Sharia Councils and Muslim Family Law: Analysing the Parity Governance Model, the Sharia Inquiry and the role of the state/ law relations.

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Abstract

In February 2018 '*The Independent Review into the application of sharia law in England and Wales'* was published with a focus on whether sharia law is being misused or applied in a way that is incompatible with the domestic law in England and Wales. In particular it raised questions as to whether there were discriminatory practices against women who use sharia councils and came about after years of concerns raised by academics, lawyers and women's activists. The British Muslim identity reveals important insights into the ways in which community formation and legal regulation and the rights of minority religious communities has taken shape over the past five decades and this chapter draws upon the Inquiry findings to consider whether religious tribunals can be reformed from within and if so whether the parity governance model is a useful model of application.

Introduction

Drawing upon critical legal and feminist scholarship this chapter evaluates the Sharia Inquiry findings and analyses the possible value and or potential limitations of the 'parity governance' model (broadly conceived as gender parity) to be constitutively applied as a framework of 'democratic governance' to Muslim legal pluralist models of dispute resolution (identified as Sharia councils and the Muslim Arbitration Tribunal).

Debates on multiculturalism and its normative concern for justice, equality and fairness have of course long been debated, theorized, critiqued and challenged. The twin goals of the 'accommodation' of cultural and religious differences and practices and the limits of such 'recognition' has led to the emergence of a renewed liberal political discourse and public policy development(s) dealing with the specific conflicts of 'minority rights', individual rights versus group rights and the tensions created by different sets of obligations owed to self, family, community and state law. Political and social theorists have, for example, long traced the European liberal legal tradition of 'Minority Rights' with a focus on problems generated by conflicting of norms and normativity (social and legal/state law norms) and the extent to which individuals are able to choose between two or more sets of conflicting norms in the face of group loyalty versus state law obligations.

The chapter raises a set of related questions. Firstly a closer analysis on the institutional design of private community governance in Britain identified as sharia councils and the Muslim Arbitration Tribunal: what is it about these bodies that signifies 'Islam' 'Muslim practice' and 'Muslimness'? How are these bodies conceptualized in relation to ideas of liberal justice, human rights and equality? What are the contours of the debates and the resolution of family law disputes within the processes of what we understand as dispute resolution? Can we capture an assertion of Muslim subjectivity and Muslim autonomy in these spaces? And does this assertion of Muslim subjectivity undermine state law legal processes?

The diverse, contested and varied experiences of South Asian Muslim women utilizing unofficial dispute resolution mechanisms such as Sharia councils and more formalized religious bodies such as the Muslim Arbitration Tribunal is increasingly being documented and demonstrating the ways in which debates on belonging, identity and rights cannot be

understood as fixed and unchanging.[1] Debates across UK and Europe have focused on policies of multiculturalism and the extent to which minority religious practices are tolerated and or endorsed by national domestic courts. Further afield debates in Canada, US and increasingly Australia highlight issues of conflict, equity and discrimination. Muslim women remain at the centre of these debates while feminists from across the political spectrum seek to defend or resist calls for greater accommodation of religious norms and values and practices in western democratic societies. This has led to enormous conflicts, crossing political spectrums and the extent to which state law should recognize alternative systems of family law dispute resolution. As Marie Ashe and Anissa Helie explain,

'Civil governmental recognitions of jurisdiction in specifically-religious courts may be the most extraordinary of the accommodations currently being provided to religious organisations. The toleration of judicial autonomy in such bodies in itself manifests a striking sharing of sovereignty. And the ceding to religious bodies of a central feature of governmental sovereignty- the judicial power- becomes particularly problematic when that power is utilized in order to enforce religious law that conflicts with fundamental principles of the civil law'.[2]

Debates have therefore focused on the extent to which religious legal practices comply with liberal legalism and gender equality raising a further set of questions: Do such bodies discriminate against Muslim women? Are women's rights, liberty and equality under threat? Is justice being administered in the shadow of the law? The controversy of Sharia, it seems, will not only not disappear but is increasing in its intensity and vigour both by its opponents and its supporters. This raises the important question raised again by Ashe and Helies as to whether such bodies should be tolerated at all? Can the 'problem' in fact be resolved? 'The non- settled status of sharia- related questions' they argue 'invites broader more historically-informed, and more comparative inquiry concerning the policies that should shape liberal-governmental interaction with religious courts in general'.[3] Why for example under a liberal multiculturalist framework is the demand for religious and communal group autonomy considered both inevitable and necessary rather than questioning the basis upon which demands are made and met?

