Family Mediators and Family Mediation: when norms collide

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Abstract

We consider the nature of family mediation and the role of the family mediator in England and Wales in situations in which the cultural and/or religious tradition(s) of those involved may collide, for example when understandings of the law of England and Wales and of Muslim law may appear to some to point in different directions. We examine issues such as the family mediator's approach to negotiation facilitation, the role of the law and other norms including cultural and religious norms that are strongly held by one or more of those involved within the negotiation and the presence or absence of the voices of other members of the family within the mediation setting. We consider the ethical dilemmas the family mediator may face in a situation where there is an apparent power or knowledge imbalance and/or where the family mediator may be bound by competing expectations about their role including professional body obligations. Throughout we examine how the ethos of mediation, including its underpinning value of mutualism, and the challenges this can lead to where there is normative disagreement between the parties or substantial power imbalances, are evidenced within Sharia councils' family mediation practices.

Introduction

Family disagreements are a common phenomenon in all societies, whether they be about the establishment, subsistence and dissolution of adult relationships, about parenting and children, kinship obligations whether legally, culturally or religiously defined, how to structure finances, caring responsibilities for family members, inter-personal conflict including domestic violence and inter-generational differences about how family members should live their lives. It is therefore unsurprising that family matters are among the most common disagreements that give rise to disputes in which people seek third party help towards resolution.[1] These kinds of disagreements are rarely single-issue matters; they are usually complex, imbued with emotion, interwoven with differing perspectives on how things 'should be done'. Perceptions can change over time as family members' circumstances alter during the life-course and new people enter and some leave the family, as fortunes wax and wane.[2] As in other types of relationships, there is rarely a power-balance between those involved (the parties) and there may be differences in access to support and knowledge too.

Support for a range of life challenges is often provided by family or by family friends, some of whom may be implicated within or torn as a result of the nature of the disagreement, making support during these kinds of disagreements more partisan and less accessible to one or more of those involved. Family conflicts can be amongst the most challenging that people encounter, going to the core of identity, personal integrity and safety. Some may make recourse to formal legal help to support them during this time, whether by involving lawyers to negotiate on their behalf or to take matters through the courts. Others may seek the help of known trusted individuals to help them to broker an agreement. Others may choose a different kind of third-party intervention, that of a family mediator or, in some instances, a family arbitrator. This may be someone they have accessed via one of the family mediation

[1] Hazel Genn *Paths to Justice: What Do People Think About Going To Law?* (Oxford: Hart Publishing, 1999): 2000; Liz Trinder, Rosemary Hunter, Emma Hitchings, Joanna Miles, Richard Moorhead, Leanne Smith, Mark Sefton, Victoria Hinchly, Kay Bader and Julia Pearce *Litigants in Person in Private Family Law Cases* (London: Ministry of Justice, 2014).

[2] John Eekelaar, Mavis Maclean, and Sarah Beinart, *Family Lawyers: The divorce work of solicitors* (Oxford: Hart Publishing, 2000); Richard Ingelby 'Chapter 3 – The Solicitor as Intermediary' in Robert Dingwall and John Eekelaar (eds) *Divorce Mediation and the Legal Process* (New York, Oxford: Oxford University Press, 1988): 43–6; Gwynn Davis *Partisans and Mediators: The Resolution of Divorce Disputes* (Oxford: Clarendon Press, 1988); Lisa Webley *Adversarialism and Consensus? The Professions' Construction of Solicitor and Family Mediator Identity and Role* (New Orleans: Quid Pro Books, 2010).

organisations or referral systems. It may be someone they access via a community or religious group such as their mosque.

In this article we focus on the normative flexibility afforded to family parties by family mediation and also the challenges this can pose in contexts of substantial power imbalance between the parties. In doing so use a range of examples in the context of family mediation provided through Muslim Councils, independent third-party mediators linked to mosques. We draw upon empirical data collected and analysed by Bano during her research for the Ministry of Justice, locating her findings within the extensive family mediation literature and noting the extent to which there are effective ways to accommodate Muslim law within the family law system in England and Wales. We also address the potential for norms to collide, for example when the parties are not in agreement about the relevant norms, where a family mediator seeks to frame settlement through norms that are not shared by all parties, where there is a power imbalance that requires a family mediator to step in, for example in the context of domestic violence, and by intervening there may be perceptions of an imposition of norms. To do this we focus in section 1 on the nature of family mediation and its practice by Muslim Councils, which we shall sometimes refer to as Sharia Councils using those terms interchangeably. In section 2 we consider the importance of norms and in section 3 we turn to power-imbalances including those derived from or deepened by domestic abuse and the impact this has on family mediation. In doing this we hope to provoke thought about how a process-based profession may afford protection to vulnerable parties while maintaining its core values of mutualism which requires consensual, respectful co-decision-making, party autonomy, confidentiality and mediator neutrality. We also consider how in some contexts it may fall short.

Section1 The flexibility, utility, positive contribution and potential pitfalls of family mediation in Britain: Muslim Councils

The general nature of family mediation is now very well understood, although the simple definitions of family mediation belie the complexity of its practice or the sophisticated balancing act that needs to be performed as regards facilitation and direction, neutrality and power balancing as between the parties. Family mediation, as an umbrella term, covers a wide range of different types of facilitated negotiation entered into voluntarily by those who seek to address a family related issue that they have been unable or would prefer not to address entirely on their own. The term is used to explain a set of practices and values and has tended to be used as a means to explain a *process* of facilitating negotiation for family (or former family) members who remain themselves the decision-makers in relation to any agreement that may be reached.[3][4] It has proven difficult to define in a way that captures the nuances of the processes and values in this unusual professional project, a professional project where having mastery of a body of skills and tasks is essential but knowledge of a body of norms to provide advice is not.[5]

Family mediation has been practised in some senses for as long as third-parties have been trying to help others to reach their own agreements. In recent decades it has become increasingly professionalised, in part due to State focus on it as a means to provide quicker, cheaper, potentially less adversarial dispute

[3] Laurence Boulle and Miryana Nesic *Mediation Principles Process Practice* (London: Butterworths, 2001); Jay Folberg and Alison Taylor *Mediation: a Comprehensive Guide to Resolving Conflict Without Litigation* (San Francisco: Jossey-Bass, 1984) and Jay Folberg, Ann Milne and Peter Salem (eds) *Divorce and Family Mediation: Models, Techniques, and Applications* (New York, London: The Guildford Press, 2004). For definitions: Gwynn Davis and Marion Roberts *Access to Agreement: A Consumer Study of Mediation in Family Disputes* (Milton Keynes: Open University Press, 1988); Hans-Jürgen Bartsch (1999) *Council of Europe-Legal Co-operation in 1998-9* (Council of Europe).

[4] Lisa Webley 'Ethics and the Family Mediation Process' in Marian Roberts and Maria Federica Moscati (eds). *Family Mediation: Contemporary Issues* (London: Bloomsbury Publishing, 2020).

