Kleinhans and Macdonald's (1997: 15) radical theoretical contribution has argued that legal subjects possess a creative transformative capacity that enables them to fashion the very structures of law that contribute to constituting their legal subjectivity. Other scholars too have adopted an 'actor's perspective' when addressing the challenges and opportunities presented by legal plurality. Notably, Petersen's attempt with collaborators to understand 'law from the inside' against a backcloth of polycentricity, which sees 'law as being engendered in many centres' (Petersen and Zahle 1995: 8). Hellum's contribution reflected upon women's experiences of managing deep legal pluralism in their daily life in Southern Africa, which presents them 'with a variety of options, choices and dilemmas as to how to achieve their goals' (1995: 18). Harris's (1996) edited volume also included case studies that provide some insights into how groups and individuals exercise their agency, when presented with multiple legal orders. Other notable scholarship that advances an 'actor's perspective' include Menski (1993), Turner (2006), Shariff (2008), Sbriccoli (2013), and in relation to parallel dispute resolution fora, Shah-Kazemi (2001), Basu (2006), Shahar (2008), Bano (2012), Bowen (2013), and Tas (2014).

The central aim of this study is to illuminate the phenomenon of norm-navigation or what I call cultural surgery.¹⁰ Cultural surgery occurs not only on

¹⁰ Cultural surgery is not something peculiar to Muslims or members of faith communities. Some scholars have argued that humans possess innate cognitive mechanisms specialised for the acquisition and implementation of norms, since the existence of these mechanisms would they say help explain the universal or near universal presence of norms in all groups (see Sripada & Stich 2006).

the basis of rational choice,¹¹ but under the influence of cultural prejudice and political, economic and ideological hegemony. The explicit recognition of these forces, of power relationships between actors in the law and between normative orders, is essential in providing a deep understanding of the whole phenomenon. While the challenges here – historiographical, comparative and social scientific – are significant, a close investigation of norms in action, and in the minds, is at the heart of understanding cultural surgery (Donlan 2015: 28). Dupret (2007: 24) has similarly emphasised the importance of ‘close investigation of actual data reflecting the ways (methods) in which people (the members of any social group) make sense of, orient to, and practice their daily world’.

Using the case study of Muslims and their relationship with the English legal system, the study investigates how they are coping with diverse norms. We restrict our discussion to family law matters, and in particular to the institution of marriage,¹² which has become an especially contested site in recent years.

The study has three main objectives. First, focusing on the content of English law, to examine how far it has adapted to accommodate the ‘beliefs of Muslims and their ways of life’.¹³ The concern primarily is to see whether, and to what extent, English law either explicitly or tacitly recognises ‘Muslim laws’.¹⁴ Second, where

¹¹ According to the idea of ‘bounded rationality’ proposed by Simon (1997) decision-making is limited or bounded by ‘cognitive limitations’ and the ‘structures of the environment’. In practice this means that decision-makers behave as ‘satisficers’, that is, when presented with a situation where they are required to make a decision they seek a satisfactory solution rather than an optimal one.

¹² Other issues related to marriage such as the age of marriage, dower (*mahr*), dowry, divorce, if it is an arranged, forced, gay, polygamous or consanguineous marriage, though equally worthy of investigation, do not directly fall within the ambit of this study.

¹³ According to ‘official legal science’ or legal positivism, the legal ideology underpinning English Law, Muslim norms (whether *shari’a* or *urf*) are not ‘laws’ rather they are ‘appropriately’ conceived of as beliefs, customs, mores, or simply cultural practices. Chapter two discusses this in some detail.

¹⁴ For many Muslims, a view consistent with the science of legal pluralism’, particular *shari’a* and *urf* norms are ‘laws’ which they do not wish to transgress or violate. Changing the methodological lense, as discussed in chapter 2, results in a very different lived experience.

this is not the case what has been the response of Muslims to such non-recognition? To help illustrate the diversity of responses the study records, creating a three-fold typology, the strategies and tactics by which this community, and its members, have sought to deal with the challenges raised by the presence of conflict between differing, overlapping, normative orders. Thirdly, to obtain a fuller understanding of the decisions Muslims are making when it comes to marriage solemnisation, in-depth qualitative interviews with 59 Muslims were conducted, to draw out the sample's motivations. It is the 'voice' of individuals that the research seeks to bring out. In particular, we interrogate the impact that personal, ethnic and territorial law is having on their decisions, as well as to draw out other explanatory factors.

1.2 Perceptions and realities

The study has chosen to put Muslims under the spotlight because for a long time Islam has been portrayed as an existential threat to European character (Cesari 2012: 433-4). In this mode of thinking Islam is presented as intrinsically different from other cultures, unchanging and monolithic, culturally inferior yet paradoxically threatening. Adherents of the faith are deemed inassimilable and the mere mention of the word shari'a invokes fear and suspicion.¹⁵

One reason for why such negative views have taken root is because of the British media's intense ideological preoccupation with a purported Muslim threat. Media representations often depict a single Muslim or 'orient' community with negativisations; in essence, problematising the community. Often, and

¹⁵ One leading Muslim scholar pointed to what has become the elephant in the room when he wrote, 'In the West the idea of Sharia calls up the darkest images of Islam [...]. It has reached the extent that many Muslim intellectuals do not dare even to refer to the concept for fear of frightening people or arousing suspicion of all their work by the mere mention of the word' (Ramadan 2005: 31).

increasingly, since the Satanic Verses Affair in 1988, particularly through the use of ideational framing,¹⁶ newspaper reporting of Muslims has collocated negativisations, like associating Muslims with descriptions such as ‘fundamentalists’ or ‘extremists’, with collectivisations that amass Muslims into a singular, homogeneous group such as ‘Muslim youths’ or ‘Muslim gangs’.¹⁷ Other recurring suggestions include that Muslims aspire to ‘impose shari’a law’ and, more disturbingly, that they are ‘terrorists’.¹⁸ Associating Islam with the acts of a tiny minority of Muslims who have engaged in acts of terror conflates the religion of Islam with terrorism and perhaps more than any other type of framing has contributed to a rise in anti-Islamic discourse that feeds the story of the ‘other’ that simply cannot be assimilated or integrated (Lenard 2010: 310-11; Barou 2014: 647). Often, and increasingly asked to demonstrate their roles as active citizens and to ‘British values’, Muslims thus continue to be seen as an ‘alien wedge’ or even the ‘enemy within’.

Media representations of Muslims shaped by the categorisations above do not just occur, but result from what Poole (2002: 52-3) calls the ‘manufacture of news’. The way the veil and the 2008 speech on civil and religious law in England by the then Archbishop of Canterbury have been portrayed reveal the extent to which narratives are manufactured; to the woe of Muslims, liberals, and multiculturalists.

¹⁶ For a conceptual background on framing theory see Goffman (1986).

¹⁷ For details see Richardson (2009). The insightful study describes how British Muslims were represented during the 1997, 2001, and 2005 general elections. For a useful longitudinal study of portrayals of Islam and British Muslims in the British media see Poole (2011).

¹⁸ For a useful account of how Muslims are being framed in the US see el-Aswad (2013). He picks up the very same portrayals.

The veil is a long-standing topic in the British press and has either been 'eroticised or constructed as Muslim women's victimhood and of Islam's backward patriarchy' (Khiabany and Williamson 2008: 70). Often the diversity of reasons why British women wear the veil has been ignored. More recently, however, the veil's figurative use has been transformed. It is now used symbolically to represent the failings of multiculturalism, and a threat to the British way of life. Previous depictions of Muslim women as 'victims' has been erased and instead the image is used in a sinister fashion to illustrate what is described as rising fundamentalism and contributes to the demonisation of Muslims more generally. Similarly, the coverage of the Archbishop of Canterbury's 2008 speech was subject to decontextualisation, exaggeration and misinformation (Moore et al 2008: 32). Though attracting widespread criticism, including from a variety of politicians, Williams comments were in fact nuanced and carefully considered. To allay the danger of a stand-off, where the law squares up to people's religious consciences, he suggested constructive accommodation of some aspects of religious law including shari'a for Muslims. In his view, the adoption of parts of Islamic law would help maintain social cohesion, but he emphasised that this relies on shari'a being better understood. Disseminating a better understanding of shari'a however seems to be off the agenda for much of the British media, which is involved in creating a consensus view of what is important about Muslims and how this community is to be understood. The result is that other more complex understandings about Islam and Muslims are excluded. Constant repetition of negative tropes and in particular the routine framing of Muslims as the 'other' has a profoundly

negative impact on the (self) perception of Muslims. Injurious consequences include inter-ethnic conflict, most readily seen in the form of hate crime, but also the impairment of a person's self-esteem that could lead to self-hatred (Honneth 1992: 189; Taylor 1994: 25); in other cases to a 'reactive ethnicity' (Rumbaut 2008: 3), or religiosity in the face of perceived threats. Experiences of non-recognition and distortion of their beliefs and ways of life have left many Muslims feeling imprisoned in false or distorted stereotypes that they have found difficult to pierce, and hence have had the effect of reducing their mode of being. Though the constant priming of negativisations becomes very difficult to dismantle, these discourses need to be interrogated, not least because they create roadblocks to a peaceful multicultural coexistence.

There are several reasons also for why the study focuses on the institution of marriage. The family is central to the whole scheme of social life as envisaged by Islam (McDermott & Ahsan 1980: 13). On the basis of sunnah, Muslims generally consider marriage to be 'half of one's faith'. This has contributed to the formation of a well-established view, namely, that 'an unmarried man or woman is rather an oddity in Muslim society, particularly if he or she is able bodied and of sound mind' (Hassan 2006: 246). By encouraging the norms of marriage, ethnic groups also strengthen their ties, and maintain their notions of honour. Ethnic or traditional norms predicated on honour, or prevention of shame, are often crucial to ethnic groups. These concepts are deeply interwoven to everyday notions of familial, kinship, and customary norms.¹⁹

¹⁹ On the importance of honour as it relates to young British Asians, one recent BBC poll found that two-thirds believed that families should live in accordance with an 'honour code': 'Honour code supported by young Asians, poll says', online BBC report, [available at: <http://www.bbc.co.uk/news/uk-17319136> [accessed 14/12/13]].

Whether we see religion as a culture in itself (Geertz 1973: 91), or part of a broader culture, it is clear that the family is seen by the state, faith and ethnic groups as a key institution for social reproduction and the transmission of culture and values. For this reason, marriage is ideologically an especially contested site. From the moment they arrived, as we shall see, Muslims have been busy 'reassembling' their familial norms in diaspora (Nielsen 2004: 120). This has led to what Grillo (2015) describes as 'MILLI', a 'socio-legal-political industry', involving a multiplicity of organisations, groups and individuals who, while having their own agendas and preoccupations, share a concern with how Islam relates to law and the legal aspects of Muslim presence in Britain.²⁰ The terrain that MILLI operates on is the desire to maintain or constrain cultural and religious practices, notably as they relate to family law, especially marriage and divorce. (2015: 8). This sets the scene then for us to explore how Muslims are coping with diverse norms, against the wider backcloth of MILLI.

1.3 Chapter outline

The study begins from the position that to remove many misunderstandings, but also if there is to be a buy-in of the recommendations on how we move forward together, it needs to provide a better understanding of Muslims and of Muslim norms, including the subspecies that we define as 'laws'. Many misunderstandings derive from a too limited knowledge and insight into what the 'other', or 'another' more appropriately one might say, is doing and experiencing, and from the stereotypes and assumptions of one's socialisation

²⁰ The acronym MILLI stands for Muslims, Islam and the Law: A Legal Industry.

(Qayyum 2014: 64). In chapter two, we interrogate the label 'Muslim', and we note that there is no uniform answer to what makes someone a Muslim. Many people describe themselves as being Muslim, but this does not mean that they don't identify themselves in other ways, or that 'being a Muslim' is the primary source of their identity, and even if it is, as this study shows, it will not be uniformly expressed. We interrogate also the notion of a 'Muslim community', and we notice that the community consists of a variety of sub-groups. There are many dimensions of difference. We note that these internal differences have important outcomes. We also note that Muslims like all human beings are motivated by all sorts of motivations, aspirations and needs. Essentialist tendencies have also led to scant attention being paid to individualism in Muslim consciousness.

As we are oriented to the Muslim presence in Britain, we see that the community has been present here for a long time. Its number has grown through various waves of immigration from an ever increasing variety of countries, but also through birth rate and conversion. Immigration restrictions led to a settled Muslim community, and chain migration and family reunification led to dense patterns of settlement, which in turn significantly contributed to the reassembly of Muslim norms in the diaspora.

The demographic profile reveals that almost half of the Muslim population was born in Britain, and are under the age of 25. This establishes that they are no longer 'immigrants', and this has important ramifications not least over their expectations but also in terms of the demands they make as citizens. The last Census also revealed significant inequalities experienced by Muslims. Muslims

are overrepresented in the criminal justice system. In the context of employment research suggests that they are experiencing the double penalty of racial discrimination and islamophobia.

Muslims did not arrive in Britain as empty vessels or blank slates rather each person brought with them their peculiar cultural luggage that included a 'legal consciousness', which contrary to assimilationist expectations they did not discard or erase on entry. Either on arrival, or sometime soon thereafter, Muslims realised that not all norms and values are shared. In fact, some personal or ethnic norms were diametrically opposed to those of the majority and of the legal system. But stable residence in the new country meant that they had to actively cope with diverse norms. As we are oriented to different acculturation models, we consider how they could adapt. We take a brief look at the policies that have been adopted by the British state over the years, from assimilation, to multiculturalism, to community cohesion, and now it seems 'muscular liberalism'. We also look at what guidance Islamic jurisprudence provides to Muslims. The vacuum in authority has led to much confusion. Efforts by Muslims to develop guidance have, notably, led to a new but contested '*fiqh* for minorities'. Muslims are also involved in finding their own answers by using their personal judgment in the new social setting. As a trend, Muslims have been busily reassembling their cultural and religious values, with some modifications, in their new homes. This is the case even with British-born generations, but the process has not been without its tensions. Muslims rapidly developed life-cycle rituals, local infrastructure and community institutions. The commitment to reassembly also extends to the legal sphere but among legal scholarship has

largely gone unnoticed. This is because of received ideas about law. Official legal science renders other normative orderings invisible.

The present study is not a black-letter study of jurisprudence or of 'law in the books'. Official legal science alone does not allow us to adequately see the normative influence of personal or ethnic orderings, or alternative understandings and meanings of 'law' circulating in social relations. This is because it does not allow us to get past the fiction that only the state makes and administers the law. This is not consistent with how Muslims in Britain see their lived reality. To understand how Muslims read their daily world – a world in which they or their act are subject to multiple, overlapping normative orders – we need to look to adopting the more appropriate lens provided by the science of legal pluralism. This forms the subject-matter of chapter three. After explaining why official legal science or legal modernity, an ideology undergirded by legal positivist and centralist ideas, is unhelpful, we turn our attention to legal pluralism. Pluri-legal theories recognise that multiple forms of law may be present within a population, which might have different sources, content, and range of functions. The state certainly does not have monopoly over law. These are just 'political claims' (Santos 2002: 90). They also highlight the problem with a hierarchal concept of law or that other norms – norms of religion, morality, ethical custom, or fashion – may be more authoritative in compelling behaviour than the legal norm.

Against the use of pluri-legal theories several objections have been raised. We examine these, and in the process explain how the study conceives 'law', namely, as a sub-species of norms with no special epistemic status that makes it more

authoritative than another norm. This approach takes normativity beyond legality seriously. From examining the interaction of differing, overlapping normative orders, pluralists and their allies have extended their inquiry to the phenomena of hybridity, interlegality and internormativity.

For years much attention has focused on how the state and its agencies are coping with diverse norms. This study seeks to bring out how actors on the ground are coping with the same. It adds to the scant literature on 'legal pluralism in subjectivity'.

Having supplied the theoretical framework, in chapter four we look at the interaction of personal, ethnic, and territorial 'law' on Muslims in the English context. In other words, the interaction of *shari'a* (or more precisely forms of *fiqh*) and community-specific forms of *urf* and English law. The impact of 'legal modernist' thought is that the state treats only its normative ordering as 'law', all other normative orderings are de-statised to simply 'customs', 'cultural practices', 'mores' and at best 'beliefs'. As uniform law is seen as desirable and the pinnacle of legal development, we have a 'one law for all' policy. The English legal system is guided by particular reference points when making law, notably these include a particular notion of secularism, human rights norms, and public policy. The state expects citizens to prioritise loyalty to the state over personal or ethnic group membership. In other words, citizenship requires that they prioritise their national identity over religious or ethnic identity. Many Muslims however feel compelled to follow *shari'a* and *urf*, particularly in the family context. The ramifications, then, are that we have a 'battle of laws' that is part of a wider 'war of normativities and values' taking place.

We focus on the content of English law, to examine how far it has adapted to accommodate Muslims and Muslim norms in the context of marriage solemnisation. We then examine what has been the Muslim response to what is largely non-recognition of their identity, norms (including the sub-species of legal norms) and values. The analysis records multiple strategies and tactics that have been employed by Muslims in response to challenges raised by the presence of conflicts caused by a situation of internormativity. From efforts to reform orderings, to the creation of new trans-local hybrid living laws and identities, to avoidance or even rejection of particular orderings. The negotiation begins with the individual and their conscience, before negotiations between individuals and others including the state occur. Many British Muslims are mixing and matching, or synthesising, their norms and values and this allows for great variety, eclecticism and personal patterning. In this way identity remains individual.

In chapter 5 we engage directly with Muslims 'on the ground'. The aim is to obtain a thick descriptive understanding of the negotiation that is taking place in the individual's mind. In several ways the research is explorative, for in recent years much attention has focused on Muslims not registering their marriage, (with the connotation that they then need to use unregulated *shari'a* councils that are suspect of due process and human rights norms, particularly equality, when it comes to women), yet the prevalence and explanations for the practice have largely been based on anecdotal evidence. A primary aim, then, of the research is to identify the extent of non-registration amongst the sample and to record explanations for why this is occurring. In addition to understanding the

significance of *shari'a*, *urf* and English law to the individuals involved, the investigation also seeks to bring out how other dimensions of difference (like age, gender, social class, immigration status, and residential location) possibly impact their decisions.

Chapter 6 summarises the findings and makes suggestions. The findings support the case that the English legal system needs to accept difference or alterity more substantially, if it is to build multicultural bridges and not communitarian walls. Non-recognition, moreover, places the state on the back foot when it comes to helping those whom it regards, and who probably in fact are, vulnerable and disadvantaged. The study adopted the individual as the point where all normative orderings 'converge', and suggests that this be the vantage point from which to look at the possible reconfiguration of the legal system. Since many minorities prefer using private ordering and private orders, the state could respond through institutional change that is part of a bigger paradigm-shift that allows majority-minority communities to co-exist and define their mutual rights and obligations. In this way the state is moving closer to giving effect to the will of all its citizens, not only to that of the majority, and this should be accompanied by a commitment on its part that the citizen's right to choose is supported, even offered legal protection. Such an approach does not flatten individual choices when awarding group rights and therefore avoids the risk of imposing obligations on individuals who do not identify with them. This approach would help to protect vulnerable or powerless subjects, whose choice might otherwise be suppressed or ignored within the community to which they 'belong'. Here I am thinking particularly of women and sub-minorities. The focus on allowing

individuals options, and protecting their right to choose, forms a sound basis for multicultural policies.

Chapter 2: Muslims in Britain

2.1 *Defining Muslims*

Before we can look at how Muslims are coping with diverse norms, it is important that we prepare the ground, by dispelling stereotypes and misconceptions, and by clearing particular mental blockages caused by an uncritical acceptance of some received ideas that may hinder our progress. This chapter in relation to 'Muslims', and the next in relation to 'law', seek to do this.

There is much misunderstanding about who Muslims are, what it is that they believe in, and how they will behave in any given situation. If we begin by briefly asking what makes someone a 'Muslim', we see that no uniform answer is forthcoming.²¹ While most Muslims point to the *shahadah* as the acid test that separates the Muslim from the non-Muslim, others argue that belief (*al-i'tiqaad*) must be translated into action (*al-'amal*).²² On the basis of doctrine rather than observance, newer groups who regard themselves as 'Muslim', such as the Ahmadiyya and the Nation of Islam, are not considered by orthodox Sunni and Shi'a Muslims to be part of the fold (Ansari 2002: 6). Similar views have also been expressed about particular divisions of Alevi 'Muslims', and also about 'Muslims' who have based their lives around the ideas of a particular teacher and his disciples resulting in a *firqah* (sect). Amongst Barelvi Punjabis, for instance,

²¹ It is generally thought that a person is a 'Muslim' if s/he accepts *tawhid* (one-ness of god) and the prophethood of Muhammed, expressed through the taking of the *shahadah*. All Muslims however do not share this view. Others, emphasising the *sine qua non* relationship of belief (*al-i'tiqaad*) with actions (*al-'amal*), have argued that alongside the acceptance of the *shahadah* there must be a commitment to the practice of *salat* (prayer), *sawm* (fasting), *hajj* (pilgrimage to mecca), and *zakat* (charity), which are the 'first and essential pillars of a life of faith' (Ramadan 1999: 20). At its most comprehensive, being a Muslim is submitting to the will of Allah and therefore Islam becomes a complete way of life (*deen*), with the *qur'an* (the word of God) and *sunnah* (the sayings and practices of the Prophet) becoming the key points of reference. On Islam as a complete way of life see Anwar (1979: 158-169); McDermott and Ahsan (1980: 7).

²² See for instance Ali (1992: 164).

Ballard (1996) describes the operation of a local manifestation of Islam. Emphasis on what he refers to as panthic and kismet dimensions of religion has led to a particular importance being placed on pirs (spiritual guides) but Deobandis, the other main doctrinal influence on Sunni South Asian Muslims, regard this as misguided and un-Islamic. This revivalist movement within Hanafi Islam is critical of Barelvis for,

[...] adopting non-Muslim ideas through their cult of pirs or saintly leaders, in particular [...] the belief that pirs can intercede with Allah on behalf of their followers. Such ideas they believe are not justifiable in terms of the teachings of the Qu'ran, the Hadith or the law schools (Rex 1996: 221).

Such differences over who is a 'Muslim' raise all sorts of questions, including over who has the authority to speak in the name of Islam, to render someone in so that they become part of the 'we' rather than a 'they'. The issue has become even more critical in light of perceived hijacking of Islam by particular jihadist/terrorist groups like ISIS/Daesh in recent years. The term 'Muslim', when used in this study, refers to people who describe themselves as Muslim. This does not mean that they do not identify themselves in other ways, or that 'being a Muslim' is the primary source of their identity and even if it is, as this study shows, it will not be uniformly expressed.

As bricoleurs, most Muslims select bits and pieces of different traditions and combine them for their own purposes, in their own way.²³ Put differently, they mix and match, or synthesise, their norms and values and this allows for great variety, eclecticism and personal patterning.²⁴ In this way identity remains individual. For this reason we can say people, not only societies, are multicultural

²³ On the concept of bricolage see Lévi-Strauss (1966).

²⁴ See in detail Ballard (1994); Werbner (2002); Hussain & Bagguley (2005).

(Gutmann 1993). One effect of mixture is hybridised identities, and this has led to a variety of embraced, and sometimes imposed, descriptions: from hyphenated descriptions (e.g. British Muslim), to portmanteaus (e.g. BrAsian), to controversial metaphors (e.g. 'coconut', 'fish and chips', and 'uncle tom'). The latter implies that the person oscillating between cultures has gone too far in favour of the new, is confused, or has lost sight of traditional values and allegiances. As Muslims have multiple, overlapping identities, they present themselves in different ways depending on the context in which they find themselves.²⁵ Another effect of mixture, or when cultures meet, is that there are a number of vying points of reference and hierarchies which, as this study explores, Muslims must negotiate.

The idea of a 'Muslim community' in Britain, Europe or elsewhere, often exchanged in public discourses, is also misleading. There are many and diverse communities who happen to also be Muslim. Far from being a homogeneous community, Muslims are ethnically diverse and heterogeneous in language, culture and skin colour (Kabir 2010: 6). As one scholar with insights into Muslim communities in Britain writes,

A Sylheti from Bangladesh, apart from some tenets of faith, is likely to have little in common with a Mirpuri from Pakistan, let alone a Somali or a Bosnian Muslim (Ansari 2004a: 3).

There are also other dimensions of difference, including importantly gender, masculinity, class, generation, education and profession, and religiosity. Hopkins (2006; see also Hopkins & Gale 2009), researching the formation and expression

²⁵ For a useful discussion on how people change their presentation according to context see Goffman (1956).

of identity among young Muslim males in Edinburgh and Glasgow, found evidence of the importance of masculinity, which of itself was informed by a complex range of issues including members' own class position, familial and related gendered expectation, as well as their interests in sport and other leisure activities. Samad (2004), in his research of Muslim youth in Britain, picks up the relatively unexplored dimension of class. He says that,

The main division that is emerging between different Muslim groups and within certain groups is that some groups mainly of middle class backgrounds are achieving high educational attainment leading into prosperous professions and becoming integrated into multicultural Britain. However the majority are working class in origin, with poor educational attainment and are subject to uncertain futures and social exclusion and marginalisation (Samad 2004: 10).

Hussain and Bagguley (2005) discuss the importance of generation and country of birth when it comes to belonging, identity, and related claims.²⁶ Among Pakistani Muslims in Bradford, they found that members of the first generation still see themselves as 'denizens', or visitors, living but not belonging in Britain. Their sense of belonging was interwoven with their experience of migration, settlement, and (lack of sufficient English) language. In contrast, the younger generation 'belong' through being born here and saw themselves as having the same 'natural rights' as any other British citizen; this, in turn, shaped both their identities and claims as citizens. Decomposing the dichotomy of immigrant first and second generation, Rumbaut (2004) more generally draws out the experience of the often forgotten 'midway generation', referring to migrants who arrived after primary school but before thirteen years of age, enabling them to be

²⁶ More generally, on why generation is useful for sociological groupings see Edmunds and Turner (2002).

somewhat socialised into the host country life through educational experiences of youth culture. Mandaville (2001) identifies how their minority status in Britain causes Muslims to revise their own conceptions of themselves in diaspora. He highlights the important generational aspect of this process. In shaping their identity, he notes that many young Muslims distance themselves from their parents' views of Islam, (seeing these as outdated and shaped by a different socio-cultural setting), and draw from their contact with other communities and traditions. In some cases the process leads to Muslims turning away from Islam, in some cases to them reaffirming their Islamic faith, but one that is different to that of their parents.

To help identify Muslims according to their adherence to their religion (religiosity) and orientation towards Western culture, against a backdrop of globalisation and one that takes account of local and historical influences, Ameli (2002: 227-72) has developed a typology of Muslim British identities. He identifies eight different types, based partly on fieldwork involving British-born Muslims in the outer London borough of Brent: traditionalist (characterised by social conservatism, ritual centredness and political indifference); islamist (characterised by their emphasis on Islamic politics and movements and the comprehensiveness of the Islamic way of life); modernist (characterised by a 'combination of modernization and Islamic ideology', their desire to achieve social reformation through modernisation and reformation of religious thinking in accordance with modern modes of thought; secularist (characterised by rejection of the politicization of Islam, and its traditional aspects, but, unlike the traditionalist form, with active participation in secular politics and social activity,

and lack of religious observance and involvement with social institutions; nationalist (characterised by those who identify themselves primarily with the culture of the parents' homelands as an expression of patriotism); anglicized (or westernised, characterised by no serious inclination towards the original culture, an inability to re-assimilate into it, absorption of attitudes, values, and norms governing British culture to the point that it is indistinguishable from 'native counterparts', and involvement in multiplex secular social relationships with non-Muslims, and comparatively less religious orientation); hybrid (characterised by no firm orientation towards the original culture as well as not giving primacy to the new Western culture); and, undetermined (characterised by a rejection of diverse cultures one is confronted with, confusion about religious belief, and a sense of hopelessness and rootlessness).

Other scholars have put forward their own system of classification (see Jacobson 1998; Bokhari 2004; Shepard 2004). With specific reference to British Muslims 'for whom Islam is the reference point of thinking' Ramadan (2005: 24-29) believes they can be sorted into scholastic traditionalists, Salafi literalists, political Salafi literalists, Salafi reformists, Sufists, and liberal rational reformists. Like the aforementioned, and most other categorists, he offers his typology as a guide that reveals tendencies, and cautions against rigid compartmentalisation.

Some scholars have found it useful in their investigations to categorise Muslims, but often the scheme envisaged is inadequate, either because it is too contested ('practising'), or too broad ('non-observant' or 'cultural'), and/or too culturally loaded ('modernist' or 'traditional'). For this reason, and because such

distinctions are often more of a reflection of the author's assumptions about what it means to be 'Muslim', this study avoids such labelling.

On the relationship between Islam and identity, in Muslim dominated areas like Bradford, Lewis (2003: 136) discusses the rise of something different altogether: an 'assertive Muslim identity', in which Islam is used by Muslim youth as a marker of 'street culture' rather than religious creed. Pointing out other dimensions of difference, Hamid (2011: 251) catalogues newer, emerging Muslim youth subcultures, including the highly macho 'rude boy',²⁷ the 'asian gang',²⁸ fashion conscious 'muhajababes',²⁹ 'heavy metal Muslims',³⁰ 'gay Muslims'³¹ and even 'atheist Muslims'.³² To the list we can also add 'secular Muslims', 'professional Muslims', 'millennial Muslims', 'feminist Muslims', and 'activist Muslims'. Many Muslims are also keen to point out that they are not Muslims *in* Britain but *of* Britain. In sociological terms, then, Muslims are far from a homogeneous community.

The internal diversity has important, sometimes unexpected, outcomes. For instance, Mirpuri Muslims at times highlight their religious identity and, as part of this affirmation, their ties to (non-Mirpuri) Muslims, but on other occasions they seek to highlight sharp distinctions even within their own community – distinctions of *firqah* (sect), *zat* (caste) and *biraderi* (clan) in particular.³³ The exploitation of these differences in Britain has amongst other things impacted

²⁷ For details see Imtiaz (1999); Macey (1999: 848).

²⁸ For details see Alexander (2000).

²⁹ For details see Stratton (2008).

³⁰ For details see LeVine (2009).

³¹ For details see Kugle (2014).

³² See for details: <http://ex-muslim.org.uk> (date accessed 11.10.13).

³³ Just what is a *biraderi*? The concept has a range of meanings, depending on context, from that of a kinship group of virtually infinite size – the *quam* or *zat*, the equivalent of caste or subcaste – to a smaller group of intermarrying close kin between who spouses are exchanged (Shaw 2014: 140).

local patterns of political mobilisation,³⁴ social relations, civic engagement, and the organisation and running of mosques.³⁵ Besides loyalty for instance to the *biraderi* that can precede loyalty to one's co-religionists,³⁶ Muslims like all human beings are motivated by all sorts of other factors. Writing about his own personal experience, An-Na'im explains,

As a Muslim myself I know Islam is important to Muslims in general, but people who are Muslims are influenced by all sorts of motivations, aspirations and needs, like all human beings (An-Na'im 2010: 104).

Apart from an unhelpful lack of sensitivity to intra-Muslim differences, essentialist tendencies have also led to scant attention being paid to individualism in Muslim consciousness. Expressing her irritation, Jalal points out,

There is nothing particularly unusual about the attachment of Muslims to the symbols of their collective religious identity. It has nevertheless fuelled the misconception that the notion of the individual in Islam is either non-existent or at best weakly articulated. It is true that Muslims identify strongly and passionately with the Quran, their Holy Prophet and a range of other Islamic symbols. Yet identification with a common set of symbols and beliefs cannot be grounds for the erasure of the individual in Muslim consciousness (Jalal 2000: 4).

The lack of sensitivity is not only the result of a homogenised view of Muslims bandied around in Western discourses. In the aftermath of 9/11 and ensuing

³⁴ See in detail Anwar (1991: 41-62); Nielsen (1992: 44-49); Alavi, H. (1998: 449-62); Ellis & Khan (1998: 471-488); N. Akhtar (2003); Garbaye (2005).

³⁵ See in detail Anwar (1979: 163-4); Joly (1988: 37-8); Nielsen (1992: 44-9); Halliday (1992: 138); Akhtar (2013). This can be observed, for example, in the fierce rivalry for mosque control especially between the *Deobandis*, *Tablighi Jamaat*, *Ahle-e-Hadith* and the Pakistani Sufi orders known as the *Barelvis*.

³⁶ For details see Ballard (1994); Lewis (1994).

‘war on terror’ some Muslims have pushed ‘umma-nationalism’ (Zubaida 2007), a unifying ideological theme that imagines Islam as a universal community under attack by non-Muslims, especially Jews and Christians, which stems from a deep civilizational difference and antagonism.³⁷ Contrary to both totalising conceptions, the Muslim community is a community of communities and individuals. Members are part of a wider social matrix, tied to a myriad of other relationships, and influenced by all sorts of motivations, aspirations and needs. As this study shows, and calls for others to explore, this impacts how, why and to what extent they negotiate different legal traditions, authorities and norms.

2.2 The development of Muslim presence in Britain

While their presence as settlers can be traced to at least the 16th century (Matar 1997: 63-82; Barbour 2003: 13-67), it was not until post-1945 that large-scale Muslim immigration, mainly of South-Asian origin, to Britain occurred (Peach 2005: 19). In the intervening period, a small but steady number of Muslims, mainly in the form of lascars, migrated to Britain especially from Yemen, Somalia, Egypt, and South Asia (Gujarat, Sind, Assam and Bengal), to work on British merchant ships and ports (Ansari 2004a; Gilliat-Ray 2010). From India many Muslim lascars arrived through the activities of the East India Company.³⁸ From Yemen, Egypt and East Africa (especially Somalia) lots of Muslim lascars arrived with the opening of the Suez Canal in 1869, which shortened the voyage to the East and led to an increase in trade. Some arrivals chose to settle in Britain, establishing small communities in port or canal cities such as Cardiff,

³⁷ See also Zubaida (2003: 88-98); Roy (2004: 148-200).

³⁸ See in detail Fisher (2006); Balachandran (2007).

Liverpool, Manchester, South Shields, and London (Ansari 2002: 8; Lewis 1994: 11; Nielsen 1988: 53).³⁹ Some social scientists have also pointed out that Muslims have lived in Europe for even longer than this, not only as immigrants but as rulers, the effects of which can still be felt today (Anwar 1994: 5).⁴⁰

The Muslim population in Britain dramatically increased after the Second World War.⁴¹ Until the 1962 Commonwealth Immigrants Act, any citizen of the Commonwealth could enter Britain freely.⁴² Employers encouraged migration from the former colonies to help alleviate the acute labour shortage, particularly in the steel and textile industries in Yorkshire, Lancashire and the Midlands.⁴³ The vast majority of arrivals were young male migrants in search of economic betterment. Most arrivals from the Indian Subcontinent – India (Punjab, Gujarat), Pakistan (Mirpur District of Azad Kashmir, Punjab, North West Frontier Province), and present-day Bangladesh (Sylhet and Chittagong) – were not escaping destitution, but were acting out a calculated plan to improve the collective lot of the *biraderi* (Ballard 1994: 7-8; Shaw 1994: 36; Gardner & Shukur 1994: 146-150). In time these immigrants, like their predecessors before

³⁹ Settlement was also involuntary, for example, in practice the East India Company simply abandoned *lascars* once they were in London.

⁴⁰ This past, unknown to many, led Prince Charles, when addressing an audience at the Oxford Centre of Islamic Studies in 1993, to emphasise that: 'The surprise, ladies and gentlemen, is the extent to which Islam has been a part of Europe for so long, first in Spain, then in the Balkans, and the extent to which it has contributed so much towards the civilisation which we all too often think of, wrongly, as entirely Western. Islam is part of our past and our present, in all fields of human endeavour. It has helped to create modern Europe. It is part of our own inheritance, not a thing apart'. H.R.H., The Prince of Wales, gave the speech titled 'Islam and the West' at the Oxford Centre for Islamic Studies in 1993. It can be accessed via: www.princeofwales.gov.uk/media/speeches/speech-hrh-the-prince-of-wales-titled-islam-and-the-west-the-oxford-centre-islamic (accessed 8/02/13). Facts such as these require us to carefully consider how we express the connection between Muslims, Islam, and Europe: Is the more appropriate expression Muslims *in* Europe, Muslims *of* Europe or European Muslims? Each has different connotations, and tends to call for different ways of thinking about particular issues (see also An-Na'im 2010: 86).

⁴¹ Peach (2005:23) suggests the Muslim population rose from around 21,000 in 1951 to 250,000 in 1971 and to nearly 600,000 in 1981.

⁴² This is despite attempts in the 1950s to introduce administrative curbs on Commonwealth emigration. For details see Dummett and Nichol (1990: 177-81).

⁴³ See in detail Kalra (2000).

them, became 'bridgeheads' through which 'worker rotation' and 'chain migration' was facilitated.⁴⁴ The process in turn influenced the patterns and nature of Muslim settlement that we see today.

During the 1950s and 1960s, Muslims also arrived in significant numbers from the West Indies, Cyprus, and from various parts of Africa and the Middle East (Ansari 2004a). The influx of 'visible' immigrants, however, received bitter criticism from large segments of the media and wider British society.⁴⁵ Those living in the poorer areas to which immigrants gravitated were especially vocal of their misgivings. The new arrivals were seen as 'aliens' who threatened the 'British way of life' (Solomos 1993: 51), and a drain on scarce resources especially on housing and state benefits (Banton 1985: 35). Hostility towards 'the other' manifested itself in the form of political campaigns for control,⁴⁶ widespread discrimination,⁴⁷ racial harassment and violence⁴⁸ and, what could no longer be ignored by the state, 'race riots'.⁴⁹ A new migration policy emerged based on two pillars: on the one hand, 'limitation' of Commonwealth immigration, which led to the enactment of three statutes, in 1962, 1968 and 1971,⁵⁰ and had the goal of zero net migration; on the other hand, 'integration' of immigrants who had already settled in Britain, which also led to the enactment

⁴⁴ See in detail Ansari (2000: 40-6, 145-165); Nielsen (2004: 40-61); Halliday (2010: 17-57).

⁴⁵ See in detail Greenslade (2005: 17-20).

⁴⁶ See, for example, the electoral campaign of Peter Griffiths in Smethwick in 1962. Supporters of the Tory candidate were reported to have circulated the slogan: 'if you want a nigger for a neighbour – vote labour'. See also Enoch Powell's 'Rivers of Blood' speech in 1968.

⁴⁷ See for details Lester & Bindman (1972); Griffith (1997); and, Jones & Welhengama (2000: 30-35 & 73-75).

⁴⁸ Throughout this period racism was made respectable. The 'nigger-hunting' campaigns by Mosley's Teddy Boys and later the 'Paki-bashing' episodes were portrayed as being conducted by heroes.

⁴⁹ The 1958 'race riots' at Notting Hill and Nottingham were the most violent. Although involving largely acts of white hooliganism, these were cited as examples of the dangers of unrestricted immigration. See in detail Pilkington (1996: 171-184); Phillips & Phillips (1998).

⁵⁰ The 1962 Commonwealth Immigrants Act, 1968 Commonwealth Immigrants Act, and 1971 Immigration Act. For details see Wray (2011).

of three statutes, in 1965, 1968 and 1976,⁵¹ and had the goal of improving race relations (Somerville et al 2009).

With the enforcement of the 1971 Immigration Act primary immigration of Muslims to Britain from outside the European Economic Community virtually came to a halt.⁵² Lots of Muslims continued to arrive through the process of family reunification, but faced increasingly draconian measures, mainly targeted at South Asians, that were introduced to curtail the (supposed) abuse of the arranged marriage system as a means of continuing primary migration.⁵³ The emphasis on the pillar of limitation and restriction thereafter became stronger, until the Labour government came into power in 1997 and instituted a new migration policy based on 'selective openness': a commitment to economic migration on the one hand, but also the development of a tough security and control framework, which accelerated after 9/11, on the other (Somerville et al 2009). Throughout this period more Muslims, particularly under the Labour era, arrived as students, professionals and entrepreneurs, with some choosing to settle in Britain.

Over the last half-century, lots of Muslims have also arrived in Britain as refugees, prominently from Kenya,⁵⁴ Uganda, Somalia, Iran, Palestine, Afghanistan, Sudan, Kurdistan, the former Yugoslavia, Iraq, Yemen, Eritrea, Ethiopia and Ivory Coast. During the 1990s, as the number of refugees sharply

⁵¹ Namely, the 1965, 1968, and 1976 Race Relations Acts. For details see Allott (1980: 226-232); McCrudden et al (1991); Hepple (1992: 19-34); Jones & Welhengama 2000: 33-35).

⁵² The European Economic Community was officially renamed the European Union on the 1st of November 1993.

⁵³ On the practice of arranged marriage, especially within the South Asian community, see Ballard (1982); Bradby (1999); Charsley (2006). On how immigration measures were used to target the arranged marriage system see in detail Sachdeva (1993); Juss (1997); Ballard (2006); Wray (2011).

⁵⁴ For a useful outline of why African-Asians came to Britain see Alibhai-Brown (2000: 74-5).

grew, the state introduced successive statutes to reduce the number of asylum applications, to speed up the process, and to achieve more effective deportations of failed asylum seekers (Somerville et al).⁵⁵ Since then further restrictive measures aimed especially at asylum seekers and third country nationals have been introduced.⁵⁶

The impact of various waves of Muslim immigration to Britain is that today Muslims of Pakistani and Bangladeshi origin comprise the largest group, but there are also a sizeable number of smaller groups present, prominently of Arab, Indian, Sri Lankan, African (especially Somali), Albanian, Bosnian, Cypriot, Kosovan, Turkish, Bravanese, Bruneian, Malaysian, Afghani, Afro-Caribbean, Iranian, Kurdish, and Iraqi origin.

2.3 The demographic profile of Muslims in Britain

In the last national Census of 2011, over 2.7 million Muslims recorded their presence in England and Wales, officially establishing that Muslims make up 4.8% of the overall population.⁵⁷ This makes Islam the second largest religion in the UK in terms of adherents.⁵⁸ Since 2001 the population has seen an increase of 1.2 million (or 75 percent); the biggest increase for any religious group in Britain. Almost half of the Muslim population is below the age of 25, and just over 47 percent were born in the UK, establishing that these residents are no longer immigrants, but part of a burgeoning British-born second, third and fourth

⁵⁵ For details see: Asylum and Immigration Appeals Act 1993; Asylum and Immigration Act 1996; Immigration and Asylum Act 1999; Nationality, Immigration and Asylum Act 2002; Asylum and Immigration (Treatment of Claimants, etc.) Act 2004; Immigration, Asylum and Nationality Act 2006.

⁵⁶ See in detail Chakrabarti (2005); Drywood (2014); Mackenzie (2014).

⁵⁷ There are at least 3,800 Muslims in Northern Ireland and 77, 000 Muslims in Scotland.

⁵⁸ The religion question was the only voluntary question in the 2011 Census, and 7.2 per cent of the people chose not to answer the question.

generations. A significant number of Muslims, approximately 100,000, are converts, mainly of 'White'⁵⁹ and 'Afro-Caribbean' ethnic origin,⁶⁰ and a study commissioned by interfaith organisation Faith Matters suggests that as many as 5,200 conversions occur nationwide each year (Brice 2010: 2). The 2011 Census confirmed that the Muslim population is ethnically diverse: over two-thirds of British Muslims are of 'Asian' ethnicity (of these, 38% identified themselves as Pakistani, 14.8% as Bangladeshi, and 7.3% as Indian). 1 in every 10 Muslims is 'Black', 1 in every 13 Muslims is 'White', and 1 in every 26 Muslims is of mixed ethnicity.⁶¹ For the first time, the 2011 Census included the 'Arab' ethnic category, which revealed that they constitute 1 in every 15 Muslims in Britain.⁶² All ethnic groups that make up the Muslim population in Britain saw an increase in their numbers since 2001; the largest increases being made by Pakistani and Arab ethnic groups. Since 1990 there has been a significant rise in the Somali, Afghani and Iraqi populations in Britain, but in the absence of specific corresponding ethnic categories in the Census that would enable respondents to self-identify themselves, it is not possible to provide accurate figures.

In addition to an ethnic group question, for the first time the 2011 census had a national identity question. The purpose of the question was to enable respondents to express what they (subjectively) felt was their national identity. The question was seen as being especially important for people whose ethnicity was not for example 'White: English' or 'White: British', but who were either British-born or had lived in Britain for a long-time, and would not otherwise

⁵⁹ See in detail Zebiri (2007).

⁶⁰ See in detail Reddie (2009).

⁶¹ Over 272,000 Muslims identified themselves as 'Black'.