In Britain, new methods of dispute resolution in English family law have also led to an unprecedented rise in the number of scholarly and policy critiques questioning their effectiveness and the challenge to liberal legal principles of 'equality before the law', 'justice' and 'common citizenship'.[4] Debates have focused on the wider discussions of promoting 'access to justice' for all citizens and to better understanding the relationship between cultural and social norms that may underpin new forms of dispute resolution. Indeed the contemporary landscape of civil and family justice in England and Wales is part of a renewed recognition by the state to build upon mechanisms of Alternate Dispute Resolution (ADR) that are evidenced by the increasing use of arbitration, mediation, conciliation and initiatives developed by practitioners such as collaborative law. As part of these

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[1] See Samia Bano, *Muslim Women and Shari'ah Councils: Transcending the Boundaries of Community and Law*, (Palgrave MacMillan 2012); John Bowen, *On British Islam. Religion, Law and Everyday Practice in Sharia Councils* (Princeton University Press 2016).

[2] See Marie Ashe and Anne Helie, 'Realities of Religico-Legalism: Religious Courts and Women's Rights in Canada, the United Kingdom and the United States' (2014) 20 U.Cal.-Davis J International Law & Policy 139, 142.

[3] Ibid 143.

[4] See John Eekelaar and Maclean M (eds) *Lawyers and Mediators. The Brave New World of Services for Separated Families* (Hart Publishing 2016).

contemporary developments issues of cultural and religious diversity are addressed including demands for the accommodation of religious dispute mechanisms as part of new dispute resolution initiatives. We have seen, for example a rise in cross-cultural mediation mechanisms in determining both the use and delivery of services and the desire to accommodate the needs of all users, irrespective of cultural and religious differences. In essence, what we see then is not only the emergence of new forms The of legal cultures but also the ways in which new forms of informal and formal adjudication in all their complexity emerge and develop within groups, communities and networks.

The Sharia Inquiry Findings: Brief overview

The Independent review into Sharia Law in England and Wales was tasked to examine the practice of Islamic law in England and Wales with a specific focus on the potential mis abuse of sharia councils in their position as alternative dispute resolution fora within Muslim communities. The focus was on sharia councils therefore and not sharia practices in general. A public call for evidence was issued and this led to a wide range of evidence being collated including users of sharia councils, women's rights groups academics and lawyers and other key stakeholders. A sharia council was defined as, "a voluntary local association of scholars who see themselves or are seen by their communities as authorised to offer advice to Muslims principally in the field of religious marriage and divorce."

Key findings included (i) the primary users of sharia councils are women (ii) the primary motivation was due to the fact that Muslim couples do not register their marriages and therefore some Muslim women have no option of obtaining a civil divorce (iii) evidence of good and bad practice was found. The panel put forward a set of recommendations including changing the Marriage laws in England and Wales to ensure Muslim marriages fall under the remit of registered marriages. Further an awareness campaign within Muslim communities to educate and inform women of their rights under English law. There was also a partial call of regulation to sharia councils but this was not supported by all panel members and the regulation comprised of a state mandated self-regulatory body.

Multiculturalism and Managing Migrant Communities

Debates on the nature and settlement of postcolonial migrations are often discussed in relation to discussions on identity, ethnicity, religion, migration and the impact of transnational populations upon settled communities. Within a wide body of scholarship and sociological research we are better able to understand how notions of diaspora, hybridity and globalism intersect with social and class divisions, gender, ethnicity and class. Today, therefore there is a growing literature which seeks to understand identities as multiple, fluid, dynamic and partial and which can only be understood in interaction with other identities, ethnicities and social structures. This understanding of identity as fluid and changing has led many commentators to conclude that, at specific times, a particular aspect of the group identity emerges. In Britain, for example we have seen the emergence of a 'renewed' Muslim religious identity as part of South Asian Muslim communities[5] and demands for the accommodation of religious systems of law to be made under this understanding of identity.