[5] For a classic definition of the hallmarks of professionalism see Richard Abel *English Lawyers between Market and State: The Politics of Professionalism* (Oxford, Oxford University Press, 2003).

resolution outside the formal court system.[6] Family mediators may be credentialised by a range of training providers and professional associations but in the UK this is not compulsory in most instances absent legal aid payment of family mediators. There is no legal requirement that one has undertaken a recognised form of training, adheres to a particular code of conduct or is regulated by a recognised professional association or body in order to practise family mediation. It is not a 'reserved' activity. There is consequently no compulsory regulation, no compulsory minimum standards, no requirement that a particular body of knowledge is used as the basis to support family mediation clients or that family mediators refrain from intervening as decision-makers on the substance of settlement. It is the embodiment of private ordering, a means by which family mediation clients agree upon someone to help them to try to reach an agreement using the norms that the clients consider important to them, although in true private ordering fashion it is also unregulated activity except to the extent that a family mediator has chosen to become credentialised and professionally recognised and thus to be regulated by a professional body as a family mediator.

At its core, family mediation involves one or more third-parties facilitating, evaluating and/or directing discussions which become negotiations between two or more people within a family, whether those family members are there alone, accompanied or represented by other third parties who are present or available to the parties externally in the background. Family mediators are not decision-makers on the substance, only on the process by which negotiations are conducted and even then they need agreement from all parties, party autonomy being fundamental. The family members who are holding the discussions may be in the same room or in separate rooms. The discussions are being facilitated, directed or evaluated by the family mediator, they are not being decided by her. The nature of the issues, the personalities and expectations of all involved will shape the way in which the mediation is conducted. There is an expectation of mutual respect, candour and confidentiality within the mediation setting, as well as dealing in good faith. As indicated elsewhere, family mediation has much in common with the ideology of mutualism and thus party autonomy is crucial, which includes genuine and freely given consent to all elements of the mediation, including whether to use family mediation to reach an agreement, the process, the norms and the terms of any settlement.[7]

Given its flexibility, family mediation is practised in different ways by different family mediators.[8] Some mediators, whether working alone or in pairs, are more facilitative, others more interventionist and definitions of family mediation reflect this. Those who are more procedural so as to facilitate the parties' ability to negotiate with each other consider party autonomy to be of fundamental importance. They may additionally seek to develop the parties' abilities to negotiate, seeing their role as partly developmental for the future as well as facilitative towards a solution for the present matter, thus supporting the parties to reframe their differences of view so as to develop positive approaches to different stances and perceptions of the way forward.[9] This can deescalate situations which may have been viewed as conflictual or disputatious into differing viewpoints which may be able to be brought into harmony. Some mediators approach family mediation in a task based or role orientated way, adopting a more facilitative or directional approach to the tasks of defining the discussion points, exchanging differing views, summarising either party's viewpoints, stated needs, possible settlement terms.[10]

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[6] For an in-depth analysis of notions of adversarialism and the reality in family disputes see Mavis Maclean and John Eekelaar *Family Advocacy: How barristers help victims of family failure* (Oxford: Hart Publishing, 2009); Mavis Maclean, John Eekelaar and Benoit Bastard (eds) *Delivering Family Justice in the 21st Century* (Oxford: Hart Publishing, 2015). See also for concerns about lawyer involvement related to governmental perceptions of adversarialism Philip Lewis *Assumptions about Lawyers in Policy Statements: A Survey of Relevant Research No. 1/2000* (London: The Lord Chancellor's Department, 2000).

[7] Webley, n 4.

[8] For a detailed analysis of contemporary issues in family mediation see: Marian Roberts and Maria Federica Moscati (eds). *Family Mediation: Contemporary Issues* (London: Bloomsbury Publishing, 2020).

[9] Christopher Richards 'The Expertise of Mediating' (1997) *Family Law* 52*;* Nancy Foster and Joan Kelly 'Divorce Mediators; Who Should Be Certified?' (1996) Vol 30 *University of San Francisco Law Review* 667.

[10] Simon Roberts 'Three Models of Family Mediation' at 144 in Dingwall and Eekelaar n 2; Philip Gulliver 'On Mediators' in Ian Hamnett (ed) *Social Anthropology and* Law (London: Academic Press, 1977) at 26–31.

Self-governing religious bodies are an interesting and important example through which we can better understand the ways in which family mediation takes shape in multiple and diverse ways in multicultural societies.[11] Bano's research on Muslim Council's provides us with insights into how forms of family mediation have been practised through one such religious dispute resolution mechanism. While family mediation is a core part of Muslim legal dispute resolution, it has a far longer history as a distinct religious practice of Muslim jurisprudence and Muslim family law.[12] It is practised within the context of family relations both in Muslim majority countries and within Muslim diasporic communities living in the West.[13] In substantive terms, scholars have, over the years, engaged with a range of issues and subjects considering the dynamics and process of family mediation as a form of Muslim dispute resolution (as found in Sharia councils) with debates ranging over the legal 'recognition' and 'accommodation' of Sharia councils, gender equality, conflicts with state law, domestic violence, the nature of family relationships and other aspects of lives of women as primary users of these bodies.[14] As a result, the scholarly contributions focus on the nature and development of Sharia councils and family mediation is now well over three decades old in the UK. Over this time there has been a growth of empirical and anthropological research with more recent focus by scholars and feminist scholars on the question of how do these bodies safeguard women as the most vulnerable of users? From a social and legal standpoint therefore the question of access to justice has been a key concern and whether Muslim women are subject to principles of equality, justice and fairness in Muslim family mediation settings, and further whether family mediation as practised in those settings adheres to conceptions of family mediation in other settings in the UK.

The idea of family mediation within a Sharia council setting refers to a set of assumptions found within the bodies in which Islamic jurisprudence, norms and values operate as the dominant mode of practice. In Britain, the history of Sharia councils has been widely documented[15] and can be traced to a diverse set of social, political and religious developments in civil society and evident as part of the emergence of a Muslim identity both forged and as part of multicultural practices and lived experience. The question of how such bodies should be classified and understood, for example as groups, associations, institutions, mediation bodies or alternative disputes resolution mechanisms often rests upon the way they may operate and the nature of their relationship to multicultural practices and internal rules of process, institution, whether they rely on a hierarchal relationship and the structures and processes of decision-making and methods of enforcement.[16] Moreover, over the past three decades, a growing number of scholars have explored the changing and contested nature of this relationship, revealing a new discursive space of engagement, contestation and negotiation between minority religious

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[11] For example, see Arshad Muradin 'Religious Authority and Family Dispute Resolution among Moroccan Muslims in the Netherlands' (2022) 11(1) *Journal of Muslims in Europe* 52-66. In Australia see Farrah Ahmed and Ghena Krayem *Understanding Sharia Processes Women's Experiences of Family Disputes* (Oxford: Bloomsbury, 2021).