⁶² Put differently they make up 6.6 % of the Muslim population.

have the opportunity to express their sense of 'Englishness' and/or 'Britishness'. In England and Wales, almost three-quarters of all Muslims (73%) identified themselves as having a 'British only identity', a smaller number saw themselves as 'English only' (12.8%), while only a tiny number recorded 'Welsh only' as their national identity (0.21%). Some respondents may have misunderstood the meaning of the question, but the response re-ignites long-standing concerns raised by some activists and researchers about notions of 'Englishness' and 'Welshness' in particular continuing to have systematic, largely unspoken, racial connotations (see Parekh 2000).

Muslims are not evenly distributed across Britain rather the population is clustered in particular regions,⁶³ major urban areas,⁶⁴ and inner city boroughs.⁶⁵ Over a third of all Muslims live in the inner city conurbations of London. In the London Borough of Tower Hamlets, one in every three residents is Muslim; making Muslims no longer the religious minority rather Islam has become the largest religion followed by Christianity in terms of adherents. It is doubtful that any of us have yet fully come to grips with the momentous implications of these developments (Qayyum 2014: 63).

The spatial distribution of Muslims, especially since 9/11, has attracted significant public and research attention. According to the 2011 Census, almost half of all Muslims live in the most deprived local authority districts in England

⁶³ The majority of the Muslim population lives in the inner city conurbations of London (37.4%), West Midlands (14%), North West (13.2%), and Yorkshire and Humber (12%).

⁶⁴ In Blackburn one in three residents is Muslim, and in some other some cities and towns, such as Bradford (24.7%), Birmingham (21.8%), and Slough (23%), Muslims constitute over a fifth of the resident population. Amongst the capital cities of Britain, London is the place with the largest Muslim population.

⁶⁵ In several London boroughs Muslims form between one-third and one-fifth of the resident population: Tower Hamlets (34.5%), Newham (32%), Redbridge (23.3%), and Waltham Forest (21.9%).

and Wales.⁶⁶ Some researchers have pointed to the overrepresentation of Muslims in less well-off areas, especially inner city neighbourhoods, as indicative of structural inequality and high levels of deprivation and disadvantage experienced by the community.⁶⁷ Focusing on the linkages between settlement patterns and acculturation, others have claimed that the clustering of Muslims in particular areas represents self-segregation, isolationism, and communities living 'parallel lives' (Cantle Report 2001: 9),⁶⁸ but the accuracy of such claims has been questioned.⁶⁹

To a large extent, residential polarisation can be explained by the process of chain migration, which led to the 'transplantation of whole villages' in the diaspora (Menski 1993: 254),⁷⁰ and by the higher birth rate amongst the Muslim population than other groups in the particular areas concerned (Simpson 2004). For this reason we find that Punjabis for instance are predominant in Birmingham, Sylhetis in East London, and Mirpuris in Luton, Slough and Bradford. Researchers have also pointed to other explanatory factors for the uneven spatial distribution: many migrants on arrival opted for cheaper housing (and unskilled work) in inner cities so that they could send remittances without delay. Earlier waves of migrants tended to gravitate towards each other because of common goals and fears, for many wished to lay the foundations of a community within which the essentials of Islamic (and cultural) life could be

⁶⁶ The Index of Multiple Deprivation 2010 (IMD 2010) considers seven dimensions when considering multiple deprivation: income, employment, education, barriers to housing and services, health, crime, and living environment.

⁶⁷ See in detail Choudhary et al (2005); Beckford et al (2006); Gale and Hopkins (2009).

⁶⁸ See also Phillips, T. (2005); Phillips, M. (2006).

⁶⁹ See Peach (1996); Simpson (2004); Phillips, D. (2006).

⁷⁰ See also Anwar (1979: 21-6); Halliday (1992: 61-2); Shaw (1988: 22-5); Ballard (1994: 8); Ansari (2000: 40-6 & 145-165); Shaw (2014: 27-30); Nielsen (2004: 40-61).

nurtured.⁷¹ Later generations of Muslims have elected to continue to cluster in order to sustain communal ties and, even if it means a situation of a very varied Muslim population (or ummah), to have close access to community infrastructure such as mosques and madrassas (Abbas 2005: 37). Looking at the concentration of Bangladeshi Muslims in East London, Dench et al (2006) show that members of this community have tended to cluster together to feel a sense of solidarity, and as a mechanism of self-protection from prejudice, which since 9/11 has developed into widespread Islamophobia and anti-Muslim hate crime.⁷² Although lots of Muslims have elected to live in Muslim dominated areas, a smaller minority, bucking the trend, have chosen to distance themselves from the majority community, representing a sort of 'inter-Muslim flight'. Both trends are much more relevant for socio-legal analysis, as this study identifies, than researchers have so far realised.

The density of Muslims in particular areas adds up to considerable electoral power, especially when read together with the fact that many aspects of public control and organisation are in the hands of local government. Looking at the first party in Europe that is dominated by Muslim leaders, Peace (2013) shows how the Respect Party has managed to achieve significant electoral success by focusing on constituencies with high numbers of Muslim voters, which previously had represented 'safe seats' for the Labour Party. In 2010, the first directly elected Muslim mayor in Britain took office in the London Borough of Tower Hamlets. In the recent national elections a record number of Muslims (13)

⁷¹ See in detail Lawless (1995: 218-244); Ansari (2004a: 121-144); Gilliat-Ray (2010: 183-186).

⁷² See The Runnymede Trust Report (1997); Vertovec (2002b: 19-35); Werbner (2005: 5-9); Allen (2010); Lambert & Githens-Mazer (2011).

secured a seat in parliament, but the figure, which corresponds to about 2 percent of MPs, fails to match their share of the population.

The 2011 Census also revealed significant inequalities experienced by Muslims in Britain. The unemployment rate in particular was closer to double the national average (7.2% compared to 4.0%); over a third (37%) of 16-24 year olds were unemployed despite almost one in four having a degree or above qualification. The picture in relation to women was even bleaker: Pakistani and Bangladeshi females had the lowest employment rates of all ethnic groups in Britain, with less than a third in employment.⁷³ A growing body of research is now showing that Muslims are experiencing the 'double penalty' of racial discrimination and Islamophobia in the labour market despite race, ethnicity, and religion being protected characteristics under the 2010 Equality Act.⁷⁴ This may partly explain why many Muslims are opting for self-employment.⁷⁵

When it comes to the criminal justice system, Muslims (especially Asians and Somalis) are heavily overrepresented, making up 13% of the prison population in England and Wales. Since the Macpherson Report (1999) the impact of institutional discrimination has received greater recognition, but in terms of explanatory factors researchers have also highlighted broader issues of social disadvantage at play as well (Ali et al 2015: 43; Svenisson et al 2012).

⁷³ This is not to say that the low female unemployment is not due to other factors, for example, linked to patriarchy.

⁷⁴ See in detail Heath & Martin (2013); Khattab & Johnston (2014: 1358-1371).

⁷⁵ See Rafiq (1992: 57) who looks at the development of Muslim businesses in the UK with a particular emphasis on the northern city of Bradford in the context of Asian business development as a whole. More expansive research on this phenomenon is needed. The MCB estimates that 33.6% of small to medium Enterprises in London are Muslim owned. According to the ONS, 32% of Pakistanis and Bangladeshi's owned or worked in hotels or restaurants.

2.4 *What did the migrants bring with them?*

Though the specific push-pull factors behind their migration varied, each migrant brought with them their own peculiar ‘cultural luggage’: a rich mixture of their ethnic inheritance (distinctive cultural, religious, and linguistic traditions), acquired life experiences and affiliations, and a legal consciousness. This study focuses on two important items brought over by all Muslims (or inherited in the case of British-born generations) in their cultural luggage: shari’a, and urf (described variously as urf, rivaj, rewaj, adat, heer and so on).

Before we turn to briefly look at both, it is worth noting that neither in everyday life exists in pure form, rather each exists as a complex, plural amalgam of different ‘bricks’ (Menski 2006: 279-379). In their long history of interaction each has attempted to usurp the other, transforming the elements appropriated into their own image and likeness. Salafi Muslims in particular have been preoccupied by the task of separating an idealised form of Islam based on the practice of the ‘pious predecessors’ (al-salaf al-ṣāliḥ) from lived experience, which is perceived to have been corrupted through conflation with traditional custom.⁷⁶ While not mutually exclusive, and despite the difficulties created by cross-fertilisation, the separation of shari’a and urf in broad terms is useful for analytical purposes, enabling us to see how Muslims read, and negotiate their daily world.

Muslims call the totality of Islamic norms shari’a (see in particular Johansen 1999: 38-39). Like its Jewish counterpart halakhah, Chinese Tao, and Hindu dharma, shari’a means the right action or path (to follow). When it comes to its

⁷⁶ For a useful discussion of the distinction between ‘scholarly Islam’ and ‘everyday Islam’ see Alam (2007).

normative reach, shari'a is said to be (or provides) a complete way of life (Anwar 1979: 158-169; McDermott and Ahsan 1980: 7). The primary source of shari'a is the qur'an, believed by Muslims to be the word of God, upon which all else is dependent and built, including the other sources of shari'a: the sunnah (sayings, practices and traditions of Prophet Muhammad), *ijmā* (consensus or agreement of the Muslim community⁷⁷) and *qiyās* (analogical reasoning) (Hallaq 1997:1). The latter, though facilitating law much in the same way as *stare decisis* or precedent does in common law systems, is regarded as a source of law. For Shi'a Muslims, the authority of the Imam replaces *ijmā* and *qiyās*.

All Muslims agree that shari'a as revealed is the will of Allah so it only takes one form; is sacred, immutable and universal. At the same time, Muslims recognise that the law of God has not been given to humans in the form of a ready-made code or finished product. Instead rules have to be extracted from the sources through human husbandry (Weiss 1998: 22-23). The interpretative process of extraction is known as *ijtihād* ('striving' or 'exerting'); the end product of this juristic process is known as *fiqh* ('understanding'). In the absence of a central authority or caliph (one exception is that of Isma'ilis), jurist-scholars came forward from within the community to provide relevant guidance or *fiqh* for members. In the early centuries of Islamic legal history, thus, schools of *fiqh* formed around leading *fuqaha'* (jurists), which led to distinct schools of law – the *madhhabs*. There were dozens in the past, most disappeared and others merged by the 10th century. In present times, adherents of at least four classical Sunni

⁷⁷ There is no agreement over whether *ijma* refers to consensus of that of the first generation of Muslims only; or the consensus of the first three generations of Muslims; or the consensus of present jurists and scholars of the Muslim world; or of all the Muslim world, jurists, scholars and laymen. On establishing consensus see Rahim (1995: 115-136); Hallaq, (1997: 75); Weiss (1998: 122-126).

(Hanafi, Maliki, Shafi'i, Hanbali), and three Shi'a (Ithnā'ashariyyah (or Twelver Shi'a), Ja'fari, Ismā'ili) schools of law are found in Britain.

By the middle of the 10th century, the variety of legal concepts and tools that were being used by the fuqaha', such as, qiyās, ijmā, maslaha (public interest), were consolidated into an interpretative methodology undergirding the process of ijtihad and came to be known amongst Sunni Muslims, who constitute 85-90 percent of Muslims worldwide today, as *usul al-fiqh* ('the roots of law', or 'principles of understanding'). In the same century, some researchers state that a consensus was reached amongst Sunni jurists that major matters of 'law' had been settled allowing for taqlid – the established legal doctrines of the madhhabs to take priority over ijtihad. As Schacht (1964: 70-1) notes, 'all future activity would have to be confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all'. This movement towards taqlid described as the 'closing of the gates of ijtihad' has since been cited as the cause that led to Islam to become a rigid and static system, which society could no longer shape rather it came to control society. As a result the legal manuals of the madhhabs were elevated in the minds of many Muslims to the level of the sources of shari'a; the muqallid replaced the mujtihad. Other scholars, including Hallaq (1984), point out that the controversial idea of the gates of ijtihad closing did not arise until the 12th century, but in any event never truly happened in theory or practice amongst a large number of jurist-scholars.

Fiqh categorises shari'a norms as either relating to `ibadat (ritual worship) or mu`amalat (dealings and transactions between people) (Rahnema 1997: 106);

and, in terms of obligation to obey as: fardh (obligatory), mustahabb (recommended), mubah (neutral), makrooh (discouraged), or haraam (forbidden) (Fyzee 2008 [1949]: 16-17; Rahman 1979: 83-84). Where fiqh on a particular issue is unclear from the perspective of the individual or judge, s/he may make a request to an expert on religious law (mufti) to provide a legal opinion (fatwā). Unlike the legal ruling of a court, a fatwā is a non-binding legal opinion and is left to the individual's discretion: s/he may respect or ignore it.

Once an individual has freely chosen to embrace the religion, Islam demands full allegiance (Kettani (1990: 226). This does not mean that Muslims cannot accept other norms; issues mainly arise when conflict with fardh or haraam norms occur, but even then Islamic jurisprudence has developed several mechanisms and concepts that facilitate compromise, such as darura (necessity), ikrah (duress), and maslaha (public welfare) (Fadl 1994a: 179). In the event that compromise is not possible the Muslim is required to adopt the position that in any 'encounter between Islam and unbelief, Islam must dominate' (Lewis 1994: 13) since:

[...] it is Allah's laws alone that are acceptable to the Muslim and no other temporal or sovereign authority can command his obedience; this is the essence of the social contract within a Muslim community (Nyazee (1996: 118).

In attempting to comprehend shari'a as a legal order, there are three points we can therefore note from this brief synopsis. First, we are dealing with a pluralistic legal order to its very core. Unlike shari'a that is the product of God and therefore perfect, fiqh is the product of human engagement with the textual sources of Islam and therefore imperfect and fallible. This was widely accepted

by classical scholars, and exemplified by the statement ‘and Allah knows best’ (wa Allahu a‘lam). The expression was invariably used each time they concluded discussions and legal opinions. Difference of opinion (ikhtilaf) was therefore embraced, not seen as something problematic. By extension no fatwa has monopoly, and for any particular set of facts, there can quite legitimately be several opinions, if not more. Second, the distinction between shari‘a and fiqh ensured that the ‘law’ could never be inert rather it is in a perpetual state of conceptual development (Hallaq 1984; Weiss 1998; Johansen 1999). In other words, fiqh is responsive to varying circumstances and across time and space, whereas shari‘a only is unchanging. This is why translating shari‘a as simply ‘Islamic law’ without noting the context is problematic since it obscures this critical conceptual distinction between shari‘a and fiqh. Third, there was no general apparatus, such as the state, that applied Islamic legal codes in the way that we are now accustomed to in the modern era (Jackson 1996). The development of fiqh rather was a bottom-up process, beginning often with a request for a fatwā (Masud, Messick and Powers 1996: 4). This is not to say pre-modern rulers did not apply ‘Islamic law’, but they did so by giving force to particular fiqh opinions and this was regarded as an expression of the ruler’s siyāsah (policy) authority. The separation of siyāsah from fiqh helped preserve the latter as an independent sphere of activity, separate from administration.⁷⁸

To understand the forms of fiqh brought over to Europe by Muslims, or for that matter that operate in postcolonial states today, we must also take account of the role of European colonial powers, which shaped, even actively constructed these.

⁷⁸ For a useful description of shari‘a and the relationship of fiqh and siyasa in sharia-based legal systems, see Quraishi (2012).

The codification of Islamic law in India, North Africa, and elsewhere to aid colonial administration led to the entrenchment of particular understandings of shari'a.⁷⁹ In the process, modifications were inevitably introduced reshaping Islamic legal positions according to the colonisers' preconceptions and interests.⁸⁰ The resultant 'Anglo-Muhammadan law' survives to some extent as part of Muslim personal law codes, including in India, Pakistan and Bangladesh in the area of family law. Among Muslims of South Asian origin in Britain it therefore also survives to some extent since they have brought their understandings of 'Islamic law' with them to Britain.

Understandings of shari'a were also modified or re-shaped by Muslim communities themselves in response to colonial rule. With the removal of the Muslim ruler and accompanying mechanisms of governance by the colonial officer, the community had to source that sustenance elsewhere (Robinson 2009: 212-3). Muslims renewed their investigation into fundamental texts. Part of the reason for this was that the preferences for written documents had led to a perceived superiority to oral testimony or custom. The result was a shift towards increased orthodoxy.

Following the Indian Rebellion of 1857-8, various reformist and revivalist movements emerged. Reformists sort through *ijtihad* to reinterpret long-standing *fiqh* in ways that could be reconciled with European norms and colonial

⁷⁹ Based on the majoritarian and/or most powerfully voiced claims, in the Indian Subcontinent British colonial officers codified mainly Hanafi *fiqh*, while their French counterparts in North Africa codified forms of Maliki *fiqh*.

⁸⁰ See for details Anderson (1995). It is one of the ironies of contemporary history, given the role British colonial officers had in its construction and administration, how much fear and resistance there is to Islamic law amongst non-Muslim Britons, and on the part of the state.

rule, or conversely that could be robust enough to displace or overcome foreign rule.

Of particular relevance since they have been imported to Britain are three rival movements, which at times unified against the colonial threat to Islam. The revivalist Deobandi movement, founded a decade after the failed revolt, sought to bolster the authority of the traditional ulema to address the perceived corrupting effects British imperialism and English education was having on the religion. Ulema based at the Deoband seminary (Darul Uloom Deoband) in North India sought to purify their religion, by purging mystical practices and other innovations (*bida'ah*) seen by them to be contrary to 'true' Islam. They emphasised the importance of *taqlid* (imitation of past legal rulings) as the way to renew scriptural adherence to *shari'a*.⁸¹ The desire to purify the faith was shared by the Ahl al-Hadith movement, or Salafi, also referred to as Wahabism by opponents after its founder, Muhammad ibn Abd al-Wahhab (1702/3-91). Founded in Nejd, and today the established form of Islam in Saudi Arabia, it was imported into India in the 19th century.⁸² Its puritanical ulema declared Sufism and Shi'ism as heretical innovation (*bida'ah*), and urged Muslims to reject the learned exegesis developed by ulema of the four *madhhabs*. There was, then, no basis for *taqlid*, which they branded as 'blind imitation'. Instead, a return to the 'true' Islam of prophet Muhammed and his companions (*ṣaḥāba*) meant returning to the earliest teachings of the first three generations of Muslims, namely, the 'pious predecessors' (*al-salaf al-ṣāliḥ*).⁸³

⁸¹ For a useful account of the movement see Moj (2015).

⁸² For details see Allen (2005: 87-93).

⁸³ Interpreted as the first three generations of Muslims, that is, the generation of the Prophet and his Companions (*ṣaḥāba*), the generation that followed (*tābi'īn*), and their successors (*tābi'īn al-tābi'īn*).

To counter the influence of both movements and the perceived moral and intellectual decline of Muslims – the Barelvi movement emerged in the 1880s.⁸⁴ It sought to defend a version of a local manifestation of Hanafi shari'a centered on devotion to Prophet Muhammed that could be propagated by the established channel of ulema, but also pirs. Unlike the Deobandi or Salafi, Barelvi's revere saints and shrines and believe that prophet Muhammed, although human, had mystical powers, including knowledge of the unknown (ilm-ul-ghaib) since he possessed a divine light (nur) that predated creation.

The significant differences in ideology produced bitter criticism on all sides, and some hardliners from each movement went as far as to declare the 'other' as apostate. All these groups regard the Ahmadiyya movement, also founded in the colonial context in 1889, as heretical. This is because of their belief that their founder was not just a mahdi (guided one), but also an actual prophet, a successor to prophet Muhammed himself. All of these groups have influenced the development of the Muslim community in the West where there have been large migrations of South Asians, particularly Britain. It is not difficult to see this when one takes a look at mosque affiliation in Britain. According to one source there are 1804 recorded masjids and prayer rooms that are actively being used (October 2015). Of these, 43.2% are Deobandi, 24.8% Barelvi, 8.6% Salafi, and 1.3 % are Ahmadiyya.⁸⁵

What went on during the colonial period thus continues to have a lasting legacy on the makeup and outlook of the Muslim minority communities in Britain, and elsewhere in the West. Many of the ideas and images of 'Islam' that inhabit us,

⁸⁴ For details see Sanyal (2005).

⁸⁵ 'Uk Mosque Statistics /Masjid Statistic (2015), Muslims in Britain Report, available at (http://www.muslimsinbritain.org/resources/masjid_report.pdf accessed 05/10/15).

which we assume to be important or even peculiar to the religion are in fact outcomes of the mutually influencing relationship between colonial powers and Muslim reactionaries.

Unlike shari'a, the relevance of *urf* in the legal lives of Muslims in Britain and elsewhere in Europe has received much less research attention. This may partly be explained by the fact that commitment to shari'a is easy to identify. To borrow Goffman's (1959) vocabulary, this commitment appears 'on the stage' while the attachment to custom remains hidden 'behind the scenes', making Muslim practical attachment to custom more difficult to apprehend. Writing about the struggle of Muslims to have Islam acknowledged as a legitimate source of value pluralism in the Western context, Shah (2013: 61) argues that the religious aspects of Muslim law, with their doctrinal justifications, are foregrounded, while customs conversely are suppressed because they are seen as remnants of paganism within a religion. He refers to this process as 'shariatization'. Custom, as bandied around in Western discourses, is also often seen as something very old and being supported by less social pressure than other types of rules (Allott 1980: 50). Criticising this view, Yilmaz (2005a: 28) points out that '[c]ustom has regularity like law. It also defines relationships. Both custom and law are sanctioned'. This view was widely accepted in the past, including in Britain. Francis Bacon who went on to serve as both Attorney General and Lord Chancellor of England, had no doubt that custom, and not law, was 'the principal magistrate of man's life' ([2011: 501] 1765).

Focusing on South Asian Muslims in Britain, Ballard (1994: 4; see also 2008: 49-50) says that when it comes to solidarity and mobilisation religious affiliation

may be more important than mere nationality, as illustrated by the Satanic Verses affair, but a closer look reveals that it is the networks of reciprocity, namely caste (*zat*), and descent group (variously, *got*, *qom*, *patti*, *biraderi* or *tabbar*), that provide the framework for most settlers' everyday lives.⁸⁶ In an early study exploring familial practices amongst Pakistani Muslim (and Christian) families in Bristol, Jeffery (1976) records the ability of the *biraderi* to control its members, especially when involving *izzet* (variously, prestige, honour, status), which if endangered resulted in punitive action. On the same point, but in relation to the Somali diaspora, Haji-Abdi (2013) explains that a look at the population in Britain reveals that it is 'divided into tribes, clans and sub-clans, which are based on a system that has very clear pyramid-shaped layers'. The hold of tribalism is such that,

When meeting someone for the first time, a Somali is more likely to ask 'which tribe do you belong to?' rather than 'where are you from?' (Haji-Abdi 2013: 6).

Underlining the importance of the tribal or clan norms to the Somali, (2013: 73) exclaims that one only needs to look at the recent political history of Somalia to understand that 'ethnic loyalty easily trumps loyalty to Islam'. Besides religion, custom may actively and creatively resist state law (Fitzpatrick 1986: 67). Galanter (1981: 23) goes as far as to say that in fact state law may have to operate in the 'shadow of indigenous ordering'.

Urf, then, can be seen as a form of folk law and in fact has over the years been described as 'people's law', 'indigenous law' and 'customary law'. Intimately intertwined with myths, folktales, legends, proverbs, riddles, and so on – many

⁸⁶ On the relationship of *zat* and *biraderi* see Blunt (2010: 10)

'legal anthropologists' like von Savigny (1831: 14)⁸⁷ saw custom as the backbone of folk law.⁸⁸

2.5 *How should they adapt?*

The arrival of immigrants, not just Muslims, to Britain has perennially led to discussion of how the newcomers adapt or should adapt. The multifaceted debate is occurring on both sides, and the views and arguments presented by the 'host' community, or by the newcomers themselves, are informed by numerous social and psychological factors, including the perception that each has of the other's expectation. Writing about refugees in Lincoln, Nebraska (which she exclaims is 'the middle of everywhere') Pipher (2003) explains the relevance of what she calls 'cultural brokers': members of the settled community who befriend newcomers and help them adjust by teaching them about their new environment, their new neighbours, and the cultural lens used by locals to interpret their daily life. Adding a further layer of complexity to the ongoing discussion is the fact that the 'host' or 'majority' community, (or rather 'settled'

⁸⁷ It is difficult to say with any certainty when the 'anthropology of law' began. Mertz and Goodale (2012: 79) explain that one reason for this is that what today would be classified as anthropological studies of law, or legal systems, were being conducted by scholars long before there was a self or peer consciousness of 'legal anthropology' as a distinct and legitimate sphere of legal research and writing. They outline usefully different points in time that one could legitimately arrive at when tracing the roots of an anthropological scholarship, including as far back as 5th century BCE (Herodotus 484–425 BC) or to eighteenth century France (Charles-Louis de Montesquieu, 1689–1755). They also note the contribution of another notable early writer in this field, namely Friedrich Karl von Savigny (1779–1861): his 1814 anti-codification pamphlet, *Of the Vocation of Our Time for Legislation and Jurisprudence*, 'made the argument that law and legal institutions are the unique expressions of a people's culture and history and cannot be understood apart from them' (2012:79). Rouland (1994: 67) also notes the contribution to the birth of legal anthropology made by von Savigny, citing his influential concept of *volkgeist* that conceived law as intimately connected to the people of a society that produced it and thus best approached through anthropological methods.

⁸⁸ Allott & Woodman (1982: 4) provide a useful typology of studies that have been conducted on 'folk law'. They believe studies can be sorted into three categories: (a) so-called 'traditional laws' that developed before state laws claimed jurisdiction over the societies, which may have been transformed during subsequent social change; (b) relatively new laws of groups whose members are predominantly within technologically advanced societies; and (c) 'indigenous laws' of minority ethnic groups which find themselves today within technologically advanced societies. For a more recent collection of work on the importance of folk laws see Renteln & Dundes (1995).

communities), include members who themselves arrived as immigrants some time ago or are of immigrant heritage. They can espouse a variety of different views over how the newcomers adapt or should adapt.

Turning to the newcomers, we must equally be mindful of the pitfalls of generalising their attitudes and approaches to adaptation. For some newcomers, since they are 'twice' or 'thrice' migrants, the issue of adaptation is not new. For all newcomers however, the issue of adaptation becomes more complicated if they decide to start a family in their new country of abode. Several studies reveal intergenerational conflicts over adaptation. Although some researchers are drawing out the various dimensions of the ongoing debates around (immigrant) acculturation, that is, the process of cultural and psychological change that results when different people or cultures interact, there still remains considerable confusion over what the process involves.

Over the years, acculturalists have developed different models, and used different methods and measurements.⁸⁹ Until the late 1960s, the prevailing literature mainly saw acculturation as involving a process of assimilation. It was assumed that newcomers would discard their native culture, and adopt the culture of the 'host' community. The assumption can also be seen in the reasoning of several English judges dealing with ethnic minorities and their

⁸⁹ Gordon (1964: 71) lists seven 'variables' or types of assimilation that could be used to assess, and compare, the degree that immigrant groups have achieved assimilation: (1) 'Cultural or behaviour assimilation' (newcomers adopt language, dress, and daily customs of the host society (including values and norms)); (2) 'Structural assimilation' (large-scale entrance of minorities will enter cliques, clubs and institutions in the host society); (3) 'Marital assimilation' (widespread intermarriage); (4) 'Identification assimilation' (the minority feels bonded to the dominant culture); (5) 'Attitude reception assimilation' refers to the absence of prejudice and discrimination; (6) 'Behaviour reception assimilation' refers to the absence of prejudice and discrimination; and, (7) 'Civic assimilation' occurs when there is an absence of values and power struggles.

‘customs’ or ‘mores’.⁹⁰ Underpinning the assumption was an ethnocentric bias, that British and more broadly Western culture and values, informed by Judeo-Christian and Hellenistic traditions were superior. The process of assimilation placed the burden of adjustment only on the newcomers and, as native culture, religion and identity would ‘melt’ away in the process of adjustment, conjured up the image of a ‘melting pot’. Through the process of assimilation, which could take up to a generation,⁹¹ the view was that a new ‘citizen’ would emerge and find meaning, identity and culture from the new mode of life s/he has embraced, the state s/he obeys, and the new rank s/he holds.

This vision of how newcomers were likely to behave came under increasing scrutiny, and by the 1970s a number of studies came to show that newcomers did not necessarily discard or lose their native ethnic identity or culture in the process of adjustment. Instead, minorities were adopting a two dimensional approach, described as ‘integration’,⁹² which involved them striving to maintain their native heritage and identity on the one hand, whilst adopting aspects of the ‘host’ culture. Subsequent acculturation research shifted from a mould examining the adaptive behaviour of newcomers only to include that of ‘settled’ or host members, assessing changes that occurred to their culture and identity. In the process of mutual adjustment researchers began to more actively engage with the fact that social constructs such as ‘ethnicity’, ‘culture’, and ‘identity’,

⁹⁰ Jones & Welhengama (2000: 88) highlight that ‘in some older cases, judges openly took the view that it was necessary to educate migrants and their descendants about how they should live in this country ‘according to our way of life’ (Mohamed v Knott [1968] 2 A11 ER 563, at 568), or how they should conduct themselves ‘without violating the ethos of Christendom’ (see Baidail (otherwise Lawson) v Baidail [1946] 1 A11 ER 342 CA, at p.344-5).

⁹¹ Poulter (1986: 161) for example thought that assimilation would occur amongst subsequent generations through education, mainly in schools.

⁹² Other researchers have preferred to use the term ‘biculturalism’ (see for example Benet-Martinez & Haritatos 2005) or ‘enculturation’ (see for example Weinreich 2009).

although containing references to an enduring larger historical context, are not static or closed-ended. Each construct can be re-shaped by collective and to a lesser extent individual experience, with often much room for selectivity, rearrangement and outright innovation (Calhoun 2007). We should therefore not be surprised that all around us we can observe the development of new ethnicities (e.g. BrAsian),⁹³ new cultures, (e.g. valayati-rivaj), and new living laws, (e.g. angrezi shariat).⁹⁴ At a macro-level, several metaphors have since been used (e.g. 'mosaic', 'salad bowl', 'kaleidoscope') to describe a society where different cultures and ethnic groups mix, but remain distinct in some aspects.

Over the course of the last half-century in Britain, various models of acculturation have been championed, sometimes appropriated by policy-makers against a backcloth of chequered responses of public opinion at the local and national level. By the 1970s, the project of assimilation had lost favour.⁹⁵ Sivanandan (2006) locates the origin of its replacement, namely 'multiculturalism', to the ebb of a united anti-racist struggle built by grassroots campaigners.⁹⁶ It seems that several things came together in the early 1980s that led to the government 'appropriating', rather than embracing, this form of multiculturalism. One can point to the growing sway of postmodern identity

⁹³ See the volume edited by Ali et al (2006). Several contributions problematise neat categorisation of people into types of national identities or ethnicised minorities. Instead, they forward the use of hyphenated categories like 'BrAsian' to understand the lived experience British South Asians.

⁹⁴ Angrezi-shariat, an urdu term meaning British-Muslim law, involves Muslims building the requirements of official or state law into the requirements of shari'a as necessary or expedient. For an account of how angrezi shariat was developed by Muslims see Pearl & Menski (1998: 74-80; Menski 2001).

⁹⁵ The point often cited as the turning point is 1966, when Roy Jenkins, then Labour Home Secretary, backed the policy of 'integration' that he notably defined as 'not as a flattening process of assimilation but as equal opportunity, accompanied by cultural diversity, in an atmosphere of mutual tolerance' (Jenkins 1967: 267).

⁹⁶ 'Britain's shame: from multiculturalism to nativism'. Available at <http://www.irr.org.uk/news/britains-shame-from-multiculturalism-to-nativism/> (accessed 04/02/12).

politics, international developments (Canada and Australia had embraced types of 'multiculturalism' in the late 1970s), and domestically the Scarman Report into the 'race riots' of 1981. Lord Scarman's inquiry concluded that the issue was not institutional racism or class inequality rather individual prejudice and ethnic disadvantage were to blame. Unlike the 1981 Rampton Report, the 1985 Swann Report into the underachievement of ethnic minority children, arrived at similar conclusions. It was then thought that this could be remedied by meeting the cultural or ethnic needs of minorities and this paved the way for multiculturalism to become the official government policy, but it was a different type to the one campaigned for by activists like Sivanandan. This does not mean what followed with the change in direction was not good for (minority) citizens; some things were, but others (like pitting one ethnic group against another for funds or favour that bred resentment) were not. With sections of the left embracing the new tool of social progress,⁹⁷ the golden decade of multiculturalism followed. Even during its heyday conservative and right-wing groups criticised the project, as a threat to native values and identity, labelling it as political correctness hysteria and as something that gave preferential treatment to some. Events following the 1988 Satanic Verses affair not only led to the demarcation of an Asian and Muslim identity, that hitherto had been amassed into the general 'Black' category, but caused liberals to question their support. Others also began to raise their misgivings, claiming that a 'soft

⁹⁷ Conversely some on the left saw it as an apolitical form of cultural relativism, or a tool that separated people on the basis of 'race' or 'ethnicity' rather than unifying them on the basis of class, and thus inherently opposed its use.

multiculturalism' of equal rights had grotesquely morphed into a divisive 'hard multiculturalism' of positive promotion of ethnic and religious identities.⁹⁸

Several things have happened since 2001 that have led to a retreat from 'multiculturalism': the summer riots in the northern cities of Oldham, Bradford and Burnley, 9/11 & 7/7, the increasing conflation of multiculturalism with 'uncontrolled immigration' and 'home grown terrorism', and something that has allowed 'foreign' value systems like *shari'a* to take root in Britain. The British media has played a major role in the discourse against multiculturalism. Many journalists and tabloid newspapers have displayed an intense preoccupation with a purported 'Muslim threat'.⁹⁹ Among the various media framing mechanisms that el-Aswad identified, he notes the suggestions that Muslims aspire to impose *shari'a* law and, more disturbingly, that they are 'terrorists' (2013: 47).¹⁰⁰ These discourses need to be interrogated for a variety of reasons, not least because they create roadblocks to a peaceful multicultural coexistence. In recent years, media reporting has especially focused on the 'obscenity' of 'parallel sharia courts', '*shari'a* controlled zones' in East London, and alleged plots to introduce an extremist Islamic ethos in our British schools that came to be known as the 'Trojan Horse affair'.¹⁰¹ The policy of multiculturalism has also come under attack because it has been framed as having prevented public

⁹⁸ See Goodhart (2012): 'Immigration and Multiculturalism'. Online report (available at: <http://fivebooks.com/interview/david-goodhart-on-immigration-and-multiculturalism/> (accessed 04/05/14).

⁹⁹ See for details Eade (1996); Werbner (1996); The Runnymede Trust Report (1997).

¹⁰⁰ See for details Richardson (2009); el-Aswad (2013).

¹⁰¹ 2014 saw intense media coverage of the so-called 'Trojan Horse' affair – an alleged plot to introduce an 'islamist' ethos in a number of state schools in Birmingham. Four separate inquiries were launched into the allegations and similar claims. Ofsted also conducted inspections at 15 city schools. The Education Commissioner for Birmingham found no evidence of terrorism, radicalisation or violent extremism, but did find a number of people in position who 'espouse, endorse or fail to challenge extremist views' (for details see the Clarke Report 2014).

authorities from piercing the 'cloak of oppression' that hides barbaric and harmful (Muslim) cultural practices such as 'forced marriages', underage marriages, 'honour killings/murders', FGM/FGC, congenital birth defects that ensue from the practice of cousin marriages (especially directed at the Mirpuri Pakistani community in Britain), and the grooming of girls by 'Asian gangs'.

The Cattle Report (2001), which looked into the 2001 'urban disturbances' (it choose not to use the term 'race riots'), was one of the first government-commissioned reports to officially suggest a new policy direction away from the multicultural model. The replacement model of 'community cohesion' that it proposed, although incorporating some features of the multicultural project, supposed that ethnic minorities had been given too much cultural expression and that this, in itself, had led to polarised communities 'leading parallel lives', characterised by 'ethnic segregation, limited cross-cultural interaction and the absence of a shared identity and values' (Robinson 2008: 8). As Sivanandan notes,

[...] the thinking this time 'was not on the lines of 'ethnic disadvantage', as Scarman had it, but of (too much) ethnic advantage, too much 'multiculturalism', not enough integration/assimilation or the much more euphemistic term 'community cohesion' (Sivanandan 2006: no pagination).¹⁰²

Although local reviews into the towns most affected by the riots came back with at least other explanatory factors,¹⁰³ the Denham Report 2002, which was part of the same administrative process, was commissioned by the Home Office to propose how the risk of future 'disorder' could be minimised. It made the

¹⁰² <http://www.irr.org.uk/news/britains-shame-from-multiculturalism-to-nativism/> (accessed 02/24/13).

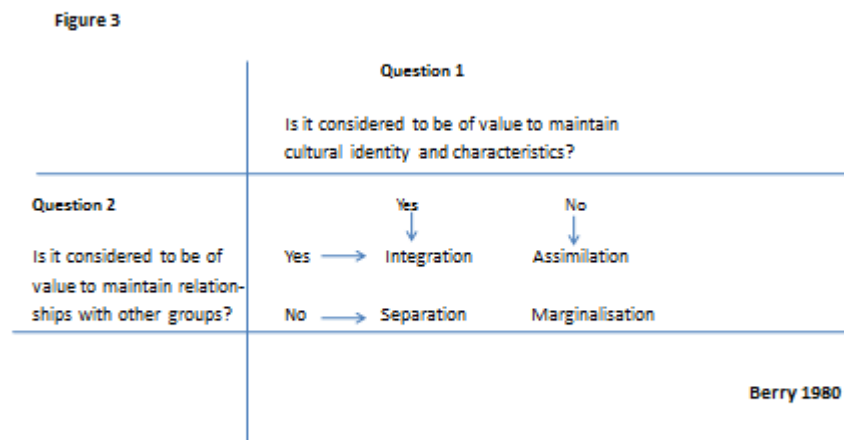
¹⁰³ The Ritchie Report looked at the socio-political conditions of the ethnic minorities involved, as well as the local policies adopted in relation education, housing and so on.

overarching recommendation that the achievement of community cohesion must be the central aim of government, reflected in all policy-making.

Over the next decade, different definitions of community cohesion at the national and local levels emerged, illustrating varying degrees of thinly disguised assimilationist tendencies. Nevertheless, the concept was widely adopted in Britain, and some of the ideas and approaches that developed have also been embraced internationally, including by the institutions of the European Union.

The latest policy offering of 'active muscular liberalism' by the Conservative government is still unravelling. Shaped in the context of (Islamic) terrorism it is an extension of the line of thinking that created 'community cohesion'. Muscular liberalism however more forcefully rejects the multicultural project, branding it a failure, importantly because it harmfully moved from the tolerance of particular types of cultural expression to advocating for the tolerance of multiple value systems. It seems to have a greater assimilationist tendency because it bypasses that many ethnic minorities suffer poverty, inequality, and racism, instead it emphasises the need for (Muslim) minorities to recognise the 'responsibilities' of citizenship, to be less, well, ethnic, by adhering to 'British' values to the exclusion of all others.

In his attempt to shed light on when assimilation or integration may occur, Berry (1980) developed a four dimensional model that asks two interrelated questions as seen in figure 3 below:



The oft-cited model however has several limitations: Berry refers to integration, assimilation, separation and marginalisation as acculturation attitudes, but this assumes that ethnic minorities are free to choose as they please. For a variety of reasons, this may not be the case. Other researchers, notably Ward and Kennedy (1994), point out that the second question, focusing on the value of maintaining relationships with other groups ought to be replaced since it does not tell us directly what the attitude of minority members is towards the 'host' culture. The value of contact with other groups is rather different from that of valuing the cultural identity and characteristics of other groups.

One other major limitation of Berry's model, but also of acculturation research generally, relates to the importance of recognising that people's acculturation preferences can differ according to the context or situation in which the behaviour takes place. For example, young female Mirpuris might show more behaviours corresponding to their ethnic heritage when being around family

members, while displaying more behaviours fitting into the 'dominant' culture when at work.¹⁰⁴ This chameleon-like behaviour is not something peculiar to ethnic minority females. Minorities, living multicultural lives, often move between their heritage culture and the culture of the 'dominant' community by adapting their attitudes and behaviours in response to the cultural context, a process that has been variously described as 'code switching', 'cultural frame switching', and 'cultural or legal navigation'.¹⁰⁵

Taking a different approach than that of cultural orientation to understand acculturation, others, for instance Hutnik (1991), have focused on examining 'identity', that is, they have investigated whether minorities identify themselves with their ethnic culture, faith, the host culture, or all of the aforementioned.¹⁰⁶ This approach is different from that proposed by Berry's model, or that adopted by behaviourists examining practices of ethnic minorities, since commitment to a particular identity requires conscious endorsement, whereas cultural orientation or behaviour may not. This helps us see, for example, that a Somali living in Cardiff may behave in the same way as native Welsh people, but, in their mind, they still unambiguously identify with, and explain their behaviours through, Somali culture.

Turning back to Muslim migrants in Britain, along with the growing British-born generations, they have had to decide, as their predecessors had to before them,

¹⁰⁴ Investigating the adaptive behaviour of Turkish minorities in the Netherlands, Arends-Tóth & Van de Vijver (2002, 2008; see also Zane & Mak 2003) show that for Turkish-Dutch members having both cultures in their lives was important, but the importance varied across 'domains'. Turkish-Dutch members preferred adjustment to the Dutch culture more in the public domain, than in the private domain, whereas cultural maintenance was deemed important in both domains. Similarly, amongst first generation Asian Indians in the United States, Sodowsky & Carey (1987) found a strong preference for Indian cuisine and dress at home, but American cuisine and dress elsewhere.

¹⁰⁵ See Ballard (1994); Menski (1993); Yilmaz (2005a); Qayyum (2014).

¹⁰⁶ See also Bhamra (2011).

the terms and degree of their adaptation. Do they affiliate themselves to the British state, to their *zat* (caste) and *biraderi* (clan), to their *firqah* (sect), *madhhab* (school of *fiqh*), a British or European Muslim community, or to the global *ummah*? Do they adopt multiple or overlapping identities, or should they privilege one aspect of their identity over others? Would their choice be respected, and what would the legal implications be? These questions have forced Muslims to (re)evaluate many of their *shari'a* and ethnic norms, but in the process of finding answers for themselves they have also provoked questions about liberal Britain and its limits of tolerance for difference. Before proceeding to examine what decisions Muslims are making in practice, it is important to consider what guidance Islamic jurisprudence provides for Muslims living in 'non-Muslim lands' (in the West) so that they can live in accordance with *shari'a*.

2.6 *What guidance does Islamic jurisprudence provide?*

If we briefly ask what guidance does Islamic jurisprudence provide for Muslims living in non-Muslim lands, over the ethical and legal duties that they owe to *shari'a* and to their host polity, we see that no uniform answers are forthcoming (Fadl 1994a). One reason for this is that the current scenario of Muslims voluntarily migrating to live in non-Muslim lands is something new. From the very beginning of the history of Islam, jurists have discussed the predicament of the Muslim under a non-Muslim regime, but their deliberations have related to the believer being a temporary visitor, a traveller or captive, a recent convert, or the unhappy inhabitant of a Muslim country conquered by unbelievers (temporarily). Lewis (1992: 13) also explains that 'the possibility never seems to

have entered their minds that a Muslim would voluntarily leave a Muslim land in order to place himself in this predicament’.

The Christian conquest of Muslim Iberia, or Reconquista, triggered a great intellectual crisis for Muslims (see in detail Verskin 2015). With the fall of Grenada in 1492, vast Muslim populations came under non-Muslim rule and caused jurists to confront the question: can ‘Muslims stay or must they emigrate to a Muslim land?’ (Lewis 1992: 6).¹⁰⁷

The answers varied, for there was no consensus over what constituted *dār al-Islām* (the territory or abode of Islam) and *dār al-harb* (the abode or territory of war).¹⁰⁸ Fadl (1994a: 153-164) says that raw from their defeat, jurists from the Mālikī school adopted an absolute and uncompromising view, asserting that Muslims were duty bound to leave their capitulated lands and seek refugee under the rule of Islam. In contrast, many Hanafi and Shafi’i jurists maintained the view that a territory under non-Muslim rule could still be part of *dar al-Islam* and, depending on the conditions, it was morally imperative for Muslims to maintain Islam in foreign lands; whereas, jurists from the Hanbali and Shi’i schools typically were of the view that though not ideal such residence was not

¹⁰⁷ Examples in the early period of Islam offer two alternative approaches for Muslims experiencing ‘hardship’ related to their faith when living in non-Muslim lands: to undertake *hijrah* (emigration) to a more hospitable (preferably Muslim) jurisdiction,¹⁰⁷ (particular importance is placed on the fact that the final prophet of Islam himself emigrated from Mecca to Medina in order to escape persecution and, on his advice, his early followers emigrated to Abyssinia to seek refuge), or to remain, and exert themselves with other Muslims to preserve an Islamic identity (*jihad*); thus safeguarding *shari’a* as a way of life. Both approaches are permissible (*halal*), but the reward (*sawāb*) for the latter is more, for it provides an opportunity to fulfil a core duty placed on the Muslim: to call or invite people to Islam (*da’wah*).