The term multiculturalism in Britain today is debated, discussed, contested, challenged and more recently dismissed. Indeed some of the problems attributed to multiculturalism including the perceived lack of integration of minority ethnic communities into British society, the emergence of parallel and segregated minority ethnic communities and the failure to foster a national British identity only illustrates the shifts and contradictions in its meaning and what it was originally perceived to stand for. Current public commentary therefore pays

[5] See Tariq Modood, 'Part One Accommodating religions: Multiculturalism's new fault line' (2013) 34(1) *Critical Social Policy* 121.

much more attention to its perceived principle failure rather than any real success. Whether the term itself as any epistemological value is itself open to question as are questions on measurable outcomes. At its best, multiculturalism, promotes tolerance, equality and respect for cultural and religious difference, promoting positive relations between minority and majority communities but at its worst it promotes segregated, polarised and parallel communities who have little care or understanding how the 'other' may live. For many it is this politics of difference and the threshold of tolerance that remains problematic, for example at which point does a cultural practice become intolerant and oppressive and to whom? For many liberal multiculturalists the threshold is to protect vulnerable members within communities and in Muslim communities this has often meant Muslim women being protected against what is often deemed oppressive, archaic and traditional religious practices. In other words the principles of freedom and choice are seen as easily compromised in Muslim communities where the protection of Muslim women becomes the benchmark upon which we must fight for women's rights and liberal values of freedom, justice and equality. In her work Lila Abu-Lughod warns of the dangers this can bring, explaining that

'….generalizing about cultures prevents us from appreciating or even accounting for people's experiences and the contingencies with which we all live. The idea of culture increasingly has become a core component of international politics and common sense. Pundits tell us that there is a clash of civilizations or cultures in our world. They tell us there is an unbridgeable chasm between the West and the 'Rest'. Muslims are presented as a special and threatening culture- the most homogenized and the most troubling of the Rest. Muslim women in this new common sense, symbolize just how alien this culture is'.[6]

Today, in an age where the practice and discourse of multiculturalism and policies of diversity and managing diversity is coming under increasing attack from all sides of the political spectrum questions of culture (whose culture?) and rights (whose rights?) become ever more urgent in the context of the settlement and management of minority ethnic and religious groups in western democratic societies.

The twin policies of social cohesion and integration has led to what Patel (2008) identifies as a move away from multiculturalism and towards what she describes as 'multi-faithism' with government policies specifically promoting and nurturing 'faith communities'. For Patel the encroaching of secular spaces that are increasingly being taken up by religious groups means that women from minority backgrounds are left with even less choice. She explains,'Ironically, the current promotion of faith based projects in all areas of civil society will compromise the gender equality agenda for black and minority women in particular. It will divert women away from the legal justice system into the hands of religious conservative and fundamentalist leaders. The cry of religious discrimination can and will be used to claim access to and control over resources, whilst at the same time it will serve to perpetuate discrimination against women and other sub groups and to deter state intervention in family matters'.[7]

Not only does this lead to a denial of rights for women from minority ethnic backgrounds but this critique also flags up central questions of power, voice and representation and the use of male interlocutors in forging majority/ minority relations between communities and the state. Further critique points to an outcome for minority ethnic communities who maybe feel disempowered from processes of power but the focus on cultural and religious difference that has in fact led to a form of limited autonomy over internal 'community' affairs, such as religious observance, dress and food. In other words the emphasis upon communities to focus on their culture and religion as in effect led to a shift away from public decision-making

[6] Lila Abu-Lughod, *Do Muslim Women Need Saving?* (Harvard University Press 2013) 6.