[12] There is a wide body of scholarship tracing the history of family mediation in Islamic jurisprudence. Family mediation is considered an essential requirement prior to separation and divorce according to all Muslim schools of thought. See (eds) Ziba Mir-Hosseini, Kari Vogt, Lena Larsen and Christian Moe, '*Gender and Equality in Muslim Family Law, Justice and Ethics in the Islamic Legal Tradition'* (I.B.Tauris, 2013).

[13] In Muslim majority countries and countries with significant Muslim populations family mediation can be found as part of official state law practices. See Gopika Solanki, *Adjudication in Religious Family Laws: Cultural Accomodation, Legal Pluralism and Gender Equality in India* (Cambridge. Cambridge University Press).

[14] There is a wide body of scholarship crossing many disciplines. For an overview see Ralph Grillo, *Muslim Families, Politics and the Law: A Legal Industry in Multicultural Britain* (London: Ashgate, 2015).

[15] See Samia Bano (ed) *Gender and Justice in Family Law Disputes: Women, Mediation, and Religious Arbitration* (Chicago: Brandeis Series on Gender, Culture, Religion, and Law, 2017). John R. Bowen. *On British Islam: Religion, Law and Everyday Practice in Shari'a Councils* (Princeton University Press, 2016).

[16] See Samia Bano (2019) Private Community Governance: What is the 'Parity Governance Model' *In Minority Religions Under Irish Law* (ed.) O'Sullivan, K (Brill Press) pp 120-155.

communities and the State.[17] This would include for example the emergence of Sharia councils as part of mosques and religious community centres more specifically in Britain charting from the 1980, 90's and 00's. While these bodies can be identified as being autonomous and constructed by the institutional autonomy and frameworks of local religious loyalties and Islamic schools of thought, many may actively seek to avoid any interaction with each other and any possible conflict with a secular state and civil law. In other words, such bodies exist also to distinguish themselves from other religious groups and religious practices to emerge as offering a very specific type of expertise.

The development of Sharia councils can therefore be understood in relation to the conditions in which they are situated. There have been two seminal reports on the operation of Sharia councils in Britain. A report by the Ministry of Justice entitled *An exploratory study of Shari'ah councils in England with respect to family law*[18] identified 30 councils that worked on issues of Muslim family law and issued Muslim divorce certificates. The project found much diversity in the size of the councils, the number of religious scholars providing advice and assistance, and in the composition of council members. The second, the *Independent Review on Sharia Law in England and Wales*[19] focused on the question of State responsibility and State protections as part of debates on multiculturalism, integration and legal pluralism in Britain: and questioned what is the role of the State and law in the recognition and/or accommodation of Muslim religious practice? Both reports attest to the fact that Sharia councils are embedded within Muslim communities, act as family mediation services, at least to an extent, as part of mosques and community centres and appeared to have evolved according to the needs of the communities in which they are located. They provide family mediation and other services to local communities who seek them and are responsive to community need. The primary motivation for Muslim women who may contact a Sharia council is to obtain a Muslim divorce certificate. It is this context upon which family mediation takes shape and it is this space that opens up important questions of autonomy, choice and rights or norms and whether new forms of family mediation as forms of mutualism provide evidence of the emergence of new cross cultural mediation mechanisms both supported and challenged by State law?

Section 2 Family mediation and private ordering: the role of norms

Drawing upon mutualism as its ideological underpinning, family mediation is heavily process orientated so as to provide the ideal conditions in which the parties are able to reach their own mutually agreed solutions to the issues that they face. Consequently, the normative framework of family mediation is extremely weak, because the norms to be applied as the basis for decision-making are the norms that are acceptable to the parties, whether or not they are shared in common with the family mediator's preferred normative framework. The caveat here, is that the norms must be agreed, they must be lawful in that they cannot be actively contrary to State law eg must respect fundamental human rights and the welfare principle in relation to children etc and the mediation must be genuinely consensual and meet minimum standards of power balance so that any agreement is not void on public policy grounds. This provides a great deal of flexibility for the parties in determining how they wish privately to order their affairs and resolve their issues. It provides opportunities for, say, the parties to draw upon their understanding of Muslim Law or cultural or family traditions in a way that may be more difficult in a 'secular' or notionally secular setting ie State legal setting. It may be an important mechanism to reach religiously and culturally sensitive and compliant agreements. This may reduce conflict and emotional upset during a difficult time and allow religious and/or family traditions to be honoured and afford other family members with a means to offer support in a way that is acceptable to them. Solutions can be as creative as the parties can imagine and agree.

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[17] See Samia Bano , '*Feminist Methodologies, Legal Pluralism and Muslim Family Law in Britain'* in (eds) R. Scarcigila and W. Menski, Normative Pluralism and Religious Diversity: Challenges and Methodological Approaches (Kluwer Press 2018) pp57-88.

[18] Samia Bano *An Exploratory Study of Shariah Councils in England with Respect to Family Law* (MOJ and University of Reading, 2012).

[19] *The Independent Review on Sharia Law in England and Wales* (London: HMSO, 2018), see in particular 11-12. For a contrast with Australia see Ahmed and Krayem n 11.

Family mediators who adhere to professional standards remain bound by the requirement that the norms that form the basis of decision-making are the ones that are selected and used by the parties and not them.[20] Family mediators may not provide legal advice, and may only provide legal information if asked to by all the parties, agreements may be reached in ignorance of State law, or knowing the law but with a desire to apply a different set of norms that have been mutually agreed as between the parties. Those mediators who adhere to the College of Mediators' Code have this as a professional obligation including checking clients' emerging terms against the State law framework and, where it is considered that the likely outcome will be at odds with State law to insist that they take legal advice prior to finalising the agreement and in any event prior to seeking its legal enforceability through the State court consent order process that may turn a private agreement into a court ordered one.[21] For some this may appear to negate some of the benefits of mediation for those who wish very consciously to eschew State law as their normative underpinning but they are free to do this if they do not wish to render their agreement into a legally enforceable one through State courts. This is in keeping with the UK State's move towards private ordering, where those involved in what are regarded as private legal matters are heavily influenced via a series of public policy nudges to reach agreements themselves without recourse to the courts.[22] Family mediators who practise under the aegis of the College of Mediators' Code are obligated to ensure that the parents adhere to the welfare principle in section 1 of the Children Act 1989, namely that the child's welfare is the paramount consideration, welfare being understood as it is assessed in State courts by judges rather than by the parents themselves.[23] That being said, if the parties are not seeking to transform their agreement into a consent order there will be no outside assessment of any of the settlement terms unless someone seeks to query them independently of the process, whether through social services or the courts. Further, the welfare checklist is sufficiently loose-weave to allow for a range of arrangements for children albeit ones that will often require the ascertainable wishes and feelings of the children to be prioritised if not given overwhelming weight, rather than the wishes and feelings of the parents or other family members. Otherwise, the normative framework is not prescriptive aside from the agreement being one that would not be void on public policy grounds.