¹⁰⁸ The carving up of territory between *dār al-Islām* and *dār al-harb* by classical Islamic thought represented the opinion that Muslims can only live an Islamic life in *dār al-islām*. for it was a territory governed by *shari’a*. The binary framework, of ‘us’ and ‘them’ until they converted or were overcome through *jihād*, became a central theme in discussions when Muslims started living outside Islamic territory (for details see Fadl, 1994a; 1994b).

in itself un-Islamic and was permitted provided that Muslims were secure from harm, and able to manifest or practise their religion.

The qualified nature of the mandate to remain on non-Muslim territory led to more confusion and uncertainty as no consensus since has been reached over what constitutes 'harm', or the point a Muslim can be said to have been prevented from 'manifesting' or 'practising' their religion. Is the line crossed if one is not able to perform acts of worship, such as prayers, wear religious garb, such as the burqa, or when Muslims cannot apply the laws of shari'a in their totality? The answers are very relevant to Muslims across Europe, who in recent years have seen the banning of the burqa in public places in France, a constitutional amendment banning the building of new minarets in Switzerland, and the criminalisation of established halal practices relating to the ritual slaughter of animals (dhabiha) in Denmark. Petitioning the ECtHR, Muslims appeals were rejected in relation to the first two decisions and, given that Muslims can access halal meat that has been slaughtered outside Denmark, it seems very unlikely that the apex court would find a violation under article 9 ECHR.¹⁰⁹

Reflecting on the jurisprudential guidance available, one can see that a variety of different views/rulings exist. Given the peculiar historical circumstances in which many of these views were shaped, some Muslims have argued that they have limited relevance to the current scenario, particularly for Muslims in Britain. As a result of the decision of many Muslims to settle and raise their children in countries characterised by non-Islamic culture and rule, a new

¹⁰⁹ See *Cha'are Shalom Ve Tsedek v France* [2000] ECtHR (No. 27417/95) (27 June 2000).

jurisprudence in recent years has been developed by some jurists, known as *fiqh al aqalliyyāt* ('fiqh for Muslim minorities'), to provide them with guidance. Two prominent Muslim scholars, Taha Jabar al-Alwani in the US, and Yusuf al-Qaradawi in Qatar, assert that the need for *fiqh al aqalliyyāt* arises because inherited *fiqh* does not adequately take account of the contemporary status of, and dilemmas faced by, Muslims living under non-Muslim rule. According to al-Alwani, who coined the term,

'Fiqh for minorities' is a specific discipline, which takes into account the relationship between the religious rulings and the conditions of the community and the location where it exists. It is a *fiqh* that applies to a specific group of people living under particular conditions with special needs (al-Alwani 2010: 3).

On the question of whether the West is a non-Muslim land, al-Alwani breaks away from the traditional division of territory as either comprising *dar al-Islam* or *dar al-harb*, or even *dar al-ahd* (the territory or abode of truce). Instead he feels that territory can be sorted as being either *dar al-Islam* or *dar al-dawa* (territory or abode of invitation (to Islam)). This view, he concludes, more appropriately recognises the internationality of Islam (*alamiyyat al-Islam*) (al-Alwani 2001: 55-58 cited in Fishman 2006: 4). The emphasis on the element of *da'wah*, as other contemporary Muslim scholars have also pointed out, allows for the permanent residence of Muslims in non-Muslim lands, for as long as *shari'a* as a way of life is protected (Shadid & Koningsveld 1996: 96; Maréchal 2008: 265). In al-Alwani's view Muslims living in the West, unlike their coreligionists living in *dar al-Islam*, are surrounded by a non-Muslim social and cultural order, by laws made by man (*qanun wad'i*) rather than God (*shari'a*), and therefore

have had to deal with a range of unique problems: over diet, dress, marriage (to non-Muslims) and so on, to more challenging dilemmas, concerning the enforcement of shari'a, preservation of an Islamic identity, and the management of conflict between positive law and shari'a (al-Alwani 2010: 6). Having developed the doctrinal basis on which they could formulate their fatwās, al-Alwani founded the Fiqh Council of North America (FCNA) in 1988, and has since become an authoritative figure for many Muslims living in non-Muslim countries (Fishman 2006: 2-3). For al-Qaradawi, who is also a major figure in the wasa'iyya (Islamic moderation) movement,¹¹⁰ Muslims are duty-bound to live in and influence non-Muslim countries because they currently lead the world (Polka 2013: 36). The doctrine of fiqh al aqalliyyāt therefore is a necessary development to enable these Muslims to flourish, and fulfil their global mission of maqasid al-shari'a (goals/purposes of shari'a) through peaceful means and persuasion.¹¹¹ He details several essential principles of fiqh al aqalliyyāt. Important amongst these are, that there is no Islamic jurisprudence without ijtihād, and any rulings made must observe the rules of al-qawā'id al-fiqhiyya (Polka 2013: 34).¹¹² The latter deals with the principles by way of which the rulings involving new occurrences are identified in the absence of a clear decree

¹¹⁰ The doctrine of wasa'iyya is derived from the Qur'ānic verse 2:143: 'Thus we have appointed to you a middle nation (ummat wasat), yet ye may be witnesses against mankind and the messenger may be a witness against you'. It represents a 'middle way' between polarising currents in Islamic thought, whether described as historical or evolutionary, traditionalists and modernists, or fundamentalists and liberalists. For Al-Qaradawi the doctrine offers a way by which Muslims can be re-united in Islam.

¹¹¹ Maqasid al-shari'a refers to the essential goals/purposes of shari'a. These are commonly understood to be: protection of religion (deen), protection of life (nafs), protection of offspring or progeny (nasl), protection of intellect ('aql), protection of wealth or property (mal). Classical scholars, frequently discussed maqasid al-shari'a: after al-Juwayni (d.1085) the doctrine was developed by al-Ghazali (d.1111 CE), and was most notably added to in the 14th century, by Ibn Taymiyyah (d.1328) and Al-Shatibi (d. 1388 CE). In recent years, several prominent Muslim scholars have also advocated for, and contributed to, the development of the *maqasid* approach, making it a key feature of how they read and negotiate challenges in their contemporary context. See details see Auda (2008).

¹¹² For details of al-qawā'id al-fiqhiyyah (normative maxims or principles) see Musa (2014).

in the qur'an, sunnah, or ijma. Another important defining feature is that the rule that enables rulings to be adjusted in light of custom (urf), time, place and circumstances should be implemented. In terms of rulings, they should follow the principle of gradualism (tadrîj), avoid adherence to any specific madhāhib (school of legal thought), seek public interest (maṣlaḥa) and therefore take account of human necessity (darura), need (hajah) and improvements (tahsinat); rulings should also facilitate (taysir) rather than impose strictness. As to its normative reach, the doctrine of fiqh al aqalliyyāt offers a comprehensive framework, dealing not just with personal questions related to comprehension (fiqh) and action (a'māl), but also how Muslims can interact, socially, politically, legally and so on, with non-Muslims, as well as within the Muslim minority itself. To establish/develop fiqh al aqalliyyāt, al-Qaradawi founded in 1997 the Dublin-based European Council for Fatwa and Research (ECFR).¹¹³ Its primary aim is to enable Muslims to achieve 'integration without assimilation' (Caeiro 2010: 444). Consisting of self-selected scholars and clerics, the ECFR publishes religious rulings/explanations (fatwā) to meet the needs of Muslims in Europe. Since its establishment, several publications, institutions and websites have developed and advocated the doctrine, while others have either rejected it altogether, (criticising the notion that Muslims in the West need a 'special system of fiqh'), particular terms of reference and models used by al-Alwani and al-Qaradawi, or specific rulings under its auspices; largely on the basis of leniency.

During its almost two decades of existence, the ECFR has given several rulings that have departed from long-standing fatwās/consensus, including permitting

¹¹³ The organisation's website is available at www.e-cfr.org (accessed 04/8/13).

(even obliging) Muslims to participate in elections, to run for political office, (when there is no alternative), to bury their dead in non-Muslim cemeteries, to obtain a mortgage to buy a home and student loans to gain an education, even though being party to an arrangement involving usury (*riba al-qarud*) is in line with traditional interpretations strictly forbidden in Islam. With reference to family law, contrary to the opinion of the major schools of sunni and shi'i law, Muslims can adopt a child and give that child their last name to meet the legal requirements of positive law. Although females cannot marry non-Muslims, female converts, again in contrast to established consensus, are not required to divorce their non-Muslim husbands, provided that their ability to profess their religion is not restricted; moreover, they can receive inheritance from their non-Muslim relatives.¹¹⁴

On the matter of integration, in contrast to the position adopted by other prominent jurists, the ECFR in 2007 ruled that there is no contradiction between receiving (European) citizenship (*muwatanah*) and loyalty to shari'a (*al-wala' wa-l-bara'*). To prevent segregation and isolation Muslims should, it suggests, demonstrate controlled flexibility, openness and engage in reciprocal relationships with non-Muslims. The ECFR has also instructed that shari'a encourages them to abide by the laws of the nation state; to know the language, customs, and procedures of the society they live in; to participate in public life and to promote the public interest; to earn their own livelihood; and, to be productive and avoid unemployment (Polka 2013: 39-40).

¹¹⁴ The fatwas that the ECFR has given can be accessed on its website.

For the ECFR when it comes to instances of conflict of interest between qanun wad'i (positive law) and shari'a, or, put differently, between a Muslim's civil and religious obligations, there are no obvious answers: 'it depends'. This is not to say that god's law is not always and unequivocally more important than man-made law. Rather, the ECFR recognises that by following positive law, or a civil obligation, on some occasions a Muslim is still following shari'a. In such circumstances, faced with two opposing shari'a-compliant acts, in arriving at a judgment over the right course of action, the jurists of the ECFR employ the 'doctrine of balance' (fiqh al-muwazanat) and the 'doctrine of priorities' (fiqh al-awlawiyyat). Put into practice, this translated to perhaps the ECFR's most controversial ruling: following a query by a Muslim chaplain in the U.S. army, the ECFR permitted the participation of Muslim soldiers in the war against the Taliban in Afghanistan following 9/11, provided the soldier had done his best to avoid direct combat. However, the general position remains that if a Muslim is compelled (as opposed to being permitted) to perform actions that are forbidden by shari'a (muharramat) s/he must refuse, and if circumstances become untenable, emigrate (hijrah) to a more hospitable jurisdiction.

Although seemingly controversial, what al-Alwani and al-Qaradawi through their respective fatwā bodies (FCNA & ECFR) are attempting to do is to fill the 'vacuum of authority in modern Islam' (Fadl 2009: 35-37). Since its earliest beginnings Islamic jurists had a pivotal role in providing authoritative guidance in Islam, but as a consequence of colonialism and the replacement of shari'a by legal systems based on Western models, they lost their privileged position and with it their ability to influence through fatwās – society, law and politics on a large scale (see

in detail Fadl 2009: 26-36). Since the 18th century, many jurists in their own ways have attempted to address the ‘crisis in authority’, and the discourse of *fiqh al aqalliyyāt* can be seen as a continuation of these reformist projects.¹¹⁵

Besides the FCNA and ECFR, there are other transnational institutions/fatwā bodies, ‘Internet Imams’,¹¹⁶ as well as (self-appointed) muftis in the Islamic world offering guidance to Muslims in and outside dar al-Islam. The list includes: the Muslim World League in Mecca, the *dār al-iftā’* at the al-Azhar University in Cairo, Diyanet İşleri Başkanlığı in Ankara, which also has a branch in Cologne-Ehrenfeld to cater for the religious needs of the large Turkish minority in Germany. Offering an alternative to *fiqh al aqalliyyāt*, the Grand Mufti of Bosnia-Herzegovina Mustafa Cerić has developed a ‘Muslim Social Contract’ theory, modelled on the ‘Covenant of Medina’, to enable Muslims to negotiate mutual obligations, and to positively engage on a socio-political as well as intellectual level in wider European society. Similarly, the French imam-theologian Tareq Oubrou in his effort to provide guidance has developed what he calls a ‘shari’ah of the minority’, which ‘minoritises’, ‘localises’ and ‘relativises’ Islam as a religion in a pluralist liberal milieu through the use of ‘classical jurisprudential devices (such as fatwas), contemporary hermeneutics and critical thought, and through personal communion with the divine (spirituality)’ (Hashas 2014: 365). Another influential figure for European Muslim youth in particular is Swiss-born theologian Tariq Ramadan, who argues that a ‘self-conscious’ rethink of the role

¹¹⁵ In particular, see the efforts by Sayyid Jamāl al-Dīn al-Afghānī (1838-1897), his student Muhammad ‘Abduh (1849-1905), and his student Muḥammad Rashīd Riḍā (1865-1935).

¹¹⁶ One can discern a significant trend mainly among British Muslim youth that involves them seeking legal opinions as part of a process of self-and-peer-education. Based elsewhere in the world, but it seems especially in North Africa, Turkey and the Gulf, internet imams or sheikhs dispense advice via emails, blogs, chatrooms (etc.). Local imams now find that their authority and influence has to be won, not simply accepted as may traditionally have been the case.

of shari'a and fiqh is necessary, but should not be directed from a minority point of view (Ramadan 2005: 53). Instead, what he calls 'transformation reform' requires shifting from the traditional Islamic focus on law and legal norms onto the broader Islamic ethics (Ramadan 2009: 33). Through intellectual creativity, an endeavour different from innovation, Ramadan argues that (European) Muslims must find their own answers to contemporary challenges by 'being faithful' to the traditional techniques, such as *maṣāliḥ* and *maqasid*, and by so doing, even if they arrive at answers different from the ones suggested by him, they will 'both reassert their belonging within mainstream Islamic tradition and assert their cultural and social belonging in Europe' (Nielsen xiv in Ramadan 1999). Offering to fill the vacuum in authority are also a generation of Western-educated Muslim intellectuals, who are largely self-taught on religion, able to provide answers using a simple logic in an accessible language, when providing peer-education.

With a variety of parties, 'moderate' and 'puritan', institutions as well as (self-appointed) muftis, coming forward to fill the vacuum in authority, this has given rise to a number of competing voices,¹¹⁷ intellectual controversies, and arguably even a 'jurisprudential chaos' Fadl (2009: 29). It is within this wider context that Muslims in Britain and elsewhere in Europe have to make decisions concerning their daily life.

¹¹⁷ In March 2015 Imams Online launched a new online magazine, 'Haqiqah', which aims to reclaim the digital space from extremist 'muftis'. See for details: <http://imamsonline.com/blog/wp-content/uploads/2015/03/Haqiqah-What-is-the-Truth-Behind-ISIS.pdf>.

2.7 The reconstruction of Muslim identity and norms

Prior to the introduction of immigration restrictions in the 1960s, most Muslims who arrived in Britain never intended to become permanent settlers. The 'myth of return' was deeply embedded in the psyche of early South Asian migrants (Anwar 1979; Gardner & Shukur 1994: 153). Feelings of imminent return, for instance, amongst Somalis led them to not campaign for their social needs (el-Solh 1991: 548), and for Iraqis to refuse long-term employment that might have led to permanent settlement (al-Rasheed 1992: 541-3). It is now widely recognised that the immigration restrictions of the 1960s and 1970s were instrumental in the creation of a permanently settled Muslim population in Britain (Holmes 1988: 26). Muslims who wanted to ensure the continuation of remittances had to stay on. In addition, two other factors played a crucial part in the transition from sojourn to settlement: the phenomenon of family reunion,¹¹⁸ and the fact that air travel and long-distance telephone calls became much cheaper. The latter enabled immigrants to actively maintain transnational links. In more recent years the rapid growth of the internet and the mobile phone network has enabled transnational communities anywhere in the world to better maintain multi-polar links.¹¹⁹ Following the collapse of the myth of return settlers began to put down local roots. How this was done varied among different communities and among individuals themselves. The aim here is to present some of the main issues which have characterised the general Muslim experience of living in a country that in many ways was alien to them.

¹¹⁸ See in detail Wahab (1989: 7-11).

¹¹⁹ This phenomenon has also enabled Muslims to be part of any number of 'network societies' (Castells 1996) in which they can live and act in relation to long-distance (Muslim) 'virtual' peers, in sometimes enormous online communities.

Writing about the South Asian experience, Ballard (1994: 12) reports that the shift in mind-set led to settlers making 'vigorous efforts to rebuild almost every aspect of their social and cultural traditions'. Particular factors were especially significant in the (re)construction process. In the first place, settlement patterns played an important role. Being in close proximity to other Muslims, to one's kinship especially, motivated Muslims to (re)construct Muslim norms and values, and even at times stirred up izzet competition (Ballard 1994: 11). Within groups it was understood that the more religious, or cultural, one and one's family were seen to be the greater the social standing – or status – they were accorded by their Muslim peers, tribe and/or kin. Many Muslims therefore felt under constant pressure to be (or seen to be) committed to *urf* and *shari'a* in the diaspora. Secondly, the phenomenon of family reunification accelerated the (re)construction process: 'many wives saw themselves as joining their husbands to 'save' them from being estranged from their culture and religion' (Nielsen 1991: 47; see also Shaw 1994: 49-52). The establishment of families led to an instant return to networks of kinship and village as primary reference points (Ellis 1991: 365).¹²⁰ Thirdly, lots of Muslims viewed the lifestyle and values of the majority native British with some distaste, certainly something not worth emulating. In relation to izzet, especially, it was felt that the native 'English seemed to lack all comprehension of what it meant' (Ballard 1994: 10).

Muslims rapidly developed life-cycle rituals, (especially associated with birth, marriage and death), local infrastructure, (e.g. mosques, madrassas, ethnic shops

¹²⁰ Illustrating the heterogeneity of responses, many Bengali Muslims choose not to call their wives to Britain at all (see Gardner and Shukur 1994: 153-4).

and restaurants), community advisors, imams,¹²¹ biraderi and clan-based ADR and shari'a councils, second tier (or umbrella) organisations and so on. The rising number of mosque registrations in particular serves to illustrate the extent of Muslim commitment to their religious, but also cultural, norms.¹²² Apart from providing a place for communal prayer, mosques became a key hub where information was shared and discussed regarding what was happening in the 'biraderi' or clan and more broadly the community.

One can also point to various organisations set up by Muslims, including the London-based United Kingdom Action Committee on Islamic Affairs (UKACIA). In 1988 it brought together the UK Islamic Mission (est.1962), the Islamic Foundation (est.1973), and the Union of Muslim Organisations (UMO) (est.1976), to lobby Penguin publishers to withdraw the infamous Satanic Verses written by Salman Rushdie, and the government to ban it. The Muslim Institute (MI) set up in 1974, originally as a foundation for research, established a number of organisations to help address the needs of, and shape, the British Muslim community, including the Council for British Muslims (CBM) that it hoped would act as a 'Muslim Parliament' in Britain, and the Halal Food Authority (HFA). The CBM was the key recommendation of the MI's 'Muslim Manifesto: A Strategy for

¹²¹ Muslims established institutions dedicated to the training of imams, including in 1981 the Muslim College in Ealing and in 2000 the Markfield Institute of Higher Education in Leicester. Since then various other institutions, including universities, have developed imam-training courses. In 2006, the Mosques and Imams National Advisory Body (MINAB) was set-up by Muslims (and to some extent constructed by government as part of its strategy to counter radicalisation and extremism). It aims to raise standards by the promotion of a set of core standards over how imams and mosque committees should conduct themselves primarily through the provision of infrastructure support.

¹²² In 1963 a total of 13 mosques were registered in Britain (Vertovec 2002a: 21), rapidly increasing to 177 in 1977 and to 338 in 1985 (Nielsen 1987: 387). Today, there are over one hundred mosques in London alone. Many of these institutions, such as the Islamic Centre of England in Maida Vale, and East London Mosque/London Muslim Centre, serve not only as places of worship, but are the focus of community life, providing a range of services, advice and information, and jobs for men and women in the local communities.

Survival'.¹²³ The document also provided guidelines for Muslims over how they could remain faithful to their religion, outlining their duties and responsibilities to both the state and shari'a, raised some of the problems faced by, and grievances, Muslims had living in a secular nation, and suggested in addition how the state could foster better relations with the Muslim community. Both the UKACIA and CBM did not have popular support either of government or British Muslims, partly because of ideology and the perceived unhealthy links that each respectively had with the Saudi and Tehran governments. This gave rise to the establishment of the Muslim Council of Britain (MCB) in 1997.¹²⁴

The MCB was founded (and to some extent constructed) to act as a single 'representative' voice of the disparate Muslim communities in negotiations with government. In essence, it was modelled on the Board of Deputies of British Jews, which for decades has been the 'representative' of Jewish communal interests to government. For some years it was the 'go-to' organisation for the then Labour government, but lost favour by the mid-noughties when it became increasingly critical of the government's foreign policy, and was accused of not doing enough to combat extremism.¹²⁵ The MCB could no longer ignore the swell of fear, anger and resentment that the 'war on terror' had initiated amongst Muslims general. Though this won it some new credibility amongst some sections of Muslims, other quarters continue to see it as 'out of touch' and unrepresentative. The MCB has strived to be inclusive, but most of its affiliates

¹²³ The document can be accessed at: <http://www.muslimparliament.org.uk/MuslimManifesto.pdf> (accessed 03/10/13).

¹²⁴ For a more broader and up-to-date understanding of the extent to which Muslims have established local, national and international 'Muslim' organisations and associations, from charities to professional networks to educational bodies to funeral services, a valuable resource is the 'Muslim Directory' (MDUK Media).

¹²⁵ See in detail Kundnani (2007).

are drawn from Deobandi, Jamat-e Islami, and Barelvi Muslims. Presently, it claims to have over 500 affiliated Muslim organisations that include a range of local, regional and national organisations, mosques, charities, and schools. From the MCB the government moved onto engage with other Muslim voices, including the British Muslim Forum and the Sufi Muslim Council. While it did not consider them to be any more representative than the MCB, these organisations were assessed to be more ‘moderate’ and less openly critical of foreign policy (Gilliat-Ray 2010:110).¹²⁶

As ‘ethnic colonies’ grew in size and became more sophisticated the confidence of Muslims also grew. More felt that they could re-establish their family life in the alien milieu (Ballard 1982: 189; Ballard 1994: 8). Wahab (1989: 5) reports that some Muslims became more devout in the face of what they held was a ‘corrosive’ British atmosphere than they were back ‘home’. This is not to say that some norms, values and practices did not change. Muslims have made some modifications and, as we have already discussed, developed new hyphenated (but contested) identities. In Ballard’s (1994: 8) view what characterises the experience of newer minorities is that they have become an integral part of the British social order ‘on their own terms’, and not according to expected assimilationist trajectories that placed the burden only on them to adjust (Nielsen 1992: 164).

¹²⁶ Successive governments have considered Sufi and Barelvi strands for some time as ‘moderate’, a euphemism for ‘good’, since they have been politically the ‘quietest’ and therefore safe to support. In the government’s bid to build a national coalition to challenge and speak out against terrorism, David Cameron in 2015 launched another forum by way of which to engage with Muslim voices – the ‘Community Engagement Forum’. On social media especially, the government’s selection of members has raised disbelief from some layers of Muslims. It remains to be seen whether Muslim members of this gathering can be ‘representative’ of the very different Muslim voices in Britain. The Community Engagement Forum had its first meeting on the 13th of October, hosted by the Prime Minister at Downing Street. The forum consists of 30 members, chosen because of their work or expertise on radicalisation.

The strong commitment to the (re)construction of Islamic and ethnic identity, as this study also shows, is in no way limited to the first generation but extends to subsequent British-born generations; though this complex process has not been without its tensions. Mirza et al (2007) report a growing religiosity amongst sections of the younger generation, who exhibit a much stronger preference than their parents for Islamic schools and shari'a law and place a greater emphasis on asserting their identity publicly, for example, by wearing a hijab, or by spending their time proselytising (daw'ah).¹²⁷ Several researchers, including Hamid (2011: 252), have identified how an intersection of alienation from parental values, domestic religious institutions, marginalisation from mainstream society, identification with international Muslim political events, and the work of active revivalist organisations in Britain, have led to an assertive faith-based activism amongst layers of second-generation British Muslims.

Muslim commitment to Islamic and cultural (re)construction also extended to the legal sphere, but this process until recently has received only muted attention in British legal scholarship, mainly because of received ideas about 'law'. Legal theorists and practitioners continue to conceive 'law' as a set of abstract rules decreed by the state and tied to a territory, rather than as something that could have personal application.¹²⁸ Rahim notes that:

In Muhammadan jurisprudence law is personal in its application to the Muhammadans, that it to say, is not affected by the constitution of a particular

¹²⁷ See also Geaves (2010); Gilliat-Ray (2010); Tarlo (2009).

¹²⁸ Carroll (1997: 105) demonstrates this typical position: 'It is important to realize that in the modern world Islamic law, as law, does not exist as some disembodied entity floating in the stratosphere, overreaching national boundaries and superseding national law. In the modern world, Islamic law exists only within the context of a nation-state; and within the boundaries of any particular state it is only enforced and enforceable to the extent that, and subject to the reforms and modifications that, the nation-state decrees'.

society [...] thus, if a Muhammadan goes from one state to another, he is bound by the same law, and if he does not live within the same jurisdiction of a Muslim state, the Muhammadan law still applies to his conscience (Rahim 1984: 47).¹²⁹

The personal application of 'law' is not unique to the phenomena of religion, but is equally applicable to customary norms. Ellis (1978: 7) perceptively noted that Africans, wherever they may go, "carry' the village with them for the reminder of their lives', as if it was in their bone marrow. Similarly, amongst Pakistanis and Indians who emigrated to Britain, Pearl (1972: 120) noted that they do not discard their deeply engrained family customs.

The stranglehold of legal positivist ideas continue to hinder our understanding that immigrants do not arrive as legal *tabulae rasae*, but bring with them their own legal consciousness, that is, their own understandings and meanings of 'law'. This in practice translates to a state of affairs where there is a number of normative orderings acting on the individual. For us to be able to see this more clearly, or put differently, to understand how Muslims read their daily world – a world in which they or their act are subject to multiple, overlapping normative orderings – we need to look to adopting the more appropriate lens provided by the science of legal pluralism.

¹²⁹ See also Coulson (1968: 54).

Chapter 3: How legal pluralism can help us see how Muslims read their daily world

The task of this chapter is to explain how the concept of legal pluralism is able to help us to understand, locate and (possibly) explain different types of 'legal' norms, however configured, their interaction and interdependence, and the social significance of their elements on the actors involved. Before we turn our attention to legal pluralism, it is important to briefly examine why 'legal modernity', based on theories of legal positivism and legal centralism, is unhelpful.

3.1 Why legal 'legal modernity' is unhelpful

In speaking about 'legal modernity' one may mean many things. Evolutionist thought, which gained prominence in the mid-eighteenth century, believed that all societies passed through clear and inescapable stages of legal and social development, distinguished by increasing complexity.¹³⁰ The idea of legal evolution was developed particularly in Scotland by Adam Smith (1723-1790) and John Millar (1735-1801), but appeared in a different form in the thinking of Friedrich Carl von Savigny (1779-1861) and the German Historical School, while in England it gained popularity with the publication of Maine's *Ancient Law* in 1861 (see in detail Stein 1980).¹³¹ The movement presented European states and their legal systems as the highest stage of development. Such ethnocentric claims were very convenient for European colonisers implementing their

¹³⁰ Both French and Scottish social theorists were using evolutionary schemes during the 18th century. For a useful account of stadial theory see Meek (1976: 5-36).

¹³¹ In his monograph *Ancient Law* (2013), Maine developed the principle that progressive societies developed from systems based on kinship to those of territoriality, from status to contract, and from civil to criminal law.

imperialist agenda.¹³² Even after independence it was assumed that post-colonial states of Asia and Africa would, and indeed did, follow the European model of legal evolution.¹³³ Looking at current debates about Muslim laws in Europe, as this study also shows, they too remain influenced by colonial experiences and the inferiorisation of non-European concepts and values.

So what are the key characteristics of legal modernity? Galanter (1966) describes 'legal modernism' as the movement or sustained efforts, of older and newer nations in the past two centuries, towards ten particular features, which he lists as (1966:154-5):

First, modern law consists of rules that are uniform and unvarying in their application.

The same rules apply to all citizens, irrespective of their membership of any religion, tribe, class, caste, gender and so on. There is no room for personal status laws rather a one law for all arrangement is applied across the territory.

Second, modern law is transactional.

People's rights and obligations flow from negotiations they have agreed (contractual, tortious, criminal and so on), not from inherent worth or sacramental honour. Legal rights and duties are not determined by factors such as age, gender, class, religion, which are unrelated to the particular transaction or encounter.

¹³² The belief amongst colonisers was such that 'European civilization could do nothing but good, moral, and material to those among whom it arrived' (Kelly 1992: 303-4). For a discussion of how this was done in the African context see Moore (1992). Initially, the approach also dominated legal anthropology and is noticeable in some important monographs, (see, for example, Malinowski (1926), and Llewellyn and Hoebel (1941).

¹³³ See in detail Menski (2006).

Third, modern legal norms are universalistic.

Methods of regulating are devised that enable legal decisions and rules, once made, to become standardised and uniform rather than altered from case to case. In this way the application of law is both reproducible and predictable. This means, for example, that *qadi* justice is replaced by Kant's categorical imperative. Looking at the kind of institutional arrangements and techniques that are used by nation states to administer these rules, Galanter (1966: 155-6) notes the following,

Fourth, the system is hierarchical [...] Fifth, the system is organized bureaucratically [...] Sixth, the system is rational [...] Seventh, the system is run by professionals [...] Eighth, [...] Lawyers replace more general agents. [...] Ninth, the system is amendable.

This means that in practice institutions, such as courts, have a hierarchical structure, in which authority is distributed 'top-down'. The system operates impersonally following prescribed procedures. Each case is decided according to written rules and records are kept to permit review. These rules can be ascertained from written sources through techniques that can be learnt. Functional techniques replace theological or formalistic ones, and rules are valued for their utility in producing consciously chosen ends. Full-time professionals (trained jurists, examiners and so on) are employed with demonstrable qualifications that relate to the mastery of the techniques of the legal system itself. The complex and technical system requires lawyers who act as intermediaries between the courts and the layperson who must deal with them. There is no sacred fixity to the system. Rules and procedures can be

changed by methods that are controlled by the state. In this way the state can revise rules and procedures according to its preferences. Looking at the relationship between law and political authority, Galanter (1966: 156) notes that,

Tenth, the system is political [...] Eleventh, [the] [l]egislative, judicial and executive are separate and distinct.

Law is so intensely connected to the state that it enjoys complete monopoly over all disputes it cognises in its territory. All other bodies, such as religious courts or trade associations, are subordinate to the state. The judiciary who is charged with applying the law is differentiated in personnel and technique from other government functions.

Under this notion of 'modern law', predominant in the West, we can see that the sovereigntist and territorial nation-state is adopted as the point of reference for law, not mankind or the divine. In fact it becomes no longer possible to comprehend law unless the state is presupposed as an underlying social reality. In other words, the state marks the border between the 'legal' and the 'non-legal' (Donlan 2015: 21). Law becomes a pragmatic device, an instrument used by the state to accomplish its will (Sugarman 1983: 233-245; Moore 1978: 244; Berman 2000: 333-4). The intrinsic justice or moral worth of legal rules becomes irrelevant (Austin 1832: 278; Hart 2013: 185-6). The strong belief is that society and all or most of its social phenomena can be decisively influenced in the desired direction from the centre of political power, through top-down control (Summers 1977). The state tolerates no rivals by means of law over its sovereignty, and uniform law is seen as a condition of progress toward modern

nationhood (Griffiths 1986: 8). The focus for those seeking to understand law becomes what is posited (ordered, decided, practised, tolerated and accepted) by the state. In practice this translates to what did the court decide? What bill did parliament pass? What order, rule or regulation has the Minister made by means of statutory instruments? This vision of 'modern law' is largely based on legal positivist and legal centralist ideas that, for over two hundred years, have dominated Western legal theory. To obtain a deeper insight into legal modernity therefore it is important to briefly outline the origin and key ideas of both positivist and centralist traditions.

The origins of modern legal positivist tradition lie in the Enlightenment, which proposed a conception of law free from natural law. The mood within Europe in the mid-18th century was one of profound scepticism 'towards traditional systems of authority or orthodoxy (especially those of religion), and a strong faith in the power of human reason and intelligence' (Kelly 1992: 249). A parallel development, also inspired by the spirit of Enlightenment, was the movement towards centralised 'nation states'. At the heart of this movement, which arguably began with the 1648 Treaty of Westphalia, was the idea of a social contract between man and the state. According to this social contract, a nation state would take care of its citizens by giving them certain rights but it could, at the same time, place certain responsibilities on them. The impact on 'law' and on the legal systems of Europe was revolutionary. Enlightenment produced legislative attempts to unify and codify national legal systems that had previously not been seen. Along with Napoleon's Civil Code, codification attempts took place in Prussia and Austria, for the purpose was to modernise

and order what was previously a 'heterogeneous civil law, inherited with a bewildering penumbra of local customs and Roman accretions of the middle ages' (Kelly 1992: 262). By the following century, legal thought in England firmly developed that law did not have to accord with reason or natural law for it to be valid. With some force, the source of the law was asserted to be the will of the legislator. In his version of legal positivism, 'a command theory of law', Austin (1832) defined laws proper, in other words norms that properly could be called 'law', as commands backed by threat of sanctions, issued by a political superior known as the sovereign, to whom people have a habit of obedience.¹³⁴ The theory espoused not the 'rule of law', of government subject to law, but the 'rule of men', of government using law as an instrument of power (Cotterrell 1989: 74). In the same period, the state began to accept a larger role in social life, bringing to an end its previous non-interventionist approach.¹³⁵ The change was described by Dicey (1926: 409) as the transition from 'individualism to collectivism'. In practice the effects were quite substantial, as the state increasingly began to take an active interest in regulating family relationships and their consequences. This can be seen, for example, by the introduction of secular marriages by the state through the 1836 Marriage Act, and the liberalisation of the divorce procedure by virtue of the 1857 Matrimonial Proceedings Act, which moved litigation from the jurisdiction of ecclesiastical courts to the civil courts.

¹³⁴ Austin modified the views developed by his reformist teacher, Jeremy Bentham (1748-1832), who, himself, was significantly influenced by the political philosophies of Thomas Hobbes (1588-1679) and David Hume (1711- 1776).

¹³⁵ This approach favoured the theory of freedom of contract, which viewed the best policy presumptions as *laissez faire*, self-reliance and individual responsibility. For details see *Printing and Numerical Registering Co v Sampson* [1875] 19 Eq 462.

In Austin's view it was logically impossible to have multiple sovereigns, or to divide the powers of a sovereign amongst different bodies, with each body enjoying habitual obedience. By the mid-twentieth century, however, this account had lost influence, especially amongst practising legal philosophers. The chief architects of a revised positivism, Hans Kelsen (1881-1973), Herbert Hart (1907-1992), and Joseph Raz (1939-present) shifted the focus from legislative institutions to include law-applying institutions, such as courts, and from the imperative and coercive nature of law to theories emphasising the systematic and normative character of law. Though there are distinct differences in their respective elaborations of legal positivism, they all agree that laws are laws by virtue of their form, duly authorised by the political sovereign, irrespective of their moral or political content. This is not to say that they didn't recognise that some laws were bad, oppressive, or simply irrational.

The Concept of Law (1961 [2012]) by Hart is still by far the most influential statement of legal positivism in the anglophone world. In it he agrees with Bentham that law is all about rules, but he adds there are two kinds of rules: obligation-imposing 'primary rules' and power-conferring 'secondary rules'. Both types of rules according to Hart enable us to understand law and any legal system. The 'rule of recognition', the most fundamental secondary rule, specifies the ultimate criterion of legal validity,¹³⁶ which in the English context translates to 'that what the Queen in parliament enacts is law' (2012: 107). Moreover, Hart's version of positivism argues that analysis of legal rules can and should be done by using legal methodology. By this he means techniques and concepts that

¹³⁶Kelsen's equivalent is the 'grundnorm'. For a useful overview of Kelsen's theory of the basic norm see Raz (1974).

lawyers have traditionally used in their analysis. Among these, he tells us, the important ones are: 'sources of law', 'interpretation', 'validity', 'rights and duties', 'ultra vires' and 'locus standi'. Most positivists assert that by using these concepts they can 'prove' that law is something quite separate from morality, custom, religion, mores, brute force and politics.

In the legal centralist view, state agencies occupy the centre of legal life. Law is the single, unified and exclusive hierarchical ordering of normative propositions of the state (Griffiths 1986: 3-4). This ideology sees unification, that is, 'one law for all' which is administered by state agencies, as normal, modern, good, but also necessary and inevitable. Such assumptions are very much linked to the aspiration of a strong, unified, nation state, which in turn is portrayed as the mark of civilisation and progress. When it comes to other mechanisms of social order in society, such as the family, tribe, church, organisation, voluntary association and so on, and their respective normative orders, legal centralists see them as hierarchically subordinate to state law and to the institutions which implement it (Galanter 1985: 67). From this perspective, the nation-state has complete prerogative to decide in what circumstances and under what conditions it allows international law, religion, ethical custom, morality, fashion or any other ordering to operate within its territory and under its authority. Until unification and uniformisation of law from a single validating source – the state – is achieved, some allowances, subject to the state's standards of acceptability, can be made for local or group 'custom' and heterogeneous structures (Griffiths 1986: 7-8). Importantly, the domination, subordination and limited recognition by the statist system means that,

[...] local attitudes and concerns can no longer find direct embodiment in law. They become law only when mediated through ideas of remote lawmakers and the techniques of professional judges' (Galanter 1966: 162-3).

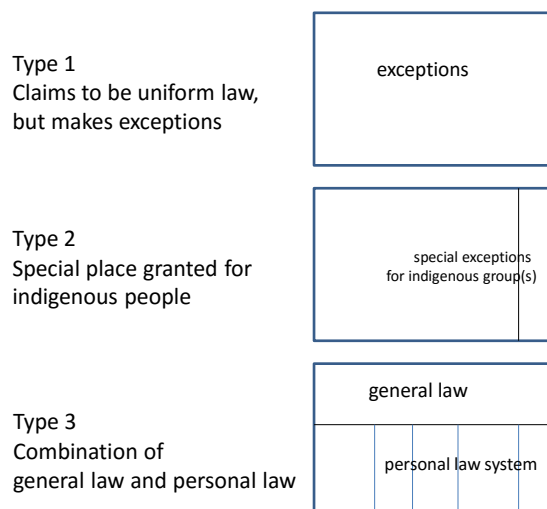
But when it comes to dealing with local and group normative orders, including ethnic minority variations, these tend to be viewed with suspicion, treated as a modality of 'primitive' societies, and are generally deemed problematic (Jones 1998: 7-8). As a result of legal centralism there is now a widespread 'tendency to visualise the 'law in action' as a deviant or debased version of the higher law, 'the law of the book' (Galanter 1981: 5). The observation and theorisation of 'law' in 'primitive' societies has also suffered overtly and indirectly, by way of 'false comparisons' with this idealised picture of law in 'modern' societies (Griffiths 1986: 4; see also Allott 1980; Legrand 1996). In both scenarios the phenomenon under observation, we are told, is simply not 'law'. In the West, Griffiths says that legal centralism,

[...] has had such a powerful hold on the imagination of lawyers and social scientists that its picture of the legal world has been able successfully to masquerade as fact and has formed the foundation stone of legal and social theory' (Griffiths 1986: 4-5).

On the macro-level, as argued by Menski (2013), we are presented with the conception that there are basically three types of legal systems in the world with the state at the helm:

Menski (2013: 20)

Three types of legal systems in the world



A type 1 legal system, found across Europe, presents itself as applying a uniform law to all its subjects and is seen as the ideal global system towards which every other system should aspire. A type 2 legal system, for example the Canadian model, makes special allowances for a particular indigenous group(s), while a type 3 or 'millet-type' legal system, such as the Indian and South African model, retains the formal recognition of different personal status laws.

For some time now, theories of positivism, centralism and uniformism, referred collectively by Cotterrell (1984: 3) as 'normative legal theory' because of the status these ideologies hold in the minds of many, have been at the end of increasing criticism for their unrealistic and hegemonic view of 'law' and how it operates in the society it claims to work in. Menski (2013: 7) argues that it is simply intellectually dishonest to insist that type 1 legal systems are the yardstick against which all other legal systems should be measured. Griffiths

(1986: 4) describes legal centralism as ‘a myth, an ideal, a claim, an illusion’. In Cotterrell’s view, the criticism is justified because normative theory presents a picture of law,

[...] grounded in abstract philosophical speculation, rather than in the empirical examination of actual patterns of legal behaviour or actual social and historical contexts in which law exists (Cotterrell 1989: 8).

The irony of the current scenario becomes clear when one considers that early advocates of positivism wanted to get away from discussing what law ought to be rather to concentrate on what it actually is. Instead, in our contemporary times, positivist thought has become ‘a mixture of assertions about how the world ought to be and a priori assumptions about how it actually and even necessarily is’ (Griffiths 1986: 3). This has led some observers to conclude that legal centralism is a hindrance, even the enemy, preventing the observation of law in practice and in the formulation of a descriptive theory of law (Griffiths 1986: 3-4; Mattei 2001: 254). On the same point, in their own way, jurists Chiba (1986), Legrand (1996), Woodman (1998), Tamanaha (2001), F. Benda-Beckmann (2003), Menski (2006) and Twining (2009), have argued that mainstream preoccupation over what is ‘legal’ and in this regard the drawing of criteria too narrowly, that is, circumscribed by statist, monist and positivist ideologies rather than open-ended and empirical socio-legal methodologies, has led to impoverished legal research and understanding.

So what does this mean for our study? Chiba (1986) explains that by mistakenly assuming its own universality, (Western) ‘model jurisprudence’ has rendered invisible the specific experiences of non-Western cultures, legal systems, and the

presence of ‘unofficial laws’ and their underpinning ‘legal postulates’ in any given legal system. The latter observation is especially important for our study, which seeks to push against the tendency to keep hidden or render invisible through defining away non-state normative orders that resist, challenge and compete with the normative ordering of the state that popular scholarship only regards as ‘law’. In the end, as this study will come to show, observational data of actual patterns of behaviour in society present a strong challenge to the view of ‘law’ suggested by ‘legal modernity’. Rather, legal reality appears as an ‘unsystematic collage of inconsistent and overlapping parts, lending itself to no easy interpretation’ (Griffiths 1986: 4). Muslims in Britain are caught up in a multi-dimensional competition between various normative orders that are important to them, which includes that of the ‘modern’ state, and normative orderings based on shari’a and urf in particular. This is the actual state of affairs. For us to come to grips with this reality, we must discard the blunt tools of ‘official legal science’ that render this invisible and adopt new ones. We can now turn to examine in jurisprudential terms how theories of legal pluralism can help us in our task of understanding how Muslims see and experience their lived normative (legal) reality.

3.2 Why ‘legal pluralism’ is more helpful

Unsurprisingly, given the disagreement over ‘law’, legal pluralism too does not have the same meaning for everyone (Moore 1986:1 Zahle 1995: 186; Dupret 2007: 1). The term is however generally accepted to describe a situation in which two or more ‘laws’ (legal systems, or orderings) coexist in a social field (or

given location), or are obeyed by an individual, group, or population (Michaels 2009: 3). In this way, legal pluralism is diametrically opposed to legal centralism. All legal pluralists share the core credo that the state does not have a monopoly on the production or distribution of law (Allott & Woodman 1985: 2; Dupret 2007: 1). Many are also critical of any single notion of law 'as universal across space and time', and the state law's claim to 'integrity, coherence and uniformity' (Griffiths 1986: 8-14). But there are significant differences amongst legal pluralists too.

F. and K. Benda-Beckmann (2006: 14) see legal pluralism not as a theory but merely as a 'sensitising concept'. Griffiths sees legal pluralism as a concept suitable for the development of a descriptive theory of law, and as describing a factual 'state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs' (1986: 2). Sack (1986: 1-2) takes this one step further, for he argues that legal pluralism implies an ideological stance that sees plurality as a positive force to be utilised and controlled rather than eliminated. In contrast, Santos (2002: 89) is of the view that 'there is nothing inherently good, progressive, or emancipatory about 'legal pluralism''.

Over its occurrence, Griffiths (1986: 38) argues that as 'legal pluralism is a concomitant of social pluralism', in all diverse (and superdiverse) populations we will find the empirically verifiable situation of legal plurality (see also Melissaris 2009). For him, then, legal pluralism is simply a fact of life. It has also been pointed out that legal plurality is not something new, a contested feature of globalisation(s), (post)colonialism, or (post)modernity. It was openly acknowledged in ancient times. Menski (2010) in his endeavour to shed light on

Sanskrit law found the operation of ‘Vedic legal pluralism’. He notes that ancient Indians were much more plurality-conscious and aware of inter-linked legal phenomena than researchers have uncovered so far. In relation to Western legal orders, Donlan (2015: 18) also identifies that throughout ‘Western history, a unified system of national state common laws is the historical exception rather than the rule’.