[7] Pragna Patel, 'Faith in the State? Asian Women's Struggles for Human Rights in the UK' (2008) 16(1) Feminist Legal Studies 9, 25.

spaces. More worrying however it has also led to the emergence of community leaders who often have the undemocratic mandate to represent their communities. For example male leaders, who over time have become the primary interlocutors and who are afforded the right to speak on behalf of the whole community and seen as both legitimate and with authority. Women are in effect then side-lined and given less voice and capacity to engage with community and state practices.

Islam and the 'Muslim Question'

The 'Muslim Question' (generated by a series of questions over integration/ loyalty to the state/ citizenship and claims for religious communal autonomy in family law matters, to name but a few) has in recent times, come to be understood (by scholars and policy makers alike) as one of *the* defining questions in the twenty first century when framing, challenging and debating issues ranging from the limits of liberal free speech, minority rights, questions of modernity, immigration, liberalism, multiculturalism and most importantly of course issues of gender equality, injustice and personal autonomy for potentially vulnerable Muslim women living within Muslim families and communities. This literature is accompanied by an expansive body of scholarship tracing the social and lived realities of Muslim communities in the UK[8], rights of minorities communities and multiculturalism[9] to charting the rise of anti-Muslim discrimination and 'Islamaphobia'[10] and tracing the rise of religious intolerance and the emergence of a politics of fear and the limits of anti-discrimination legislation. Furthermore it seems that the 'Muslim Problem' is inextricably linked to the 'Secularism Problem' with the juxtaposition of religion and secularism and the public and private spheres deemed, imaginary, problematic and illusory. For example the work of Saba Mahmood[11] (2011), Talal Asad[12] (2011), Oliver Roy[13] (2010) and Salman Sayyid[14] (2014) demonstrate *how* debates on secularism are closely linked to the ways in which Muslim mobilisations in the West are managed, controlled and designated in western European societies often through security and racist governmentalities. In Britain for example the governments Prevent strategy has been critiqued for not only the loss of civil liberties but its focus on Muslim communities and the potential consequences that this kind of exceptionalism promotes. This body of literature raises important questions regarding the separation of religious and political spaces in liberal politics and the junctures upon which religious personal practices can be located and accommodated as part of the liberal human rights framework. As Sayyid points out, 'secularism is one of the categories often deployed in discussions about the difficulties of exercising Muslim agency'.[15] Therefore, what are the dialogic processes and challenges between community and state law relations if Muslim communities seek not to operate from a liberal legal and ethical framework ? What are the other possibilities for communicative or intercultural dialogue(s)? Are minority Muslim communities in Europe simply in need of secularization?

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[8] See Russell Sandberg, Gillian Douglas, Norman Doe, Sophie Gilliat-Ray and Asma Khan, 'Britain's Religious Tribunals: "Joint Governance" in Practice' (2012) 33(2) Oxford Journal of Legal Studies 263; Farah Ahmed, 'Personal Autonomy and the Option of Religious Law' (2010) 24(2) *International Journal of Law, Policy and the Family* 222.

[9] See Modood (n 5).

[10] There is a wide body of scholarship that examines the nature and practice of Islamaphobia. Problems on definition exist. See Salman Sayyid and AbdoolKarim Vakil (eds), *Thinking Through Islamaphobia: Global* Perspectives (Hurst Press 2009).

[11] See Saba Mahmood, 'Secularism, Hermeneutics, Empire: The Politics of Islamic Reformation' (2006) 18(2) *Public Culture* 323.

[12] See Talal Asad, *Foundations of the secular: Christianity, Islam, Modernity* (Stanford University 2003).

[13] Oliver Roy, *Holy Ignorance: When Religion and Culture Part Ways* (Columbia University Press 2010).

[14] See Salman Sayyid, *Recalling the Caliphate: Decolonisation and the World Order* (Hurst Press 2014).

[15] Ibid 32.