Family mediation may be ideal for those with a shared normative framework, financial means, sufficient respect for each other that they wish to reach a genuine agreement, and similar levels of power within this setting. With an expert mediator they may feel to be in control, have the chance to craft creative solutions, voice their concerns and hopes to each other about how their lives will develop in whatever new configuration may result.[24] They may be able to give power to their values, involve a wider kinship group in the process of uncoupling or reconfiguring. They may feel truly heard. At a time which is often fraught and can lead to bitterness and upset, the mediation process may feel empowering. True, they may have reached a different outcome, perhaps even a more personally 'beneficial' outcome had they gone to solicitors for partisan legal help deploying English law as the normative framework, But a more lucrative outcome may not be a better one if it leads to a (former) partner or one's children or extended family being worse off, and if third parties become one's mouthpiece in a way that does not support positive separation or change.

Difficulties may arise when the parties are in conflict and/or they do not have a shared set of norms they wish to apply, or their norms are ones that would fall outside an acceptable range of norms for the State, a relatively rare occurrence but a possible one. Further, if they need to fall back on the State for financial or housing assistance now or in the future, they may struggle. The State has largely walked back from a family justice model where financial as well as other forms of power imbalance have the potential to

[20] Lisa Webley 'Chapter 17 When is a Family Lawyer, a Lawyer' in Maclean, Eekelaar and Bastard (eds) n 6 at 305–21.
[21] HA Finlay 'Family mediation and the Adversary Process' (1993) Vol 7 63 *Australian Journal of Family Law* 70–74; Simon Roberts 'The Path of Negotiations' (1996) Vol 49 *Current Legal Practice* 108.
[22] Webley, n 6.
[23] Webley n 20.
[24] See Mavis Maclean and John Eekelaar *Lawyers and Mediators: the brave new world of services for separating families* (Oxford: Hart Publishing, 2018).

be partially 'corrected' or more likely adjusted on divorce or similar break-down. But there are some legal protections built into the State framework for those considered more vulnerable, particularly for children. State legal norms can be used to adjust power imbalances within families, whether that be to do with gendered caring roles leading to a loss of income from the primary carer and their financial subordination to the primary income provider, or the limited contact of the primary incomer-generator with children following separation from the primary child carer.[25] That is not to say that different norms cannot provide these levels of protection, or even greater protection. And a skilful mediator may sense test any developing settlement terms with the parties to ensure that they are clear on what they may mean for them and their dependants, not just now but in the future. Privately negotiated agreements may do as much as State norms to support the more vulnerable party, or even more. Having said that, any decisions made during a relationship breakdown may have life-long consequences for the more financially straitened party, and those consequences may also be borne by dependants.[26] Given the dominance of neoliberal ideology in the way in which the State has structured welfare support for families, gendered roles within families can have lasting consequences and State law has some power to redress some of the outcomes, if not perfectly or fully, often reflected in solicitor negotiated settlement terms.[27] A family mediator is not permitted to impose her own view of an appropriate settlement, all she can do is to guide even in the most directive forms of family mediation. She cannot provide legal advice only legal information if asked. In a context where State assistance is limited, it is imperative that the norms which are deployed are ones that protect the vulnerable as the State will not necessarily step in sufficiently to help if the agreement does not provide sufficient resources or opportunities for those involved.

This is where the controversy about whose norms are used begins to become apparent. There are some who assert that regardless of the type of dispute resolution that is used, whether third parties are involved, whether it is an agreement reached by the parties, by third party representatives or an adjudication by an arbitrator or a judge, the norms should be those of the State in order for structural inequality as between different groups to be minimised and so that those with less power do not find themselves unequally and negatively impacted.[28] Leaving aside, here, whether State law is able to deliver equity, to give effect to the principle of compulsory use of State law would require a major investment either in public legal education and/or legal aid in family matters, as well as court infrastructure. The current lack of State funding is considered, by some, to be an abdication of responsibility that erodes the rule of law with more acute consequences for the vulnerable.[29] Some consider all settlement, rather than adjudication, to be contrary to the purpose of the law.[30] Others consider that the law, and family law specifically, is so structurally unequal and patriarchal that a move away from its black letter application may be beneficial[31] as regards rebalancing gender inequality[32]

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[25] See Marty Slaughter 'Chapter 3 Marital Bargaining: Implications for Legal Policy' in Mavis Maclean (ed) *Making Law for Families* (Oxford: Hart Publishing, 2000) at 44 on gender and mediation; see Jantine Oldersma and Kathy Davis 'Introduction' in Kathy Davis, Monique Leijenaar and Jantine Oldersma (eds) *The Gender of Power* (London: Sage Publications, 1991) 1 at 12 on gender and power more generally.

[26] Bob Jessop 'From Thatcherism to New Labour: Neo-Liberalism, Workfarism, and Labour Market Regulation' in Henk Overbeek (ed) *The Political Economy of European Employment: European Integration and the Transnationalization of the (Un)Employment Question* (London: Routledge, 2003) 137.

[27] Gwynn Davis, Stephen Cretney and Jean Collins *Simple Quarrels: Negotiations and Adjudication in Divorce* (New York: Oxford University Press, 1994): ch 3. NB Although note O'Donovan's concerns as regards the gendered nature of law: chapter 2.

[28] For a discussion of family law's purposes, see John Eekelaar (2000) 'Chapter 2 Uncovering Social Obligations: Family Law and the Responsible Citizen' at 9-28 at 9 in Maclean n 25.

[29] For a discussion, see Hazel Genn 'What is Civil Justice For? Reform, ADR, and Access to Justice', (2012) Vol 24 *Yale Journal of Law and the Humanities* 397.

[30] Owen Fiss 'Against Settlement' (1984) Vol 93 Iss 6 *Yale Law Journal* 1073–90 at 1075–85. See further William Twining 'Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics' (1993) Vol 56 No 3 *Modern Law Review* 380 on rational adjudication; see Finlay n 21 for a contrary view.

[31] Ngaire Naffine *Law and the Sexes: Exploration in Feminist Jurisprudence* (Sydney, Melbourne, Wellington and London: Allen and Unwin, 1990) at 148.

[32] Katherine O'Donovan *Family Law Matters* (London: Pluto Press, 1993) at 41.

and cultural alienation for those who are not well represented by the law's approach to families.[33] And as family law is so malleable it can be difficult to predict what would be a likely outcome were the case to be adjudicated, in any event, and so whatever protections may exist are not so obvious that they could be readily identified as being absent from an agreement that has been reached by the parties themselves. For proponents of family mediation, it is crucial that the parties are the decision-makers when it comes to choice of norms, the heads of settlement, whether they can and do reach agreement on any aspects of their situations. The family mediator must not impose norms or terms of settlement, but they also ensure that one party does not overbear another and impose his norms on the other or pressure the other to agree to particular causes of action. This is where a conflict of norms, or power imbalances which may give rise to an imposition of norms or terms, become live issues regardless of the type of family mediation that is being practised or the service or organisation within which the service is located.