As we have seen, legal modernity has little to say about non-state law, but other legal orderings or unofficial laws exist, emerge and evolve whether the state gives them space or not (Yilmaz 2005a). As Griffiths (1986: 13; see also Ehrlich 1936: 24) asserts, state ‘recognition or some form of incorporation or validation is not a prerequisite to the empirical existence of a legal order’. To make sense of a plurality of normative orderings, or law as a ‘conglomerate of phenomena’ (Sack 1986: 1-2), efforts have led to the emergence of a number of studies since the 1980s, assisted by the establishment in 1978 of the Commission on Folk Law and Legal Pluralism,¹³⁷ and by the birth of the Journal of Legal Pluralism and Unofficial Law in 1981.

3.3 An overview of legal pluralism studies

Before we move to examine studies of legal pluralism since the 1970s, it is important to briefly note the contribution of earlier legal researchers. Testing received ideas, Malinowski (1926) in particular led the important movement ‘out of the armchair and into the field’. The fertile approach allowed him to reveal that a variety of cultural ‘mechanisms’ operated simultaneously to maintain

¹³⁷ To date, a network with over 400 lawyers, anthropologists and other social scientists as well as NGO activists and other policy makers representing all regions of the world.

order in the Trobriand Islands, including relationships of reciprocal obligation that acted as a binding force in the achievement of compliance. Llewellyn and Hoebel's (1941) careful analysis of 'trouble cases', amongst the seemingly homogeneous Cheyenne Indians of the Great American Plains, led them to conclude

[w]hat is loosely lumped as 'custom' [on the society's level] can become very suddenly a meaningful thing – one with edges – if the practices in question can be related to a particular grouping [...] there may then be found utterly and radically different bodies of 'law' prevailing among these units, and generalization concerning what happens in 'the' family or in 'this type of association' made on the society's level will have its dangers. (1941: 53).

The shift of focus from that of society as a whole to sub-groups as the unit of analysis to capture a descriptive theory of 'law' is also evident in other studies. Ehrlich (1936), a lawyer and administrator writing from a social scientific standpoint, noted that people's behaviour is not necessarily dominated by the all-encompassing state law, but primarily by the inner practices of 'associations', what he called 'living law'. Ehrlich had discovered in the Bukowina, a remote province of the Habsburg Empire that besides the centralised legislator and judiciary in Vienna, there existed an independent customary law that was much more important to the people than the state's law. For a long time, Kelsen's harsh critique overshadowed Ehrlich's analyses until later scholars, notably Pospisil (1971),¹³⁸ used his theory and suggested making use of it in describing legal

¹³⁸ Pospisil (1971: 97-126) saw the occurrence of a 'multiplicity of legal orders' as a reflection of the patterned mosaic of sub-groups in society, of differing memberships and degrees of inclusiveness. Similarly, Smith (1974) argued that the ordering of society could be understood in terms of corporate

phenomena in modern societies. Ehrlich's own work was inspired by that of the lawyer and historian, Otto von Gierke, who had pioneered the study of social groups and 'associations' in German life. He rooted social control firmly in the activity of associations, not the state, and had criticised the newly drafted German Civil Code for being inconsistent with German social traditions. Writing about law as process, Moore (1978) explains that 'reglementation', a term she created to describe non-state legal orders, as emanating from multiple 'semi-autonomous social fields' (SASF) that make up society. A SASF, she says, is

[...] defined and its boundaries identified ... by a processual characteristic, the fact that it can generate rules and coerce or induce compliance to them' (Moore 1978: 58).

In the business or market context, Macaulay (1963) and Hayek (1973) note, in their own ways, the priority given by citizens to 'private ordering', which takes a number of forms, from 'thick' configurations that rely on customs and behavioural norms based on kinship, communal, or relational exchanges, to 'thin' configurations, involving individuals who do not know each other but use free market signals to coordinate their behaviour for mutual benefit.

Owing to received ideas about 'law', none of these studies expressly referred to the concept of 'legal pluralism' and some of the researchers decided against using the term 'law' altogether when describing particular regulatory features of social life. The first study to use the term legal pluralism was Gilissen's (1972) *Le Pluralisme Juridique*, in which Vanderlinden made the main theoretical contribution, asking about phenomena both historic and contemporary:

groups, (which include companies, clubs and families), and these had their own internal rules (or 'legal order').

patrician and plebeian family law, the law merchant, canon law, as well as the various colonial and post-colonial situations.

The term became prominent with the publication of Hooker's (1975) state-centred study of legal pluralism, for it discussed colonial and neo-colonial legal pluralism caused by the transfer of whole legal systems across boundaries. Hooker's is the leading study of the 'early phase' of legal pluralism studies, which Merry (1988: 872) labels as 'classic legal pluralism'; while, F. von Benda-Beckmann (1988: 900) prefers the term 'early' discovery of legal pluralism.

In the early phase, studies conceived normative orders as static and tended to treat non-state law as subordinate to state-law in colonial or postcolonial settings (Griffiths 1986: 35). Fitzpatrick (1983: 162) is especially critical of studies in this early phase because of their lack of sufficient discussion of the interaction of normative orders with state law. Yilmaz (2005a: 20) says that these earlier studies also tended to mix up the factual reality of legal plurality with the state's responses to it. The next phase of legal pluralism studies that emerged, which Merry labels as 'new legal pluralism',¹³⁹ shifted foci in some important ways. First, as Moore's example of the semi-autonomous social field that is the New York garment industry illustrates, researchers extended their examination to include the occurrence of legal pluralism in Western contexts. Secondly, studies moved away from the law and society dichotomy and the effects of one on the other, to examine the 'more complex and interactive relationship between official and unofficial forms of ordering' (Merry 1988: 873). To this observation by Merry, we may add that the shift also saw researchers

¹³⁹ F. von Benda-Beckmann (1988: 900) prefers the term 'late' discoveries of legal pluralism, while Fitzpatrick (1983: 47) prefers to use the term 'rediscovery' of legal pluralism.

examine each 'law's' underpinning value system(s), (or 'legal postulates' as Chiba (1986: 6-7) puts it). Third, studies began to examine day-to-day peaceful living in addition to examples of conflict (Yilmaz 2005a: 20). More recent studies, described by some scholars as the 'third phase' of legal pluralism, elaborate on the effects of globalisation(s) on the phenomena of legal plurality. These studies have an even broader focus that goes beyond the individual state, group, or community, and the dichotomy of postcolonial or Western contexts, toward the transnational sphere (Michaels 2009: 4; see also Hertogh 2008: 18-20; Tamanaha 2008: 386-390). The state and its law now compete with 'laws' emanating from other states, as well as intra-national and supra-national institutions and actors (see Griffiths 2002: 298-302; Santos 2002: 92; Berman 2002: 461-78; Jansen & Michaels 2008: 527-540).

In the last two decades, legal pluralism has been declared a 'universal fact' (Riles 1994: 641), the 'new paradigm' that has defeated the ideology of legal centralism (Griffiths 1995: 383), and as the fourth major approach to legal theory (Menski 2006: 186). More recent writing just accepts law as dynamic and plural:

[l]egal pluralism – the coexistence of multiple legal systems within a given community or socio-political space – is a normal state of affairs in all societies, but it presents distinctive challenges and opportunities' (Tamanaha, Sage & Woolcock 2012: 1¹⁴⁰; see also Melissaris 2009).

By using theories of legal pluralism, in their own ways, scholars from disciplines other than legal anthropology have helped to integrate legal pluralism within broader theories of society and law. Legal pluralism has not only become an

¹⁴⁰See also Tamanaha (2008); Melissaris (2009); Croce (2012).

essential reference point in the post-modern vision of law (de Sousa Santos 1987, 1995, 2002; Twining 2000, 2003, 2009), but has also been analysed and placed within neo-systemic theories of law (Teubner 1992, 1993, 1997), as well as 'interpretive' (Geertz 1973; 1983), 'habitual' (Bourdieu 1987; 1990), and 'structural' theories of law (Chiba 1986; 1989; 1993; 1998; Menski 2006; 2011). Some exponents of conventional legal doctrine in the West have also found notions of legal pluralism useful in understanding and handling the needs of legal practice. This is illustrated by the relatively 'new' 'concept of 'polycentricity', which stresses legal diversity within state law. According to Bentzon,

[...] researchers interested in Polycentricity are primarily concerned with the problematic use of conventional doctrine of the sources of law in the different parts of the state administration [...] The polycentric character of law presents itself by the fact that the different authorities in the different fields of regulation use different sources of law and in different orders (1992: 30)¹⁴¹ (cf. wider meaning of the term used by Petersen & Zahle 1995).

Researchers examining feminist and ethnic minority legal issues in Britain (notably, Menski, Shah, Jones & Welhengama and Yilmaz) have also used theories of legal pluralism in order to make it possible to understand a wide range of non-state norms that constitute an essential part of the (legal) lives of women and/or ethnic minorities, which remain invisible if one only focuses on the instruments of official (male/white/statist) law alone. The cumulative effect of the prolific use of theories of legal pluralism by scholars from various disciplines has resulted in legal pluralism to become 'a major topic in legal anthropology, legal

sociology, comparative law, international law and socio-legal studies' (Tamanaha 2008: 375).

3.4 Theoretical issues related to legal pluralism

In response to the rising use of legal pluralism theories, some objections have been raised. At the same time, legal pluralists themselves have engaged in intense debates over a number of doctrinal issues, and pointed out that there are significant differences amongst them (F. von Benda-Beckmann 2002:72; Dupret 2007: 1). We now turn to discuss some of these matters (objections against, as well as the debates and differences amongst legal pluralists) together with their relevance to answering the specific questions with which this study is concerned.

3.4.1 Demarcating the legal from the non-legal

Against the use of legal pluralism, various scholars have reformulated a basic objection to the new paradigm, namely, that pluralists and their allies establish clear criteria that enables the drawing of a boundary between legal and non-legal rules, or, put differently, the identification of non-state 'law' (Tamanaha 1993; Roberts 1995; Kramer 2002). The difficulty of the task and potential for obfuscation has led some scholars to refrain from using the label 'law' other than for when referring to the state's normative ordering. This includes scholars who have accepted that it is impossible to establish state law as a finite and separable group of norms endowed with a special epistemic status (see Ferrie 1999: 21). The difficulties have been acknowledged in some important anthropological writings, both explicitly (Merry 1988), and implicitly (Moore 1973 refers to normative fields rather than legal systems and Roberts 1979, in his work, refers

to orders and disputes). Other scholars whose work has focused on exploring the challenges and opportunities presented by legal plurality consider the search for a clear-cut definition of what is or is not law irrelevant. Menski tells us that we should simply accept that 'law' manifests itself in different culture-specific forms over space and time, and the 'key question then ought to be what kind of law a particular phenomenon might be rather than agonising over whether something is law or not' (Menski 2011: 2). Similarly, Tamanaha (1997: 128) says that 'law is thoroughly a cultural construct, lacking any universal essential nature. Law is whatever we attach the label law to'.

Such a claim by legal pluralists has been subjected to two major objections. The first employs the slippery slope argument, that is, by removing the state as the marker of the border between the legal and non-legal all forms of social control, from university regulations to table manners are at risk of becoming 'law' (see Tamanaha 1993). It is claimed that this results in crucial differences between normative phenomena to become obfuscated (Merry 1988: 878; see also Moore 2001). The second objection is that using the term 'law' for other normative orders than that of the state we may be 'jamming other peoples' normative ideas into Western Eurocentric categories and thereby distorting them' (F. and K. von Benda-Beckmann 2006: 15 paraphrasing Roberts 1998). For Roberts (2005) this de-stabilises 'the comparative project' and weakens our capacity to grasp the nature of negotiated orders (cited in Twining 2009: 371).

F. and K. von Benda-Beckmann (2006) were not convinced by either objection. Instead, they set out broad analytical criteria that they say could be used satisfactorily to examine different bodies of law that exist empirically which vary

in structure, form, content and significance in social life (2006: 12-14). According to them, legal pluralism which primarily is a sensitising concept does not obscure but rather reveals relevant similarities and differences between normative orders, which a narrow concept of law as state law would in effect make invisible.

Other legal pluralists have also put forward criteria that they argue enables one to locate and demarcate non-state 'legal' norms from social norms more generally. Griffiths (1986: 38), for example, using Moore's popular concept locates non-state 'law' to 'the self-regulation of a semi-autonomous social field'. Adopting a more state-centric approach, Chiba (1986: 125) limits 'unofficial law' to those practices that are supported by the general consensus of a group of people which distinctively supplement, oppose, modify, or undermine official laws.

This study takes the view that we make,

[...] the context and purposes of the inquiry supply the criteria for distinguishing 'legal' from other normative orders (Twining 2003: 250).

When adopting an appropriate approach, we must be mindful of the dangers of ethnocentrism while at the same time recognising that one cannot completely escape from ethnocentric influences (F. and K. von Benda-Beckmann (2006: 15). In this regard using a plurality-conscious concept is more conducive to minimising bias and distortion. Like Merry (1988: 889), this study argues that defining the essence of law or social norms is less valuable than situating these concepts in particular sets of relations in particular historical contexts. As a cultural construct there are many different types of laws depending upon who is

asking the question and why they are asking it (see in detail F. Benda-Beckmann 2002: 39; Cotterrell 2006: 37; Menski 2011: 2). Like Twining (2000: 249) this study sees legal pluralism as a species of normative pluralism. Like Ferrie (1999: 21), it sees both norms and laws (and practices) as points in the same process. When it comes to demarcating norms and law, it takes the approach that 'law' is what the people concerned consider to be 'law', nothing more and nothing less. Put differently, 'what law is, is determined by the people in the social arena through their own common usages, not in advance by the social scientist or theorist' (Tamanaha 2000: 314). This position, as Dupret (2007: 1) identifies, 'is grounded on a principle of indifference, by which one seeks to avoid normative and evaluative engagements: the focus is put on the description of practices, not on their evaluation'. This approach, as has also been argued by Dupret (2007) and Donlan (2015), takes general normativity beyond legality seriously. In relation to the present study, our task is to examine English law, *shari'a* and *urf* norms, their interaction, interdependence and the social significance of their elements on Muslims in Britain. The question of whether *shari'a* or *urf* are 'legal' orderings is not crucial to the analysis. In other words, the names of things do not matter, only what things 'are' is important: 'that which we call a rose, by any other name would smell as sweet'.¹⁴² A focus on normativity, rather than only legality, allows us to take account of norms that we may find difficult to consider as 'legal' but which come into play with positive legal norms or institutional norms that are important to the actors involved. This approach also enables us importantly to take account of single norms or mechanisms, which systemic or

¹⁴² These words were used by Juliet in Act II, Scene I, in the play *Romeo and Juliet* by William Shakespeare (2011).

institutional versions of legal pluralism like that proposed by Moore (1978) adequately do not.

3.4.2 Are we dealing with a body of norms, orderings or systems?

Another important debate that has emerged amongst legal pluralists is whether the normative phenomena being examined are best conceived as interacting 'bodies of norms', 'orderings', or 'systems'. When exploring the challenges and opportunities presented by legal plurality some scholars have described the phenomena being examined as consisting of discernible 'legal systems', whilst others have avoided this, so as not to imply that the 'bodies of law' in question are highly systematic (Woodman 1999: 12). Griffiths (1986) therefore prefers to use the term 'orderings'. Woodman (1999: 12) however argues that similar difficulties arise with such an expression and therefore prefers to speak of 'bodies of laws', which he says means no more than a number of norms that refer to each other. In his view, the notion of 'bodies of laws' enables us to see and accommodate 'internal legal pluralism' (or 'system-internal pluralism' as F. & K. von Benda-Beckmann 2006: 18 put it), as well as deep legal pluralism. K. von Benda-Beckmann (2003: 299) agrees but says that the term 'system' should not be taken too literally as,

Law is not an amorphous set of norms and principles but neither is it a tightly structured system. This is not even the case for western legal systems, despite the efforts of centuries of legal scholarship. Law typically consists of clustered sets of norms, principles, concepts and procedures. And such clusters provide cognitive and normative and institutional contexts for interaction.

Like English law, this study recognises that the phenomena of shari'a and ethnic orderings are also internally diverse, and refer in actuality to many different 'orderings' – as many as there are functioning sub-groups, to use Pospisil's (1971) argument – rather than one. Moreover, there is some doubt to what extent the norms of shari'a, urf, and English law can be separated from each other or, for that matter, from the norms of other normative orderings for example European Law. We are presented then with the difficult task of setting out what label we employ. The study recognises that '[a]ssigning labels to the different fragments of an order, no less than the order itself, is always an approximation that will fail to capture the nuances of actual practices' (Donlan 2015: 20). In this study we use the term 'ordering' when referring to shari'a, and urf. Without ignoring complexity, or implying reification, or a ranked position, the analytical device is employed because we require a manageable point of reference that enables us to understand the phenomena under investigation, their complex relations, together with English law, and how Muslims in Britain ultimately negotiate each.

3.4.3 Can the multiplicity of orderings be placed into a hierarchy?

Legal pluralists and their allies have used a variety of terms – living law,¹⁴³ everyday law,¹⁴⁴ home-knitted law,¹⁴⁵ implicit law,¹⁴⁶ polycentric law,¹⁴⁷ non-monopolistic law, privately produced law, law in action, law in minds, religious law, canon law, god's law (shari'a, dharma, halakhah, etc.) customary law, folk

¹⁴³ Ehrlich (1936).

¹⁴⁴ Macdonald (2002).

¹⁴⁵ Petersen (1996).

¹⁴⁶ Fuller (1968).

¹⁴⁷ Petersen & Zahle 1995).

law, indigenous law, unofficial law,¹⁴⁸ minority legal order,¹⁴⁹ regulation,¹⁵⁰ normative order, institutional norms – to capture non-state normative orderings and their co-existence with state law. Given the coexistence of a multiplicity of competing orderings within a population or location, an important issue that has emerged is whether the variety of normative orderings can be placed in a hierarchy. This has led to some discussion about whether there are ways that allow us to rank and benchmark normative orders. In contrast to advocates of legal modernity, Woodman says,

[s]tate law seems not to be distinguishable from other normative orders by virtue of its effectiveness as a form of social control, its institutional enforcement, its degree of doctrinal elaboration, its unity, self-consistency or inflexibility (Woodman 1999: 12).

Legal pluralists and their allies who attribute no special pre-eminence to the state or its law, accept that this may lead to a state of affairs that can be described as ‘an unstructured and promiscuous plurality’ (Fitzpatrick 1986: 116). Others, such as Ehrlich (1936), see or saw state law as subordinate to other normative orderings in terms of guiding behaviours, which are more important to people. There are yet other legal pluralists, who we might describe as ‘weak’ or ‘state’ legal pluralists, who reduce or subordinate legal plurality within the framework of the state and its law. To understand this better we need to unpack two different types of ‘legal pluralism’ that Griffiths says operate in reality. The ‘strong’ type refers to a situation where ‘not all law is state law nor administered by a single set of state institutions, and in which law is neither systematic nor

¹⁴⁸ Chiba(1998).

¹⁴⁹ Malik (2012).

¹⁵⁰ Moore(1978).

uniform' (Griffiths 1986: 5). This type of legal pluralism is ontologically excluded by the ideology of legal centralism. The 'weak' type, on the other hand, can be found where different bodies of law are being applied for different groups of people within a population, commonly on the basis of ethnicity, nationality, religion or geography, but are validated by a single authority – usually the sovereigntist state. As outlined earlier, such a situation is consistent with what Menski (2013) describes as type 2 and type 3 legal systems. In Hooker's (1975: 1-5) view weak pluralism is applied as a means of sensible governance, but according to Griffiths (1986: 7-8) 'unification remains the eventual goal, to be enacted as soon as circumstances permit'. Griffiths (1986: 5-13) therefore argues that weak legal pluralism is merely an 'imperfect form' of legal centralism, a feature of the arrangement of state law that bears only a confusing nominal resemblance to strong legal pluralism which is an empirical state of affairs. As such, according to him, it cannot serve as the basis for a descriptive and analytic framework, and thus is less relevant for sociological investigation. Woodman (1999: 10) disagrees, arguing instead that weak (or as he calls it 'state') legal pluralism is a form of legal pluralism, which is empirically observable, socially significant and practically useful to identify. He does however acknowledge that strong (or as he calls it 'deep') legal pluralism is distinguishable, for under a situation of deep legal pluralism other laws have separate and distinct sources of content and legitimacy. In addition, it is important to note, that even in countries in which a form of state legal pluralism gives rise to personal status laws, unofficial laws can still be observed to be operating alongside these (see Yilmaz 2005a). In reality, therefore, all legal systems exhibit strong or deep legal

pluralism, which in our contemporary times are best explored against the backcloth of migration, globalisations, localisation and synchronous technological advancements.

Approaching the issue of hierarchy from another angle, some scholars have pointed to the resources, power and influence that the state uniquely possesses and can wield (Moore 2001: 106-7). According to Zorn, legal pluralists must not 'refuse to recognize that the state does have powers unavailable to other institutions' (Zorn 1990: 293). Not to recognise this, she argues, is to ignore important historical processes and power relationships. Similarly, Merry (1988: 879) notes that the state exercises coercive but also symbolic power through state institutions. She argues that this ideologically impacts on other legal orders, and results in the state providing the framework for the practices of other legal orders. Some legal pluralists have criticised such a view, mainly on the basis that remains shackled to a state-centric world view (see F. von Benda-Beckmann 1988: 900).

Whether or not there is a hierarchical concept of law has to be resolved in the context of the investigator's enquiry. As Hinz (2006: 32) points out what is higher and what is less important is factually determined and determinable, and it can vary from field to field. In relation to the present study, the research questions and methodology adopted are based on a deep legal pluralist approach. Although there is some consideration of how the British state ought to manage legal plurality, the central concern of this study is how Muslims themselves, as individuals, members of communities, citizens of a specific state, and global citizens, are negotiating shari'a, urf orderings and the norms of

English law. These normative (legal) orderings of different origin coexist in Britain regardless of their mutual recognition of each other. We have already discussed earlier in this study how shari'a and English law respectively claim dominance and demand obedience. It is important here to add that customary orderings also make similar demands and actively and creatively resist legal centralism (Allott 1980; Fitzpatrick 1986; Starr & Collier 1987). And then there are possible competing expectations emanating from global visions of human rights, international law and also the global Muslim ummah. How Muslim actors see the hierarchical positioning of these various orderings in the context of marriage solemnisation is discussed below and is also established in more detail through the analysis of fieldwork data in Chapter 5.

3.5 Towards exploring interactivity, hybridity, inter-legality

More recent literature on legal pluralism has shifted its attention to examine the complex relations between different orderings (laws, bodies of norms, systems, dispute mechanisms, or social fields), and their underpinning value systems (Chiba 1986, 1989, 1993). The interaction of different laws has been described as a highly 'dynamic process' (Santos 1995: 473; Yilmaz 2005a: 25; Menski 2011: 1), that may result in conflict and contestation, harmonious coexistence, reciprocal weakening or strengthening, hybridity, syncretism, creolisation negotiation, isolation, diffusion, differences in scale, and extinction.

In her 1978 seminal contribution, *Law as Process*, Moore develops her idea of the 'semi-autonomous social field' (SASF) as a means of examining the connections between the inner and inter functioning of SASFs. She explains that each SASF

has rule, custom and symbol generating capacities, the means to induce compliance, yet it remains nevertheless simultaneously vulnerable to the rules, customs and symbols of other SASFs, including the piecemeal legislation of the state, which may or may not be invited by its own members. By underscoring the partial autonomy of a social field, Moore draws attention to the fact that each SASF affects the way another is able to operate and effect social changes in practice. Moore's concept has proven to be popular, as has in more recent years the analytical framework suggested by Chiba, largely because he uniquely draws attention to the interaction of different types of laws as well as their underpinning value principles and systems, (explicitly recognising that no action or norm is ever value-free).

Chiba (1989) developed his framework, namely, the 'three dichotomies of law', as a cross-national analytical tool to enable the accurate observation of the interaction of different types of laws, and their connected value systems. In short, his 'first dichotomy' makes a distinction between 'official law' and 'unofficial laws'. Official law is defined as 'the legal system sanctioned by the legitimate authority of a country' (Chiba 1986: 5), ordinarily law made or accepted by the state. If we were to apply the concept to our study this would refer to the English legal system. Chiba (1986: 6) defines 'unofficial law' as the 'legal system not officially sanctioned by the legitimate authority, but sanctioned in practice by the general consensus of a certain circle of people' although limited to those practices that 'distinctively supplement, oppose, modify or undermine any of the official laws'. If we were to apply it to our study this would refer to orderings not recognised by the state but sanctioned by the consensus of Muslims, within or

outside Britain. Chiba argues that different systems of law interact with one another either harmoniously or conflictingly, but the effectiveness of official law is dependent upon the unofficial laws concerned. Chiba does not discuss, however, that unofficial laws interact as well. This study does examine the interaction of 'unofficial Muslim laws' or orderings, namely shari'a and urf, and points out that these orderings also interact with what could be described as internally plural 'Christian', 'Jewish', 'Hindu' and 'Sikh' and so on orderings (or unofficial laws), operating in Britain.

Chiba then tells us that both official and unofficial laws are connected to a particular value system or principle, which 'acts to found, justify and orient the latter' (Chiba 1986: 6-7). These values form 'the second dichotomy of law', and Chiba (1989: 178) separates them into 'legal rules' and 'legal postulates'. Legal rules are connected to official law, and are defined as 'formal verbal expressions of particular legal regulations to designate specified patterns of behaviour'. In relation to the English legal system these legal rules would include ideas such as equity, justice, equality, the rule of law, individualism, secularism, and so on. Legal postulates in contrast are connected to unofficial laws. The legal postulates of customary orderings would include ideas such as honour (izzet), shame (sharam), the caste system, clan, kinship, and/or familial unity and so on. In relation to shari'a they would include the qur'an, sunna, ijmā and qiyās (for Sunni Muslims) and so on. Chiba tells us that the most fundamental legal postulate is the 'identity postulate' because it 'enables a people to maintain their cultural identity in law' (Chiba 1986: 45). Moreover, it enables people 'to choose official or unofficial law alternatively so as to adapt themselves to changing

circumstances while maintaining their individuality and identity' (Chiba 1986b: 43). Although Chiba does not elaborate in any great depth what constitutes the identity postulate, one could interpret it as being synonymous with 'Englishness' or 'Britishness' or 'Muslimness' and so on.

In his 'third dichotomy', Chiba draws a distinction between the different origins of 'law' in society. He distinguishes 'indigenous law', (law that originated from the native culture of a people), from what he calls 'transplanted law', (that is, 'law transplanted by a people of a foreign culture' Chiba 1989: 179). This dichotomy is of increasing significance in our age of unprecedented global mobility, globalisations and technological advancements. We have already discussed how immigrants bring with them a normative and legal consciousness as part of their cultural luggage. Similarly, developing the idea of transplanted law, which is quite different from Watson's (1977) idea of a 'legal transplant', Menski (2006: 58-65) proposes the idea 'ethnic implant', a role reversal of the colonial transplant, to describe precisely the importation by immigrants of their non-Western laws into Western countries.¹⁵¹

Having outlined how different orderings can come into contact especially through migration, it is important to note that through the process of interaction, each ordering can take significant meaning and in part its identity from the other(s) (Chiba 1989: 207; Silbey 1992: 43; Yilmaz 2005a: 26). Fitzpatrick (1984: 122) explains that state law interacting with custom transforms the elements it appropriates into its own image and likeness, but equally other normative orderings will often appropriate techniques and legal content from

¹⁵¹ See also Shah (2005); Shah & Menski (2006); Twining (2009: 262-92).

the state. He sees this process, which he calls 'integral plurality', as part of the dialectic of power and counter power. Similarly, Santos (2006: 46) emphasises the 'porous' nature of the boundaries between different legal orders and that in 'dense' interactions 'each one loses its 'pure,' 'autonomous' identity and can only be defined in relation to the legal constellation of which it is a part'. F. and K. von Benda-Beckmann (2006: 19) assert that under conditions of legal pluralism,

[...] elements of one legal order may change under the influence of another legal order, and new, hybrid, or syncretic legal forms may emerge and become institutionalised, replacing or modifying earlier ones.

According to them, 'such transformational processes are an integral part of legal pluralism', and the changes that result are by no means unidirectional. To make sense of the highly dynamic, uneven, and unstable state of affairs, Santos (2002: 427-38) argues that we need a 'new legal common sense'. He introduces the concept of 'interlegality', 'as the phenomenological counterpart of legal pluralism', to describe the complex social constructions of normative orders and the psychological state of the individual subject experiencing them. The need to give attention to the 'subjective' perspective of social actors experiencing normative (legal) plurality has also been emphasised by other researchers. We now turn to consider their contributions, together with Santos's, to obtain a deeper theoretical understanding of how individuals may experience and negotiate normative plurality.

3.6 Legal pluralism in subjectivity

Vanderlinden (1989) says that legality and plurality are best approached from the perspective of individuals as *sujet de droits* rather than institutions. He argues that 'instead of looking at the legal pyramid from the top, from the centres of decision, from the standpoint of power', we ought to 'contemplate it at the level of ordinary men in their daily activities' (Vanderlinden 1989: 153). By adopting this approach, he notes that the ordinary person in his daily life is,

[...] confronted in his behaviour with various, possibly conflicting, regulatory orders, be they legal or non-legal, emanating from various social networks of which he is, voluntarily or not, a member (Vanderlinden 1989: 153-4).

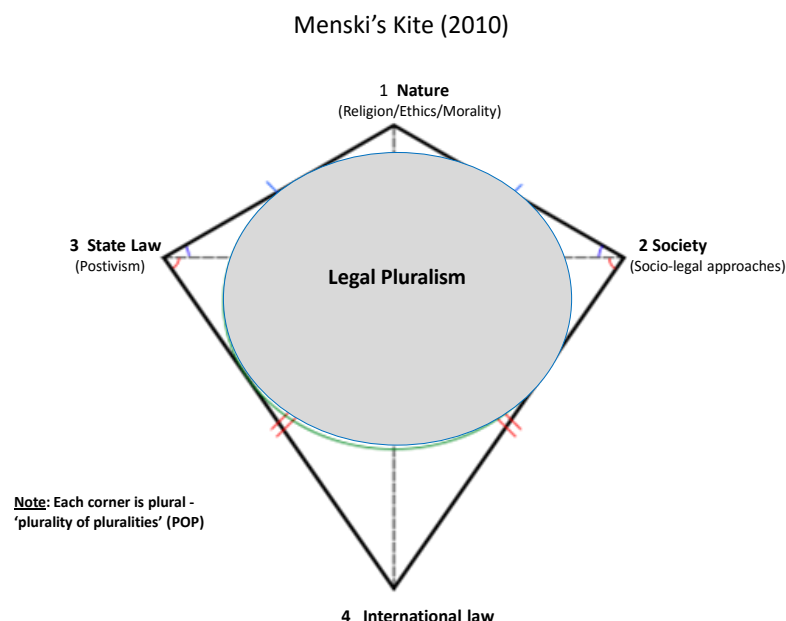
Both Moore (1978: 3) and Pospisil (1967: 9) note also that individuals may simultaneously be subject to rules of several 'SASF's' or 'legal levels' respectively, which may overlap and conflict. As we have noted already, Chiba (1998: 234 - 238) describes this situation as 'legal pluralism in conflict' and when we take an 'actor's perspective' as 'legal pluralism in subjectivity'. Similarly, Santos explains that in experiencing 'interlegality' individuals find that their life 'is constituted by an intersection of different orders' (Santos 1987: 298). He argues that the multiple network of legal orders are not separate or autonomous entities existing in the same political space, as conceived by 'traditional legal pluralism', but rather the spaces between orders are porous resulting in a 'conception of different legal spaces superimposed, interpenetrated, and mixed in our minds as much as in our actions' (Santos 1987: 297-298). Taking things one step further, Kleinhans and Macdonald (1997: 25-46) reject the characterisation of law as simply an external force to be obeyed by subjects. They argue that,

The modern self is a construct, but this construct itself has a constructive capacity, and it is upon this constructive capacity that the internormative character of legal pluralism must be focused (1997: 44).

Therefore, legal subjects control law as much as law controls them within its normative sphere. Kleinhans and Macdonald pinpoint a transformative capacity that legal subjects possess which they say enables them to produce legal knowledge and, as it is knowledge that maintains and creates realities, they are able to

[...] fashion the very structures of law that contribute to constituting their legal subjectivity' (Kleinhans & Macdonald 1997: 38).

This study envisages individuals as genuine norm-creators and the nexus of normative activity, but recognises that they do not generate norms out of thin air (see Finnemore & Sikkink 1998). Nor does this study draw a sharp line between individual or collective actions. This view is consistent with what Lévi-Strauss (1966) describes as the practice of 'bricolage': people's capacity as a matter of agency to select bits and pieces of various systems and to combine them for their own purposes in their own way. As skilful navigators, Muslims invent, combine, mix, construct, deconstruct and reconstruct norms as a matter of agency. Ballard (1994) makes the same observation in his ethnographic analysis of South Asians in Britain, a very large number of who are Muslims. How this is done by Muslims in the legal context will be the subject of analysis in the next chapter. In our quest to know more about how Muslims read and negotiate normative (legal) plurality it is important to add to our analytical toolkit 'Menski's Kite' (2009; 26-45)

Figure 1

Menski's model is based upon a number of propositions (2011:1-22; 2013: 15-31): first, that law is a universal phenomenon, but it manifests itself in many different ways; secondly, law not only takes different forms but also has different sources; thirdly, these sources, in essence different manifestations of the state, society, 'transcendental' and 'transnational', compete and interact in various ways; fourthly, any given body of rules produced or accepted by one will also contain components of the other three, which adds another (generally invisible) layer of plurality; and, fifthly, law constantly needs to be worked out or negotiated (for example by the state, community, or individual) in a culture-specific social context, and thus is inherently dynamic and flexible.

Stated summarily, Menski's kite illustrates that four types of internally plural law (what he calls 'POP' structures) are constantly found in dynamic competition as

illustrated in figure 1 above. Of particular significance for this study is that the kite model draws attention to the fact that the individual may simultaneously face the cross-demands from (1) natural law, which for Muslims translates as divine law or shari'a; (2) socio-legal and economic norms, customs or conventions, which in our study translates to particular forms of *urf*; (3) various forms of state-centric positive laws, which in our study means the English law; and (4) international laws and norms, which translate to, *inter alia*, the law of another state, (especially relevant for Muslims employing private international law in Britain), supra-national bodies like the EU, as well as the legal judgments of supranational bodies such as the ECtHR and CJEU. The resulting sequence of numbers in tracing decision-making processes 'implies no intention of ranking or relative superiority' (Menski 2006: 610) or evolutionism, rather what we have is a 'competitive pluralist symbiosis' (Menski 2013: 27).

Faced with cross-demands from competing (legal) norms, or networks, of which they may or may not voluntarily be a member, individuals have to decide how they will manage pluri-legality in their life. What choices will they make? Menski (2009: 9) notes that when making their decisions individuals have to make up their own minds about what is 'the right law',¹⁵² the most appropriate solution for them in a pluri-legal scenario. As a result we can observe that psychologically a person will,

[...] rank last what is least liked, but the unwanted 'other' remains present. A state-centric approach that dislikes religion would generate a sequence of 3-4-2-1. A fundamentalist Muslim opposed to the state would probably proceed with a 1-2-4-3 sequence and so on (Menski 2013: 26).

¹⁵²Menski has developed the concept from what the German jurist, Rudolph Stammler (1856-1938), called '*das richtige Recht*'.

Menski (2013: 27) contends that 'Muslim consciousness clearly involves all these four corners, creating the potential for huge conflicts, but also room for altruistic harmonisation'. In light of such theoretical debates, the Muslim legal experience in Britain is the subject of analysis of our next chapter, to which we now turn.

Chapter 4: The interaction of English law and Muslim 'laws'

4.1 The ideological position of the English legal system

The major impact of legal centralist and positivist thought is that in Britain we have 'type 1' legal systems. The term law is only used to refer to the state's normative ordering and Britain's legal systems envisage uniform laws as both desirable and the pinnacle of legal development. It is also understood that law gains its authority because it has procedural validity (Luhmann 1992: 1427). This is powerful because, simply put, law emanates from a perceived democratically legitimate and accepted process. In 2006, the chairman of Britain's Commission for Racial Equality, which has since been reconfigured, publicly shared this sentiment when he stated:

We have one set of laws. They are decided on by one group of people, members of Parliament, and that's the end of the story.¹⁵³

The idea of legal pluralism, of multiple, overlapping normative orderings, existing side by side and not dependent on each other for their validity, is seen by state officials as alien, archaic, and undesirable since it runs counter to (particular notions of) the rule of law, equality, uniformity, and integration (expressed as we have seen as 'community cohesion' and more recently 'muscular liberalism'). The general policy therefore, presented by the English legal system, is that there must be 'one law for all'. Any other system or

¹⁵³ Muslims 'must' accept free speech, BBC news report, 26/02/2006 (available at: <http://news.bbc.co.uk/1/hi/uk/4752804.stm>, last visited 05/02/2015). Trevor Phillips was responding to angry protests by Muslims against the publication of cartoons satirising Prophet Muhammed.

normative (legal) ordering,¹⁵⁴ such as shari'a or urf, has prima facie no place in it except, and to the extent, that English law recognises its norms or institutions as having some effect. How the English legal system has exercised its discretion, especially in granting exemptions from the uniform law, is discussed in some detail below.

Along with a one law for all policy, over several centuries the English legal system has come to embrace the ideology of secularism, which inter alia is seen as the appropriate governance tool for facilitating peaceful coexistence amongst citizens (Taylor 1998).¹⁵⁵ This notion of 'secularism', displayed as 'neutrality to all faiths', is not the same as the Indian form that sees all religions as equidistant from the state (*sarva dharma sambhava*) (Engineer 1998: 1). But forged in response to the horrors of intra-European religious conflicts (Taylor 1998: 32), demands the 'privatisation' of religion (Asad 2003: 205). In practice, however, there is some doubt over whether the English legal system is, in accordance with its claim, 'neutral to all faiths': one can, for instance, point to the privileges the Church of England continues to enjoy since its establishment in 1532 (for details see Robilliard 1984: 84-103; Klausen 2005: 8; O'Halloran 2014: 161-2). There are currently 26 Lords Spiritual who sit in the House of Lords, the upper house of Parliament, by virtue of their ecclesiastical role in the established Church. This unique position, as demonstrated in the shaping of the 1988 Education Reform Act, can have important effects.¹⁵⁶ Lenard asserts that if Europe's genuine

¹⁵⁴ Although some competencies have been granted to the EU and the 1998 Human Rights Act makes the ECHR enforceable.

¹⁵⁵ For an anthropological view of 'secularism' and 'the secular' see Asad (2003: 21-66).

¹⁵⁶ Although parents are able to exercise their right to have their child excused, the Act (as amended) requires each pupil at a voluntary, foundation or community school to take part in a collective act of worship of a 'wholly or mainly of a broadly Christian character' during each school day. The National

character was secular, rather than Christian, restrictions on the wearing of the veil or the building of minarets on mosques would not occur (Lenard 2010: 316). Expressing the same sentiment, as well as their frustration, many Muslims are asking: how else do we explain the banning of minarets yet the allowing of spires? Some scholars have also asserted that the very notion of Western 'secularism' is the spread of a Christian anthropological framework in a non-Christian guise (de Roover, Claerhout & Balagangadhara 2011; Shah 2013). The latter view, although not developed in this study, is much more relevant for legal analysis than researchers have so far realised.

Besides a commitment to some form of 'integration', two other important ideological elements also provide important reference points against which English law's response to minorities and their claims can be unpacked, measured and analysed. First, the positive right to religious freedom, and more broadly human rights, and second the aspiration to protect minorities. Both the absolute right to religious belief, and importantly, the qualified right to manifest one's religious belief, are now enshrined in a number of international, regional and domestic agreements and legislation. As evidence of this one can point to article 18 of the 1948 UDHR, articles 18(1) and 27 of the 1966 ICCPR, article 13(3) of the 1966 ICESCR (the UK ratified both treaties on the 20th of May 1976), the 1981 UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, art 9 of the 1950 ECHR, which was indirectly incorporated by the UK through the 1998 Human Rights Act, and article 10 of the 2000 Charter of Fundamental Rights of the EU (which became

Muslim Council of Britain, founded in 1978, had lobbied for the wording to be changed to the 'worship of one supreme god' but met resistance from the Church of England.

legally binding in December 2009). These treaties and conventions, and more broadly international law, are imbued with value assumptions of European, predominantly Christian, civilization (see for details Stumpf 2005), and by ratifying these instruments and incorporating the ECHR into domestic law, English law, as must all legal systems, has chosen its aspirational values (Bradney 2001: 71-5), signalling the importance it places on religious, and more broadly, human rights values.

Turning to the separate, but overlapping, embracement of the value of protecting minorities, though the genesis can be traced back to at least the 1648 Treaty of Westphalia in the European context (Gross 1984: 5; Leuprecht 2001: 112), the concern became particularly prominent after the events of WW1, when protection of racial, ethnic, religious and linguistic minorities was enshrined in a series of minority treaties in 1919.¹⁵⁷ Though they were off the agenda for some time after WW2, (largely due to the treaties being regarded as unenforceable and because Western European countries saw minority safeguards necessary for Eastern European countries and not for themselves), they made a soft return in the late 1980s. Since then minority rights have been codified in the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,¹⁵⁸ two Council of Europe treaties (1995 FCNM¹⁵⁹ and 1992 ECRML¹⁶⁰), and in the 1990 Organisation for Security and Co-operation in Europe. Although ratifying states have generally tended to equate their

¹⁵⁷ For details see Preece (1998: 67-94).

¹⁵⁸ The Minority Rights Declaration enshrines an obligation on states to acknowledge and promote the rights of minorities to profess and practice their own religions, to enjoy their own cultures and identities, and to use their own languages.

¹⁵⁹ Framework Convention for the Protection of National Minorities.

¹⁶⁰ European Charter for Regional or Minority Languages.

fulfilment of minority rights as being achieved by their fulfilment of human rights, this is not always the case. Illustrating the effect of the FCNM, the UK government in 2014 recognised the Cornish ethnic group as a national minority. Prior to this, the Cornish language was recognised as an official regional language, like Welsh and Gaelic, under the ECRML in 2002.

Against this backcloth, when looking at the official status of Muslim 'laws' in Britain, we find a complex dual picture. The English legal system has different rules pertaining to Muslim 'laws' that come under conflict of laws (or private international law as it is sometimes called) than for those that do not (for details see Pearl and Menski 1998: 84-113). Under the rules of private international law, various forms of customary and Islamic law that have been duly authorised by the state of another jurisdiction may be recognised as 'law', but only as foreign law. In this context, a review of case law and accounts provided by expert witnesses reveal an inconsistent approach being adopted towards individuals, (whatever their domicile), who have conducted acts while abroad in accordance with the law of a particular foreign legal system but then become involved in litigation in British courts. At times, judges and entry clearance officers avoid close examination of certain acts, and proceed on the basis of (sometimes erroneous) assumptions; at other times, they become unreasonably pedantic and obstructive (Warraich & Balchin 2006: 9), and can end up taking contradictory positions simultaneously over the same facts (see the story of H in Menski 2007a: 284-294).

When it comes to the validity of shari'a or ethnic norms per se, that is, when not involving a foreign legal dimension, the state and its institutions treat them as

simply ‘customs’, ‘mores’, or ‘cultural practices’ – not as ‘law’. This approach has also been adopted (often uncritically) by a number of scholars writing about legal matters involving ethnic minorities. Sebastian Poulter’s seminal texts, *English law and ethnic minority customs* (1986) and *Asian traditions and English law* (1990a), exemplify this attitude and reflect the distortive effects of the ideology of legal centralism. With this re-definition we are presented with the picture that there is officially no legal plurality or scenarios involving conflict of laws in Britain. This approach, of course, simply ignores Muslim, and other ethnic minority, legal perspectives and ignores the agency of individuals and groups. Moreover, the effects of the ideology of legal centralism, in combination with the presupposed superiority of British culture and values that now also includes secularism, manifests in the form of two major expectations in the legal sphere. First, the expectation placed on Muslims, and other ethnic minorities, is that it is in their best interests to adopt British values, British identity, and to follow the rules of English law.¹⁶¹ In other words, the message is ‘fit in’: ‘when in Rome do as the Romans do’ (Poulter 1986: v). The second expectation is that religion and ethnicity should be ‘privatised’ (Parekh 1990: 67; Barot 1991: 196). This does not mean that there is no space for them in the social sphere, only that there is no space in the legal sphere. Although this is not policed as aggressively as under the French *laïcité* model, failure to comply opens ‘the other’ to the possibility of ‘ethnic penalties’ (Modood and Berthoud 1997: 144-145), to the

¹⁶¹ For a recent example, see Eleftheriou-Smith, Loulla-Mae (2014): David Cameron pledges lessons on Magna Carta as he seeks to push ‘British values’. The Independent Online (last accessed 03/08/2014).

extent that the 'more ethnic one is seen to be, the more the likelihood of marginalisation and penalisation' (Shah 2002: 1).¹⁶²

The acknowledgement by all major political parties that assimilation is not a realistic policy has not however led to a change to the structure of the legal system. The nature of, and the presuppositions that operate within, the English legal system means that both civil and criminal law begin from a position that makes them resistant to demands of cultural (religious) recognition or 'cultural defence' (Renteln 2004).¹⁶³ Despite such messages, Muslims have generally been unwilling to abandon shari'a and their urf orderings as a way of life. However, motivated by a genuine desire not to offend the laws of the country that they see as their home, they have sought the inclusion of both in English law.