Critiques on liberal legal models aim therefore to de-center the 'West' and challenge the 'Western imaginary' as *the* dominant loci of politics, governance and identity. Indeed the contemporary binary oppositions of Islam and the West are not only widely acknowledged as a reflection of the hegemony of western legal liberalism but the framing and naming of Islam and Muslim legal pluralism has led to disjunctures between 'official laws' and 'law as a lived social reality'. Questions of 'norms' 'truth' and claims-making have focused on the uneasy tensions produced by communities with liberal and democratic principles of liberal legal conceptions of justice, equality before the law, human rights and citizenship. The focus on Islam and Muslims remains important for both communities and state-law relations because 'the act of naming is also the act of becoming'.[16] In other words the ways in which Muslims name themselves as Muslims and construct *ways* of belonging (for example belonging to the Muslim community or the Muslim Ummah) coupled with the ways in which communities are understood (or imagined) in non-Muslim societies contributes to policy initiatives and community- state relations. Furthermore the ways in which Muslim communities 'imagine' the Muslim Ummah can help our conceptualisations of community and Muslim autonomy. Therefore the rubric upon which we frame debates can also help to reframe debates on cultural and religious autonomy and finding legal remedies to protect vulnerable members of communities subject to religious personal systems of law, most often Muslim women.

Indeed this act of becoming as taken shape and form in a myriad of ways as epitomized by the emergence of local grassroots Muslim community groups (including private community governance) and the different levels of state funding and state support. Over the past three decades, for example, we have seen the emergence of local Muslim women's groups, refuges and counselling services to the setting up of national organisations such as the Muslim Council of Britain[17]and the Muslim Women's Network[18] and numerous Sharia Councils and the Muslim Arbitration Tribunal.[19] The 2011 Census identified Islam as the second largest religion in the UK with a population of 2,786,635 and 4.4% of the total population. This act of becoming has therefore taken shape, for example, under the rubric of multiculturalism, policies of integration, socio-economic factors vis-a-vis community, state and cultural interlocutors. So what are the cultural impacts of these new formations in our understandings of Islam and Muslims living in non-Muslim majority societies? What does the description of a 'Muslim community' mean for Muslims and non-Muslims alike? What are the processes of governance and governmentality that *signify* Muslim communities? And how can we conceptualise, identify and address issues of cultural inter and intra community conflicts addressing issues of unequal gender relations without relying on reified notions of culture, religion, belonging, identity and law?

Muslims and the Problem with Democracy?

In their article Ruiz and Rubio-Marin (2009)[20] point out that democratic parity 'must define what democracy is fundamentally about.' Similarly in her work Ann Philips[21] concludes that, 'Democratic parity matters because without it we do not yet have democracy'. Whilst we also learn that this model 'has its own distinctive logic' such observations clearly point to an implicit relationship between the two leading to some kind of normative conception of democracy. Of course all claims about meaning and value of concepts such as democracy merit scrutiny and both scholars successfully draw upon a political theory of democracy that promotes gender equality in ways that aims to avoid the pitfalls of essentialism and

[16] Ibid 4.
[17] See Muslim Council of Britain at www.mcb.org.uk.
[18] See Muslim Women's network at www.mwnuk.co.uk.
[19] See Muslim Arbitration Tribunal at www.mat.org.uk.
[20] Blanca Rodriguez-Ruiz and Ruth Rubio-Marin, 'Constitutional Justification of Parity Democracy' (2009) 60 (5) Alabama Law Review 1171.
[21] Anne Phillips, *Multiculturalism without Culture* (Princeton University Press 2007).

normative truth/ claims-making-as theorizing choice, capability and capacity from a feminist perspective. Feminist political theorists and philosophers have also (over the past two decades) developed new models to challenge discrimination and oppression occurring within particular cultural and religious settings (for example Shachar[22]and her model of transformative accommodation).