How then should the question of power and potential forms of violence within families in the spaces encapsulated by Sharia councils be approached by feminists and human rights defenders under the context of culture and multiculturalism? Many feminist theorists accept that multicultural accommodation of religious and cultural practices in family mediation should only be permitted if it enhances rather than constrains the personal freedom of users. If the agency and choice of, for example, women users are threatened or undermined, then accommodation should not only be denied but actively prohibited. Family mediation has mutualism including mutual respect and party autonomy as a set of core values, and so on the face of it family mediation should provide an opportunity to support those in more vulnerable positions if practised in a way that is in keeping with those values and by a skilful mediator. Underpinning this is the role of the family mediator and in the Muslim council context the extent to which norms are agreed by all parties in a spirit of transparency, openness and trust. This gives rise to some questions. Firstly, are the parties who are seeking mediation aware of the nature of the model of dispute resolution that is being offered and is the third party dispute resolution provider aware of their role as a facilitator rather than a decision-maker or adjudicator? The Independent Review into the Application of Sharia Law in England and Wales panel indicated that it was not always clear when Muslim Councils were providing family mediation or other forms of dispute resolution which may have different understandings of the roles of all involved.[34] They found that the definition of mediation was lose, there was a lack of formal mediation skills on the part of those undertaking the dispute resolution work, a lack of standardised practices and safeguarding protocols and some concerns, in some instances, that pressure may be being applied to women that was not being counterbalanced in the mediation process. Gohir and Akhtar-Sheikh have separately noted that Muslim council mediators often have little if any formal or Islamic law mediation training, knowledge of arbitration rules and counselling and many therefore may have "neither the skills nor the knowledge to deal with family and divorce matters from an Islamic or English family law perspective."[35] These findings raise important questions on the parties strategies for using faith based dispute resolution, whether family mediation is being entered into freely, whether safeguards are in place through the mediation so as to ensure the values of mutualism are respected and settlements fully consensual.

Research on Sharia councils points to the contextual and lived experience of women users of these bodies and the ways in which Muslim women's agency can enable a transformation and challenge to group norms as part of family mediation practices. Drawing upon the voices of those affected by Sharia councils enables a process of personal autonomy and decision-making. Some feminist scholars point out that State regulation can prevent harms that individuals may experience with their use of Sharia councils, as in other faith based or non-State law services, through a process of deliberative

[33] On the importance of culture, see Sonia Shah-Kazemi 'Cross-cultural mediation: a critical view of the dynamics of culture in family disputes' (2000) Vol 14 No 3 *International Journal of Law Policy Family* 302-325.
[34] The independent review into the application of Sharia law in England and Wales at 11-12 n 19.
[35] Shaista. Gohir and Nasim. Akhtar-Sheikh 'British Muslim Women and Barriers to Obtaining a Religious divorce' in Samia Bano (ed) *Gender and Justice in Family Law Disputes* (Chicago: Brandeis Press, 2017) at 166.

democracy.[36] For some feminist scholars and legal practitioners, new methods of family mediation within religious communities raise a number of fundamental questions relating to citizenship, personhood, and agency as well as the extent to which family mediation may undermine traditional conceptions of justice, "equality before the law" and "common citizenship".[37] The role of culture and religion in family mediation within Sharia councils is broadly understood as part of a wider liberal response to the challenges presented by immigration and the settlement of migrant communities into western liberal democracies from diverse religious and cultural backgrounds. The emergence of new forms of family law dispute resolution mechanisms raise questions of "rights" and demands for recognition of community rights are framed as "multicultural challenges" which, in turn, give rise to important questions about power, authority, agency, choice and capacity.[38] For instance, should the State or a religious minority community have the ultimate authority in all forms of family mediation? Are women who work through family mediation in religious tribunals acting autonomously? Or, are they succumbing to the pressures of non-Western religious models of family mediation? There is now a rich body of scholarship that draws our attention to the social, political, and philosophical dimensions of minority rights and the ways in which the State accommodates cultural and religious differences while respecting group rights.[39] For legal scholar Ayelet Shachar, the right balance between "the accommodation of minority group traditions, on the one hand, and the protection of individuals citizenship rights, on the other" is what holds together liberal societies.[40] This balance has been tested out extensively in relation to the practice of cultural and religious beliefs of religious communities living in the west and their potential effects upon women as "at-risk" group members in the realm of family mediation.

Nevertheless, legal anthropology of family mediation points to ways in which religious tribunals encourage a reinforcing of male and conservative male voices and internal dialogue in the family mediation processes that can be skewed in favour of male participants, criticisms that have been levelled at the way in which State law has been framed historically and which law reform has sought to redress.[41] Scholars have evinced scepticism about Muslim women's use of Sharia councils as family mediation fora, for instance, arguing that such behaviour constitutes acquiescence to patriarchal structures rather than an autonomous choice because the dispute resolution afforded through these routes is less mutualistic and more normative on the part of those who act as dispute resolution specialists within the councils.[42] By contrast, other scholars provide important insights into the ways in which women's agency, autonomy, and personal decision-making capabilities are expressed through formal and non-formal marital dispute resolution mechanisms and as part of women's social and legal lived realities.[43] These critiques suggest that the process may strengthen rather than weaken party agency, including women's autonomy, by effecting some measure of power balancing as between different interests.

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[36] See Anne Phillips, *Multiculturalism without Culture*, (Princeton: Princeton University Press 2007)

[37] See Ayelet Shachar 'Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law' (2008) Vol 9 No 2 *Theoretical Inquiries in Law* 573-607.

[38] Shaheen Sardar Ali 'From Muslim Migrants to Muslim Citizens: Islamic Law and Muslims in a Multi-faith Britain', in R. Griffiths-Jones (ed.), *Islam in English Law, Rights and Responsibilities and the Role of Shar'ia* (Cambridge: Cambridge University Press 2012) pp157-75.

[39] For an overview of the extensive literature produced in this field of study see Shaheen Ali Sardar, *Modern Challenges to Islamic Law*, (Cambridge: Cambridge University Press 2016).

[40] Ayelet Shachar, Multicultural Jurisdictions: Cultural Differences and Women's Rights (Cambridge University Press 2005) at 23.

[41] See Ziba Mir Hosseini et al n. 12 and Ziba Mir Hosseini, *Journeys Toward Gender Equality in Islam* (Oneworld Academic 2022).

[42] Machteld Zee 'Choosing Sharia? Multiculturalism, Islamic Fundamentalism and British Sharia' (2016) *Continuum* 54. See further Machteld Zee *Choosing Sharia? Multiculturalism, Islamic Fundamentalism & Sharia Councils* (Eleven International Publishing, 2015) and cf. Bowen n 15 and Silke Elrifai 'Choosing Sharia? Multiculturalism, Islamic Fundamentalism & Sharia Councils On British Islam: Religion, Law and Everyday Practice in Shari'a Councils' (2016) Vol 14, Iss 4 *International Journal of Constitutional Law*1034-1038 for a review and critique of Zee and Bowen's books.