4.2 The official legal response to Muslims and Muslim (legal) norms

Before we look at English law's response to Muslim claims for accommodation, it is important to note that the common law system in itself is inherently flexible.¹⁶⁴ One can point to particular instances where judges have demonstrated remarkable willingness to develop the law in light of changing social and cultural

¹⁶² Over the tendency to 'criminalise alterity' see also Ballard (2011).

¹⁶³ Although not the focus of this study, in the criminal sphere the official law has for some years now been creating a growing number of 'cultural offences', such that an act which is within the cultural group of the 'offender' (which might be condoned, approved or even endorsed and promoted in a given situation), receives aggravated punishment, or is criminalised through the creation of specific offences. A recent example is the criminalisation of the consumption and supply of *khat*, which came into force on the 24th of June 2014, and is regarded by many members of the Somali Muslim community as a specific offence targeting them. For a recent example that involved a Shi'a Muslim see *R v Z* (2009) 2 Cr App R (S.) 32.

¹⁶⁴ On the parameters of stare decisis, judicial discretion and law-making see Zander (1989: 278-9); Duxbury (2008).

developments.¹⁶⁵ Moreover, custom is still a source of law today, though underplayed and marginalised. Judges have recognised particular instances of custom creating a special law for the locality involved but only if the custom is 'reasonable', 'certain', and deemed as having existed since 'time immemorial' (Zander 1989: 375-7). The latter requirement does not require the claimant to trace a custom back to 1189, 'the terminal date of legal memory', but to establish that the usage of the custom has persisted for a reasonable time. Technically, then, judges do have scope to recognise custom as law, or to grant custom legal validity.

Turning to how English law has dealt with Muslims and their claims for accommodation of their (legal) norms, we see that the response has neither been consistent nor coherent, lending itself to any easy interpretation. Judges during the 1960s and early 1970s showed a willingness to allow newer minorities, including Muslims, the right to maintain cultural practices and values rather than imposing unequivocally English standards. English courts recognised the significance of religious marriage ceremonies,¹⁶⁶ the right of a Muslim wife to her mahr (dower),¹⁶⁷ (child) marriages conducted abroad contrary to English marriage rules relating to capacity,¹⁶⁸ talaq and other extra-judicial consensual divorces,¹⁶⁹ polygamy,¹⁷⁰ and the relevance of stigma when it came to granting a

¹⁶⁵ See for example the case of *R v R* [1991] 4 A11 ER 481 at 483. The House of Lords swept away a principle that had been in place for over 250 years, namely that women agree to sexual intercourse on marriage and cannot retract that consent.

¹⁶⁶ *Kaur v Singh* [1972] 1 A11 ER 292.

¹⁶⁷ *Shahnaz v Rizwan* [1964] 3 WLR 1506.

¹⁶⁸ *Cheni v Cheni* [1962] 3 A11 ER 873; *Alhaji Mohamed v Knott* [1969] 1 QB 1.

¹⁶⁹ *Qureshi v Qureshi* [1971] 1 A11 ER 325; *Varanand v Varanand* [1964] 108 SJ 693.

¹⁷⁰ *Imam Din v National Assistance Board* [1967] 2 QB 213.

divorce.¹⁷¹ For this reason, some writers have described this as a 'liberal phase' (see Maidment 1974; Poulter 1979; Pearl and Menski 1998).

This trend was halted by the intervention of Parliament, which responded to the misgivings expressed over these decisions. In relation to divorce, the 1973 Domicile and Matrimonial Proceedings Act, s.16, provided that forthwith no extra-judicial divorce obtained anywhere in the British Isles would be recognised as having legal effect.¹⁷² A divorce that took place abroad, although recognised if at least one party was habitually resident or a national of the country in question,¹⁷³ became subject to considerations of 'public policy'.¹⁷⁴ With the shift in approach, judges openly voiced disdain for Muslim cultural practices. In one reported case, *Chaudhary v Chaudhary*, Cumming-Bruce LJ criticising *talaq-al-bida* stated:

[p]ronouncement of *talaq* three times finally terminates the marriage in Kashmir, Dubai, and probably in other unsophisticated peasant, desert or jungle communities, which respect classical Muslim religious tradition.¹⁷⁵

Judges, by and large, felt that Muslim, along with other faith-based, legal traditions could not be trusted to protect human rights norms, particularly when it came to women. Secondly, English law could be applied over customs, or mores, and even at times in contradiction to private international law since it was fit for universal application and its values were superior. As exemplified by the Act and case cited above, English law had embraced a more restrictive and

¹⁷¹ *Banik v Banik* [1973] 3 A11 ER 45.

¹⁷² This has since been re-enacted in the Family Law Act 1986, s.44.

¹⁷³ Recognition of Divorces and Legal Separations Act 1971, s.3 later amended by s.46(1) Family Law Act 1986.

¹⁷⁴ Recognition of Divorces and Legal Separations Act 1971, s.8.

¹⁷⁵ *Chaudhary v Chaudhary* [1984] 3 A11 ER 1017 at 1018(J). These words were re-quoted in *Mirza Waheed Baig v. Entry Clearance Officer, Islamabad*, [2002] UKIAT 04229 at para 31.

exclusionary approach. It signalled to minorities, that for a 'custom' or 'tradition' to be eligible for legal recognition, particular standards had to be met. The approach was consistent with the state's new agenda of 'integrating' newcomers, who had previously been allowed to continue many of their native practices in the context of civil law because at that time they were sojourners. The shift in approach led to debate over what these standards were.

In Poulter's view, legal recognition could not be afforded to customs that encroached minimum standards of 'public policy', and 'certain core values in English society' (1986: v-vi). He did not provide a list or description of what he meant by English 'core values', preferring instead to highlight 'customs', such as polygamy, talaq, and forced marriages, which he saw as transgressing them. Adopting what appears to be a more liberal position, in later writings he referred instead to 'shared values' (1992b: 270 ; 1995: 83), and identified more prominently human rights and civil liberties – the bedrock of British values – as the relevant tests for legal recognition (1998: 23). Poulter argued that reference to the latter would provide more consistency in decision-making, reduce ethnocentricity because of the 'universal' nature of human rights,¹⁷⁶ and help get the balance right between the 'three central objectives of equal opportunity, respect for cultural diversity and mutual tolerance' (1992a: 187).

In practice, English judges made it clear that 'tolerance' is circumscribed by notions of public policy, reasonableness, human rights, and that minority or foreign practices would not be recognised if they were deemed 'repugnant' or

¹⁷⁶ Several states have opted out of human rights treaties because of perceived clashes with their values and traditions. Underpinning decisions is often the view that these treaties are Euro-American centric in origin. This in and of itself brings to the fore ongoing debates over whether human rights are universal or culture-specific?

otherwise offended the ‘conscience of the court’; although the exactitudes of each were left unclear. In relation to how Parliament has responded to ethnic diversity, it is possible to identify a number of examples where specific exemptions to statutory offences have been granted to accommodate the religious or cultural practices of different British communities.

Before we turn to examine these, it is worth noting that the UK’s partly codified constitution has for centuries allowed individuals to do as they please in matters of faith and culture, unless the law states otherwise. With the 1998 Human Rights Act the state has had to shift its approach to recognising religious liberty as a positive right. For this reason, the 1998 HRA is a game-changer (Qayyum 2014: 66).

Among the newer minorities, Sikhs appear to be the main beneficiaries when it comes to legislative exemptions. A Sikh wearing a turban is not required by law to wear a crash helmet on a motorcycle or hard hats on building sites.¹⁷⁷ Also for religious reasons, they are not prohibited from carrying kirpans in public places,¹⁷⁸ or at schools.¹⁷⁹ Subject to particular provisos, Sikhs and Hindus are also not prohibited from cremating their dead in open air,¹⁸⁰ and can scatter their ashes in rivers in accordance with their religious rites.¹⁸¹ In contrast to Muslims,¹⁸² Hindus and Rastafarians,¹⁸³ Sikhs,¹⁸⁴ along with Jews¹⁸⁵ and itinerant

¹⁷⁷ See respectively Road Traffic Act 1988, s.16(2) and Employment Act 1989, s.11.

¹⁷⁸ Criminal Justice Act 1998, s.139(5)(b).

¹⁷⁹ *Ibid.*, 139A (4)(c).

¹⁸⁰ *Ghai, R (on the application of) v Newcastle City Council & Ors* [2010] EWCA Civ 59. Prior to this case any method of cremating the body other than that prescribed by s.8 of the Cremation Act 1902 was an offence.

¹⁸¹ Such activity will not contravene the 2010 Environmental Permitting (England and Wales) Regulations, and will not therefore be a criminal offence relating to pollution. See also The Water Act of 1989.

¹⁸² *Tariq v Young and Others* (Case No. 24773/88, EOR Discrimination Case Law, (2) Winter 1989); *Morgan v Civil Service Commission and the British Library* (Case no. 19177/89, EOR Discrimination Case Law Digest 19177/89, (6) Winter 1990).

Gypsies,¹⁸⁶ were recognised as a protected ‘ethnic group’ under the 1976 Race Relations Act, and this continues to be the case today under the superseding 2010 Equality Act.¹⁸⁷

Like Jews, Muslims are exempt from the statutory provisions over the slaughter of animals and domestic fowl, enabling shechita and dhabaha methods and thus paving the way for kosher and halal meat.¹⁸⁸ Though this exemption has come under intense attack in recent years, it continues to remain intact. Besides the field of Islamic finance, some recognition is also discernible in the field of adoption. Although no reference to Muslims is made, the 2002 Adoption and Children Act introduced the concept of ‘special guardianship’, which is the equivalent of kafala in Islamic law, ‘an Islamic ‘fosterage’ arrangement that takes account of the traditional Muslim prohibition on adoption’ (Menski 2008a: 57).¹⁸⁹

¹⁸³ *Crown Suppliers (Property Service Agency) v Dawkins* [1993] ICR 517, CA.

¹⁸⁴ *Mandla (Sewa Singh) and Another v Dowell Lee and Others* [1983] 2 AC 548.

¹⁸⁵ *Seide v Gillette Industries Ltd* [1980] IRLR 427 EAT; see also Lord Denning’s judgment in *Mandla v Dowell Lee and Another* [1982] 3 A11 ER 1108 (CA).

¹⁸⁶ Gypsies were identified as an ‘ethnic group’ for the purposes of the Act in *Commission for Racial Equality v Dutton* [1989] 1 A11 ER 306, CA. See also *R v South Hampshire District Council, ex parte Gibb* [1994] 3 WLR 1151, and *R v Gloucestershire County Council, ex parte Barry* [1997] AC 584, *R v Dorset County Council, ex parte Rolls and another* [1994] 2 WLR 1151, which established that the status of Gypsy for the purposes of the Act would cease if the itinerant lifestyle is relinquished.

¹⁸⁷ Being able to invoke protection as a racial group, rather than bringing a claim of discrimination on the protected characteristic of religion, still has an important benefit. See, the case of *R(E) v Governing Body of JFS* [2009] UKSC 15. An admission policy that selected on the basis of religion in the context of over-subscription was deemed lawful, but not one that did so on the basis of racial group.

¹⁸⁸ Slaughter of Poultry Act 1967, s. 1(2), and Slaughterhouses Act 1974, s.36(3). This exemption dates back to Slaughter of Animals (Scotland) Act 1928 and the Slaughter of Animals Act 1933 (which applied to England and Wales). For slaughter by religious method see also The Welfare of Animals (Slaughter or Killing) Regulations 1995, schedule 12 and Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing.

¹⁸⁹ A look at Adoption, a new approach - White Paper (Department of Health, 2000, CM 5017) reveals the link: ‘In order to meet the needs of these children where adoption is not appropriate, and to moderate the law so it reflects the religious and cultural diversity of our country today, the Government believes there is a case to develop a new legislative option [...]’ (para 5.9).

Attempts for legislative recognition otherwise have been generally unsuccessful. Until its abolition in 2008 in England and Wales,¹⁹⁰ the common law offence of blasphemy only combated the vilification of the Christian religion, despite vigorous lobbying (and litigation) by Muslims for it to be extended to protect Islam following the infamous Satanic Verses affair in 1988.¹⁹¹ In the same year, the National Muslim Education Council lobbied the government for a change to the Education Reform Act (ERA), which required compulsory acts of 'broadly Christian' worship in schools.¹⁹² The attempt was also unsuccessful. All pupils in most schools are required still today to take part in a collective act of worship that is 'wholly or mainly of a broadly Christian nature' on each school day,¹⁹³ unless a school has obtained a 'determination' from SACRE that lifts the requirement, or a parent exercises the right for their child to be excused.¹⁹⁴ The ERA established religious education as part of the basic national curriculum that all schools are required to implement. In accordance with the Act, as amended, most English schools teach a syllabus that is 'in the main Christian', but account is taken, though often in a small way, of other 'principal religions', including Islam. Faith schools provided education long before the state made elementary education compulsory in 1880,¹⁹⁵ and thus religious communities have for a long time had the right to set-up their own independent schools. But until recently there were no Muslim state-funded schools. The first Muslim state-funded

¹⁹⁰ See Criminal Justice and Immigration Act 2008, s.79. It was replaced by the 2006 Racial and Religious Hatred Act, which created a new offence of incitement to religious hatred.

¹⁹¹ *R v Chief Metropolitan Stipendiary Magistrate, ex p. Choudhury* [1991] 1 All ER 306; *R v Horseferry Road Magistrate Metropolitan Stipendiary Magistrate* [1991] 1 All ER 324.

¹⁹² Inter alia, they had lobbied for the wording to change to 'the worship of one supreme God'.

¹⁹³ Education Reform Act 1988, s.6(1).

¹⁹⁴ *Ibid.*, s.9. See also s.71 School Standards Framework Act 1998.

¹⁹⁵ See 1880 Elementary Education Act.

school, Islamia Primary School in Brent, Greater London, fought a 15-year campaign before being awarded grant maintained status in 1998 (for details see Parker-Jenkins et al 2005). Since then other independent Muslim schools have also managed to obtain state-funded status. Of the 6817 faith schools in England today, 23 are now state-funded Muslim schools.¹⁹⁶ There are at least a further 155 registered Muslim Independent schools, that is, private Islamic schools in England according to the Association of Muslim Faith Schools (AMS).¹⁹⁷ Faith schools, particularly Islamic ones, have also become a contested site in recent years. Though there has been some conflict over the planning and building of mosques (McLoughlin 2005), Muslims have been able to successfully build places of worship. Alongside purpose built mosques, over the years, Muslims have converted a large number of terrace houses and buildings previously used for other purposes that they then have registered as places of worship. Though this is not a compulsory procedure, registration brings some benefits including, as we shall see below, the mosque to qualify as a registered building under the 1949 Marriage Act.

Mosques, and other Muslim institutions, are able to obtain charitable status that grants significant tax benefits provided that they can demonstrate that they fulfil the prescribed requirements of the 2006 Charities Act. Muslims can bury their dead according to their religious rites. Local authorities have allowed sections in public cemeteries to be used by different religious denominations, and for private Islamic cemeteries in Britain. In the absence of contractual arrangements, the law does not allow for Muslims to take time off for the Friday

¹⁹⁶ See Faith Schools: FAQS. House of Commons Library, Briefing Paper, Number 06972, 14 October 2015, p.16.

¹⁹⁷ See <http://ams-uk.org/muslim-schools/> (accessed 02/11/15).

congregational prayer (ṣalāt al-jum`ah) despite them regarding it as a compulsory obligation under shari'a. A clear line of decisions establish that art 9 ECHR is not engaged when an employee asserts the right against an employer in relation to their working hours.¹⁹⁸ Though each case must be considered on its own facts, when faced with indirect discrimination claims under the 2010 Equality Act, employers have succeeded in establishing that the requirement relating to working hours was justified.¹⁹⁹

Besides accommodation of religious practices or values, English courts have also recognised in some circumstances (often when involving behaviour that fits stereotypical ideas or images) the importance of cultural values, especially related to honour (or izzet). In the case of *R v Bibi*,²⁰⁰ the Court of Appeal reduced the sentence of a Muslim woman convicted of drug couriering on the basis that sufficient account had not been taken of the 'cultural fact', as she pleaded, that many Muslim women are subservient to the authority of males. In the case of *Bakhitiari (Leila) v Zoological Society of London*,²⁰¹ the court took account of how injuries inflicted by a chimpanzee on an Iranian British-born child would negatively impact her future marriage prospects when determining the final award of damages. In the case of *R. v MC* [2002],²⁰² the Court of Appeal increased the sentence handed down to a rapist partly because the victim, a young virgin Muslim woman, had lost a degree of respect in her own community, damaging

¹⁹⁸ *Stedman v UK* [1997] 23 EHRR CD 168; *Ahmad v UK* [1981] 4 EHRR 126; *Copsey v WBB Devons Clays Ltd* [2005] ICR 1789, CA.

¹⁹⁹ *Cherfi v G4S Security Services* [2011] UKEAT 0379/10.

²⁰⁰ *R v Bibi* [1980] 1 WLR 1193.

²⁰¹ *Bakhitiari (Leila) v Zoological Society of London* [1992] CLY 1689.

²⁰² *R. v MC* [2002] 1 Cr. App. R. (S.) 80.

her marriage prospects and self-esteem. In another case, *Seemi v Seemi*,²⁰³ also recognising *be-izzeti* (shaming), the court awarded a Muslim woman £20,000 in damages after her former husband had falsely claimed in public that she was not a virgin at the time of consummating the marriage.²⁰⁴ In sharp contrast, as we will discuss in some detail below, Muslim women who had nikah ceremonies, but did not register those 'marriages' with the state, were told that such unions had no legal standing.

Reviewing the degree and type of accommodation given by the state as a whole, it seems clear that both Parliament and the English judiciary have been content to adopt a piecemeal or ad-hoc approach to accommodating minority practices and values, reflecting their desire arguably to see as little as possible a change to English law, except where the need is compelling or the demands are strong and skilfully negotiated. In this regard, the Muslim community has struggled generally to present united demands, not least because of the community's internal plurality and lack of hierarchical organisation.

Although the state has granted very few exemptions to Muslims, and to ethnic groups in general, it does allow individuals to do as they please in matters of faith, unless the law states otherwise. A position that has since been bolstered by the 1998 Human Rights Act. In this way a significant amount of conflict is avoided.

²⁰³ *Seemi v Seemi* 1990 NLJ 747.

²⁰⁴ For a discussion of the influence of culture on the determination of damages see Renteln (2009: 199-218).

4.2.1 The legal validity of the nikah in various scenarios

The family as a unit, like in most other religions, holds a central position in Islam. Though understandings of what constitutes a 'family' may be different we find the same tendency of reverence in the English, as well as in other, traditions. As the union of two people is regarded as the bedrock on which the institution of the family is built, over time each tradition has developed specific rules of how this could validly be done. These rules, which we can call 'gateway criteria', are what people, but especially 'judges', use to decide if the institution that one has tried to create is a valid example of that institution. The rules address whether a person can marry, to whom, who has to agree to the marriage, what ceremonies and what formalities need to be completed and so on.

At this point, a number of problems arise, emanating from the reality that each tradition has its own gateway criteria, which may or may not be recognised by the other. It is not uncommon then for a person to find that they are treated as 'married' (and therefore have certain rights and obligations) under one normative regime, but not under another. More precariously, one may find to their dismay that the same 'marriage', that is recognised as being valid according to one normative regime, is actually criminalised under another. Given the importance placed on the institution of marriage by all sides, and more broadly the family, this area has become an especially contested site, contributing to what Grillo describes as the establishment in Britain of MILLI (Muslims, Islam and the Law: A Legal Industry): a 'socio-legal-political industry', involving a multiplicity of organisations, groups and individuals who either desire to

maintain or constrain Muslim cultural and religious practices, notably as authorized by shari'a in the context of family law (2015: 8).

Before turning to examine in some detail the problems that have been created by the diverse sets of gateway criteria, and Muslim responses, it is important for us to briefly examine the gateway criteria laid down by English law.

In earlier times, according to the Law Book of Gratian (also known as the *Decretum Gratiani*), compiled in 1151, English marriage 'was relatively simple: Consent plus consummation' (Jacobs 2001: 2). Legal disputes over validity would have been rare since a couple wishing to marry, as far as practicalities were concerned, had only to announce their intent and set-up house together. In the 13th century, codifying the position, Pope Innocent III decreed that oral consent alone, freely given by both parties, was the essence of marriage and led to the status of 'husband' and 'wife'. Marriage *per verba de praesenti* took effect immediately, and marriage *per verba de futuro*, resulted in a binding agreement, that led to the marriage coming into being on consummation. Marriage could occur without prior notice, and elsewhere than at church. No church official was needed, and no written record of the marriage had to be kept. This reality led to the conceptualisation of a 'common law marriage'. Ironically, by the 14th century, when disputes occurred it was common law not the ecclesiastical courts that used church ceremonies to determine the legality of most marriages, the entitlement to property (including dower) rights, the husband's right/duty to act for his wife (coverture), and even, potentially, the inheritance rights of the children. The approach adopted led to the creation of,

[...] two classes of married people: those whose unions conferred property rights and responsibilities, and those whose marriages were valid only in the eyes of

God and their neighbors. Marriages of the latter sort were unsolemnized, and verged on 'invalid' to the legal mind (Jacobs 2001: 7).

The law changed little between the 14th and mid-16th centuries. In 1563, the Council of Trent decreed secular or contract marriages unlawful, by the issuance of the *decretum de reformatione matrimonii*. Though affecting much of Europe, it was not binding in England. This was because Henry VIII, earlier, in 1532, had himself recognised as the Supreme Head on earth of the Church of England, ensuring final authority over doctrinal and legal disputes (including over marriage) vested with the sovereign rather than the papacy, and, in so doing, foregrounded the Anglican ordering.²⁰⁵ Over the next two hundred years, the status of clandestine marriages remained unclear.²⁰⁶ During this period, the different courts of English law – common law, equity, criminal and ecclesiastical – used not the same gateway criteria when presented, either directly or indirectly, with the question: had a valid marriage occurred?²⁰⁷ The position was not made obvious by the legislature. In 1695 by the Marriage Duty Act the state did impose a tax to be paid on marriage to help pay for the French War, and, by way of preventing revenue loss, fines on parties and clergymen who solemnised a marriage without the publication of banns, or possession of a marriage licence. Yet, such (clandestine) marriages were not rendered null and void by the Act. Besides the fact that fines were often not enforced, the practice of clandestine marriages continued because they were cheaper than official church

²⁰⁵ See for details Act of Supremacy 1534.

²⁰⁶ The Church of England did, however, step up its promotion of church marriages, in accordance with the Book of Common Prayer, which included, that an ordained minister conduct the solemnisation of marriage, during canonical hours, and after three public readings of the banns.

²⁰⁷ Property, especially inheritance, issues tended to be heard in common law courts, enforcement of contract in ecclesiastical courts, accusations of bigamy from 1603 in criminal courts, and issues related to marriage settlements and trust deeds in the equity courts.

marriages, and the element of secrecy was important for minors fearing opposition from parents and servants fearing dismissal. With the publication of scandalous accounts of how unscrupulous individuals were flouting public morals and the law, through committing bigamy, and the fraudulent seduction of heirs and heiresses, by way of clandestine marriages, Parliament intervened with the 1753 Marriage Act (also referred to as Lord Hardwicke's Act). The Act, which ushered in a new age of more state regulation of marriage, sought 'to better prevent clandestine marriages'. It provided that any marriage other than one performed in a church or public chapel, by an ordained Anglican clergyman, either after three public readings of the banns or purchase of a licence from a bishop or one of his surrogates, (unless by special licence by the Archbishop of Canterbury), would be invalid for all intents and purposes whatsoever. The Act also abolished the jurisdiction of ecclesiastical courts to enforce a contract of marriage, and entrenched regulations for, the publication of banns, issuing of licences, and the registration of marriages. Some types of marriages were, though, expressly exempted from the new rules: marriages by members of the royal family, marriages solemnised beyond the borders of England,²⁰⁸ and marriages amongst Quakers (Society of Friends) and Jews in accordance with their religious rites (for details see Henriques 1908).

The Act achieved many of its objectives, but the ease with which nullity could be obtained, related either to flaws in the publication of banns, or the absence of consent by guardians when marriages involved minors, led to it being

²⁰⁸ The Act did not apply to Scotland, resulting in the town of Gretna Green, which is situated near to the border of England, to become notorious for its role in facilitating clandestine (runaway) marriages. To prevent the practice parliament passed Lord Broughman's Act of 1856, which required at least one party to the marriage to have been resident on Scotland for 21 days or more immediately preceding the marriage.

repealed.²⁰⁹ Its successor, the 1823 Marriage Act, largely was a re-enactment, but added provisions that both scenarios did not automatically lead to invalid marriages. In relation to the former, the Act provided that both parties must have 'knowingly and wilfully' intermarried in violation of marriage formalities (related to the banns, licence, or officiating Anglican clergymen). The fact that everyone else, (other than members of the royal family, Jews, and Quakers), had to comply with these formalities created great hardship for (Roman Catholic and Protestant) non-conformists.²¹⁰ A number of social changes, including the spread of Enlightenment values, the wealth and influence of non-conformists, the industrial revolution itself, led to 'toleration' of non-conformist practices. The 1836 Marriage Act established a new form of marriage that involved a purely civil ceremony. Parties could, now, intermarry by giving due notice to, and obtaining a certificate from, the superintendent registrar for the district in which one of the parties was resident. In practice this meant that the registrar filed the notice, entered it into the Marriage Notice Book, which was open to the public for inspection. Parties could choose to have their ceremony at the register office, or in a 'registered building', the latter allowed Catholic and Protestant non-conformists, but also members of other minority religions, to marry in their own places of worship (if registered building status was obtained), and include the solemnisation process as prescribed by their religious rites. Another reform, provided by the 1898 Marriage Act, meant it was no longer necessary for the registrar to attend ceremonies in places other than churches, instead there was only a requirement of an 'authorised person'. The Marriage Acts of 1949 – 1994

²¹⁰ Stone (1977: 31) reports that up to a third of all marriages between 1753 and 1836 were illegal or void because of the monopoly given to the Church of England.

consolidated the position, and set out in our present times the requirements of English law to effect a valid marriage. The law provides for:

- (i) marriage according to the rites of the Church of England;²¹¹
- (ii) marriage according to the usages of the Jews;²¹²
- (iii) marriage according to the usages of the Society of Friends;²¹³
- (iv) marriage in a register office, (with no religious service, in the presence of the superintendent registrar, a district registrar, two witnesses, and using a prescribed declaration);²¹⁴
- (v) marriage in a registered building, (in the presence of a registrar of marriages or an 'authorised person', two witnesses, and using a declaration similar to that used in a register office);²¹⁵
- (vi) marriage on approved premises (such as stately homes, hotels and similar buildings), (with no religious service, in the presence of the superintendent registrar, a district registrar, two witnesses, and using a declaration similar to that used in a register office).²¹⁶

All options, except for (i), require a certificate to be issued by a superintendent registrar. Until recently, the only place where Muslims or other newer minorities could validly marry was in a register office or registered building.²¹⁷ As required

²¹¹ Part 2, Marriage Act 1949 and s.26 (e).

²¹² Ibid., s.26 (d).

²¹³ Ibid., s.47 and s.26(c).

²¹⁴ Ibid., s.45.

²¹⁵ Ibid., ss.43-4.

²¹⁶ Ibid., ss. 46(A) & (B).

²¹⁷ Ibid., ss.45 & 45(A). The 1990 Marriage (Registration of Buildings) Act and 1994 Marriage Act amended the 1949 Marriage Act, allowing buildings to be registered even if they are used for purposes other than wholly religious worship, and allowed buildings not registered under the 1855 Places of

by the 1855 Places of Worship Registration Act, the latter needed to be a 'separate' building, used exclusively for the purpose of worship. This was a significant obstacle for Muslims since most mosques are used for a variety of purposes, as community centres, places for public meetings, and supplementary education (madrassas). The result of such requirements was that Muslims could not solemnise marriages in many mosques.²¹⁸ In relation to community centres, popular places for the *nikah* and *walimah* (marriage banquet), and generally for minority weddings, they also could not be used since they were not places of public worship. In contrast, Quakers and Jews are exempted from these rules. Their ceremonies need not be in any particular building, or require the presence of a state official, and can take place at any hour of the day or night.²¹⁹

Muslims have also experienced other difficulties related to differences in gateway criteria for creating a valid marriage. Firstly, under *shari'a*, a proxy marriage is permissible. A representative (*wakil*) acting on behalf of either the prospective bride or groom with their permission can exchange declarations. Secondly, in Muslim ceremonies, one commonly finds the couple in separate rooms, (usually at the family home), making declarations separately. It is also possible, though opinion is divided amongst scholars, for a valid marriage to be effected even if the parties are in different countries over the telephone.²²⁰ In the eyes of English law, such ceremonies would not amount to valid marriage, even if

Worship Registration Act to become designated 'approved premises', where valid registration ceremonies can take place.

²¹⁸ On the impact of such restriction, Hamilton (1995: 48) reports that in 1991, out of 452 mosques registered as a place of worship under the 1855 Act, only 74 mosques were registered buildings.

²¹⁹ Ss. 26 (1)(c), (d) and Ss.35(4) & 75(1)(a) Marriage Act 1949.

²²⁰ For an example of a ceremony conducted over the telephone see the case of *KC v City of Westminster Social and Community Services Department* (2007) EWHC 3096 (Fam), and *KC v City of Westminster Social and Community Services Department* (2008) EWCA Civ 198.

they occurred in a mosque that had been designated a registered building. Thirdly, on the issue of whom one can marry, otherwise expressed as prohibited degrees of relationship, shari'a does not permit same-sex marriages, marriages with close blood or milk relations (considered *maharim*),²²¹ or marriages with non-Muslims, (though there is a long-standing opinion that men can marry women from the other Abrahamic faiths). In contrast, other than treating relationships between certain persons related by affinity as *void ab initio*,²²² English law would disregard the other prohibitions since they fall outside its rules. Though there have been no reported cases on such issues, giving the impression that there is little or no conflict, it is possible to find examples of an 'offending' son or daughter being ex-communicated (or worse) by their family and wider community. Not only when involving inter-faith marriages but also if marriage occurs outside one's caste, class, and/or kin. A closer look also reveals that these issues are being dealt with by the police, courts and expert witnesses, at times unbeknown to them, under such headings as 'honour' or 'gender related' violence. These differences in gateway criteria are much more relevant than legal researchers have thus far realised.

In relation to same sex unions, since 2005 gay couples have had the right to enter into civil partnerships and, following a remarkable volte-face, 'gay marriages' from 2014.²²³ Opposition to the latter was vigorously raised by various religious organisations, including the Muslim Council of Britain, but the government saw the change in law as an important step towards achieving equality and fulfilling

²²¹ As prohibited in the qu'ran (surah 4, verse 23).

²²² Prohibited relationships are defined in s.1 of the Marriage Act 1949; see also Marriage (Prohibited Degrees of Relationship) Act 1986.

²²³ See in detail Marriage (Same Sex Couples) Act 2013.

human rights obligations. To date, there have been no Muslim same-sex marriages, but there has been a highly publicised example of a civil partnership, involving two Pakistani Muslim females.²²⁴

Before we turn to look at other points of difference in the gateway criteria, it is important to distinguish between what shari'a allows, and what is obligatory and encouraged. Equally, here, we need to be mindful of differences between doctrinal rather than lived shari'a. The latter takes us closer to, or crosses into, the realm of Muslim (ethnic) rather than Islamic practices. Much change has taken place over time, not just necessarily because of state controls, (these can and are evaded), but because large sections of contemporary Muslims have adopted a contextualising approach that sees the historical context in which many rules pertaining to marriage, (and more broadly gender), were borne. One should also be aware of the conditions that must be met before we can say that seemingly 'permissible' unions (involving for instance multiple wives or child brides) are actually shari'a-compliant.

When it comes to polygyny, (only Muslim men can have up to four wives, if specific conditions are met), there is a clear conflict between shari'a and English law. The 2013 Marriage (Same Sex Couples) Act revised only part of the long-standing (Christian) definition of marriage as the voluntary union for life of one man and one woman, to the exclusion of all others, which was affirmed famously by Lord Penzance in 1866.²²⁵ In other words, the union of marriage still has to be exclusive. Not only does English law render a marriage in which either party is

²²⁴ For details see <http://www.independent.co.uk/news/uk/home-news/pakistani-women-rehana-kausar-and-sobia-kamar-marry-in-britains-first-muslim-lesbian-partnership-8632935.html> (date accessed 02/02/14).

²²⁵ For details see *Hyde v Hyde and Woodmansee* [1866] LR 1 P & D 130.

already married to someone else as *void ab initio*,²²⁶ since as far back as 1861 such an act is an offence.²²⁷

Up until 1946, English courts refused to recognise either an actually polygamous marriage (where the husband had married more than one wife), or a potentially polygamous marriage (one where the husband was legally capable of taking more than one wife owing to his domicile, but in fact had not), even if the parties had acted in accordance with the law of their country of domicile (*lex loci celebrationis*). Wives were not allowed to seek any form of matrimonial relief if party to such marriages.²²⁸ Recognising the harsh impact of such an approach, that if continued would affect a greater number given the increase in immigration post-WW2, the courts began to accord validity to ‘marriages’ presented before them by distinguishing them from the established precedent in *Hyde v Hyde and Woodmanese*, notwithstanding their potentially polygamous character.²²⁹ Recognition remained under the aegis of the judges until 1972 when the enactment of the Matrimonial Proceedings (Potentially Polygamous) Act finally placed on statutory footing that matrimonial relief could be granted to a spouse in a potentially, or actually, polygamous union. Though the Act gave some important marriage-like effects to polygamous unions,²³⁰ the disconcerting concept of a potentially polygamous marriage continued to cause problems until

²²⁶ S.11(b) Matrimonial Causes Act 1973.

²²⁷ For details see s.57 Offences Against the Person Act 1861.

²²⁸ See in detail *Re Bethell* [1888] 38 Ch. D. 220; *Re Naquib* [1917] 1 KB 359; *Nachimson v Nachimson* [1930] P. 217.

²²⁹ *Srini Vasan (otherwise Clayton) v Srini Vasan and Baidail (otherwise Lawson) v Baidail* [1946] 1 All ER 342.

²³⁰ Another marriage-like effect is demonstrated in the case of *Onobrauche v Onobrauche* [1978] 8 Fam Law 107: the first wife could not rely on the fact of ‘adultery’ to establish the ground of irretrievable breakdown necessary for a petition of divorce since it related to the husband’s actions involving his second wife.

it was nullified in 1995.²³¹ The 1972 Act, later largely re-enacted in s.47 of the 1973 Matrimonial Causes Act, also made it clear that polygamous marriages by English domiciliaries, even if recognised by foreign jurisdictions, would be *void ab initio*. The change in the law left only one exception as to when a polygamous union would be recognised as being valid under English law. A polygamous marriage by a foreign domiciliary that is solemnised in a jurisdiction that allows it (in accordance with the *lex loci celebrationis*). Though such marriages may be valid, during the 1980s, Immigration Rules were amended to prohibit polygamous wives from exercising their right of abode, restricting settlement to one wife.²³²

When it comes to marriages involving ‘minors’, there is considerable debate amongst Muslims over what shari’a prescribes. The qur’an does not specify a legal age of marriage, but circumscribes that parties be both physically mature and of sound judgment. Based on hadith,²³³ a spectrum of opinions has evolved, from no age limitation, to when one reaches ‘adulthood’, (for some this means attainment of biological puberty), to the minimum age of 18 years.²³⁴ If we briefly ask what customary orderings such as *rivaj* or *heer* have to say about the minimum age of marriage, we see also that no uniform answers are forthcoming.

²³¹ Over the problems the concept continued to create see *Hussain v Hussain* [1982] 1 A11 ER 369, and Law Commission (1985) Private International Law: Polygamous Marriage – Capacity to Contract a Polygamous Marriage and Related Issues, Law Commission Report no 146, Scottish Law Commission Report No 96, London: HMSO. The Private International Law (Miscellaneous Provisions) Act 1995 clarified that all ‘potentially’ polygamous marriages are monogamous marriages and therefore valid, and amended s.11 (d) of the Matrimonial Causes Act 1973, limiting its operation to actually polygamous marriages only.

²³² See in detail S.2 Immigration Act 1988 and Immigration Rules part 8: family members, paragraphs 278 – 280.

²³³ Especially Sahih Bukhari, one of 6 major canonical texts in Sunni Islam (also referred to as the authentic six or *al-sihah al sittah*).

²³⁴ The lack of consensus was reflected in figures, produced by an ITV documentary in 2013 (‘Exposure - Forced to Marry’), that imams from 18 out of 56 mosques agreed to conduct a *nikah* involving a 14-year-old Muslim girl.

Under English law, a marriage in which either party is below the age of 16 is *void ab initio*.²³⁵ Moreover, it is an offence to have sexual intercourse with a girl under the age of 16,²³⁶ and will be treated as rape if she is below the age of 13.²³⁷ Immigration Rules also ensure that entry clearance is not granted to spouses or fiancé(e)s who have not, at the time of making their application, attained the age of 18.²³⁸ Despite instances of media sensationalism, conflict between shari'a, customary orderings, and English law over the issue of child marriage is more imagined or theoretical rather than real, since there is little evidence of the practice amongst Muslims in Britain.

There is however a strong body of evidence of the practice of forced, which at all times must be distinguished from arranged, marriage. Since consent is a condition of marriage, shari'a strictly forbids forced marriage, holding such unions as invalid, and those who forced, or allowed, the marriage as guilty of major sin. For a variety of reasons, including the maintenance of family and kinship alliances, izzet, purdah and prevention of sharam, the practice of arranged, which can spill into forced, marriage has remained crucial in the lives of sections of particular groupings of Muslims in the diaspora. Here, most strikingly in the institution of forced marriage, we see the importance of tradition over both shari'a and English law.

²³⁵ Matrimonial Causes Act, 1973, s.11.

²³⁶ Sexual Offences Act 1956, s.6(1). In one case, a marriage involving a 13-year-old girl to a 26-year-old man was recognised as valid, as it had been conducted abroad (in accordance with the *lex loci*), and therefore came under an exception provided by the Act. It is doubtful that the decision by the Court of Appeal would be followed today.

²³⁷ Sexual Offences Act 2003, s.5.

²³⁸ See in detail para 277 of the Immigration Rules, & the case of *Quila and Bibi v Secretary of State for the Home Department* [2011] UKSC 45.

Under English law a marriage in which either party did not consent is voidable.²³⁹ By voidable it is meant that if duress can be established the petitioner (the person who acted under compulsion) can obtain an annulment from the court, but until this is done the marriage remains valid. Presented with a number of cases involving newer minorities, English courts have had to determine what constitutes 'duress'. In 1983, the Court of Appeal moved from a very narrow, but well-established interpretation of what constituted duress, that required the petitioner to prove their will was overborne by a genuine and reasonably held fear caused by threat of immediate danger to life, limb and liberty,²⁴⁰ to, remarkably, whether their will had been so coerced as to vitiate consent. The new guidance also directed that account be taken of the personal characteristics of the petitioner that may make them more vulnerable in terms of their will being overborne.²⁴¹ In an early case following the volte-face that also involved a male Muslim petitioner, the court accepted a parent can apply pressure to persuade their child to do what they think is right for them, but the marriage would be voidable if there is not a genuine change in mind.²⁴² Besides this development, during the course of the last decade new measures have been introduced by the legislature, which have received mixed reactions. In 2007, the Forced Marriage (Civil Protection) Act laid down a clear procedure enabling anyone to ask a family court to implement injunctive relief (a Forced Marriage Protection Order). Aimed at deterring forced marriages involving a transnational partner, Immigration Rules were amended in 2008 to prevent entry of a spouse

²³⁹ S.12(c) Matrimonial Causes Act 1973.

²⁴⁰ For details see *Singh v Singh* [1971] 2 All ER 828; *Singh v Kaur* [1981] 11 Fam. Law 152.

²⁴¹ *Hirani v Hirani* [1983] 4 FLR 232.

²⁴² *Mahmud v Mahmud* [1994] SLT 599, (Scotland).

or fiancé(e) who had not at the time of making the application attained the age of 21. After a long legal battle however, the amendment was held by the Supreme Court to be a breach of the ECHR.²⁴³ In 2014, the Anti-social Behaviour, Crime and Policing Act made it an offence to coerce someone into marriage. The Act defines 'marriage' as any religious or civil ceremony of marriage, whether or not it is legally binding.²⁴⁴ Yet, a religious ceremony of marriage that takes place without fulfilling the preliminary civil requirements, despite years of campaigning by Muslims, is not recognised as creating a valid marriage in Britain. This has been a great source of contention for Muslims, and therefore it is important that we look at this in some detail.

English courts have taken a tough line on the validity of marriages solemnised according to the usages of Muslims. Such marriages, in which the parties have knowingly and wilfully intermarried in disregard of certain formalities, as provided by the Marriage Acts 1949 – 1994, have been held to be invalid or non-marriages in the eyes of English law.²⁴⁵ It is also possible to identify examples of where English law has gone as far as to prosecute Muslims who have conducted an Islamic marriage ceremony or *nikah*.²⁴⁶ In 1965, a Muslim leader was convicted of an offence for performing a *nikah* in England.²⁴⁷ The defendant had knowingly and wilfully solemnised a *nikah* in a private home, not in a 'registered

²⁴³ *R (on the application of Quila and another) (FC) (Appellants) v SSHD* [2011] UKSC 45; *R (Bibi & Anor) v Secretary of State for the Home Department* [2011] UKSC 45.

²⁴⁴ S.121 (4) Anti-social Behaviour, Crime and Policing Act 2014.

²⁴⁵ S.11(a)(iii) Matrimonial Causes Act 1973.

²⁴⁶ Twenty years earlier, Mohamed Ali, also prosecuted for conducting a *nikah*, was found to have no case to answer because, for the provisions of the then 1836 Marriage Act to apply, the ceremony ruled Humphreys J 'must be at least one which will prima facie confer the status of husband and wife on the two persons'. The case was decided in 1943, but reported in [1964] 2 QB 352, *R v Mohamed Ali*.

²⁴⁷ *R v Bham* [1966] 1 QB 159.

building', and this act was held to be contrary to the law.²⁴⁸ His appeal was however allowed by the Court of Criminal Appeal, since

[...] unless the 'marriage' purporting to be solemnised under Islamic law is also a marriage of the kind allowed by English law it is not a marriage with which the Marriage Act 1949 is concerned [...] (168 E).

The decision gives rise to two separate, but overlapping, questions. What is the position if the parties have a nikah believing that they are contracting a valid marriage according to both shari'a and English law? Does a nikah create a void marriage, or a so-called 'non-marriage'? Dealing with the second question first, the distinction may not seem important at first glance, but it is a crucial one. Not least because, a court dealing with a void marriage can make financial orders, and redistribute property between the parties. A declaration of a void marriage is also important because it is an official recognition that some semblance of a marriage did occur, albeit that it was fundamentally flawed.

A void 'marriage' is invalid *ab initio*, meaning from its inception, and does not require ratification by the court, though this is often preferable since it provides clarity for the parties involved. A non-marriage involves a ceremony that is so far removed from what constitutes a valid marriage, as per the gateway criteria of English law, that it is deemed a non-event; hence no discussion over its validity or invalidity is required. In *A-M v A-M (Divorce: Jurisdiction: Validity of Marriage)*,²⁴⁹ Hughes J (as he then was) provides examples:

²⁴⁸ See in detail s.75(2)(a) Marriage Act 1949.

²⁴⁹ *A-M v A-M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6.

[...] a staged dramatic marriage ‘ceremony’ conducted in a play or in the course of a soap opera. Another might be the exchange of promises between small children [55].²⁵⁰

[...] the same would no doubt apply to all manner of self-devised rituals intending to be binding in conscience by those forsaking the civil forms of marriage, as well as to ‘marriages’ according to foreign religions, and to any ceremonies which make no attempt to be English marriages within the Marriage Acts [56].