In this part of the chapter, I pose a series of questions to consider the ways in which the idea and meaning of democracy as a common *signifier* of democracy may serve to ascribe meanings and value (within minority Muslim communities) in fixed and problematic ways. For example the assumptions and goals of democracy; the way in which it engages and inter-sects with non-state norms and minority communities, while raising a critical reading on the relationship between Democracy, the West and Islam. Our efforts to complicate the concepts and practice of democracy are important if democracy also exhibits an ensemble of practices and democratic institutions that seek to regulate the exercise of communal and private governance based upon orientalist tropes of Muslims simply lacking the credentials of freedom and democracy. The meaning, relevance and perils of democracy therefore raise important questions and challenges. For example, in his work on governmentality Foucault[23] poses a series of questions relating to the problems of government and the role of individuals. How should 'we govern oneself, how to be governed, by whom should be accept to be governed and how to be the best possible governor'? This series of lectures reveals important insights into the intricate and complex relationships between governance and the process of governing and the ways in which governance is both 'thought' and practiced' by the liberal political processes. Governmentality he argues is in evidence across multiple sites (such as population) where technologies operate to regulate conduct and behaviours in ever complex ways displaying the myriad and multiple forms of political power in action. The multiple dynamics of power seek to define/ address/ manage and control with implications for all in minority and majority communities. Social and legal norms operate within and across communities in relation 'to the division of labour, authority between family members and intimate behaviour.' We have, of course a long and expansive body of postcolonial scholarship that produces important insights into relations of power, legality and identity.

Yet even this (brief) overview of governmentality, power and state law relations raises important questions in relation to relations of power, dialogue, inter cultural dialogue, positionality and rights and contributes to our understanding of the myriad and complex lived social realities of law and legalities that take shape in many different forms both in state law relations and as private governance within minority communities . The rise of racist governmentalities, for example, also raises an important set of questions as the logic of democracy that can also rest upon a logic of West and non West and those who are democratic versus non democratic. One could for example question upon what basis the i*dea* of democracy is predicated in its application to minority Muslim communities living in western societies? Western exceptionality and a fixed description democracy (and democratic discourse) reveals a tenuous relationship between ideas of belonging, identity and a convergence of being democratic and being western. Postcolonial critiques for example point to the western hegemony and a fixed western identity as the primary signifiers of democracy, today. So how can we better understand the category of democracy as it applies to Muslim communities? These critiques remain important for the dislocation within Muslim communities from ideas of citizenship, democracy and belonging are in evidence and raise a series of questions, what are the primary features of democracy and how can do we understand questions of autonomous individuals, decision-making and capacity in relation to Muslim women and religious models of dispute resolution? What is the capacity

[22] Ayelet Shachar, 'Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law' (2008) 9(2) Theoretical Inquiries in Law 573.

[23] Michel Foucault, *Discipline and Punish The Birth of the Prison* (London Penguin 1979) 35.

of Muslim dispute resolution bodies to transform to accommodate 'difference within difference'? How do these organisations envisage democratic arrangements and governance? Are we able to produce alternative accounts both as insiders and outsiders of communities and groups? It is imperative, of course that we unpack this *idea* of a Muslim community as the Muslim Ummah. As Sayyid points out, 'The Muslim question encompasses the difficulties associated with the emergence of a distinct political identity that appears to be transgressive of the norms, conventions and structures that underpin the contemporary world.[24]' Yet suprising perhaps in a world of difference, complexity and challenge the emergence of fixed notions of identity and religious have only in recent times gained increasing urgency. Furthermore as a political signifier democracy with its particular cultural formations in the 'west' provides the essence of human identity transcending cultural and religious divides and acting as a designator of freedom, capacity but also government practices and hybrid western identities. We therefore understand democracy as closely aligned to a western identity and to be to be anti-western is to be anti-democratic.

Institutional design of Muslim dispute resolution mechanisms

An analysis of the institutional design and power relations embedded within Sharia councils is of fundamental importance in order to consider the ways in which these bodies, today are not only increasingly understood as the primary expression of 'Muslim legal pluralism' but also in order to consider the possible ways in which the 'parity governance' model may be useful in the process of the internal reform. All such bodies are of course plural, that is they are constructed around multiple and often conflicting schools of thought and the boundaries upon which they operate are constructed and depend upon a vast number of social and religious rules and norms. More importantly such rules, principles, procedures and sources are structured by a whole host of factors including, religious, ethnic, gender and class differences. The rule- making capacity of such bodies maybe relational and specific to local contingencies but is also dependent upon certain shared cultural and religious attributes that attribute identity and the boundaries of such alternative dispute resolution mechanisms to the authority of the religious scholar(s). In the case of Sharia councils important questions remain in relation to what kinds of structures are created and what types of communication take place between the sources of authority, religious scholars and primary users most often Muslim women. Furthermore in what ways do principles of justice, rights and gender equality differ from liberal values and how do such bodies operate as decision-making processes? What is the institutional design and the constitutive elements in the operation of justice? And does this system of dispute resolution recognize its own contingencies? In other words is it even possible to have gender parity in Sharia councils and religious tribunals?