[43] Rehana Parveen 'Do Sharia Councils Meet the Needs of Muslim Women?' in Samia Bano (ed) *Gender Equality and Justice in Family Law Disputes: Women, Mediation and Religious Arbitration* (Chicago: Brandeis University Press, 2017).

Mediation is traditionally understood as a process that assists parties in pre- and post-separation phases, whether for those married or cohabiting, and/or who have children together, to produce the best possible outcomes for all parties involved. Moreover, it can take place both with and without State assistance and recognition. Family mediation in Sharia councils is traditionally understood as a process that assists parties in application for a Muslim divorce certificate. In this way it forms a key part of parties' negotiations. Family mediation can also take place in other religious alternative dispute resolution processes, such as the Jewish Beth Din or the Muslim Arbitration Tribunal using existing civil law mechanisms to produce agreements by both parties subject to safeguards in the public interest. The terms, "mediation" and "religious arbitration" are then often presented as interchangeable and overlapping privatized forms of dispute resolution within ethnic and religious communities. Further, they are often perceived by users to be situated outside the traditional framework of legal dispute resolution. Yet as we have seen in the 2013 England and Wales Supreme Court decision where the court ruled to uphold a rabbinical authority's arbitration decision on child custody in a divorce proceeding[44], the State concurred with a religious authority in a marital dispute. Despite this decision, both family mediation and religious arbitration continue to occupy a contested arena in "law" whereby competing legal and social discourses interact to produce a wide array of new disputing mechanisms and outcomes for its users. Yet, few scholars have paid little attention to the ways such agreements are forged and how issues of fairness, consent, justice, protection for clients take shape during the process. In some instances the blurring of conceptions of mediation and arbitration make it difficult to be clear on who is determining the norms to be applied and who is the decision-maker, in other instances it is clear when the parties sign up to make use of the dispute resolution mechanism. Clarity is important as the basis for autonomy, as it is of course, to consent.

Even given clarity about the nature of the dispute resolution mechanism, mediation has been the subject of critical scrutiny of feminist theorists for many years. This is not something exclusive to Sharia Councils. In the late twentieth century, for example, feminist scholarship from multiple theoretical traditions converged around scepticism in the use of mediation to resolve matrimonial disputes. For many, the theoretical promise of resolving disputes in a fair, open, and non- adversarial process failed to match up to the experience of family mediation.[45] Instead, these practices ultimately reproduced unequal power relations and patriarchal social practices reflecting the subordinate position that women occupy in wider society. Mediation, such feminists argue, can increase rather than reduce the level of harm and violence directed towards vulnerable participants, particularly women.[46] Feminist criticisms of family mediation therefore relate to broader issues of social, cultural, and historical relationships and unequal power relations resulting in unfair bargaining practices and outcomes for vulnerable parties.

Having said that, the non-adversarial approach to negotiations is now accepted even amongst legal practitioners. And the State views this as being better delivered via family mediation than other forms of dispute resolution. For example, in April 2014 it became obligatory for all couples in England and Wales to first attend a mediation meeting prior to an application for divorce to the court. The extent to which newer mediation and religious arbitration "spaces" are emerging to resolve matrimonial disputes and the ways in which they are increasingly being occupied by a new kind of faith–based approach as part of minority religious communities warrants further academic scrutiny.[47] Framed as sites upon which family law matters are resolved according to personal religious systems of law these bodies have emerged often within the "private" sphere of local communities and developed frameworks that are

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[44] AI v MT (2013) EWHC 100 (Fam).

[45] See Pragna Patel, 'The Growing Alignment of Religion and the Law: What Price Do Women Pay? in Samia Bano (ed) *Gender and Justice in Family Law Disputes: Women, Mediation, and Religious Arbitration* (Chicago: Brandeis Series on Gender, Culture, Religion, and Law, 2017).

46. ibid.

[47] For research on the use of family mediation in this context, following government reforms see Anne Barlow, Rosemary Hunter, Janet Smithson and Jan Ewing *Mapping Paths to Family Justice Briefing Paper and Report on Key Findings* (Exeter: University of Exeter, 2014) available at https://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/lawimages/familyregulationandsociety/pdfs/Mapping_briefing_paper_final_post_conference_version___ISBN.pdf

characterized by specific cultural and religious norms and values. Furthermore, self-governing religious bodies which act as councils and tribunals in matters of family law not only challenge the assumed centrality of State law mechanisms, but also open up the question of resolving matrimonial disputes in multicultural nation states in cross-cultural settings.

This poses a series of questions: How do community processes and the State overlap and/or contest one another in family law dispute resolution? If mediation and religious arbitration manifest in different ways in law and community, what are their effects upon women? What kind of ADR practices are formed and what kinds of enforcement mechanisms, State legal processes, or community-based processes can protect against coercive social and cultural pressures? What forms do mediation and religious arbitration take within nations and across national borders? How do personal laws, State laws, and community dispute resolution processes such as Sharia councils and the Muslim Arbitration Tribunal overlap and/or contest one another in Britain? What kinds of enforcement mechanisms shape such family law dispute resolution processes nationally? And finally, to what extent do family mediation dispute resolution mechanisms protect against coercive social and cultural pressures for *all* women living as part of culturally and religiously diverse communities?

Consensus and a sufficient power balance between the parties are imperative to the success of any agreement and also its moral authority. Where the parties are being represented by separate third parties who negotiate on their behalf, power balances may be reduced or removed altogether where both have competent, qualified third party help such as solicitors. Where they are negotiating themselves, with the support of a family mediator who must remain neutral or impartial as to the outcome and the stances of the parties, this is more difficult, regardless of the location of the service or its cultural and religious underpinnings. The imbalance may be one of knowledge, of negotiating skills or attributes, or it may be as a result of family position or worst still domestic violence. The response to this, historically, has been to address power imbalances by employing legal representatives acting as advocates for their client's case representing their interests, if needs be before an impartial judicial decision-maker applying norms enacted through parliamentary procedures interpreted by the judiciary. Family mediation departs from this model, imbues the family mediator with process control but not decision-making or representative power. This has led some to conclude that family mediation cannot be deployed where the power imbalance is great and/or there is the potential that domestic violence may be present within the family setting.[48] It is to this issue that we turn next.

Section 3 Family mediation and private ordering: power-imbalances, domestic violence and process and substantive protections

As previously discussed, the success of family mediation rests, in part, on the parties' willingness and ability to negotiate in good faith and with respect for the others' positions in a way that leads to a sufficient balance of power such that any agreement is viewed subjectively by all parties, and in the event of a consent order also objectively by the court, to be consensual. Part of the role of the family mediator is to identify correctly the power imbalances and then to redress them through process interventions so that there is a reasonable prospect of equal bargaining.[49] Family mediators are as informed by their own views of relationships, gender roles, parenting, caring for family members, as are others in society and structural biases may go unchallenged in situations of power imbalance unless a family mediator is able to uncover their own stances on key issues and seek actively to redress them so as to allow for genuine impartiality in their dealings with their clients as opposed to reinforcing a

[48] See, for example, Rachael Field 'Convincing the Policy Makers that Mediation is Often an Inappropriate Dispute Resolution Process for Women: A Case of Being Seen But Not Heard' (2001) *National Law Review* 1-19; Rachael Field 'A Feminist Model of Mediation that Centralises the Role of Lawyers as Advocates for Participants who are Victims of Domestic Violence' (2014) Vol 20 No 1 *Australian Feminist Law Review* 65-91.