In this case, Hughes J concluded that a nikah conducted by a mufti in a flat in London was a non-marriage, since

[...] the ceremony was consciously an Islamic one rather than such as is contemplated by the Marriage Acts. Just as in *Regina v Bham* [1966] 1 QB 159, nobody purported to conduct or take part in a Marriage Act 1949 ceremony, and the fact that no one applied their mind to how English law would view what they did does not alter that conclusion.

Following *A-M v A-M*, in *Gandhi v Patel*²⁵¹, a *vivah* (a Hindu ceremony of marriage) conducted by a Brahmin priest at a restaurant in London met the same fate. Park J emphasised that this also was a non-marriage, since the Hindu ceremony purported to be a marriage according to a foreign religion, and it made no attempt to be an English marriage within the Marriage Acts. After a careful review of the law on non-marriage in *Hudson v Leigh* [2007]²⁵², Bodley J explained that in determining what, if any, marriage had occurred it all hinges on the degree of non-compliance with the Marriage Acts. Questionable ceremonies

²⁵⁰ See also *Gereis v Yaqoub* [1997] 1 FLR 854. Algionby J explained that a ‘marriage’ ceremony conducted in the course of a play is, by way of clarification, a non-marriage.

²⁵¹ *Gandhi v Patel* [2002] 1 FLR 603.

²⁵² *Hudson v Leigh* [2007] EWHC 1306 (Fam).

should, he says, be decided on a case-by-case basis, in particular taking account of:

- I. whether the ceremony or event set out or purported to be a lawful marriage;
- II. whether it bore all or enough of the hallmarks of marriage;
- III. whether the three key participants (most especially the officiating official) believed, intended and understood the ceremony as giving rise to the status of lawful marriage; and
- IV. the reasonable perceptions, understandings and beliefs of those in attendance.

Such guidance does seem sensible, but only if applied in a way that a Hindu *vivah*, Sikh *anand karaj*, or a Muslim *nikah* is not struck down in circumstances in which a Christian holy matrimony is upheld. The decision in *Gereis v Yagoub*,²⁵³ which has not been deemed by any subsequent court as *per incuriam*, suggests indefensibly exactly that. A look at the facts reveals a couple that chose to intermarry at a Coptic Orthodox Church in London. The church however was not registered, the priest conducting the marriage was not licenced, and no prior notice of the marriage was given to the superintendent registrar. Moreover, the couple were aware, having been pre-warned by the priest, that the ceremony did not give rise to the status of a lawful marriage, for which they would have to have a civil ceremony at the register office. But no civil ceremony was ever completed by the couple during the ten years they were together. Aglionby J ruled that more than a non-marriage had been achieved, namely a void marriage, because despite failing to meet the necessary formalities as required by law, the ceremony:

²⁵³ *Gereis v Yagoub* [1997] 1 FLR 854.

[...] bore the hallmarks of an ordinary Christian marriage and both parties treated it as such [...] and that those who attended it [...] clearly assumed that they were attending an ordinary Christian marriage [858].

The decision is another example of the privileged position that Christianity holds in the eyes of English law. Following *Hudson v Leigh*, there have been several other cases involving the issue of whether a nikah had resulted in a valid, invalid or non-marriage. In *AAA v ASH*, since both parties knew that a nikah did not comply with the formal requirements of marriage under English law, the court held they had participated only in a non-marriage.²⁵⁴ In *El Gamal v Al Maktoum* a nikah conducted in a flat in Knightsbridge was also held to be a non-marriage.²⁵⁵ In setting out the reasons, Bodey J explained that neither party demonstrated an attempt to be part of, or to set up, a ceremony that purported to comply with the requirements of English law. He found it hard to accept the petitioner's insistence that both parties had through an oral nikah, (the respondent denied that a ceremony even occurred), intended to create a valid marriage under English law. He considered, but dismissed, the view that intention was the all-important factor that ought to convert a ceremony that failed to comply with the Marriage Acts 1949 - 1994 into a marriage, albeit a void one. Holman J took the same view in *Dukali v Lamrani*.²⁵⁶ In this case there was no doubt that both parties, moreover the consulate staff too, believed that their civil ceremony (which incorporated the nikah) had legal effect in Morocco and England. They had chosen to marry at the Moroccan Consulate rather than at an English

²⁵⁴ *AAA v ASH, The Registrar General for England and Wales and the Secretary of State for Justice* [2009] EWHC 636 (Fam) . On the particular facts, the court could not find a presumption of marriage to aid the father's ability to obtain parental responsibility.

²⁵⁵ *El Gamal v Al Maktoum* [2011] EWHC B27 (Fam).

²⁵⁶ *Dukali v Lamrani* [2012] EWHC 1748 (Fam).

registry office because they wanted to ensure that any children from the marriage also had dual nationality. Holman J explained that the ceremony may be recognised under Moroccan family law, but it occurred in a Consulate in London and therefore the relevant law for determining the legal status of the ceremony was English domestic law. Since there was no, or any purported compliance (according to the judge), with English law requirements, it could only be a non-marriage.

The recent case of *MA and JA v Her Majesty's Attorney General*,²⁵⁷ affirms the tough line taken when the gateway criteria of English law is ignored. In this case, the ceremony did not fully satisfy the formalities of the Marriage Acts 1949 - 1994 (the parties had failed to give notice to the superintendent registrar and no certificate had been issued). Nevertheless, it was deemed to have met the essential requirements (the mosque was a registered building and the imam conducting the ceremony was an authorised person). Moylan J concluded that there was no statutory provision that rendered such a ceremony void, unless there was deliberate non-compliance. The same would be true in his view if there was a failure to publish banns or obtain a licence.

A brief review of the law on void and non-marriage has established that a nikah, unless complying with the essential formalities of English law, is a non-marriage. A belief to the contrary reasonably held by the parties does not alter the position, but it is fatal to any claim if the parties knew that the nikah does not comply with the formalities as prescribed by English Law. The only question that arises, then, is whether there is any other option available to a Muslim couple by way of

²⁵⁷ *MA and JA v Her Majesty's Attorney General* [2012] EWHC 2219 (Fam).

which they could have their union afforded the legal status of marriage? In exceptional cases, to achieve equity, English courts have accorded relationships involving a long period of cohabitation the status of marriage, provided that particular conditions are met, including that the couple had lived as man and wife and were reputed to be so. This includes relationships in which there was a ceremony (that was defective in some way or irregular), and where there was no ceremony, but the parties conducted themselves as if there had been. The legal presumption of marriage is not something new, or the result of the presence of newer minorities. Its origins can be traced back to the late 19th century. It was first applied in a case involving both a long cohabitation and a foreign marriage ceremony (*vivah*) in 1964.²⁵⁸ Over three decades later, in *Chief Adjudication Officer v Bath*,²⁵⁹ the Court of Appeal used the legal presumption in a case involving an anand karaj and 37 years of cohabitation, cut short by the death of the male partner.²⁶⁰ Importantly, the claimant could only receive a widow's pension, if she was party to a marriage. The couple were reputed to be, and believed they were husband and wife. The Inland Revenue and Department of Social Security, illustrated by their tax deductions, had also shared the belief. The Sikh marriage ceremony had taken place in an unregistered gurdwara in London, but this did not prevent the court from finding a marriage. After a careful review of the authorities, Evans LJ explained that the legal presumption of marriage arose from the fact of extended cohabitation as man and wife, and importantly,

²⁵⁸ See for details *Captain de Thoren v. A.- G* (1876) 1 App. Cas. 686; *Lyle v Ellwood* [1874] LR 19 EQ 98 and more generally Borkowski (2002): The presumption of marriage. Vol 14, no 3, Child and Family Law Quarterly, pp. 252 -266.

²⁵⁹ *Chief Adjudication Officer v Bath* [2000] 1 FLR 8.

²⁶⁰ See in detail *Mahadervan v Mahadervan* [1964] P 233.

[...] the presumption was extended to include an inference that the statutory requirements first introduced by Lord Hardwicke's Marriage Act 1753 had been duly complied with; but in each case the presumption was capable of being rebutted by clear and convincing evidence [21].

Through a nifty piece of judicial equity we see, here, how the formalities prescribed by statute were sidestepped. What this example also reveals is that judges are prepared to intervene to give otherwise 'irregular' minority arrangements (defective in some way from the perspective of English law) legal effect when equity demands it. This is not done by recognising minority or foreign laws, but by judges undertaking their own 'English *ijtihad*', finding inspiration from their own tradition's legal resources. In this way, only English law applies, the authority of the state remains sovereign, and the perception of a uniform law is maintained.

As outlined above, though the *nikah* was deemed a non-marriage in *A-M v A-M*, this was only part of the story. Following *CAO v Bath*, Hughes J still found a valid marriage by way of legal presumption of marriage. The Muslim couple in the case also believed that their religious marriage ceremony had legal effect; they too held themselves out to be husband and wife to others; and their cohabitation lasted for over 20 years. In *Al-Saedy v Musawi* [2010],²⁶¹ the Muslim petitioner's claim for a presumption of marriage to be applied to her union was dismissed. Reviewing the dicta in *CAO v Bath*, Bodey J concluded that there was no place for the application of the presumption of marriage where the parties could not have reasonably have held the belief that their ceremony was enough to satisfy the

²⁶¹ *Al-Saedy v Musawi* [2010] EWHC 3293.

requirements of English law. This requirement, significantly, reduces the scope of the presumption. Since it would be hard to reasonably believe that a second-generation immigrant, or someone who had lived in Britain for a period of time, could reasonably believe that any type of religious marriage that they have, or may undergo, would fulfil the requirements of English law.

The combined effect of the above requirements is that Muslims, it appears, have little choice but to comply with English law if they wish to see their marriages recognised as legally valid. Can one say, then, that Muslims have abandoned the *nikah* and chosen to follow the requirements wholly prescribed by English law? Or for that matter left on the rubbish tip of history their ethnic traditions when it comes to marriage? This is not so. As this study illustrates, Muslims have developed innovative methods to get around perceived problems, modelling their behaviour in compliance with their choice.

The ability of minorities to innovate so as to satisfy the demands of overlapping laws was picked up, during the 1980s, so perceptively by Menski (1988; 1993). He identified the emergence of what he coined 'angrezi shariat' amongst South Asian Muslims in Britain. At one level, the concept captures that Muslims learnt to combine the requirements of English marriage law with the *nikah*. Under *angrezi shariat* if the couple want to get married, the rules are, they marry twice. To have their marriages recognised in the eyes of English law they will have a civil ceremony, but will only regard themselves as 'married', or be reputed to be by their kin and *ummah*, once they have the *nikah*. Only after the *nikah*, since *shari'a* strictly prohibits *zina* (pre-or-extra-marital sexual relations), will the couple set up home together and consummate the marriage.

Menski (1993) explains that the development of angrezi shariat occurred in three stages. In the first stage, as is often the case with new immigrants,²⁶² Muslims were unaware of the requirements of English law and therefore in accordance with their legal consciousness only had a nikah. When a relationship broke down, the husband would divorce his wife by talaq, irrespective of whether she was in the Indian Subcontinent or Britain, allowing them both to move on and remarry if they so wished. In this way, life continued, until individuals realised that non-compliance with the rules of English law created great inconveniences. Confusion over legal statuses affected immigration, welfare, and decisions related to ancillary relief, which especially affected women. Some husbands had deserted their wives with great impunity, but as the wives seeking readdress from English courts to their dismay were to find out, the nikah was not even a semblance of a marriage in the eyes of English law.

The inevitable second stage brought home to Muslims that there are different sets of gateway criteria when it comes to marriage. More fundamentally, it brought to the fore a clash of authority between shari'a and English law. Muslims had to decide where their loyalties lay. Menski explains that Muslims had three alternative options: they could avoid English law altogether, relying instead on the universality of shari'a. The second option would be to simply follow the new law of the land they had made their home. The couple, then, would marry in a secular and administrative form as prescribed by English law and do nothing else. The third option, and the one chosen by most Muslims in Britain today, is to combine the rules of English law and sharia, thereby creating angrezi shariat.

²⁶² Not being able to speak or read English, avoidance (or hostility) of officialdom, attitudes formed by past experiences in their country of origin, little contact outside their recreated ethnic enclaves, are just some of the reasons why it took many Muslims time to learn the rules of their new country of residence.

Today, many Muslims, then, marry twice and if things don't work out divorce twice. In other words, they have a 'double-decker' marriage. The secular registration ceremony often precedes the nikah, and is viewed not uncommonly as a form of betrothal, that can be terminated before the all-important nikah (Menski 1988: 15; Hamilton 1995: 50). It is also done in this order, to provide a form of protective recourse to the wife, who potentially could marry an unscrupulous husband who flouts the injunctions of shari'a. Having lost her virginity, or worse still become pregnant, both of which reduce her status for remarriage in the eyes of her community, there is, then, recourse to financial and property orders under the 1973 Matrimonial Causes Act. The trend in more recent years has been to have the ceremonies close to each other. In this regard, one can read the registration of mosques and of imams as 'authorised persons', which enable this to happen without any real gap of time in between, as another feature of the ongoing process that is angrezi shariat.

Earlier I said that at one level, the concept of angrezi shariat captures that Muslims learnt to combine the requirements of English marriage law with the nikah. At a deeper level, it reveals much more. It shows very clearly that Muslims, like other newer minorities in Britain,²⁶³ are not lost 'between two cultures' (Watson 1977). They are not simply passive subjects of the law, but productive legal actors. In jurisprudential terms, they have embraced legal pluralism and created hybrid legal systems in Britain, which *they* perceive are shari'a-compliant. In sociological terms, this is an expression of the fact that they wish to lead multicultural lives, that they have multi-faceted identities.

²⁶³ On the formation of angrezi dharma among Hindus in Britain see Menski (1993).

To some extent the British state has also recognised the reality of hybrid 'legal' systems being followed by minorities in Britain. In the context of annulment of marriage, it is possible to identify instances where the courts have gone as far as to recognise that a marriage between South Asians in Britain is not fully complete and legally binding until the requirements of both English law and the respective religious law have been completed. In a nullity of marriage case involving Sikhs decided in 1972, *Kaur v Singh*,²⁶⁴ the Court of Appeal noted that:

It is beyond question that in order to fully marry according to Sikh religion and practice, it is necessary to have not only a civil ceremony in a register office but also a Sikh ceremony in a Sikh temple [293].

The petitioner convinced the court that the husband following the civil ceremony had failed to organise an *anand karaj* (which it was accepted was a precondition to consummation), and therefore she was entitled to a decree of nullity on the ground of his wilful refusal to consummate. In *A v J*,²⁶⁵ the wife's refusal to have a *vivah* following a civil ceremony was also held by the court to amount to a wilful refusal to consummate. This case moreover reveals the different weight of importance placed by the parties on the civil ceremony. The wife was disappointed by the husband's cool and inconsiderate attitude towards her following the civil ceremony, a major reason for her refusal to have a *vivah*. Acknowledging her hurt feelings, the husband had apologised and explained that his behaviour arose from his supposition that a formal relationship was appropriate until the *vivah*, at which point they would be 'properly married'. The different presuppositions led to very different expectations, ultimately leading to

²⁶⁴ *Kaur v Singh* [1972] 1 A11 ER 292.

²⁶⁵ *A v J (Nullity)* [1989] 1 FLR 110.

the relationship breaking down. In the more recent Scottish case of *H v H*,²⁶⁶ the Extra Division Court granted the Muslim petitioner a nullity on the basis that the civil ceremony at a register office had not been preceded or followed by a nikah. Another, perhaps more direct acknowledgement, of the operation of hybrid 'legal' systems amongst British minorities is illustrated by how judges and, more recently, Parliament have dealt with the harm caused by 'limping marriages'.²⁶⁷ The concept refers to a scenario where the 'wife' has had her civil marriage dissolved but finds her (often vindictive) partner refusing to take steps to dissolve the religious marriage. Under classical interpretations of halakhah only the Jewish husband can give a get (a Jewish divorce). In Britain, Rabbis in battei din used by Reform Jews have sometimes issued a get irrespective of the husband's permission. In contrast, accepting the prerogative of the husband, Orthodox battei din will rarely, if ever, do so. Without a religious divorce the wife cannot remarry under Jewish law – becoming an *agunah* ('chained to her marriage'). If she ignores the law, and enters into a new relationship, she commits a grave sin. Moreover, any child born from what is regarded an illicit relationship is branded a 'mamzer' or '*mamzeret*' (female) and is prohibited by halakhah from marrying a fellow orthodox Jew on reaching adulthood. Under shari'a, some Muslims also have adopted the interpretation that only the husband can give the talaq. Under English law, in contrast, it is the court that dissolves a civil marriage, if either party can establish the ground of irretrievable

²⁶⁶ *H v H* [2005] Fam LR 80.

²⁶⁷ Using the quantum of maintenance due to the wife as leverage in one case involving a Jewish couple, *Brett v Brett* [1969] 1 All ER 1007, the Court of Appeal ordered that if the husband had not granted the get within 3 months following the hearing, the amount would increase quite substantially. Generally, despite the harmful effects, few cases have been reported on the issue of limping marriages.

breakdown established by one of five facts.²⁶⁸ To provide (Jewish) wives with leverage, Parliament passed the 2002 Divorce (Religious Marriages) Act,²⁶⁹ enabling a party to petition the court not to grant a decree absolute in relation to the civil marriage until the dissolution of the religious marriage.

On the whole however, constrained by its ideological presuppositions, English law refuses to officially recognise hybrid 'legal' systems such as *angrezi shariat*. At the same time, it has avoided direct confrontation by neither taking steps to prohibit 'marriage' ceremonies according to religious or foreign law in Britain, nor, unlike in some European countries, by imposing penalties if religious marriages are solemnised before civil ceremonies.²⁷⁰ In the context of disputes arriving in court, this often means that important facts of the case related to Muslim laws are either missed, or simply ignored. Aware of English law's approach some litigants are manipulating facts resulting in disputes presented in court to take a twisted form, or find themselves with significant leverage to bargain in the shadow of English law, forcing wives for instance to give up maintenance or matrimonial property claims in return for a religious divorce. At times, as we have seen with the application of a legal presumption of marriage, the courts have pierced the veil of uniformity that espouses a strict adherence to English black-letter law through the use of equity to meet the challenges of justice. Another example of this is provided by the unreported case of *Ali v Ali* (2001) Unreported, otherwise known as 'the case of the missing one pound'. Decided in 1999, the case involved a Bangladeshi Muslim couple, both working professionals in London, who found themselves in a heated court battle when

²⁶⁸ See for details s.1 Matrimonial Causes Act 1973.

²⁶⁹ The Act amended the 1973 Matrimonial Causes Act by inserting s.10A.

²⁷⁰ For details see Doe (2011: 221-2).

their marriage broke down. After Mr Ali applied to the High court for a divorce, Mrs Ali cross-petitioned asking the court to withhold the divorce until her husband had paid the mahr (dower). As a pre-condition of valid marriage, a groom is obliged under shari'a to give the bride an agreed mahr, or 'nuptial gift', which after the nikah is promptly due, unless it is settled that it be deferred. The mahr is often a sum of money, but can also be a dwelling, land, jewellery or some other chattel, and is the sole property of the wife, not the guardian or husband. In the case of *Ali v Ali* the agreed mahr amount was £30,001. The husband, as one would expect, argued that the mahr was not an issue for the court, and if it was it was not payable, as in England only English law applies. As the court's expert witness, Menski explained that the Muslim couple had undergone not untypically a double-decker marriage, a civil ceremony recognised by English law and a nikah in accordance with shari'a. As there were two marriages, there had to be also two divorces, which also meant that there were two sets of financial arrangements that the judge needed to consider (Menski 2002: 49). In the interests of preventing injustice to the wife coupled with the concern to avoid the wife's recourse to a shari'a council, the judge awarded Mrs Ali £30,000. In Menski's (2002: 50) view, by giving her £1 less he applied not shari'a but asserted the application of English law. In so doing, he maintained the thin but indispensable line between uniform law and personal laws, despite the unrelenting pressure for such a reform in the context of family law caused by the commitment of minorities to their ethnic, or personal, rather than just territorial, laws.

4.3 Muslim responses to a situation of legal pluralism

Faced with the non-recognition of Muslim laws, penalties for failure to comply with English law, at times, hostile or negative attitudes and perceived interferences with their different family structures and processes, Muslims have had to find their own answers or solutions. In their mission to obtain an outcome that complies with their choice, (or, if that is not possible, to minimise their hardship), Muslims are creatively employing various strategies and tactics.

Beginning with the strategies, that is, what Muslims are trying to accomplish, it is possible to identify three different types: firstly, Muslims have sought to reform one ordering to take account of another. This is occurring in three directions:

- i. reform of English law, so as to incorporate shari'a and ethnic orderings;
- ii. reform of fiqh, so as to incorporate English law (and more broadly 'European' or 'international' values), and their ethnic orderings; and,
- iii. reform of their ethnic orderings, so as to incorporate shari'a and English law.

The second strategy is to combine two or more orderings to develop new hybrid or syncretic orderings. Examples include 'angrezi shariat', 'pardeshi rewaj' (Ballard 2006: 51), and also the construction of super-hybrid orderings that involve three or more orderings such as 'Anglo-Muslim Turkish law' (Yilmaz 2004). Thirdly, Muslims have sought to follow one particular ordering, dispensing or avoiding interaction with the other(s).

4.3.1 Strategy one: reform of an ordering so as to take account of another

When looking at how Muslims have sought to incorporate shari'a into English law, it is possible to identify the use of three different tactics, that is, how Muslims have tried to achieve this goal: tactic one, comprised of demands for a personal law; tactic two, is characterised by more limited demands on a piecemeal basis related to specific shari'a norms; and, tactic three, is characterised by efforts to seek recognition of shari'a norms through non-community specific Acts of Parliament such as the 1998 Human Rights Act, 2010 Equality Act, and 1996 Arbitration Act.

Tactic one involved Muslims campaigning for the wholesale recognition of shari'a as a personal law applicable to all Muslims over family law matters. Calls for such a reform were first made in the 1970s, most prominently by the Union of Muslim Organisations of UK and Eire in 1976 (for details see UMO 1983; Poulter 1990b). It is difficult to evaluate the degree of popular support that such a call had at the grassroots level. Nielsen (1993) suggests the demand was backed more by Muslim leaders than Muslims generally, but cautions against a reading that this implies Muslims are disinterested in such matters. As seen by the issues we have raised elsewhere, this clearly is not the case. Menski (1993) suggests that the lack of popular support could be explained by the fact that Muslim laws already exist at the unofficial level. Keeping them off the official radar, then, insulates them from interference by the state, but also avoids difficult questions such as who decides what shari'a decrees in the context of family law. Nevertheless, earlier, and similar calls since for a Muslim personal law have firmly been rejected by the state.

It is important to briefly outline reasons for the rejection. Inclusion, it has been argued, would not only destabilise a well-functioning legal system but also violate universally applicable human rights norms.²⁷¹ During the 1990s, Poulter in particular argued that,

[...] on human rights grounds, Muslims should not be allowed to operate a system of Islamic personal law in England because of the risk that the rights of women will be violated in a discriminatory fashion through such practices as polygamy, talaq divorces and forced marriage (Ansari 2004b: 266 quoting Poulter 1990b:158).²⁷²

Though Poulter made the error of seeing forced marriage as a practice sanctioned by shari'a, his overall objection is still today often (uncritically) bandied in Western discourse. State officials and institutions when offered the opportunity to do so, or when reacting to particular events, have been keen to present that there is 'one uniform law for all' based on British values (Shah 2010: 77).²⁷³ In 2006, Trevor Phillips, then chairman of Britain's CRE, went as far as to suggest that Muslims who cannot accept this, who want instead a system of shari'a law, should leave the UK.²⁷⁴ In more recent years, the 'One Law for All – No sharia law Campaign', launched in 2008, has claimed that any recognition of shari'a would also violate citizenship rights, equality under the law, and the important principle of secularism.²⁷⁵

²⁷¹ For a discussion of human rights as a Western concept see: Polis & Schwab (1979); Panikkar & Sharma (2007).

²⁷² See also Poulter (1990b: 159-164); (1997: 52-3).

²⁷³ For a recent example, see Eleftheriou-Smith, Loulla-Mae (2014): <http://www.independent.co.uk/news/uk/politics/cameron-pledges-lessons-on-magna-carta-as-he-seeks-to-push-british-values-9538187.html> (accessed 03/08/2014).

²⁷⁴ Muslims 'must' accept free speech, BBC news report, 26/02/2006 (available at: <http://news.bbc.co.uk/1/hi/uk/4752804.stm>, last visited 05/02/2015). Trevor Phillips was responding to angry protests by Muslims against the publication of cartoons satirising Prophet Muhammed.

²⁷⁵ <http://www.secularism.org.uk/launchofonelawforall-campaignaga.html>.

Tactic two involved Muslims making more limited demands related in particular to either fardh or haram shari'a norms, usually in the form of exemptions. These, particularly at the local level and prior to the Satanic Verses Affair in 1989, had some success (see Nielsen 1988; Shah 1994). Since then, besides the field of Islamic finance, demands have increasingly met resistance from a 'secularising' state and from a media vigilant of 'shari'a-creep'. In the context of criminal law, more so than in any other area of the law, agents of the law begin from a position that any recognition of otherness or alterity would jeopardise the integrity of the system (Shah 2005: 68). Few, if any, demands of (partial rather than complete) cultural defence have succeeded (see in detail Renteln 2004; Shah 2005).²⁷⁶ In the context of civil law, including when involving issues related to the family, demands have been vigorously questioned and challenged, often being interpreted as a claim for preferential treatment (see Jones & Welhengama 2000). The view from within the communities, or at least of many members, however, is that the law and its personnel are biased since they grant concessions to some groups but not others (Yilmaz 2000; Meer 2008). Noting the small number of exemptions and even less number of concessions granted to Muslims, but also to other newer minorities, it is difficult to reject Shah's (2002: 1) conclusion that a situation of repression of other 'legal' orders is in place at all levels, despite the rhetorical claim by state officials that Britain today is a multicultural or inclusive society.

²⁷⁶ Rather, the state has instead created a number of 'cultural offences', that is, new offences, or by bolting on to existing offences an aggravating factor enabling stiffer penalties, in relation to acts that are practised by the cultural group of the 'offender' (which in contrast to the territorial law is condoned, approved or even endorsed and promoted in a given situation by the personal, or ethnic, ordering). Examples include the criminalisation of fgm/fgc, khat, 'honour murders', and forced marriages.

Tactic three involves Muslims turning to non-community-specific general Acts of Parliament by way of which they could have shari'a incorporated. The Acts include the 1998 Human Rights Act, and 2010 Equality Act, and these have become key tools for religious minorities wishing to assert their right to practise their religious beliefs. The 1998 Human Rights Act indirectly incorporated ECHR rights into domestic law, and, since it marked an abrupt shift from passive religious tolerance to the active protection of religious freedom as a positive right, it was immediately hailed a 'new dawn for the freedom of religion' (Hill 2002). Article 9 gives everybody the right either 'alone or in community with others and in public or private, to manifest religion or belief, in worship, teaching, practice and observance'. This includes the absolute right to hold a religion or belief, or to change it. It also includes the qualified right to manifest religion or belief, subject only to the limitations laid down in Article 9(2), which allow the state to interfere with the right if: (a) the interference is 'prescribed by law'; and, (b) meets a legitimate aim of being in the 'interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'; and, (c) is 'necessary in a democratic society'. Since religious liberty became a positive right that could only be lawfully interfered with if specific conditions are met, a variety of claims have made their way to court, including prominently by a young Muslim girl asserting her right to wear the jilbab to school despite the clothing contravening the school uniform policy.²⁷⁷

²⁷⁷ See in detail *R (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants)* [2006] UKHL.

Prior to 2003 in England, Wales, and Scotland,²⁷⁸ discrimination on the basis of religious belief was mostly uncontrolled. Some religions were afforded 'unintended' protection under the 1976 Race Relations Act, since an 'ethnic group' was interpreted to include Jews and Sikhs, but to their dismay not Muslims. Following the 2003 Employment Equality (Religion or Belief) Regulations discrimination on the grounds of religion or belief, in the workplace, in Britain became unlawful.²⁷⁹ The Regulations, which were augmented by the 2006 Equality Act, have since been re-enacted in the 2010 Equality Act. Utilising their new found protection, a variety of claims have made their way to English courts, including prominently by a Muslim woman who asserted her right to wear the niqab whilst working as a bi-lingual support worker in a co-educational junior school in Leeds.²⁸⁰ Though both claimants lost their case, the litigation brought to the attention of schools and employers across Britain their duties under both Acts, and to consider carefully if their actions or policies when it comes to limiting religious freedom are either justifiable in the circumstances, or proportionate in achieving a specified legitimate aim.

Muslims have also used another Act of Parliament by way of which they have incorporated aspects of shari'a into English law. Unlike informal shari'a councils which rely on the good will of the parties, or forms of social sanctions by the community, the determinations made by Muslim Arbitration Tribunals (MATs) are enforceable by either party in the normal civil courts, since they come under

²⁷⁸ Legislation prohibiting discrimination on the grounds of religious belief had existed in Northern Ireland since 1976. For details see Fair Employment and Treatment (Northern Ireland) Order 1998, and its predecessor, the Fair Employment (Northern Ireland) Act 1976 (repealed 1.3.1999).

²⁷⁹ The Employment Equality (Religion or Belief) Regulations 2003 implemented the provisions of the Council Directive (EC) 2000/78/EC.

²⁸⁰ See in detail *Azmi v Kirklees Metropolitan Borough Council* [2007] IRLR 434 EAT.

the provisions of the 1996 Arbitration Act. Launched in 2007, MATs must operate within the legal framework of English law, but this is not seen by its architects to prevent or impede the,

[...] 'overriding objective' of securing the proceedings before it in 'accordance with *qur'anic* injunctions and prophetic practice 'as established by the recognised schools of Islamic sacred law'.²⁸¹

Besides child custody, civil divorce proceedings, and criminal law matters, the MAT can deal with all matters of civil and personal religious law (for details see Bowen 2013). The architects of the MAT have developed detailed formal regulations that govern the process of dispute resolution under its jurisdiction. Parties can withdraw at any time prior to the decision being made. The panel that hears a case must include a 'scholar of Islamic sacred law', but also a solicitor or barrister of England and Wales. In arriving at a decision the tribunal takes account of both the 'recognised schools of Islamic sacred law' and the laws of England and Wales. Though decisions cannot be appealed, they are open to judicial review by an English High Court. In this way, Muslims have, it appears, harmoniously created a fusion of Islamic and English legal tradition.

Muslims have not only sought to reform English law so as to take account of shari'a or their ethnic orderings, but have also sought reform in the opposite direction. If we turn to how Muslims have sought to reform fiqh, in light of English law and more broadly 'Western values', it is possible to identify two different tactics. Tactic one has involved Muslim scholars using neo-ijtihad to develop new forms of fiqh. As we have seen, some scholars like al-Alwani, al-

²⁸¹http://www.matribunal.com/procedure_rules.html (accessed 30th October 2013).

Qaradawi and Oubrou have exerted themselves to develop and establish a fiqh or jurisprudence for minorities, one that takes account of the minority status of Muslims, and the conditions under which the community finds itself in dar al-dawa. This development has allowed Muslims to be able to follow aspects of English law, when previously longstanding consensus/fatwas had suggested otherwise. The rulings by the ECFR that, subject to some conditions, female Muslim converts are not required to divorce their non-converting husbands, and that Muslims can embrace British or European citizenship (muwatanah) without this being a violation of shari'a, are cases in point. Other scholars, such as Ramadan and Ceric, depart company over the development of a 'minority fiqh', but, in their own ways, have also by way of neo-ijtihad sought to develop a fiqh to address contemporary challenges faced by European Muslims, using either traditional techniques such as *maṣāliḥ* and *maqasid*, or by re-modelling the Covenant of Medina so as to apply it in our contemporary times. It is difficult to evaluate the impact that each of these developments has had at the grassroots level. It is hoped that future research will address this.

Tactic two has involved especially Muslim youth becoming their own muftis. As self-appointed muftis they are able to reform as little or as much of fiqh as they wish. These Muslims tend to be largely self-taught in religion, and are quite eclectic in their use of source material. As part of the process of self-learning, they seek out legal opinions from a wide range of sources, including 'internet imams', from peers contributing to Islamic forums and discussion groups. Their heavy reliance on the Internet has led to them being labelled irreverently as 'google-sheikhs' in some circles. Yilmaz (2005b: 191) notes how some Muslims

are surfing a pool of 'unofficial madhhab laws' for solutions to everyday problems they face in English society, and terms this activity as 'inter-madhab-net'. Zaman (2008: 190-1) notes how the Internet (e.g. forums, discussion groups, 'ask a mufti-style' questions) has opened up avenues for 'venue-shopping' or even 'fatwa-shopping'. Within the heterogeneous category of self-appointed muftis, some are hostile towards traditional authority and established interpretations, marking them out as being less relevant in contemporary times, or for life in Britain; preferring instead to rely on personal judgments. Muslims from this group, to varying degrees, tend to use a variety of devices such as *darura* (necessity) *takhayyur* (selection), *talfiq* (amalgamation) and more radically 'neo-ijtihād' (individual reasoning), which does not necessarily conform to rules established by *usul al-fiqh*, in order to fit their beliefs to secular and modern environments. Reading the *shahada* before eating non-halal meat to make it shari'a-compliant, being at ease with free mixing of sexes, or even gay and Muslim are cases in point. This practise is controversial, and is regarded by large sections of Muslims as being unacceptable *bida' ah* (innovation). Some are even told that they do not have the right to call themselves 'Muslim'. It is clear that these 'Muslims' have moved away from ordering their lives strictly on 'textual' or 'scholarly' Islam, but do they still come within the outermost borders of 'lived' or 'everyday' Islam?

Looking at how Muslims have reformed their ethnic orderings, in light of shari'a and English law, it is possible to identify efforts here too. One tactic has involved younger British-born generations educating their parents, grandparents, and so on about what they feel is shari'a-compliant or demanded by English law. More

research is needed to draw out the impact of this tactic on customary practices such as FGM/FGC, forced marriages, dowry, kin, caste or clan discrimination, forms of gender inequality, including the prevention of women going to university or into the workplace. Another tactic has involved the establishment of community organisations to reform aspects of ethnic orderings. Besides the Anti-Tribalism Movement (ATM) whose work is based on tackling clan-based discrimination and disadvantage amongst Somalis, the Muslim Women's Network UK (MWNUK), founded in 2003, works to improve social justice and equality for Muslim women and girls.²⁸² Like ATM, the MWNUK was set-up by second-generation British-Muslims, and it uses English law as well as shari'a to achieve its mission. The MWNUK describes itself as,

[...] an Islamic feminist movement that uses the Quran's spirit of equality and justice to challenge human interpretations (based on culture and tradition) that discriminate against women and girls, to achieve equal rights and opportunities for all.²⁸³

Through recent campaigns it has targeted the practice of forced marriage, 'FGM', and 'honour' based gender violence. Responding to claims that forced marriages are a Muslim-specific problem, for years the Muslim Council of Britain has consistently condemned and raised awareness that the practice is not Islamic but a cultural phenomenon practiced by Asian communities in Britain including some Muslims (see Cesari 2009: 150). Recently, in 2014, it launched a new

²⁸² See for details their website: <http://mw nuk.co.uk/index.php> (date accessed 02/02/2014).

²⁸³ <http://mw nuk.co.uk/principles.php> (date accessed 02/02/2014).

campaign to tell Muslims who are unaware that FGM is un-Islamic, predates Islam, and by association is bringing the religion into disrepute.²⁸⁴

As we have seen, the goal of Muslims employing strategy one is to reform one ordering so as to take account of another. On reform a fusion of orderings is achieved, but limited to the extent of the reform. These changes can be tracked. For a perusal of statutes and case law, or fiqh and fatawas, or custom and cultural practices, renders them visible. The change that occurs when strategy two is employed is more difficult to see. Strategy two also involves a fusion of orderings, but this time something quite new is created, namely, hybrid living 'laws' or orderings. These phenomena however are hidden or rendered invisible if one adopts the tools of official legal science only rather than a plurality-conscious lens. This is because the new hybrid 'laws' that have emerged, to use Chiba's model, fuse 'official' and 'unofficial' laws. Before turning to strategy two, we also need to refocus our lens from how courts or other official agencies are dealing with claims of legal plurality to include how Muslims as 'productive legal actors' on the ground are coping with the fact that they find themselves, or their act, subject to multiple, overlapping orderings that coexist in the same space.

²⁸⁴ <http://www.mcb.org.uk/wp-content/uploads/2014/06/FGM-Islam-Leaflet.pdf>.

4.3.2 Strategy two: combining the norms of two or more orderings to create something new

Above, we briefly outlined how Muslims developed *angrezi shariat*, but there is more to the story of how strategy two is unfolding. Besides the example of *angrezi shariat*, Muslims have developed a multitude of hybrid and super-hybrid orderings, as many as there are functioning sub-groups within the community. For instance, it is not uncommon for Turkish Muslims in Britain to marry thrice; the civil ceremony and wedding feast (*dugun*) often follows the *nikah* (that is usually treated as a betrothal); paving the way for registration at the Turkish consulate. These Muslims are following a super-hybrid 'Anglo-Muslim Turkish Law' in Britain (Yilmaz 2004). What I call the triple-sandwich marriage solemnisation illustrates that British Muslim Turks in the diaspora are committed to three separate legal regimes: English, Turkish and Islamic.

The formulation of new hybrid legal systems involves not just Muslims combining discrete sets of rules, or laws, but the creation also of supporting dispute resolution fora, offering conciliation and arbitration both formally and informally to meet the needs of the group. By way of exploring this in more detail, let us take a look at a few examples of Muslim wives caught up in the web of legal pluralism cast in the shadow of English law that will also help us to see how this has come about.

We begin with the example of a (devout) Muslim wife, who has had a *nikah* and not a civil ceremony, but finds that her husband is refusing to give her a *talaq*. Where does she turn to? English law as we have seen does not recognise the *nikah*. If there is no marriage, there can be no question about granting a divorce. The case of *Uddin v Choudhury* is good authority that English courts will treat the

nikah as a valid contract when the dispute is over the mahr.²⁸⁵ There are also devices such as resulting and constructive trusts that have been developed by equity that could be used by judges to deal with property matters involving cohabiting couples in England and Wales; when one learns to their dismay the full repercussions of legal ownership being held by one party, rather than jointly, when the relationship breaks down. Nevertheless, the critical issue of a religious divorce remains. The wife in the scenario outlined finds that recourse to English law alone will not solve her problem. Since she is not prepared to ignore shari'a, or lose face and honour in her community by marrying someone else until she has obtained a divorce, she is stuck.

Besides the misunderstanding that the nikah is valid in the eyes of English law, there are a number of reasons why the wife in our scenario may have only had a nikah. Bano draws out that in many cases non-registration is due to women lacking 'power and position within their newly found marriages to successfully negotiate the formal registration of marriage' (2012: 163). Many Muslim women also trust or depend on promises made by the husband that he will comply with the injunctions of shari' a, or that a civil registration would follow, but which in reality is indefinitely postponed (see for details Bano 2007: 52).

Moving on to another typical scenario, say the couple had both a nikah and a civil ceremony, though an English court dissolves the latter, the former remains the prerogative of the Muslim husband. If the civil marriage is dissolved, but the religious marriage subsists, she finds herself in a 'limping marriage'. Badawi explains the predicament the wife finds herself in:

²⁸⁵ See in detail *Uddin v Choudhury* [2009] EWCA (Civ) 1205.

[she is left] hanging there, unable to remarry, because in conscience she does not want to challenge the law of Islam because she is a committed Muslim or because she is frightened as a Muslim from doing so. Also, socially she does not want to lose face and honour in her community by marrying someone else when she is still married in the eyes of God (1995: 77-8).

Although not a single Muslim to date has used the provision, the 2002 (D(RM)A) does offer the wife the option of petitioning the court to withhold the decree absolute until the religious marriage is dissolved. Nevertheless, the husband may still refuse to give a talaq. Again the wife finds that recourse to English law alone does not solve her problem.

In both scenarios we assumed that the wife knows what is possible by way of readdress under English law, often this is not the case. Muslims do often, though, occupy a disadvantaged position in English society owing to their socio-economic status, but also because of language barriers and a lack of qualifications (Modood & Meer 2010: 87). This means they are likely to face a number of barriers when attempting to access the English legal system to resolve their legal disputes. From not being able to pay legal fees to having their concerns understood.

We also made the assumption that the wife would seek readdress from a court as if this was the 'natural' course of events that she would follow. Historically, Muslims, but women especially, do not take recourse to courts when it comes to family disputes; instead, matters are dealt with extra-judicially (Menski 1993: 259; Yilmaz 2003). The underlying ethos that governs Muslim legal consciousness is that family disputes are best settled in private. There is a strong

presumption that washing one's 'dirty linen' in public can only bring dishonour and loss of face to the parties and their families, irrespective of the merits of the dispute in question. A solution achieved privately through mediation, with the help of elders or community leaders depending on the intensity of the dispute, is also likely to heal wounds and help parties move on; whereas, proceedings in a court that is set-up to impose decisions and lacks cultural expertise will exacerbate the difficulties (Pearl 1986: 32; see also Menski 1993: 255). Foblets (1994: 375) notes that Muslims in France and Belgium developed feelings of distrust and avoidance after learning that judges dealing with their disputes had a tendency to devalue Muslim norms and values, imposing instead Western standards that they sought to uphold. Muslims have had similar experiences in Britain as illustrated infamously by our discussion of *Chaudhury v Chaudhury* above; they have also learnt that the English legal system is not like the systems they had in their countries of origin, in Asia and Africa, which recognised personal laws.²⁸⁶

Outlining these factors on the one hand helps us to see that a Muslim wife is unlikely to seek recourse to English law when facing a family dispute. On the other, these same factors provide important cues for the reconstruction of unofficial Muslim dispute resolution fora. Even if the wife was to turn to English law, as we have seen, it will not provide a remedy, since in Menski's (2008b: 20) view it purposefully remains blind to unofficial Muslims laws to avoid clashes. The wife, then, has to find a way to ensure her divorce is 'Islamised' (Keshavjee 2007: 170). It is important to note also that many wives have found themselves

²⁸⁶ For a useful understanding of the operation of personal laws in Asia and Africa see Menski (2006).

in the scenarios we outlined above; in Britain and elsewhere in Europe, the US, and Canada. Some husbands deserted their wives with great impunity, refusing to grant religious divorces, whilst re-marrying themselves by way of nikah as shari'a allows controlled polygyny. Such actions created major difficulties for the wife, but also created great scandal affecting the reputation of the whole Muslim community.

Muslim scholars and community leaders felt they had to respond. For scholars like Badawi (1995: 78), it had to be in a manner that would resolve disputes 'without either breaking the sharia or the law'. In 1982, at a meeting in Birmingham's Central Mosque, representatives from 10 leading British Islamic centres came together and decided to make private arrangements by the setting up of the Islamic Sharia Council (ISC). Attendees felt they had to act since,

[...] sitting back and waiting for the civic local authorities to solve problems of the Muslim community does not present a positive response to the challenges facing Muslims (ISC 1995: 9).

So here we see another glimpse of Muslims as productive legal actors, ready to take care of their own affairs by developing a quasi-legal body that can provide 'practical viable answers to the challenges facing Muslims in the West' (ISC 1995: 3). After the meeting, a wider consultation with Muslim scholars hardened consensus, that:

[...] it is a must, in such cases, to establish such institutions to cater for the basic needs of the Muslim community'.²⁸⁷

²⁸⁷ <http://www.islamic-sharia.org/aboutus/> (accessed 4/02/14).

Besides resolving disputes referred to it based on Muslim family law,²⁸⁸ the ISC set itself the objective of promoting the lawful practice of the Muslim faith in the UK.²⁸⁹ In practice this meant that alongside dispute resolution it developed a fatwa department, and Islamic counselling service. In essence, the ISC models the London Beth Din, a rabbinical body for the United Synagogue that has been regulating the affairs of Jews in Britain since the early 18th century (for details see CSC 2009).

Based in Leyton, East London, the ISC is still today one of the most active shari'a councils in Britain – hearing around 50 cases a month. It is open to all Muslims, but makes rulings in light of the literalist and four major schools of Sunni Islam. 9 out of 10 cases are brought by women and involve mainly marital disputes. A large number of these cases concern divorce. Typically, a wife has obtained a civil divorce but the husband refuses to give a talaq, either because he does not recognise the jurisdiction of the English court or because he is trying to stop the wife from divorcing him or remarrying. One of the methods used by the ISC by way of which it tries to resolve the problem is mediation. Where an intransigent husband persists in his refusal to grant the wife a talaq, or fails to respond to repeated letters, the ISC can dissolve the marriage (*fasakh*). A *fasakh* can be granted on a variety of grounds including *dhirar* (harm or maltreatment of the wife) and *mafqood al-khabr* (desertion). Alternatively, the ISC can grant the wife a *khul'a*, but she must return the mahr to her husband, which in effect instantly dissolves the marriage. The wife receives a divorce certificate or *talaq nama*

²⁸⁸ The ISC outlines that its main function is 'to guide the Muslims in the UK in matters related to religious issues as well as solving their matrimonial problems which are referred to it by the Muslims of this country' (ISC 1995: 3).