Democracy and equality remain the two foundational principles of the parity governance model with gender representation at its core. Conversely, the model of dispute resolution dominant in contemporary British Sharia councils remains grounded in normative Islamic principles that render gender differentiated rights and duties and are marked by contested concepts of Islamic jurisprudential schools of thought. Therefore there is an obvious challenge to the application of a parity design model upon these bodies but if these challenges can be overcome what are the options for parity design as a process of reform within these bodies? In this part of the paper I discuss the normative desirability or change in the institutional design or formal structure of these bodies but also focus upon the ambiguous and contested concepts of religion that underpin these bodies. Parity claims, first and foremost provide female members with exercising their rights within a liberal and egalitarian public culture. It strongly maintains that the equal representation of women is central to ensuring that liberal societies properly invoke the principles of democracy and equality. Women members from minority groups often pay a high cost if they are denied exercising their rights that are bestowed upon all citizens.

[24] See Sayyid (n14) 3.

The history of Sharia councils has been widely documented in Britain and can be traced to a diverse set of social, political and religious developments in civil society and as part of emergence of a Muslim identity both forged and as part of multicultural practices. The question of how such bodies should be classified and understood, for example as groups, associations, institutions 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. 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 communities and the state. 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 past four decades. 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.

Therefore to understand the emergence of Sharia Councils in Britain we need to begin, not with an overview of how they may function but the ways in which they have emerged as part of multicultural Britain and the recognition of cultural and religious practices as part of British Muslim lives. They are part of British Muslim communities that have established very specific ways in which family law disputes are resolved, yet there is on-going debate within British Muslim communities regarding their role, identity and future. There are complex variations and permutations of shariah councils as they are neither unified nor represent a single school of thought but instead are made up of various different bodies representing the different schools of thought in Islam and ethnic religious groups.

Debate on the emergence of Sharia councils has largely been discussed and scrutinised in relation to debates on liberal multiculturalism and its limits on minority-group rights. There is no single and authoritative definition of the term ‘Sharia council’ and therefore no obvious consensus on the role of these bodies within British Muslim communities. In essence, a Sharia council has three key functions, issuing Muslim divorce certificates, reconciling and mediating between parties and producing expert opinion reports on matters of Muslim family law and custom to the Muslim community, solicitors and the courts. Existing scholarship for example provides little insight into the nature of rules within these bodies as institutionalised systems of dispute resolution. Concern in particular has focused on the rights and autonomy of minority group members and the potential conflicts generated by minority community norms and values in conflict with majority group norms and culture. Hegemonic relations of state law are understood as oppressive and over-bearing while undermining individual members sense of belonging and autonomy as part of their faith communities. Protection of the individual vis-à-vis the group therefore has become imperative to the liberal project. However as Karayanni[25] points out, ‘as this theory of group rights crystallised, a major problem arose: how should liberal multiculturalism relate to religious minority groups that adhere to practices viewed as illiberal, for which they seek accommodation-in the form of jurisdictional autonomy over their members in matters of family law, recognition of their dress codes, absolution from criminal liability when they perform certain religiously motivated activities or other judicial leniencies?’

[25] See Michael Karayanni, ‘The Acute Multicultural Entrapment of the Palestinian-Arab Religious Minorities in Israel and the Feeble Measures Required to Relieve It’ in Robert Provost (ed), *Mapping the Legal Boundaries of Belonging, Religion and Multiculturalism from Israel to Canada* (Oxford University Press 2014).