[49] For a range of factors to be considered see Roberts n 21.

dominant party's views, subconsciously.[50] This includes our cultural frame too. Cultural expectations may lead us to view some things as usual, others as unusual, some as acceptable, others as not. Where the parties and the family mediator have a relatively shared frame of reference and there are similar levels of power within the family relationship cultural and/or social homogeneity may not offer many benefits or challenges in the context of mediation. Where there are power differentials between the parties these may come to the fore and mediator reflexivity may be the key to them being harnessed positively for the parties rather than them become an obstacle which instantiates rather than redresses imbalance.

Some power imbalances may be obvious to the family mediator. Others may be more challenging to spot and often domestic violence within the relationship or the wider family unit will be one of those difficult ones to identify. Family mediators who have undertaken nationally recognised training will often have been trained in domestic violence identification protocols which they will deploy at the initial meeting or as a screening stage ahead of mediation commencing. They will have tools to assist in managing mediation, for example shuttle mediation practices with the parties in different rooms and the mediation shuttling between them. Where it is not possible adequately to counterbalance the power differential sufficiently the family mediator may conclude that she must terminate the mediation altogether.[51] Some of these techniques are controversial within the mediation community, as they may require the family mediator to intervene within the substantive discussions in a way that the stronger party may consider to be a breach of neutrality or impartiality, a process ethic that goes to the very foundation of family mediation.[52] Yet, not to do so would lead to partiality and a lack of neutrality in itself, a passive form rather than an active one, which would offend ask another foundation principle of genuinely consensual, voluntary decision-making.[53] Intervention may make it hard to remain neutral as to the outcome, and clear that the family mediator is not imposing her norms on the parties. Non-intervention may allow the dominant party's norms to set the agenda and frame the outcomes. As argued elsewhere, in these very sensitive and tricky situations, a family mediator needs to be deft and strategic as well as deeply reflective as to their stance, their biases, how those may impact on the parties' substantive decision-making and the perils of leaving the discussions to run as the dominant party wishes to the potential long-term detriment of the weaker party.[54] This has led some practitioners and scholars to conclude that active management of power relationships via forms of mediation such as activist, transformative narrative mediation, may be the only way of addressing power imbalances effectively alongside impartiality and neutrality as to outcomes.[55] Mediator approach and style

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[50] Trina Grillo (1991) 'The Mediation Alternative: Process Dangers for Women' (1991) Vol 100 Iss 6 *The Yale Law Journal* 1545.

[51] M Hester and C Pearson 'Domestic Violence and Mediation Practices. A Summary of Recent Research Findings' (1997) Vol 7 No 1 *Family Mediation*; Nancy Thoennes, Peter Salem and Jessica Pearson 'Mediation and Domestic Violence Current Policies and Practices' (1995) Vol 33 No 1 *Family and Conciliation Courts Review* 6-29.

[52] Ingelby at 53 n 2.

[53] Richard Dingwall (1988) 'Empowerment or Enforcement?' at 141 in Dingwall and Eekelaar n 2; David Greatbatch and Richard Dingwall 'Selective Facilitation Some Observations on a Strategy used by Divorce Mediators' (1989) Vol 23 *Law and Society Review* 613; Alison Taylor 'Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence and Transformative Process' (1997) Vol 14 *Mediation Quarterly* 215: Linda Mulcahy 'The Possibility and Desirability of Mediator Neutrality: Towards an Ethic of Partiality' (2001) Vol 10 *Social and Legal Studies* 505; Hilary Astor (2007) 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) Vol 16 *Social and Legal Studies* 221–39.

[54] Astor n 53; James Wall, John Stark and Rhetta Standifer (2001) 'Mediation: A Current Review and Theory Development' (2001) Vol 45 Iss 3 *Journal of Conflict Resolution* 3 370–91; for evidence that this practise is already in use in another context see further Mulcahy n 51. See further Webley n 4.

[55] Christopher Harper 'Mediator as Peacemaker: The Case for Activist Transformative-Narrative Mediation' (2006) Vol Iss 2 *Journal of Dispute Resolution* 595; Haynes, J *The Fundamentals of Family Mediation* (New York: Albany State University and New York Press, 1994); Astor n 53; Rachael Field 'Mediation Praxis: The Myths and Realities of the Intersection of Mediator Neutrality and the Process of Redressing Power Imbalances' 5th National Mediation Conference, Australia, 2000 available at: http://www.apmec.unisa.edu.au/events/conference2000/field.pdf; Kathy Douglas and Rachael Field (2006)

influences settlement outcomes[56] and research suggests that it may be difficult for many mediators to tell themselves how interventionist they are being in any given mediation.[57] The greater the intervention, the greater the impact on settlement, the less interventionist the less one can counter power imbalances. Facilitation and evaluation are not entirely distinct forms of practice[58], they are on a continuum and both are referenced in the College of Mediators' Code. Similarly, interventionist or therapeutic forms of mediation may have a good deal in common from the clients' points of view but may lead to different impacts depending on the nature of the clients.[59] Intervention is, in the end, an imposition of the family mediator's norms on the parties, to protect one against being overborne by the other. Whose norms are applied may become difficult to unpick where there are dominant and vulnerable parties with a family mediator seeking to ensure fairness between them. Good quality training and oversight, regular reflection on professional practice and clear statements of the purpose of mediation and who is responsible for which types of decision-maker are key to the success of mediation in these difficult contexts.

How transparent should the family mediator be about their level of intervention? Do they need to do this to underscore the values of mutualism and of impartiality and neutrality as to outcome but not necessarily as to process if that is what is needed to provide a safe, fair, more balanced space for negotiations to flourish? Should they need unanimous party consent for this and if so when, at the beginning, mid-way through? And if they begin to evaluate any suggested outcomes does that step into quasi-adjudication similar to the role of a judge in a court in, for example, a Financial Dispute Resolution but for the fact that they have supplanted their norms for those of the parties or the State? What role should the family mediator play in evaluating outcomes, and seeking to inject the voice and assess the voice of those not present in the family mediation, such as children in line with the Welfare Principle? These are difficult questions with no easy answers; the role of the family mediator is a really challenging one where parties are not represented in the mediation and there is a power-imbalance which process adjustments alone cannot remedy. The family mediator needs to be: impartial as to outcome but to seek to work towards fairness; to facilitate negotiations to support the whole family and yet only have some parties present; to ensure that one's own norms are not injected into proceedings and yet to redress a dominant party's precedence of his norms, while walking the tightrope of needing to maintain the trust of the parties in the room, if a consensual settlement could be in prospect. Family mediators will have personal views on the appropriateness of the settlement, these are legitimate and need to be privately acknowledged, but their views cannot be determinative except as a brake to stop the negotiations in the event that they appear to be leading to an unfair outcome that would be substantially detrimental to a party or parties. Whether the terms neutrality and/or impartiality are the correct ones in this context, is difficult to know, but they have connotations that are difficult to square with redressing power imbalances and Webley has argued elsewhere that critical reflexivity may be a better way of terming the approach while underlining neutrality as to outcome except where the fundamentals of mutualism are being degraded due to power differentials that cannot be effectively redressed.[60]

'Looking for Answers to Mediation's Neutrality Dilemma in Therapeutic Jurisprudence' (2006) Vol 13 No 2 Murdoch University *Journal* 177–210.