²⁸⁹ <http://www.islamic-sharia.org/aboutus/> (accessed 04/02/2014).

from the ISC, and is free to move on with her life. The ISC says that the *talaq nama* is authoritative, and has been accepted in countries like Pakistan (ISC 1995: 19), but, as Bano (2012: 23) points out, it has no legal standing under English law.

To meet demand, other shari'a councils developed over the years in major conurbations that house large concentrations of Muslims. The Muslim Law Shariah Council (MLSC) was set up in 1985, and operates from the premises of the Muslim College in Ealing, West London. It comprises of 21 ulema and is affiliated with the MCB. Since its inception the MLSC has dealt with over 3000 Muslim family law disputes. It has also mediated cases involving other spheres of Islamic law, as well as Muslims from other European countries where there are no similar institutions (Shah-Kazemi 2001: 10). The late chairman, Professor Zaki Badawi, writing in 1995, attributed the success of the MLSC to its conciliatory rather than adversarial approach:

We seek bring people together, to reconcile them, rather than to create dissension between them (1995: 78).

When operating in its capacity as arbitrator rather than mediator, the MLSC adopts an inquisitorial approach since its primary aim is to 'discover the truth'. The qadi (Islamic judge) hears and tests the quality of the oral testimony of witnesses and in so doing fulfils the duty before God 'to ensure that he has come to decisions on the basis of all his endeavours to arrive at the truth' (Shah-Kazemi 2001: 38-9).

In recent years, a number of law firms have also entered the market – dispensing advice over how clients can successfully negotiate English and Islamic law.²⁹⁰ Attracted by the reality that British Muslim family law has ‘created a legal market in its own right’; these firms offer creative legal strategies, which bridge the gap between the different forms of law (Pilgram 2011: 769-72). The involvement of solicitors in the operation of hybrid laws, though, is not something new. The strict delineation of public/private spheres, where shari’a councils restricted their operation to the latter so as to avoid conflict with English courts, meant that the involvement of solicitors remained largely hidden (Bano 2012: 228).

It is not known how many shari’a councils there are in mosques or houses today. One report in 2009 estimates that there are at least 85, but the veracity of the claim has been challenged. They do not operate in a standard manner, and Muslims can, and do, seek out shari’a councils that offer them the maddhab or service that suits their needs. It is possible to identify examples, though rare, of a party changing from one shari’a council to another midway in proceedings, or approaching other councils if the outcome is perceived as unsatisfactory. In the process of ‘privatising justice’ (Shah 2005: 358), Muslims have not only developed self-help mechanisms that operate on the basis of shari’a. Tas (2014) describes the operation of the secular Kurdish Peace Committee, established by gurbet Kurds in North London, that settles disputes with reference to traditional Kurdish values and cultural expectations. Disputes are also often settled amongst Somali and South Asian Muslims by way of clan or biraderi elders, sometimes

²⁹⁰ One example is Duncan Lewis Solicitors, which in 2012 under the leadership of Aina Khan launched an Islamic and Asian Division that seeks to provide ‘innovative Islamic solutions under English law’. For details see http://www.duncanlewis.co.uk/Islamic_Law.html (accessed 09/10/2014).

involving more formalised village or panchayat type committees but, to date, there is an absence of field research regarding such developments.

Shari'a councils have come under mounting public and political scrutiny since the (in)famous lecture given by the then Archbishop of Canterbury, Dr Rowan Williams in 2008.²⁹¹ Williams (2008) had argued that people, not just Muslims, should not be forced to choose between the stark realities of loyalty to religion/culture or loyalty to the state. In contrast to the message of Trevor Phillips to Muslims that we saw earlier, he felt there was a danger in the approach to law that simply said:

[...] there's one law for everybody and that's all there is to be said, and anything else that commands your loyalty or allegiance is completely irrelevant in the processes of the courts.²⁹²

To allay the danger of 'a stand-off, where the law squares up to people's religious consciences', he suggested constructive accommodation of some aspects of shari'a.²⁹³ What Williams had in mind is that Muslims could choose to have marital disputes and financial matters dealt with by state-recognised shari'a 'courts'. In his view, the adoption of parts of Islamic law would also help maintain social cohesion, but he argued that this relies on shari'a being better understood. Williams' speech drew a wide range of reactions. Besides criticisms based on the assertion that there should be 'one law for all' some queried whether Muslims even want this. Concerns raised much earlier by Badawi (1995: 78) about the dangers of state-sponsorship of shari'a councils, the distortive

²⁹¹ On the mixed responses to the lecture see in particular Millbank (2010); Shah (2010).

²⁹² 'Sharia law is unavoidable'. BBC news report, 7/02/2008 (available at <http://news.bbc.co.uk/1/hi/uk/7232661.stm> accessed 13/02/13).

²⁹³ Ibid.

effects this may have, were being repeated by Muslim spokespersons. Keeping such bodies on an unofficial level, in their view, provides an important degree of autonomy. As we have seen, inaction by the state was only partly the reason for the development of these self-help mechanisms. Others wanted to know how would the state decide which understanding of shari'a law it would apply or endorse.²⁹⁴ It was pointed out that the Muslim community is not homogeneous, support for one body or version of Muslim family law may mean others are left behind, creating tensions in the community. Some groups, especially those focused on rights, expressed concerns that the introduction of a Muslim law would come at a detriment to vulnerable sub-minorities such as homosexuals, women and children. Developing this point, some honed in on how (unofficial) shari'a councils discriminate against vulnerable women. Pointing to their patriarchal nature, over-emphasis on mediation including 'indefensibly' when domestic violence has occurred or when the 'wife' had already obtained a civil divorce, and how the wife has to 'buy her freedom' by the return of mahr or by forsaking her claim to child custody. These objections form a small, but important, component of a much larger discussion, namely that shari'a is incompatible with gender equality, democracy and, more broadly, the values of Western civilization.

Citing concern for Muslim women, who in her words 'are suffering a system which is utterly incompatible with the legal principles upon which this country is

²⁹⁴ Over some of the difficulties of which understanding of Islamic family would apply see also Poulter (1990b: 158).

founded’;²⁹⁵ Baroness Cox introduced a Private Members Bill in 2011-12 to restrict the (perceived) activities of shari’a councils.²⁹⁶ The Bill contained a range of measures, including the creation of a criminal offence for anyone falsely claiming or implying that shari’a councils have any of the powers or duties of a court, or in the case of arbitration, to make legally binding rulings without any basis under the 1996 Arbitration Act²⁹⁷ and, to disallow any arbitration that treats a women’s testimony as being worth half of her husbands.²⁹⁸ Accompanying the exactitudes was a more general rallying call by Cox that,

Equality under the law is a core value of British justice. My bill seeks to preserve that standard.²⁹⁹

Supporters of the Bill included Christian and secular bodies; several organisations with minority membership that largely work to diminish the role of religion in public life, concerned especially on the impact this has on the lives of women; centre and far-right opponents of shari’a including political parties UKIP and BNP, street protest movement EDL, and think-tank Civitas, Centre for Social Cohesion (see for details Grillo 2015: 163-226).

The Bill had a second reading but went no further.³⁰⁰ It was reintroduced, with few changes, and in October 2015 had its second reading.³⁰¹ Though there are

²⁹⁵ ‘Baroness Cox: ‘if we ignore wrongs, we condone them’. Independent online, 23rd October 2011 (available at <http://www.independent.co.uk/news/people/profiles/baroness-cox-if-we-ignore-wrongs-we-condone-them-2299937.html> (accessed 04/03/13)).

²⁹⁶ Arbitration and Mediation Services (Equality) Bill (HL) 2011-2012.

²⁹⁷ Ibid, s.7.

²⁹⁸ Ibid., s.1 (2)(12a).

²⁹⁹ ‘Bill limiting sharia law is motivated by ‘concern for Muslim women’. The Guardian online, 8th June 2011 (available at <http://www.theguardian.com/law/2011/jun/08/sharia-bill-lords-muslim-women> (accessed 04/03/13)).

³⁰⁰ The committee stage of the Bill was never scheduled, which is one method used by government to stop the progress of a House of Lords Private Members Bill that it does not support. In 2014, Cox introduced again the Arbitration and Mediation Services (Equality) Bill (HL) 2014-15, but this Bill never reached a

some aspects of the Bill, notably, the extension of the public sector equality duty to include ‘informing individuals of the need to obtain an officially recognised marriage in order to have legal protection’, that would have beneficial effects, yet, other measures are alarmist,³⁰² and appear to be attempting to address a phantom pain. A review of the available empirical evidence reveals no evidence of shari’a councils falsely claiming (or purporting) to have powers equivalent to English courts.³⁰³ Service users also are overwhelmingly women and they *choose* to use shari’a councils.

This is not to say that we become complacent when it comes to establishing, and if required through law, to protect the freedom to choose. As we have seen, there is pressure on the wife to ‘Islamise’ her divorce. Some women may feel pressured into approaching and then accepting the rulings of shari’a councils that do not operate under the 1996 Arbitration Act – either because they fear ostracism, excommunication or even reprisal. There is also the issue of bargaining within a patriarchal system that means that choice or voluntariness is constrained. As Sandberg & Cranmer (2015) note this mischief is not addressed by Cox’s Bill. Concerned about the genuineness of consent to the jurisdiction of ‘tribunals’ (whether religious or secular) that operate outside the state legal system, they suggest their own draft Bill: Non-Statutory Courts and Tribunals (Consent to

second reading and duly lapsed on the 30th of March 2015 when Parliament was dissolved ahead of a general election.

³⁰¹ Arbitration and Mediation Services (Equality) Bill (HL) 2015-16.

³⁰² Some of the criticism or accusations levelled against shari’a councils can also be read as being part of a wider alarmist tendency when it comes to Muslims or shari’a. The government’s new counter-extremism strategy requires schools and universities to prevent radicalisation, including by way of promoting ‘British values’. For details see ss.25, 31, 32, of the 2015 Counter Terrorism and Security Act.

³⁰³ A report by Cardiff University in 2011 found no such claim: Douglas et al (2011).

Jurisdiction) Bill. In their view, a definition of consent for the purposes of such an 'Act' could be modelled on the approach taken in the 2003 Sexual Offences Act.

For a long time acculturalists, feminist scholars, and policy-makers have been concerned about the state sponsorship of a 'cloak of oppression', that is, the undesirable marginalising effects of empowering an ethnic group on vulnerable members of that group, particularly women.³⁰⁴ The focus on ensuring there is genuineness of consent, as this study also argues, goes some way to address the concerns that many quite legitimately have about empowering ethnic or religious groups.

The concern for Muslim wives has also led to responses from within the Muslim community to address perceived inequalities and ill treatment of especially women. Aside from calls that the *nikah* be given legal validity,³⁰⁵ Muslims have also expended energy over the years to develop a model marriage contract that could help to protect women. In 2008, following a wide and lengthy consultation with religious scholars and groups like the MCB, MWNUK and Imams and Mosques Council, the Muslim Institute produced the model 'Muslim Marriage Contract' (MMC), with the objective that it would help secure 'equality and justice in British Muslim families'. The MMC outlines in clear terms that it does not constitute a valid marriage in the eyes of English law. It does however provide written proof of the marriage and *mahr*, and grants a delegated right of divorce from the husband to the wife (*talaq-i-tafwid/esma'*). Other terms like the husband waiving his right to polygyny can also be inserted. It also enshrines that

³⁰⁴ For example, see Okin et al(1999); Phillips, (2003); Deveau (2006).

³⁰⁵ In recent years calls for recognition have been made by Mufti Barkatulla of the Islamic Sharia Council, Dr Ghaysuddin Siddiqui of The Muslim Institute, Usama Hasan, imam, masjid al-Tawhid, and Cassandra Balchin of the Muslim Women's Network-UK.

a wali's (guardian) consent is not something that a female needs to obtain before she has a nikah. In other words, it is not requirement for a valid nikah. In response to major disputes that may arise between the couple, the MMC states that attempts be made for these to be resolved with the help of the family, or community leaders, and only if this does not work, by a shari'a council before readdress is sought in an English court. The suggestion is illustrative of the importance placed by Muslims to deal with matters privately or extra-judicially. Suggesting an alternative approach, on the 9th of January 2014, Baroness Warsi and Aina Khan launched the 'Muslim Marriages Project' (MMP).³⁰⁶ The project is described as being aimed at addressing the many legal and societal issues caused by unregistered Muslim marriages. According to Warsi, to treat these issues two routes as solutions need to be explored. The legal route would involve legislation, compelling Muslims to register their nikah marriage. The other route focuses on the community's role, and would involve members raising awareness of the problems of unregistered marriages amongst Muslims and a drive to encourage imams to register mosques. Since the launch of the MMP, alongside efforts to capture data on the prevalence and causes of unregistered marriages, Khan has developed a flowchart to assist mosque and marriage venue personnel to register their buildings for the purposes of solemnising marriages.³⁰⁷ What remains unclear, though, is if the envisaged legislative reform would solely apply to Muslims or would also impact other ethnic minority marriages, for example the Hindu and Sikh *vivah*, also taking place across Britain. To what extent, if any,

³⁰⁶ Aina Khan is Head of the Islamic and Asian division of Duncan Lewis Solicitors. The project builds on the work of the Ministry of Justice's Muslim Marriage Working Group that was set up 2011 to look at unregistered marriages.

³⁰⁷ Khan has also been involved in raising awareness of her project that has involved road shows, university lectures, and a roundtable discussion at the House of Lords.

these other communities have been consulted. It also appears to ignore, that for a variety of reasons, many Muslims choose not to have a civil marriage but under the proposed scheme would be forced to register their nikah marriages.

4.3.3 Strategy three: adherence to one ordering and avoiding the other(s)

Individuals acting out the third strategy seek to follow one particular ordering, dispensing or avoiding interaction with the other(s). This can be analysed as occurring in multiple directions. Avoidance may relate to the personal, ethnic or territorial law(s). Here, too, we can identify different tactics that have been employed by Muslims. These provide further illustrations of the heterogeneity within the Muslim community.

Some Muslims have undertaken hijrah (emigrated) to live in *dar al-Islam*. Following a transnational cousin marriage some South Asian Muslim women, for example, have in accordance with rivaj left Britain to live with their husbands. Illustrating their allegiance to their ethnic identity, some (first generation) Muslim immigrants (often on retirement) have returned to their country of origin, piercing 'the myth of return'. There are anecdotal accounts of parents taking their daughters back 'home' at or around the age of puberty, (or when pre-marital relationships have come to light), so that they can grow up in an environment where *izzet* can better be maintained. The decision may also involve a role reversal of family re-unification, as the father may stay on in Britain to send remittances. Another, different, strand of emigration that has received intense media attention in the past year relates to Muslims leaving Britain to join jihadist/terrorist groups. Recent statistics published by the Home Office suggest 750 UK-linked Muslims have travelled to take part in the Syrian conflict. Some, including British-born schoolgirls, are now believed to have joined Daesh/ISIS.³⁰⁸ A small number of British Muslims have left to join the

³⁰⁸ HM Government (October 2015) Counter-Extremism Strategy, Cm 9148, p.10.

Kurdish People's Protection Unit (YPG) to fight ISIS, as well as to help Syrian opposition forces. For all of the above, in the absence of detailed research it is difficult to pinpoint the extent normative influences gave rise to the decisions made.

Among Muslims who have chosen to remain in the UK, it is also possible to identify a variety of tactics used by them that have the goal of dispensing or avoiding one or more orderings. Some Muslims have dispensed with shari'a altogether, by leaving the fold of Islam (see Cottee 2015). Apart from those members who have openly or 'officially' made this public, there are others who have done so 'unofficially', choosing not to 'come out' for fear of ostracism, excommunication, or violence. Established in 2007, the Ex-Muslim Council of Britain says that it assists around 350 people a year who have faced threats for leaving Islam from family and 'Islamists'.³⁰⁹

Some Muslims appear to be avoiding English law. Sites where legal pluralism in conflict cannot be resolved with the employment of strategy one or two has led to some Muslims avoiding English law.³¹⁰ In relation to polygyny, a very small number of British Muslims are engaged in such unions. Most of these cases involve Muslims employing strategy two, namely, registering one nikah marriage, and keeping the other unregistered (see Pearl and Menski 1998: 277; Yilmaz 2001), or, in response to the immigration ban of second wives or due to financial circumstances, by undertaking 'commuter polygamy' where they spend

³⁰⁹ For details see 'Losing their religion: the hidden crisis of faith among Britain's young Muslims'. The Guardian online, 17/05/2015, can be accessed at <http://www.theguardian.com/global/2015/may/17/losing-their-religion-british-ex-muslims-non-believers-hidden-crisis-faith> (accessed 18/05/2015).

³¹⁰ The continued use of khat, practices such as FGM, honour crimes, and polygyny (involving two unregistered nikahs), are potential examples, but detailed research is required to unpack the phenomena.

some time abroad each year with wife number two. But there are cases where Muslims are not registering their nikahs marriages at all. Shah-Kazemi's study of women using the MLSC in Ealing revealed that 27% of Muslim marriages were not registered. More recently, Aina Khan (2014) has claimed that 80% of marriages are unregistered amongst young Muslims in Britain.³¹¹ Menski (2008b) has also suggested the development of a 4th stage in the process of angrezi shariat, whereby some Muslims are deliberately refusing to follow English law, choosing instead to follow Muslim laws alone. However, far more expansive empirical research is needed to understand why some Muslims are deciding not to register their marriages. To obtain a more fuller understanding of the decisions Muslims are making when it comes to marriage solemnisation, the impact that personal, ethnic and the territorial laws are having on their decisions, as well as to draw out other explanatory factors we now turn to the responses of 59 Muslim participants that this study engaged to outline some answers.

³¹¹ For details see:

[http://www.duncanlewis.co.uk/news/Aina_Khan_and_Baronesse_Warsi_kickstart_Muslim_Marriage_Project_\(14_January_2014\).html#sthash.At2PrbDT.dpbs](http://www.duncanlewis.co.uk/news/Aina_Khan_and_Baronesse_Warsi_kickstart_Muslim_Marriage_Project_(14_January_2014).html#sthash.At2PrbDT.dpbs) (accessed 06/02/15),

Chapter 5: Understanding choice outcomes

5.1 *Towards a thick description of Muslim decision-making*

Our analysis has revealed multiple strategies and tactics that have been employed by Muslims in response to a situation of internormativity. From efforts to reform orderings to the creation of new trans-local hybrid living laws and identities to avoidance or even dispensation of particular orderings. The negotiation begins with the individual and their conscience, before negotiations between individuals and others including the state occur. For us to obtain a ‘thick descriptive’ (Ryle 1971: 6) understanding of the negotiation that is taking place in the individual’s mind, this study left the armchair and went into the field.³¹²

5.2 Research methodology

It is the ‘voice’ of Muslims that the fieldwork sought to bring out. To understand through their words how they read and negotiated their lived reality against a backdrop of internormativity. For this reason the method of interview is especially useful, for it allows the researcher to focus on the respondent’s own expression of experience (Denzin & Lincoln 2011: 10). Oral interviews moreover give respondents the space to share their personal life histories against the backdrop of particular socio-cultural contexts and in this way human agency is not reduced to superficial patterns collocated with discrete social categories like ‘race’ and ‘gender’ (Maynes et al 2008: 16-20).

³¹² Over the years the term ‘thick description’ has come to be used in different ways by researchers; here it is used to portray that besides ascribing intentionality to behaviour attention must also be given to absorbing the context in which the behaviour occurred. For details see Ryle (1971).

The interview began with respondents being asked the form(s) of marriage solmenisation they had chosen to have before moving on to a series of questions probing the reasons for their choice. All participants were asked the same questions, but to obtain clarification or, importantly, to explore unexpected opportunities presented by the answers given, other questions peculiar to the respondent were also asked. This was done, for example, when one respondent revealed that they were party to a polygynous union. In another case, the respondent had converted to Islam to facilitate a nikah. While maintaining semi-structured questions, at some points the interview became non-directive, allowing respondents more freedom to share their thoughts and in this way the research was better able to ensure that a rich and thick response emerged. Overall, the conversational approach worked well, and generated a wealth of information.

In several ways the research was explorative, for in recent years much attention has focused on Muslims not registering their marriage yet the prevalence and explanations for the practice have largely been based on anecdotal evidence. A primary aim, then, of the research was to identify the extent of non-registration amongst the sample and to record explanations for why this is occurring. In addition to understanding the significance of shari'a, urf and English law to the individuals involved, the investigation also sought to bring out how other dimensions of difference (like age, gender, social class, immigration status, and residential location) possibly impacted their decisions. The objective was not to find patterns or definitive links that would reduce human agency to social status, but to show how any analysis of Muslim decision-making must look beyond an

analysis of an intersection of normative orders to include other dimensions of difference as well as the person's motivations, aspirations and needs. In other words, it is not just about 'who they are', but also about 'what they want', and though there may be a significant overlap there may also be significant divergence.

In total, 166 individuals were engaged. In my presence all respondents completed a questionnaire consisting of a series of largely closed-ended questions.³¹³ Being present allowed me to answer questions they had, address clarifications sought, and to reassure participants that the information would be treated as strictly confidential.³¹⁴ Engagement began with individuals studying at SOAS, University of London and through the use of the snowballing technique connections were made and others came to constitute the sample group.³¹⁵ The fieldwork was carried out over a period of 18 months from 2012 to 2014 and all interviews took place at universities in London, either at SOAS, University of London, Queen Mary, University of London, or at the Institute of Education, University of London. Completed questionnaires were sorted into various piles,³¹⁶ separated according to age,³¹⁷ gender,³¹⁸ social class,³¹⁹ nationality,³²⁰

³¹³ See 'Questionnaire 1: Gateway Criteria' in appendix.

³¹⁴ Participants were informed of the strict ethical code of conduct researchers at SOAS, University of London, are required to comply with. Some respondents were themselves research students and therefore had a good understanding of the process. Written consent was obtained from all participants. Some of the information being sought like immigration status or parent's occupation was very sensitive and therefore some participants either declined to participate, or left the question(s) unanswered.

³¹⁵ Where there was a shortage of respondents efforts were made to forge new contacts and to follow up new connections.

³¹⁶ The dimensions of difference were heuristically selected.

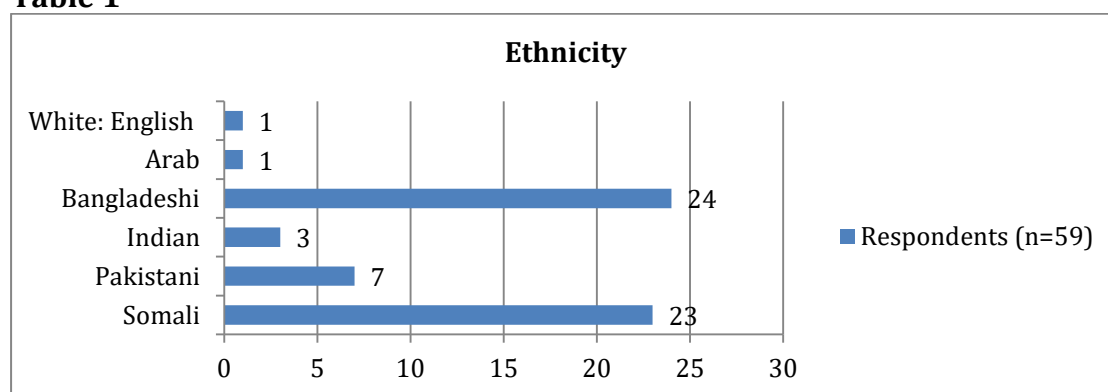
³¹⁷ Respondents were sorted into the following age categories: 18-25; 26-33; 34+.

³¹⁸ Respondents were sorted into the following gender categories: male; female.

³¹⁹ Respondents were sorted into the following social class categories: middle class; working class. Individuals were asked to self-identify, but given the possibility of the mis-match between a respondent's 'objective' social class and how they perceive themselves, they were also asked to provide their occupation and if they were a student then their parent's occupation (the 'main breadwinner' or primary

and residential location.³²¹ These were regularly reviewed, and when it became apparent that there was a shortage of respondents in one group efforts were made to forge new contacts and to follow up connections provided either by the respondents, informants,³²² or gained independently. Following perceived ‘correlative hints’,³²³ in depth interviews with 59 individuals occurred.³²⁴ The sample profile is outlined below.

Table 1



provider). The study used National Readership Survey (NRS) social grades, which uses the chief income earner’s occupation, to help classify respondents ‘objectively’. The table below illustrates the grade classification:

Grade	Social Class	Chief Income Earner’s occupation
A	Upper middle class	Higher managerial, administrative or professional
B	Middle class	Intermediate managerial, administrative or professional
C1	Lower middle class	Supervisory or clerical and junior managerial, administrative and professional
C2	Skilled working class	Skilled manual workers
D	Working class	Semi-skilled and unskilled workers
E	Non-working	Casual or lowest grade workers, pensioners, and others who depend on the welfare state for their income

In some ways, the classification was not relevant as how individuals perceived themselves and the choices they made were equally relevant for our purposes since the research wanted to show how dimensions of difference, whether real or perceived, impact how people make decisions.

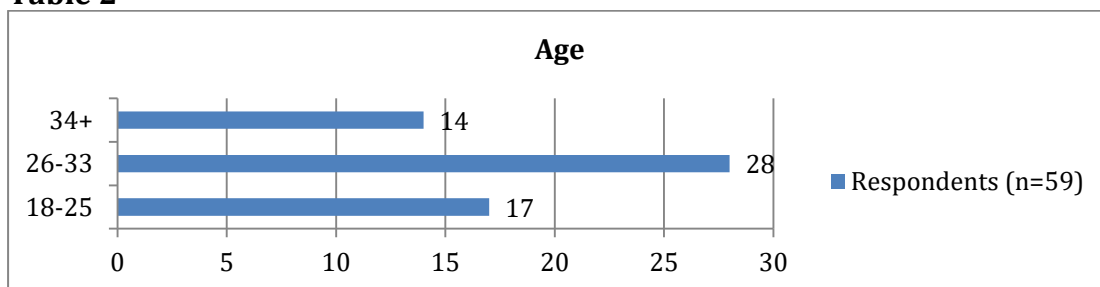
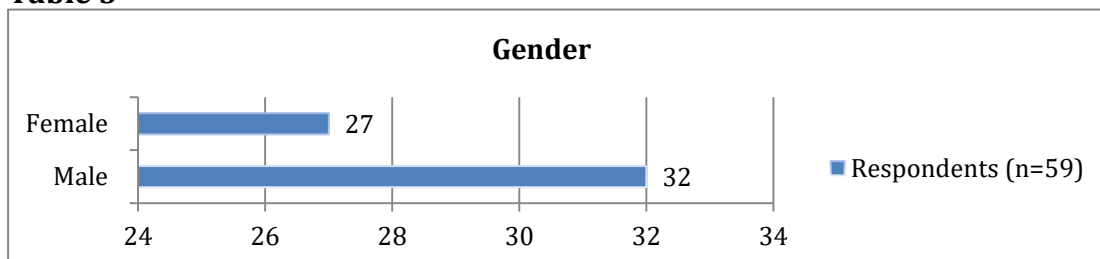
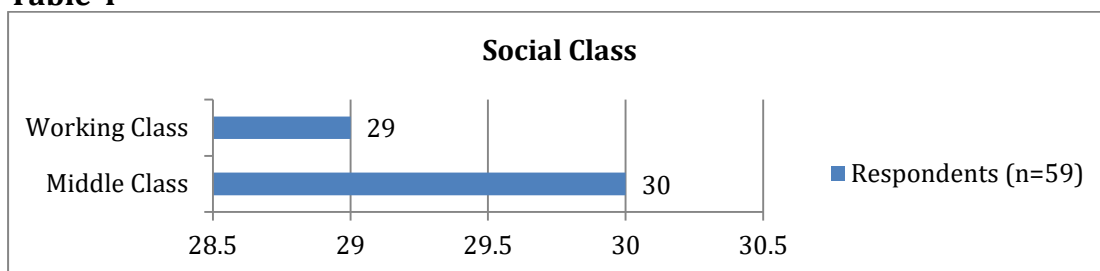
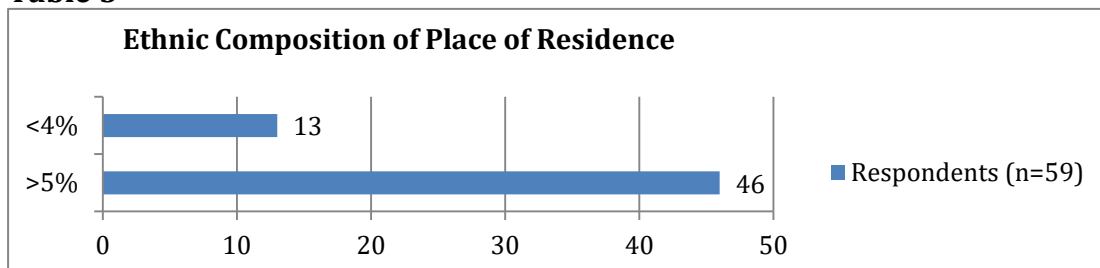
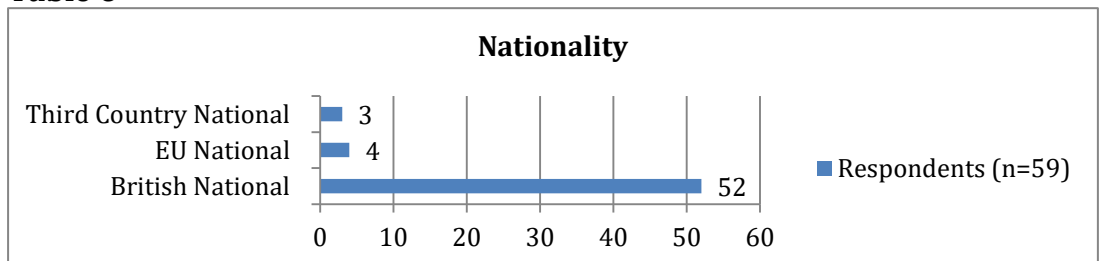
³²⁰ Respondents were sorted into either: British nationals, EU nationals and third country nationals.

³²¹ Respondents were sorted into categories where they were either resident in a location with less than <4% or greater than >5% of their ethnic groups’ population.

³²² Three Somali-led organisations were especially helpful with regard to forging contacts and to make connections with Somalis: Ocean Somali Community Association (OSCA), Tower Hamlets Somali Organisations Network (THSON), and the Council of Somali Organisations (CSO).

³²³ On the usefulness of correlative hints when conducting fieldwork see Tufte (2010: 6).

³²⁴ See ‘Questionnaire 2’ in appendix.

Table 2**Table 3****Table 4****Table 5****Table 6**

The questions used were semi-structured and open-ended. Insights from informants helped to shape the questions that were asked. All individuals self-identified themselves as 'Muslim' and had been or were currently married. Respondents were also selected on the basis that their marriage had taken place in Britain, and not abroad. Where a respondent had divorced and since remarried they were asked to discuss their present marriage. Each interview ranged between 1-2 hours and was subsequently transcribed with the permission of the respondent. All participants were assured of anonymity for their accounts and have been given pseudonyms (that correspond to their gender and that are typically found amongst their ethnic group) in this study.

A conscious effort at all stages was made to minimise bias and potential distortion. One concern related to perceptions that participants may have had about me as the researcher, for perceptions can significantly influence how participants respond.³²⁵ On the one hand, I was perceived as an 'insider' since I was Muslim, on the other hand, for the majority of participants I was to some extent also an 'outsider' since I was not a member of their ethnic group or someone who shared fully their cultural background. Being perceived as a fellow Muslim had advantages, but also opened-up the possibility of respondents worrying about how I would perceive their 'Muslim-ness' in response to what they may reveal. As part of a reflexive approach,³²⁶ I would check to see if the respondents were giving answers that they thought may please rather than what they actually believed, experienced, or knew. Several participants also wanted to

³²⁵ See for example Thomas & Peterson (2015: 18).

³²⁶ It was important to keep a reflexive diary in which I recorded my interests and values, to see how these may influence my methodological decisions and logistics of the study. On the importance of keeping a reflexive journal see Lincoln & Guba (1985). On the benefits of reflexivity see Koch & Harrington (1998).

know my view of the questions asked, but to minimise influence responses were avoided without compromising trust. Respondents were told that we could discuss my views after the interview was completed.

5.3 Observations

In relation to the form of marriage solemnisation they had, as well as accompanying ethnic rituals in the form of ceremonial events, our sample of Muslims illustrated as a group awareness of five different options:

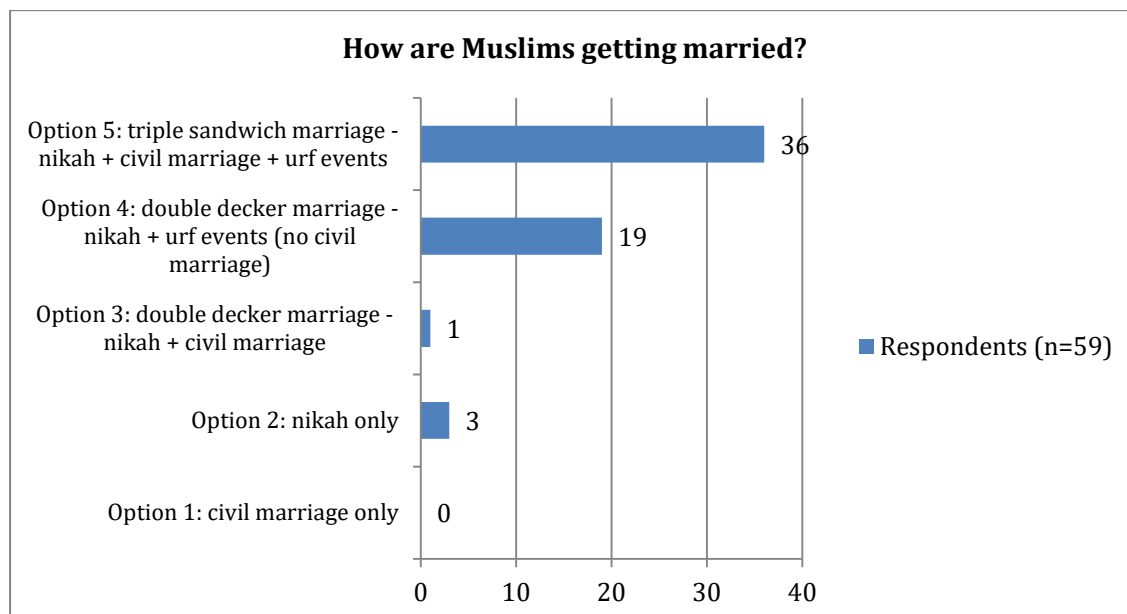
1. a registered civil marriage as laid down by English law;
2. a nikah followed by the marriage banquet (*walimah*) as laid down by doctrinal shari'a;
3. a hybrid combination of the above two, forming a 'double-decker' marriage, in accordance with 'angrezi shariat';
4. a nikah that is accompanied by ethnic rituals in the form of ceremonial events like mehndi³²⁷ or donis³²⁸ that are centred on the maintenance of honour and avoidance of shame, and;
5. a nikah accompanied by ethnic ceremonies plus a civil marriage (we could call the tri-combination a 'triple-sandwich marriage') that is done in accordance with a super-hybrid version of living law like anglo-shari'a-rivaj or 'anglo-somali-shari'a'.

³²⁷ The term refers to traditional and ritualistic ceremonies conducted by South Asians. They can vary in number, elaboration, and often take place pre-wedding but can also happen at the same time or post the wedding. Each community celebrates the ceremony in different ways according to their own familial or biraderi norms, and are often heavily centred on the maintenance of honour (*izzet*) and prevention of shame (*sharam*).

³²⁸ For Somali's a key ritual is *donis* in accordance with *heer* (tradition). *Donis* involves the formal asking (even begging) of the hand of the bride by the elders of the groom's family or sub-clan. Usually this happens during or after a lunch feast that is arranged between the parties. Speeches are exchanged by the representatives of both families. It is seen as especially important that a blessing is given by the maternal uncles of the bride. If the union is agreed, this is followed by *sooryo*, namely, a sizeable amount of money is exchanged amongst those present (and when involving diasporic Somalis can be sent to relatives back in Somalia). Dozens of people usually get a share of *sooryo*, and the importance of *sooryo* is evidenced by the fact that people talk about it for months (even years) after the wedding.

5.3.1 How are Muslims getting married?

Table 6 below illustrates the results.



Not a single respondent said that they had undertaken a civil ceremony only, or a 'registry marriage', a term used by some respondents. When a civil marriage had taken place it was either part of a double-decker or triple-sandwich arrangement. In total, three respondents (or 5.1%) had arranged their marriage in accordance with option 2, one respondent (or 1.7%) in relation to option 3, nineteen respondents (or 32.2%) in relation to option 4, and thirty-six (61%) had opted for option 5.

55 respondents (or 93.2%) completed their marriage with ethnic rituals in the form of ceremonies. All 59 respondents (or 100%) had a nikah. This suggests that in terms of normative influence shari'a followed by urf had most impact on the decisions of our sample. The prevalence of ethnic ceremonies illustrates the extent urf norms are part of the lives of Muslims. Often overlooked, failure to adequately comply with ethnic rituals like *donis* can jeopardise the prospect of

marriage itself or lead to violators being ex-communicated.

5.3.2 How many did not register their marriage?

Before turning to examine how many Muslims did not register their nikah, the responses from the sample tell us that 2 out of every 3 Muslims do register their marriage. Combining options 1, 3, and 5 reveals that thirty-seven respondents or 62.7% had registered their marriage.

Combining those that had opted for either option 2 or 4 tells us that 22 respondents (or 37.3%) had not registered their nikah marriage. There was however significant variation among ethnic groups. Among Somalis the figure was much higher: from the 23 respondents who identified themselves as Somali 16 (or 69.6%) had not had a civil registration. From the 24 respondents who identified themselves as Bangladeshi, 4 or (16.7%) chose not to have a civil registration. The figure among Pakistani respondents was higher: 2 (or 28.6%) had not had a civil registration. Hamza, our only Arab respondent, and Andrew, our only 'White: English' respondent, registered their marriage.

Looking at the age profile of Muslims who had not registered their nikah we see that the majority (15 of the 22 respondents or 68.2%) were between the ages of 18-25. In contrast, only 5 (or 22.7%) were between the ages of 26-33 and 2 (or 9.1%) were above the age of 34. Although predominantly a feature among young Muslims and thus lending support to the view that this is a newer generation trend, the results reveal that non-registration is something that exists across the age spectrum.

More male respondents reported that they were party to only a nikah marriage

that had not been registered than female respondents: 14 out of 32 male respondents (or 43.8%) compared to 8 out of 27 female respondents (29.6%) did not have their nikah marriage registered. It was also the case that more respondents who defined themselves as, and indeed were according to the NRS social grading system, as 'working class' as opposed to 'middle class' had a nikah marriage that was not registered: 13 out of 29 'working class' respondents (or 44.8%) compared to 9 out of 30 (or 30%) of 'middle class' respondents.

Finally, nearly all of the 22 respondents who did not have their nikah registered were British nationals: 21 (or 95.4%). Only 1 respondent who identified themselves as an EU national had not registered their nikah. All respondents who identified themselves as third country nationals had registered their nikahs, seeing it as necessary to secure their right to remain with their partner in Britain.

In the final analysis, based on the dimensions of difference explored, it seems that the most likely person not to register their nikah is a male Somali, between the age of 18-25, who is working class and resident of a town where the demographic profile is such that at least 5% of the population is his own ethnic group. All of the 22 respondents said that not registering their marriage was their choice. However, one respondent said that since the nikah she had expressed the desire to have her marriage registered but her 'husband' was not in agreement.

5.4.4 Examining the reasons for the variety of current social practices

We now turn to a closer examination of the information revealed by the

interviewing. Beginning with option 2, three respondents had opted to only have a nikah and a low-key *walimah*. The reasons provided varied. Adam expressed that a nikah was sufficient and thus anything else was simply extra and in his view unnecessary. In his words,

Following Islam is the most important thing and that means having a nikah and a walimah. Anything else is unnecessary. My wife agreed and I don't see a reason for having a registry marriage [...] we wanted to keep things simple and private and that is the example given to us by the prophet. [Adam].

The other two respondents provided a different reason for only having had a nikah. Both respondents were students and had met their partners at university. Farah met her partner in the first year of university and quickly the relationship developed but both parties did not want to break the injunctions of shari'a by having a relationship outside marriage. In her words,

Having a relationship outside shari'a is a major sin. I know lots of girls who are doing that but I didn't want that. I knew he was right for me, so it was a choice of either getting married or not seeing each other. [...] when we finish university we will tell our parents [...] and we feel that it is the right step. We have got to know each other much better and we are growing together. I think it will be fine and we can do things again with the traditional ceremonies. [Farah].

I asked Farah if she would have a civil ceremony and she replied that in time they both planned to do so. The other respondent came from a single parent household and revealed that her mother was privy to the relationship. She too had met her partner at university and for her the nikah symbolised their commitment to each other. It allowed them to see each other without feelings of guilt being present and she also revealed that it enabled her to get to know her

'husband' and to 'save up money' before she and her mother 'went public'.

I didn't want to have an arranged marriage but my faith really doesn't allow me to see guys outside marriage. I wanted to know [my partner] better, and not feel guilty about my feelings for him [...]. I want to be in a good place with him before we tell other members of my family. [...] My mother married young and because she had an arranged marriage she didn't really know my father and so things didn't work out for them. [Jamila].

These cases seem to suggest that a small number of Muslims are testing out relationships without violating the injunctions of shari'a: for them a nikah enables them to freely mix or even cohabit with their partner. Both of our women respondents felt they were 'married' when pressed but at the same time not having a registered marriage or going fully public meant that their cognisance of 'being married' was not entirely complete. During the interview with Jamila, she revealed knowledge of another girl that had had a nikah but not told her parents, and she was sharing a room at the university halls with her 'husband'. Unfortunately this person declined the invitation to participate in this research study. Whether the arrangement was motivated by her desire to test out the relationship is not known, but some Muslims are testing relationships within the bounds of shari'a and if the relationship bears out, they are deciding to take the next steps of registering their nikahs and/or informing family. It must be emphasised that making family privy triggers the need for the couple involved to take account of familial and ethnic norms related to the ritual of marriage. If this is triggered too early, concerns over honour (*izzet*) can translate into danger for a blossoming relationship or put pressure on the couple to marry when they are not ready. It is hoped that more, and extensive, research in the near future

will be conducted that looks at this phenomenon. What can be said here, though, is that compulsory registration of the nikah as is being pushed by some campaigners would in essence penalise these Muslims who wish to test out the relationship within the bounds of shari'a before they take the next steps. In the pursuit of protecting women from unscrupulous 'husbands' and what flows from non-recognition of the nikah we must not overlook that many women for a variety of reasons are choosing to have an unregistered nikah, including for the reason that they wish to see how the relationship goes before taking this important step.

Turning to option 3, only one respondent, with what seem quite unique circumstances, choose to have a nikah and civil registration. Hassan revealed that his partner was from a different tribe which posed a major obstacle that was exacerbated by the fact that he had arrived in Britain at the age of 14 as a refugee, and thus had no immediate family members who could liaise with his prospective partner's family. In his words,

My close family isn't in Britain so there was nobody who could really talk to my wife's father. I was from a different clan [...] a clan that is looked down on [...] they call us 'boon'.³²⁹ Her father was very against me [...] there is still a lot of conflict over which clan you belong to even if you have a good profession. We chose to get married and had a nikah and registration [...] but my wife now has a bad time from her family. We are all Muslim but which clan you belong to, who gives you a reference, is very important [...] for a lot of Somalis. [Hassan].

³²⁹ Helander (2003: 157-162) discusses several causes of the inferior position of the 'boon', including being cursed (*inkaar* or *habaar*), lacking in intelligence/reason/knowledge (*caqli*), and being regarded as descendants of some wild animal. While some Somalis treat the 'boon' as a uniform category of 'lowly' people, members themselves emphasise that they consist of a broad variety of groups, a fact that is seen as significant for the 'boon' themselves.

The non-acceptance of the relationship was a major reason why Hassan registered his marriage, which was done on the same day as the nikah. Hassan's story illustrates the pressure being faced by some minorities to marry within the same ethnic group, to comply with urf norms centred on maintaining status and honour, despite it seems whatever the profession or Muslim-ness of the suitor.

Turning to option 4, 19 (or 32.2%) of the sample chose to have nikah that was accompanied by ethnic ceremonies. An arrangement that is consistent with the stitching together of urf and shari'a norms. When asked which ceremony was more important to them – the nikah or the ceremonies connected to urf like donis, mehndi, and the wedding reception, 13 respondents (or 68.4%) of the sample said it was the nikah. Below are some of the responses recorded.

Being a Muslim means that we follow what Allah has prescribed. Marriage is half of your deen. [...] it is one of the most important things any Muslim can do so of course the nikah comes first. That doesn't mean you can't have events that celebrate your marriage with friends and family but some Muslims are forgetting that they must be modest [...] some of these events are un-Islamic and not necessary. [Abdul].

I want to follow Islam. It is really important to me [...] a nikah is a blessing and more than just an event and you can't ignore that. I would definitely say the nikah is the most important. [Amal].

My mendhi and wedding reception was important to me but they don't mean that you are married and to be honest most the people who came knew my parents and not me. [...] when I had the nikah that was when I felt married [...] it was when I gave my consent and then the imam completed the nikahnama. [Hafzah].

However, two respondents revealed it was their ethnic ceremonies modified to take account of their Britishness' that were actually the most important part of

the marriage process. Both respondents said they would not admit that openly because of how they might be perceived by other Muslims. In their own words,

I wanted to have the best mehndi and reception. [...] that may come across as shallow but it's something I always wanted since I can remember. [...] I wanted my husband to be involved in planning the wedding and I jokingly told him that if it wasn't perfect I wasn't going to go ahead with the nikah. [Sara].

The nikah is important but I want all my family and friends around me to celebrate the occasion [...] you hear other Muslims saying that it is a waste of money having a big shaadi do but I don't agree. You only get married once [...]. [Zainab].

Four respondents said that they did not see the need to choose what ceremony was more important. In their own ways, these respondents said that Islam not only allowed but encouraged the celebration of pre and post nikah events. They did not draw any sharp boundaries between ethnic ceremonies and how they interpreted shari'a or Islam. Illustrating this view, Jamal and Mohamed respectively said,

It is important to get blessings from your family and clan. That is part of Islam and we are required to inform the community when a marriage takes place. My marriage was arranged by my father and in Islam you don't disrespect your elders. He told me he had arranged the marriage and I accepted his decision. [...] my wedding celebrations lasted for seven days.³³⁰ [Jamal].

Islam encourages us to celebrate what is halal. When someone gets married it is an important event that should be planned and celebrated. All my family came together and I will never forget how special that was [...] we ate together, celebrated together and prayed together. [Mohamed].

³³⁰ Traditional Somali wedding celebrations can last for up to seven continuous days. After the wedding day, the first three days known as '*sadexda*' are spent celebrating in the bride's house, the last three days known as '*toddobada*' are spent celebrating in the groom's house. This tradition has been modified in the new milieu of Britain, with the number of days in particular being reduced.

On the question of whether they were aware that the nikah was not recognised as having legal effect in the eyes of English law, from the nineteen respondents sixteen (or 84.2%) of this group said that they were aware of this fact. Three (or 15.8%) said that they did not know at the time of their marriage that this was the case. All of these respondents were Somali. When added to the single Bangladeshi who chose option 2 (nikah only), this shows that from our sample of 59 respondents only 4 respondents (or 6.8%) did not know the nikah had no legal effect at the time of their marriage. This establishes that by and large Muslims know that the nikah does not have legal effect and when they only have a nikah (plus ethnic ceremonies) they are consciously making the choice not to register their nikah.

The reasons given by respondents over why they chose option 4 varied. Three respondents asked me to explain rather why they should have a civil marriage. In other words, what advantages did it bring or need did it address. Faisal said,

I don't see any need for me to have a civil marriage. Tell me why I should have it? [...] I'm looking to go back to Somalia or Kenya [...] there are no opportunities here and we are treated with no respect. (Faisal).

Others were clear in their responses that they saw the nikah as 'marriage' and it fulfilled their needs and saw the registration process as something extra or a 'piece of paper' that had a lot of bureaucracy attached to it. Two male respondents above the age of 35 didn't see any need for the state to have a role in the marriage process. Abdi and Rahim said,

I don't have anything against the civil marriage but it is not something that we need to have. We had the nikah and celebrated our wedding and everyone knows

we are married. [...]. My wife knows that I will follow shari'a so she doesn't insist as some women do that we need to have our marriage registered and honestly I think it would cause more hassle than do good. (Abdi).

I don't want the state to know our personal business. What happens in our marriage is between me and my wife. I don't think we need to register [...] Allah sees everything and that is enough [...]. (Rahim).

One female respondent did want to have her marriage registered but said that her husband wasn't keen and that she then didn't pursue the matter. A couple of the respondents said they 'hadn't got round' to registering their marriage, while others said they might register in the future but had no firm plans. A common theme amongst Somali respondents for non-registration was the view that in the absence of financial assets or even children there was no need to register. In another case, a respondent revealed that she was party to a polygynous union. In fact, she was the third wife. She knew from the outset that her husband had a wife in England and one in Somalia. This meant that registration was never on the agenda but she revealed she was very happy with the arrangement. The reason she gave for her confidence was,

My husband is a very good man and is a community leader. He knows what is acceptable under shari'a and what is not. He provides me with a separate home, fulfils my needs and doesn't treat me differently from his other wives. [...] we [the other wives] also get on well. [...] His first wife has had health difficulties for some years [...] every six months he goes to Somalia for a couple of weeks to spend time with his second wife and children [...] and also other family members. [...] we have a good arrangement so why do I need a registry marriage? [...]. (Zahra).

This case is consistent with our analysis in chapter four that some husbands are undertaking 'commuter polygamy', and are also entering into unions where one

marriage is registered and another that is not. The wife in this example made it clear that she willingly entered into this arrangement. She was previously a divorcee, and also stated that she regarded herself as 'middle class', and gave as her job description the title of 'director'. In another case, involving our only 'White English' Muslim the interview revealed that she had converted to Islam approximately 13 months before the interview date. Her decision was not related to her marriage. After embracing Islam Anna decided she wanted to settle down and in accordance with the dictates of her faith she wanted to marry a Muslim. She had no concerns about not registering her marriage. Anna explained,

I identify myself as Muslim and that means that I follow the word of god. For me that is the most important thing. So having a nikah was essential. [...] I wanted a husband who could help me improve my faith [...]. My husband is Moroccan and we had amazing traditional celebratory events that made me feel much closer to his family. [...] I'm not saying that having a civil ceremony is wrong, it's just not right for me [...] that might change in the future but at the moment I'm financially secure and independent and want to work towards fulfilling my spiritual needs. (Anna).

One Bangladeshi respondent revealed that the reason she chose not to have a civil marriage was partly motivated by the legal effects registration could bring. Nasima was a young professional working in Canary Wharf and had been married for 4 months at the time of interview. She was introduced to her partner, a chartered accountant by profession, by her mother's friend who she referred to as 'auntie'. Nasima explained that she had been looking for a partner for over four years before she agreed to marry her husband. Nasima revealed the pressure she felt to get married especially given her age – she was thirty-two at

the time of her marriage. She indicated that she and her 'husband' were still getting to know each other and on probing Nasima revealed that they were experiencing some difficulties in adjusting to married life and this played into her view that a civil marriage was not the right move for either of them for the time being.

The majority of our sample chose to have a triple sandwich marriage arrangement. Thirty-six (or 61%) of respondents had a nikah that was accompanied with ethnic ceremonies plus a civil registration. This shows most clearly the extent that Muslims are choosing to skilfully combine a variety of normative orders, illustrating in the process that they lead multicultural lives and are giving effect to their tessellated identities. When the respondents from this group were asked to rank the ceremony they held to be most important, the results were more diverse than the group that had opted for option 4. Twenty-five respondents (or 69.4%) of the group said the nikah,³³¹ six respondents (or 16.7%) said the civil marriage; five respondents or 13.8% said that the nikah and civil marriage were equally important.

Among the respondents that saw the nikah as the most important ceremony, similar reasons were given as respondents who chose option 4. These respondents 'felt' married only after the nikah had occurred. All saw it as 'essential' and an affirmation of their faith, or of their 'Muslim-ness'. From this group, 17 had the nikah first which was accompanied by ethnic ceremonies and the civil registration followed. Six from this group had a nikah and civil

³³¹ From this group, eleven respondents said that after the nikah the civil marriage was the next most important, whilst fourteen respondents placed ethnic ceremonies above the civil marriage.

registration that was solemnised by an imam in a registered building. All of the other respondents in this group had their nikah at the bride's home. These eleven respondents had a gap between the nikah and civil marriage. The longest gap between the nikah and civil marriage was approximately 2.5 years. Imitiaz explained why the gap was so long,

We had planned to register our marriage but both of us got busy with work and family commitments so we postponed it. The push came when my wife told me she was pregnant so we decided it was time to register our marriage.

Another respondent, Saima, had also 'put off' registering her marriage for over a year but then went through the 'registration process'. She explained her motivation:

We had saved up money together to buy our own home, and because of this we decided that it was time to get all the paperwork in order so that included the registration of our marriage. [...] the process was quick and we involved the family too. (Saima).

From the six respondents who said the civil marriage was most important to them, three respondents indicated that their immigration status impacted their ranking. Habib was keen to point out that for him,

[...] shari'a comes first but for me and my wife to be together we needed to have the registry marriage also. It is really important and it is not like the two are incompatible. It is a necessity so I think for my circumstances it has to be registry marriage first. (Habib).

The other two respondents strongly felt that having a civil marriage was essential to protect their rights and an expression of their British-ness. Sania said,

For me getting married is a big step and I wanted to make sure I had the civil marriage first. [...] I don't understand why some Muslim women are choosing not to have a civil ceremony. [...] marriage brings a lot of responsibilities and it's us women that have to give-up a lot when we get married [...] things need to be done properly and this means having the right paperwork. [Sania].

Five respondents also did not see the need to choose between the nikah and civil marriage. Respondents explained that they saw no conflict, and tended to see the civil marriage as also a requirement under shari'a. One respondent, Hussain, saw 'combining the two together as a natural process that helps Muslims feel at ease'.

Though our sample involved only 59 Muslims, the information gained shows that Muslims are not making the same choices. Not all members of the sample had the same views or were impacted by the normative orders discussed in the same way. Most Muslims are having either a double-decker or triple sandwich marriage and this reveals the extent that they lead multicultural lives. Some are testing out relationships within the boundaries of shari'a, informing families when they are ready which brings into play familial and ethnic norms. While a few it seems are creatively arranging polygynous unions without falling foul of English law. Besides the influence of the normative orders discussed, Muslims are also impacted by their personal life histories, their wants, and by other factors such as immigration status, and whether they are male or female. Yet, all respondents had a nikah, and a large number placed great weight on ethnic ceremonies. The state therefore needs to accept that Muslim's see their private orders as legitimate reference points to live by, and in the context of marriage solemnisation prefer these over the civil ceremony required by the state. Many Muslims choose to have a nikah accompanied by ethnic ceremonies only, for a

variety of reasons. Amongst the Somali Muslim community this seems to especially be the case. Therefore compulsory registration of the nikah as some have suggested is not the option. A small number of the sample did reveal that they were not aware that the nikah was not legally valid and this lack of knowledge needs to be addressed.

Chapter 6: Conclusions

In our global village, people are moving from one country to another and different cultures are intermingling as never before. The outcomes of the interaction are especially important in the context of 'law'. This is because law, which is a sub-species of norms, is at the apex of the pyramid that is culture, for law lays down communally agreed minimum standards of behaviour and failure to comply can lead to severe sanctions. The intermingling of different norms has led to what seems is 'a battle of laws' that is part of a wider 'war of normativities and values'.

This study set out to interrogate how migrants, and their offspring born in the new milieu, are responding to this situation. We restricted our discussion to family law matters, and in particular to the institution of marriage, which has become an especially contested site in recent years. Using the case study of Muslim migrants and their relationship with the English legal system, two approaches were discussed. We focused on the content of the law, to examine how far the law has adapted to accommodate the beliefs of Muslims and their way of life. Secondly, we focused on the reality of legal plurality experienced by Muslims, and how this affects their behaviour. We looked at the strategies and tactics by which the Muslim community and individuals have sought to deal with the challenges raised by the presence of conflicts between differing, overlapping, normative orderings. Thirdly, looking at a particular instance of where Muslims had to cope with diverse norms – marriage solemnisation – we interrogated the

impact that personal, ethnic and territorial norms are having on their decisions, as well as to draw out other explanatory factors. This was done through original fieldwork, involving in-depth qualitative research with 59 Muslims.

6.1 *Observations*

This study made several observations. On arrival to Britain, Muslim migrants brought with them their cultural luggage that included ethnic and personal normative orderings. In political and sociological circles, the focus has often been on shari'a to the neglect at times of the importance of ethnic orders. Migrants arrived with their own understandings and meanings of law – a legal consciousness. This is reflected in their behaviour, and affects their interaction with other citizens as well as the English legal system. When it comes to the overwhelming majority of Muslims, attachment to shari'a and their ethnic orderings has not diminished contrary to widespread expectations as the community has expanded and taken root in British society. This is the case also with British-born generations who have been brought up in the 'West'. This has led to the claim from some quarters that Muslims are simply 'inassimilable' (Barou 2014: 647), and therefore remain an 'alien wedge' or even the 'enemy within'. Despite their long presence in Britain, there is also a tendency to see Muslims as a homogeneous community – a view not uncommon among large sections of non-Muslim Britons.

A number of actors with their own preoccupations and agendas have tended to push the image and idea of people as members of discrete ethnic and cultural groups. This is particularly the case when it comes to Islam and Muslims. On the

one hand, this is being achieved through alarmist scholarship and media reporting, efforts by right-wing groups like Britain First and the BNP, street movements like EDL, but is also the result of assimilationist/multiculturalist and securitisation policy adoptions over the years that rather than redressing discrimination or alienation have made people feel 'othered' in Britain. The early policy of assimilation ignored the needs of minority communities, placing the burden on them to make adjustments. The shift towards multiculturalist policies may have sought to attend the political needs of minorities but the way it was applied reinforced group identification, which was divisive. On the other hand, some 'Muslims' themselves and notably 'jihadist' groups like al-Qaeda and Daesh/ISIS have sought to demarcate a Muslim 'us' from a non-Muslim 'them', a dichotomy that is based on a ruinous hostility to difference.

Through an analysis of a lot of secondary literature, legislation and case law, and by way of primary research, this study has shown that the overwhelming majority of Muslims are not refusing to adapt. They are not as the misrepresentation would have us believe homogeneous followers of a violent religion. This study began from the position that to remove many misunderstandings, but also if there is to be a buy-in of the recommendations on how we move forward together, it needed to provide a better understanding of Muslims and of Muslim 'laws'. It explained that shari'a is a pluralistic legal order to its very core. Ethnic or traditional norms predicated on honour or izzet are often crucial to Muslims. Muslims in Britain are heterogeneous in fiqh, ethnicity, class, education and profession, religiosity, generation and by way of many other dimensions of difference. They are part of a local community and wider society,

tied to a myriad of other relationships and are influenced by all sorts of motivations, aspirations and needs. This impacts their behavior allowing for no easy interpretation of what their views will be on any particular issue or what they will do in any given situation.

In diaspora the engagement with the 'other', not just non-Muslims but also 'different' Muslims, has forced Muslims to review their understandings of Islam, tradition, self-identities, or put more simply 'who it is that they are' and 'what it is that they want' in their new unfamiliar surroundings. In the politics of cultural negotiation existing identities, norms, symbols, and values are being considered, reinterpreted, and new forms of each are emerging. Far from simple acts of bricolage, these processes can be deeply painful and conflictual (see Salih 2004: 996). The end tendency for the overwhelming majority is towards the forging of a tessellated identity. Put differently, they are mixing and matching, or synthesising, their norms and values and this allows for great variety, eclecticism and personal patterning. In this way identity remains individual. For this reason we can say Muslims, not only groups or societies, are multicultural.

In the field of 'law', we saw that Muslims are committed to personal and ethnic rather than only territorial laws, but this is rendered invisible if we use the tools of official legal science only. Received ideas about 'law' in the West, now a state of mind rather than a geographical location, privilege a conceptualisation that treats only the normative ordering of the state as 'law'. All other normative orderings are de-stated to custom, cultural or religious practices, mores, or traditions. From this perspective, the nation-state has complete prerogative to decide in what circumstances and under what conditions it allows 'mores' to

operate within its territory and under its authority. Britain's legal systems envisage uniform laws as both desirable and the pinnacle of legal development. This approach to law is consistent with the ideology of 'legal modernity', which is undergirded by legal positivist and legal centralist ideas. As it is a self-defining system that gains its authority because it has procedural validity, law is understood as being 'normatively closed'. Since the law of the state emanates from what is perceived to be a democratically legitimate and accepted process the system in place holds a powerful position in the minds of ordinary citizens.

Muslims however relate to something more than just the state law alone. They find themselves or their act subject to multiple, overlapping, normative orderings that coexist in the same social space. This becomes visible if we use the tools provided by the alternative science of legal pluralism. Using pluri-legal methodologies enables us to see how actors on the ground are negotiating diverse norms, engaging with the norm making and enforcing authorities of the different systems to alter the significance assigned to long standing ideas and practices, or how they are developing new trans-local hybrid and super-hybrid normative orderings, as well as their own dispute resolution fora, in the bid to be consistent with their understandings of 'who they are' as well as with 'what they want'.

This study was the first of its kind to identify that Muslims have employed three different strategies and a variety of tactics under each to achieve their goal when dealing with the problems created by internormativity: strategy one involves them exerting effort to reform one ordering to take account of another. This is occurring in three directions:

- (i) reform of English law so as to incorporate shari'a and their diverse ethnic orderings;
- (ii) reform of fiqh so as to incorporate both English law (and more broadly European or Western norms and values), and their diverse ethnic orderings; and,
- (iii) reform of their ethnic orderings so as to incorporate shari'a and English law and 'European' norms and values.

The fact that some Muslims are engaged in reform in three separate directions simultaneously illustrates the extent that they lead multicultural lives.

As concerns the extent that English law has adapted to accommodate the beliefs of Muslims and their way of life we saw that few changes have occurred. The demand for a Muslim personal law was forcefully rejected. Some limited concessions have been granted, but often Muslims have found to their dismay that their claims are treated with suspicion, and as if they are asking for preferential treatment. Conversely, from within the community, some members have argued that it is the state that has given preferential treatment to the claims of some minorities rather than treating all minorities equally. Muslims have had some successes using non-community specific Acts of Parliament like the 1998 Human Rights Act, 2010 Equality Act, and the 1996 Arbitration Act. Conflict has to large extent been avoided because the UK's partly codified constitution has for centuries allowed individuals to do as they please in matters of faith and culture, unless the law states otherwise.

However, in recent years Parliament has discussed Bills, with some becoming law, that directly or indirectly target the norms, symbols or activities of British Muslims. Baroness Cox's Bill, for the third time in four years, proposes to restrict the activities of shari'a councils. Earlier, the 2010-12 Face Coverings (Regulation) Bill sought to ban the wearing of the burqa or niqab in public

places. Last year, an amendment to the 1971 Misuse of Drugs Act outlawed the use of khat.³³² In the same year the 2014 Anti-social Behaviour, Crime and Policing Act made it an offence to coerce someone into marriage. This year, Part 4 of the 2014 Immigration Act brought in to effect new duties to report 'sham marriages' and powers to investigate and prevent the same. The 2015 Counter Terrorism and Security Act, which places the Conservative government's Prevent programme on statutory footing, inter alia requires schools and universities to take active steps to prevent radicalisation and to promote 'fundamental British values'. The latter in particular has been described by Muslims as 'creating a 'McCarthyite witch-hunt' against them'.³³³ Voicing their dismay, by way of a public statement to government, a consortia of imams, Muslim community organisations, leaders, and activists, described the Act, along with the raft of anti-terror measures in the past decade, as 'criminalising Islam' and as more evidence of 'the ongoing demonization of Muslims in Britain [and] their values, as well as prominent scholars, speakers and organisations'.³³⁴ The government has since announced new plans to introduce Ofsted inspection and regulation of madrassas that inter alia will enable the state to close establishments if they are assessed to promote extreme views or are deemed to be incompatible with 'fundamental British values'. These measures and other efforts that openly focus on promoting fundamental British values are consistent with the new 'integration' policy of 'muscular liberalism', and signal the state's commitment to

³³² The Misuse of Drugs Act 1971 (Designation)(Amendment) (No. 2)(England, Wales and Scotland) Order 2014.

³³³ Topping, A, Ismail, N, & Malik, S (2014) 'British Muslims condemn terror laws for creating 'witch-hunt' against Islam'. A Guardian online report 11/03/2015 (available at <http://www.theguardian.com/world/2015/mar/11/british-muslims-terror-laws-witch-hunt-islam-cage-hizb-ut-tahrir> (accessed March 11/03/2015).

³³⁴ Ibid.

majoritarian values in the on-going war of normativities and values.

So, in legal terms at least, we have what seems to reflect a monocultural society. This belies the claim of the state and legal system that the 'other' has been accepted and reflected in the legal system. Over two decades ago, Nielsen (1992: 154) referred to this situation as the 'unreality of cultural encounter'. Not a great deal has changed. The expectation continues to involve minority, rather than majority, groups having to adapt their way of life, outlook and attitudes to European weltanschauungs. To some extent the one-way flow of information and experience is inevitable, keeping in view the existing power relationships.

The result as we have found is that the cultural and religious 'traditions' and preferences of Muslims can be tolerated so long as they do not impinge on the life of the majority, verbalised as 'public policy', the 'conscience of the court', 'secularism', and human rights norms. A number of recent cases, referred to in the course of discussion, may suggest that the judiciary is slowly becoming more sensitive with regard to minority values and traditions, but a closer look seems to reveal that this is often limited to when minorities are deemed to have in good faith attempted to assimilate to the law and its values (*MA and JA v Her Majesty's Attorney General*) or when judges have feared losing jurisdiction to shari'a councils (*Ali v Ali*). The changes to the law of nullity and the creation of civil and criminal offences in relation to forced marriage do provide real victims with a remedy. At the same time, they also further the cause of assimilation since the new measures open-up ethnic minority marriages – long understood as a key institution for the transmission of culture and values – to 'anxious scrutiny' under their jurisdiction.

It is not difficult to understand why such an approach finds little quarter with many Muslims. Though the existence of 'parallel courts' and 'shari'a-creep' may seem to some as alarming, one way in which minorities not just Muslims preserve and act-out their culture and norms is through private ordering or private orders. In relation to family laws in particular, we have seen how Muslims have attempted to readdress this imbalance in their favour by attempting, using a number of methods, to maintain themselves as a self-sufficient unit while seeking to be 'accepted' as part of the wider community. The informal and formal methods of dispute resolution and the development of trans-hybrid and super-hybrid living laws like angrezi shariat and Anglo-Muslim Turkish Law can be viewed in this context. When employing strategy two, formal use is made of English law by many British Muslims to maintain the conceptual and actual superiority of shari'a. Some Muslims make formal use of shari'a, but in actual fact their behavior is motivated very much by their allegiance to ethnic orderings verbalised as concerns over izzet (honour) or be-izzeti (dishonour). At other times, Muslims are simply pursuing their 'wants', and that has little to do with their allegiance to an ordering, and more to do with how that ordering can facilitate that specific 'want'. By their own admission many are not 'religious', or 'traditional', though often find it very difficult to 'come out' as such. Others, prioritise their religion and often visibly as a marker of identity and shared sense of community. In some cases this is a reaction against the experience of being 'othered', or perceived othering by the state and/or non-Muslim Britons. Among many 'millennial Muslims', in particular, feelings that they are not allowed to 'fit in', let alone 'be themselves' has played a major role in them forging a stronger

connection with their faith. In the case of young Muslim women or 'Muslim feminists' it is a reaction against patriarchy, for them Islam is a guarantor of women's rights and thus a liberating force for women. The demand by parents that they have arranged cousin marriages can, then, be dismissed as 'cultural' hangovers and not part of 'true Islam', in its original, 'pure' form. Yet, many are still cautious, especially if resident in an ethnic enclave and close to extended relatives and kin, that they are not seen to be overly critical of 'culture', for fear of being labelled as 'bad girls', which could affect marriage prospects and other relationships. Many younger generation Muslims often want to work out what is 'Islam' and what is 'culture', and to test the boundaries of each to see how British norms and values can be reconciled. Some do look at alternative fatwas before deciding their course of action. Others do not adhere to strict jurisprudence, instead are at ease with exercising their personal judgments. Yet others see this as inappropriate or are frightened to ask too many questions about the understanding of 'Islam' that they have inherited.

The study shows that, by and large, Muslims have successfully identified conflicts presented by normative clashes and through a complex of adjustments have managed to preserve to a large extent the values and norms of their religion and ethnic cultures. This process has not, though, been without pain or hardship. As illustrated by these developments, Muslims are clearly not passive subjects of the law rather they are 'productive legal actors'.

6.2 Looking to the future

If the status quo remains in that Muslims, along with other minorities, have to carry the weight of adjustment then the opportunities as well as the challenges presented by the intermingling of cultures can only be successfully negotiated if Muslims are 'organised, cohesive and wise' (see Kettani 1990). In the context of marriage, the development of a model Muslim marriage contract that informs parties of their responsibilities and enables the inclusion of clauses to protect the rights of women is a positive step in the right direction. It also goes some way to address the concern that some women using shari'a councils believe falsely that the nikah has legal validity and, on becoming aware, blame imams and community leaders for the lack of available information (see Bano 2012: 163). The challenge ahead, then, will be to encourage imams or those performing the nikah across Britain to use the model contract. Muslims could also seek to have the model contract recognised as a pre-nuptial agreement. In recent years, courts have been prepared to take these into account in divorce proceedings.

More broadly, the efficacy of strategy one will be improved by Muslims participating more fully in the process of law reform and to make positive contributions in those areas of social and legal policy that affects them. The Law Commission, one public body that initiates such reform, invites opinion during periods of consultation and it is at this stage that contributions from Muslims are likely to be impactful. The same can be said about White Papers, which present, and invite opinion on, 'firm' government policies. Although there are a healthy number of elected Muslim councillors in Britain, this has not translated to their number at Parliament. In time this is likely to improve and could be a valuable

asset if Muslims can learn to make use of them so as to ensure that their voices are represented when it comes to any form of public decision-making.

Besides the lack of engagement that means their views go unheard, sometimes the state is unaware, confused or able to overlook their needs because there is no co-ordinated response. The problem is not as has been suggested in some quarters that when it comes to Muslims there is an absence of a single authoritative body. This is not unique to Muslims. The issue is what prevents Muslims coming together to achieve a common good or want. In this regard, more work needs to be done by umbrella bodies like the Muslim Council of Britain to ensure that they are representative, and this would mean more collaboration, even merging, with other bodies to ensure a cohesive and united voice articulates the needs and aspirations of the diverse Muslim body. Muslims also need to have more open and focused debates within the community to explore how the transition from Islam of the fathers to Islam of the sons and increasingly daughters can occur (Mandaville 2001: 124). More open and focused debates also need to be conducted over how Muslims should address 'legitimate' concerns of the majority population: for example, in relation to proselytisation and apostasy, use of religious violence and how to foster an active concern for societal solidarity where not everyone concerned is a Muslim or expresses Muslim-ness in the same way. If the development of 'European Islam', or understandings of Islam that can be reconciled with European weltanschauungs are to occur, this will require the development of places of learning that can be at the forefront of Islamic studies in Britain.

Whether or not Muslims seek to have recognised their personal or ethnic 'laws' is in one sense a question aside, for private ordering or private orders exist and will continue to exist despite lofty declarations by the English legal system as to its all-encompassing supremacy. Yet, non-recognition causes individuals to feel conflicted and can lead to alienation. Even if individuals can successfully negotiate the cross-demands of multiple orderings – it is exhausting. Muslim respondents in this study saw their personal, or ethnic, 'laws' as legitimate moral and normative codes, by which they and others can *choose* to live their lives. Many revealed that they prefer, and in the event of conflict, would like to choose god's law rather than the state's law. The state needs to accept this, if it is to build multicultural bridges and not communitarian walls. Non-recognition, moreover, places the state on the back foot when it comes to helping those whom it regards, and who probably in fact are, vulnerable and disadvantaged.

The state should therefore consider juristic legal pluralism, as a means of reconciling overlapping, normative orders. This will require that it shifts from a conception of law as a single set of normatively-closed rules that are merely to be followed and interpreted. At one point in its own history it was advantageous for it to push such a view so as to gain and hold power, but the social setting has since changed. By replacing positivistic with sociological approaches to law it can more readily situate its own 'law', and of others, in a social setting and as a culmination of lived experiences. The process will help all citizens see the full import of culture, how it shapes our 'legal consciousness', and more broadly 'provides the spectacles through which we identify experiences as valuable' (Dworkin 1985:228).

As with any significant change there will be alarm and resistance, but there is nothing to suggest the state could not make a successful transition. A claim that the operation of state or weak legal pluralism would lead to chaos³³⁵ ignores British colonial history, and that this is a typical reality in 'southern' jurisdictions today. The British state is not unaccustomed to such a scenario, for it administered personal laws that it codified like Anglo-Muhammadan Law in India for almost 90 years. It has also been said that de-centring law from the state will make it confusing to demarcate the non-legal from the legal.³³⁶ That, calling informal normative orders 'law' is pushing them into Western categories, something that distorts rather than illuminates.³³⁷ The pitfalls are real, but almost all of the Muslims we engaged in this study saw shari'a as 'law' irrespective of whether they followed it or not. When the label of 'law' was not used, as too was the case when respondents discussed their ethnic orderings, they knew from lived experience that each laid down rules, that if not followed led to sanctions. So, against this real life context, the primary concern should be how the state responds rather than on us disputing definitions.

This does not mean that the state should recognise *carte blanche* all that Muslims feel compelled to do by their personal or ethnic 'law' codes. It doesn't follow that we should suspend judgment when discussing or facilitating normative plurality. Rather, it enables us to get into proper perspective the superdiversity being experienced by individuals, and that law and values everywhere are never a

³³⁵ Responding to the furore caused by Williams lecture, the then Culture Secretary Andy Burnham commented: 'You cannot run two systems of law alongside each other. That would, in my view, be a recipe for chaos, social chaos' ('reaction in quotes: Sharia law row' BBC report 8/02/2008 available at <http://news.bbc.co.uk/1/hi/uk/7234422.stm> (accessed 09/02/2008)).

³³⁶ As has been argued by Merry (1988: 878).

³³⁷ As has been argued by Roberts (1998: 104-5).

given but have to be constantly negotiated (Menski 2007: 132). This leads us on to, then, how the state should determine what is acceptable or 'tolerable' given the sundry of orderings and competing values.

6.2.1 Facilitation of choice and the protection of consent

The state could respond by allowing the individual to make that decision for him or herself. The study adopted the individual as the point where all normative orderings 'converge', and suggests that this be the vantage point from which to look at the possible reconfiguration of the legal system. As such, in view of the reality that many Muslims prefer using shari'a councils, the state could respond through institutional change that is part of a bigger paradigm-shift that allows majority-minority communities to co-exist and define their mutual rights and obligations.

Over clearly delineated matters of civil law, including religious divorce and conflict resolution related to civil, commercial, familial, inheritance, or mosque disputes, this could mean a system of joint governance, similar to the model of 'transformative accommodation' proposed by Shachar (2001). This approach allows for an organic transformation of competing systems but with the state acting as a 'referee' to accommodate the needs of minorities. Individuals would retain the liberty to choose from the options of going to semi-autonomous private order bodies like shari'a councils or Kurdish Peace Committees, or to English courts to resolve a dispute. This would allow individuals to be 'both citizens with state protected rights and members of a minority group who can choose to enjoy their cultural or religious group membership' (Malik 2012: 37).

In other words, they can enjoy their mosaic identity, heritage and beliefs rather than being forced to choose between them.

The change would officialise that no one body has monopoly over decision-making, creating a constructive environment in which there is healthy competition for the loyalty of British Muslims. The move from unofficial status would mean that informal dispute resolution fora could be held more accountable. Shari'a councils would have to evaluate how they operate and as a result British Muslims are likely to be better engaged. By way of an added level of protection say through judicial review individuals can still reject the jurisdictional authority of the body that they have voluntarily chosen to use, where clearly laid down procedural rules have not been adhered when disputes are heard. This may seem like a radical change, and by and large this was how it was interpreted when the then Archbishop of Canterbury Rowan Williams suggested it, but, even in 2008, it was to a large extent already a reality in Britain. A careful analysis of shari'a councils, known as MATs, and battei din like the United Synagogue London Beth Din, would have revealed that a system of joint governance was already successfully operating along these lines by way of the 1996 Arbitration Act. The initiation of institutional change therefore is not that big a step at all.

It may be that the state is reluctant to take control owing to high political, social and monetary costs involved that could come with regulating diverse groups that would be entitled to their own dispute resolution fora. It does however have a vested interest in groups' private ordering, not least because of concerns over ghettoisation and the protection of vulnerable sub-minorities, especially women.

As has already been mentioned, at one level, whether the state seeks to take the initiative is a question aside, since a variety of private order bodies offering dispute resolution services are operating in Britain in the shadow of English law. Of crucial importance, then, is how it ensures that individuals are aware of the 'options', and are able to 'freely choose'. Protecting the citizen's right to choose is a prerequisite of a democratic and liberal society. It also constitutes a sound basis for multicultural and pluri-legal policies.

One of the main observations of this study is that individuals are involved in an on-going process of identity-formation. They are open to and even seek out membership of different networks. They consider, and do internalise, norms from diverse sources. They alter the significance assigned to long-standing ideas and practices. They sometimes revive traditional norms and values. More often they create new or syncretic norms by fusing diverse norms from different sources. They model their behaviour in accordance with their knowledge of who they are, and what it is that they want. It is not difficult, then, to see that their ability to choose is crucial. That choice may relate to their membership of a community or religion, or simply the choice of a woman for instance to 'marry out' of her ethnic or religious community. This study advocates that every individual has the right as well as a responsibility to make sense of internormativity and to construct his or her own way of life. The state must ensure that this is supported, even offered legal protection. In this regard, legislation similar to that suggested by Sandberg & Cranmer (2015) that cares for genuineness of consent in the context of how the supplementary jurisdiction of shari'a councils could operate would be valuable. They suggest a definition of

consent be modelled on the approach taken in the 2003 Sexual Offences Act. Inspiration could also be gleaned from the jurisprudence that has developed to define duress under s.12 (c) of the 1973 Matrimonial Causes Act.

6.2.2 Acknowledging more substantially the right to be different

Finally, aside from this dimension of the debate, the issues raised in this study in relation to Muslims form a small, but important, component of a much larger discussion, that is, the willingness of the state and others to accept the reality of the superdiverse nature of contemporary British society. That partly has been caused by waves of immigration, more so by the forces of globalisations and synchronous technological advancements that define our postmodern age. The state's legal system predominantly is unwilling to constructively deal with difference or alterity and what flows from constituents being different. Though we have not focused on them to the same extent, the same tendency is observable amongst the gatekeepers of shari'a and ethnic orderings that we have examined. Future research needs to explore this more fully as this is a necessary aspect if we are to understand the full picture of the ills and accidents of multiculturalism that cultural surgeons are trying to cure. Yet, as our respondents showed through their choices, it is their right to choose to either be the same or different that is crucial to their well-being. In the final analysis, this study suggests that we need to embrace the 'right to be different' more positively and not with alarm. In relation to the state, this will require some paradigm-shifts, particularly over how it approaches equality and justice.

Since the first pieces of anti-discrimination legislation in the 1960s, the state has

been exerting effort to ensure that all individuals irrespective of their gender, ethnicity, religious, or national background have equal rights, and are treated equally before the law. The focus on equalisation of rights is not peculiar to Britain – it was at the heart of the early civil rights movement in the United States of America. Like all movements it is the product of a particular socio-historical and cultural context, for it was forged in response to the horrors of slavery and inspired by the Christian belief of a brotherhood of believers.³³⁸ From a focus on racial and gender equality in the early years, the movement grew to include other characteristics on the basis of which the state came to accept there could be inequality in the public sphere. So, in Britain today, enshrined in the 2010 Equality Act,³³⁹ we have nine protected characteristics, but the focus remains as the title of the Act shows on the equalisation of rights or entitlements, or using Taylor's (1994: 37) vocabulary on a 'politics of universalism'.

The right to formal equal treatment that allows for assimilation is, though, only one form of equality, albeit one that has been a particularly successful coloniser. An alternative form of equality is the right to have one's differences recognised and supported in the public sphere.³⁴⁰ It is this second conception of equality, which more judiciously treats people as equals rather than equally, that needs to be embraced. Following Taylor's (1994) critical essay this alternative approach referred to as a 'politics of difference' has attracted significant support.

³³⁸ Kelly (1992: 105-6) notes, 'The equality of men, in Christian eyes, arose not from rational consideration of the world but from the relationship of humanity to Christ, its Redeemer'... St. Paul once wrote to the Galatians, the Celts of Asia Minor, that all who are baptized, having put on the person of Christ, and being all one person in him, are 'no more Jew or Gentile, no more slave and freeman, no more male and female (Gal. 3: 28)'.

³³⁹ The Act consolidated over 100 different pieces of anti-discrimination legislation.

³⁴⁰ See Taylor (1994 37-42); Modood (1997: 20).

Minorities will continue to bring claims related to equal opportunity and equality before the law, but, increasingly, claims they bring will be related to their right to be different. For them it is insufficient for the state to focus only on the equalisation of rights and entitlements in the public sphere. They want their mosaic identity to be more substantially recognised and accommodated, and they make these demands not as immigrants but as British citizens with a global outlook living in a postmodern era. There are justifications that favour the adoption of a new approach revealed by this study. As this study shows, people are self-creating and self-defining and thus there is no such thing as a uniform Muslim, let alone uniform citizens. The state, then, cannot continue applying the Aristotelian notion that all individuals are 'likes' and therefore should be treated identically when it comes to equal treatment (see Fredman 2011: 7-11). Recognising difference does not mean that there will be inequality as if this is the 'natural' outcome. This has long been recognised in other jurisdictions. In a case involving a challenge to a university's admission policy that differentiated amongst applicants, the Indian Supreme Court in 1992 noted,

It is now an accepted jurisprudence and practice that the concept of equality before the law and the prohibition of certain kinds of discrimination do not require identical treatment. The equality means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal. To treat unequals differently according to their inequality is not only permitted but required [1662].³⁴¹

This study also shows that what makes individuals 'themselves' are their cultural

³⁴¹ St. Stephen's College v. University of Delhi, AIR 1992 SC 1630, at 166.

affiliations. Their self-identities are partly shaped by the perceptions that others have of them. Failure to recognise aspects of a person's identity, say the religious or ethnic characteristics that they hold dear, does have 'injurious' consequences, not least because a lack of due recognition can impair a person's self-esteem and could lead to self-hatred (see also Honneth 1992: 189; Taylor 1994: 25). It can also lead to a 'reactive' ethnicity or religiosity in the face of perceived threats (see Rumbaut 2008: 3). In the pursuit of equalisation the state has overlooked that the greater wrong it could end up inflicting is oppression and subjugation through non-recognition of what are perceived to be 'legitimate' differences (see also Young 1998). Experiences of non-recognition and distortion of their beliefs and ways of life have left many Muslims and other minorities feeling imprisoned in false or distorted stereotypes that they have found difficult to pierce, and hence have had the effect of reducing their mode of being. For these reasons, the state has to engage with difference more adequately, rather than 'glossing over it' and seeking to assimilate those who differ in the image of the majority.

Appendix

Questionnaire 1: Gateway criteria

1. Would you define yourself as a 'Muslim'?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
2. Are you married or have you ever been married?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
3. Did your marriage take place in Britain? ¹	Yes <input type="checkbox"/>	No <input type="checkbox"/>
4. Which age group do you fall into?	18-25 <input type="checkbox"/>	26-33 <input type="checkbox"/> 34+ <input type="checkbox"/>
5. What is your gender?	Male <input type="checkbox"/>	Female <input type="checkbox"/> Intergender <input type="checkbox"/>
6. How would you describe your social class?	Middle Class <input type="checkbox"/>	Working Class <input type="checkbox"/>
7 (a) What is your occupation?	Please specify your exact job title :	
7 (b) If you are a student please specify your parent's occupation (the primary provider or 'breadwinner').	Please specify their exact job title:	
8. What nationality is on your passport?	Please specify:	
9(a) What is the name of the town or village you live in?	Please specify:	
9(b) Please enter the first three letters of your postcode	Please specify:	
Please turn over		

¹ if you have had more than one marriage please refer to your most recent marriage.

<p>10. What is your ethnic group? Please choose one option from the list below that best describes your ethnic group or background</p>	
<p>White</p> <p>1. Scottish <input type="checkbox"/></p> <p>2. Other British <input type="checkbox"/></p> <p>3. Irish <input type="checkbox"/></p> <p>4. Gypsy/Traveller <input type="checkbox"/></p> <p>5. Polish <input type="checkbox"/></p> <p>6. Any other White ethnic group, please describe:</p> <div style="border: 1px solid black; height: 20px; width: 100%;"></div>	<p>Mixed or Multiple ethnic groups</p> <p>7. Any Mixed or Multiple ethnic groups, please describe</p> <div style="border: 1px solid black; height: 20px; width: 100%;"></div>
<p>Caribbean or Black</p> <p>8. Caribbean, Caribbean Scottish, Caribbean Welsh, or Caribbean British <input type="checkbox"/></p> <p>9. Black, Black Scottish, Welsh Scottish, or Black British <input type="checkbox"/></p> <p>10. Any other Caribbean or Black, please describe:</p> <div style="border: 1px solid black; height: 20px; width: 100%;"></div>	<p>African</p> <p>11. African, African Scottish, African Welsh, or African British <input type="checkbox"/></p> <p>12. Somali <input type="checkbox"/></p> <p>13. Any other African, please describe:</p> <div style="border: 1px solid black; height: 20px; width: 100%;"></div>
<p>Asian, Asian English, Asian Welsh, or Asian British</p> <p>14. Pakistani, Pakistani Scottish, Pakistani Welsh, or Pakistani British <input type="checkbox"/></p> <p>15. Indian, Indian Scottish, Indian Welsh, or Indian British <input type="checkbox"/></p> <p>16. Bangladeshi, Bangladeshi Scottish, Bangladeshi Welsh, or Bangladeshi British <input type="checkbox"/></p> <p>17. Chinese, Chinese Scottish, Chinese Welsh, or Chinese British <input type="checkbox"/></p> <p>18. Any other Asian, please describe:</p> <div style="border: 1px solid black; height: 20px; width: 100%;"></div>	<p>Other ethnic group</p> <p>19. Arab, Arab Scottish, Arab Welsh, or Arab British <input type="checkbox"/></p> <p>20. Any other ethnic group, please describe:</p> <div style="border: 1px solid black; height: 20px; width: 100%;"></div>

Questionnaire 2

General questions for all respondents:

1. What type of marriage did you have? civil registration ☐ nikah ☐ both ☐
2. As part of the marriage process did you have any customary ceremonies?
For example, mehndi, donis, düğün, other:
3. a) Which of these – civil registration – nikah – customary ceremonies – was most important to you?
b) Please explain why
4. At the time you had your marriage did you know that a nikah is not recognised by English Law as conferring the status of 'husband and wife'?

Specific questions:

Respondent who only had a registered marriage only
(option 1):

5. a) Why did you choose to only have a registered marriage?

Respondent who only had a nikah (and walimah) as laid down by doctrinal sharia
(option 2):

5. b) Why did you choose to only have a nikah?

Respondent who had a nikah and civil marriage?
(option 3):

5. c(i) Why did you have a nikah and civil marriage?
c(ii) Which was more important to you? Please explain why this is the case
c(iii) In what order did they occur?
c(iiii) Where did the nikah and civil registration take place?
c(iiiii) What was the time gap between the nikah and civil registration?

Please turn over

Respondent who had a nikah that was accompanied by customary ceremonies based on ethnic rituals
(option 4)

5. d (i) Why did you have a nikah that was accompanied by ethnic rituals/ceremonies?

d (ii) Which was more important to you – the nikah OR ethnic rituals/ceremonies?

Please explain why this was the case

Respondent who had a nikah that was accompanied by customary ceremonies based on ethnic rituals plus a civil registration
(option 5)

5. e(i) Why did you have a nikah that was accompanied by ethnic rituals/ceremonies and a civil registration?

e(ii) Which one was more important to you – nikah OR ethnic rituals/ceremonies OR civil registration? Please explain why this was the case

e(iii) In which order they did occur?

e(iiii) Where did the nikah and civil registration take place?

e(iiiii) What was the time gap between the nikah and civil registration?

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