[56] Jessica Pearson and Nancy Thoeness 'Divorce Mediation: An American Picture' at 212 in Dingwall and Eekelaar n 2; William Donohue, Laura Drake and Anthony Roberto 'Mediator Issue Intervention Strategies: A Replication and Some Conclusions' (1994) Vol 11 *Mediation Quarterly* 261–74.

[57] Greatbatch and Dingwall n 53.

[58] Haynes n 55.

[59] Roberts n 10: 144. Boulle and Nesic 4–6 n 3; Marion Roberts (1992) 'System of Selves? Some Ethical Issues in Family Mediation' (1992) Vol 10 *Mediation Quarterly* 11; Test Design Project, Performance-Based Assessment: A Methodology for Use in Selecting, Training and Evaluating Mediators (National Institute for Dispute Resolution, 1995)*: 4–6;* Leonard Riskin 'Understanding Mediator Orientations, Strategies and Techniques: A Grid for the Perplexed' (1996) Vol 1 *Harvard Negotiation Law Review* 7.

[60] See Lisa Webley 'When is mediation mediatory and when is it really adjudicatory? Religion, Norms and decision-making' in Bano n 43. See further Parveen n 43.

The normative framework of Sharia councils is based on a specific set of cultural and religious norms and values that can exclude alternative interpretations and discourse on 'Muslim disputing'. Empirical research demonstrates that women can both be represented in and excluded from various family mediation processes within Sharia councils.[61] Sharia councils insist that all women who apply for a Muslim divorce certificate participate in reconciliation and family mediation sessions. These mediation sessions can serve to reinforce inequality and disadvantage for some women who may already be disempowered in the family and community. They may support others. Any insistence that family mediation is an obligation (as opposed to that one is obligated to give it a try unless there are good reasons not to, such as fears that safety could not be assured) is contrary to the ethos of mediation. In this context concerns about the role of mediators negotiating family settlements where women may have no access to the protection of State law require further examination.

Family mediation within Sharia councils is largely run by male religious scholars in which it has been suggested that gendered power relations are produced and enacted in these community participatory processes.[62] Power is not uniformly distributed. The sites of challenge, resistance and agency remain limited, if not entirely absent, for Muslim women. Women may, for example, challenge the version of events put forward by the male scholar and therefore challenge his authority and seek to promote alternative interpretations albeit in subtle ways. The role of female mediators remains limited, taking on the role of counsellors rather than mediators and they therefore cannot intervene in matters of Muslim family law. In this way, resistance to traditional notions of family life, the role of wives, gender relations is one that is tightly controlled and maintained within the boundaries of the Sharia council.[63] Hence the female counsellor may be consigned to the periphery of the family mediation process, her role reduced to one of observer rather than active participant in the decision-making process. By contrast the position of male family mediators in the council is both strategic and negotiated and may produce gendered narratives of the role of women in Islam (as mothers, wives and daughters). Such gendered interpretations have a direct bearing on the process and operation of family mediation in the councils and promote the idea that the role of Muslim women is not to occupy positions of power in the local community or serve as voices of authority in the local Muslim community. This is not to suggest that such culturalized interpretations of Islam and what it means to be a Muslim woman in British society are neither contested nor unchallenged. However, the space in which women are able to engage in a transformative dialogue within the councils remains limited and tightly controlled. This militates against a full expression of mutualism as an underpinning value which shapes the process and leaves both/all family parties as the sole decision-makers of any agreement that is reached according to the norms that they together agree to apply themselves, as between themselves, to reach their own agreed position. There is also limited data available upon which to assess the success of family mediators in this context being able to balance power differentials in instances of domestic violence, as was the case early on with family mediation outside of Muslim Council settings.

Conclusions

Bano's study has revealed that the nature of family meditation within Sharia councils is embedded with the normative values of Muslim jurisprudence that underpin Muslim models of dispute resolution. The process of family mediation is interesting and contextual. It often takes shape in response to local pressures and, at times, in response to the dominant State legal culture while seeking to remain loyal to the specific normative values of Muslim jurisprudence that underpins this model of family mediation. What this means in theory is that these bodies model and aim to mirror family mediation practices on State recognised and professionally accredited mediation practices, at times emulating processes of

[61] See Samia Bano, 'Sharia Councils and Muslim Family Law: Analysing the Parity Governance Model, The Sharia Inquiry and the role of State/Law Relations' in (ed.) Samia Bano in (ed.) *The Sharia Inquiry, Religious Practice and Muslim Family Law in Britain*, (Routledge 2023) pp95-129.

[62] See Gohir and Aktar-Sheikh n.35.

[63] Elham Manea, 'Women and Shari'a Law: The Impact of Soft Legal Pluralism in the UK' in (ed.) Samia Bano in (ed.) *The Sharia Inquiry, Religious Practice and Muslim Family Law in Britain*, (Routledge 2023) pp60-78.

rules, procedures and oversight and promoting ideas of 'personal choice' as a key component in the mediation process. In practice, Muslim mediation practices occupy an intermediate social space between official mediation practices and familial relations. Often termed as cross-cultural mediation negotiations within the marital and family domains of marital disputes, they assume a very particular complexity in relation to the dynamics of power, gender and identity defining normative ethics shaping the setting upon which negotiations occur. Family mediators who consider themselves to be practising Muslims adopt a normative framework based on Islamic values and principles. Those family parties seeking to use this form of family mediation are not free to select their own normative framework as part of the process, instead they have signed up to a normative framework by seeking to use family mediation through this process. This may be party autonomy in action if the family parties are clear on what they have agreed to, in essence to use a form of dispute resolution which has some of the hallmarks of family mediation and some of family arbitration, where the parties are not entirely free to reach their own agreement based on their own expression of norms but will be supported towards a resolution according to an alternative set of norms from those applied through State processes. In this vein family mediation within the context of a Sharia council transforms the family mediation process into something potentially new and can for some women emanate an emancipatory aura, if this is what has been chosen as an informed expression of autonomy by all the parties, leading to a mutually freely agreed outcome. This is, though, dependent on the choice of family mediation in this context being a genuine choice made freely, rather than one that is deemed necessary in order for the grant of a religious divorce. And further, on the extent to which power imbalances can be uncovered and effectively addressed, something which is currently under-recognised and researched.