This body of work challenges both the essentialism and uniformity assumed in state law relations and celebrates cultural and religious difference as demonstrative of the emerging parallel systems of law operating in British society. More specifically it contributes to our understanding of how contemporary societies are 'increasingly confronted within minority groups demanding recognition of their ethnicity and accommodation of their cultural and religious differences'. However this literature also adopts a somewhat legal prescriptive analysis to understanding the emergence of Sharia councils and their relationship with and in opposition to state law. In short, there is little substantive and empirical analysis on the internal dynamics of power within these mechanisms of dispute resolution. Conceptualizing unofficial dispute resolution in this way is premised on the idea of homogeneity within 'Muslim communities' with little explanation on how these bodies are constituted within local communities. Furthermore, the primacy of a Muslim identity means that little is learnt about cultural and religious practices that may affect the autonomy of women using these bodies and how such processes are contested, redefined and used strategically to serve particular ends. Existing literature does not, for example, give due salience to the interconnection between the Sharia councils, forms of power and gender inequality.

At present the nature and scope of Sharia council activity in England and Wales remains largely unknown and undocumented. However both the Sharia and Inquiry and a report by the Ministry of Justice entitled *An exploratory study of Shari'ah councils in England with respect to family la*w identified 30 councils that worked on issues of Muslim family law and issued Muslim divorce certificates. Although this project did not look at smaller Shari'ah councils it suggests a relatively small number of key councils operating in England. 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. Most councils were embedded within Muslim communities, forming part of mosques and community centres and appear to have evolved according to the needs of the communities in which they are located.

Another example of Muslim legal pluralism is the Muslim Arbitration Tribunal (MAT) that was set up in June 2007 and aims to settle disputes in accordance with religious Sharia law. The authority of this tribunal rests with the Arbitration Act 1996 which permits civil matters to be resolved in accordance with Muslim law and within the ambit of state law. For many, this process of resolving disputes may provide the ideal forum that allows the arbitrating parties to resolve disputes according to English law while fulfilling any obligations under Islamic law. The advantages of arbitration, it is argued, allow the parties to achieve some level of autonomy in the decision-making process. This, coupled with the informal setting, lower costs, flexibility and time efficiency means that for some it may prove a more attractive alternative to the adversarial courts system in England and Wales. However there remain real concerns over whether this process can restrict women's equality and over issues of fairness and justice in family law.

Democraticizing Muslim Legal Pluralism? Parity and Muslim dispute resolution

In an earlier part of this chapter I explored the problems of 'democracy' and what has been described as a emergence of forms of Muslim exceptionalism whereby liberal governance specifically targets Muslim communities. In this part of the paper I question whether the Parity Democracy Model offer insights into the ways in which these processes of dispute resolution can promote gender parity in family law disputes? Empirical research on sharia councils suggests that the boundaries of community groups are often closed with a form of 'operative closure' that operate selectively and exclusively to reproduce norms that promote the closing of boundaries. We also know that this can lead to intra cultural gender inequalities as this process can allow dispute resolution to evolve from a system of personal decision-making to one of oppressive norms and the application of sanctions including the loss of personal decision-making and the normative values upon which the process is based

upon. Whilst the rationale for applying a parity governance model upon community dispute resolution processes maybe questioned, nevertheless, it raises important questions on the ability of such a model to provide a framework to the administration and functioning of these types of councils. As Ziegert points out 'The impossibility of communication *between* systems but the apparent historically varied correlations between the legal system and various other social systems require a more accurate observation as to how such relationships become possible and what form they take'.[26] There is now an important body of work which explores the liberal basis upon which religious and cultural autonomy may be recognized and accommodated in English law. Attempting to create new forms accommodation, however, also raises questions of power and the extent to which minority groups rely on the political system to supply a normative framework for the political system's operations.

In his work, Eekelaar puts forward a model he describes as 'cultural voluntarism' which would allow individuals to continue following group norms as long as they comply with civil law norms.[27] He explains: 'family courts could make orders based on agreements reached under religious law but only if the agreement was genuine and followed independent advice, and was consistent with overriding policy goals (for example the best interests of the child). State law would be available at all times to anyone who chose to invoke it and access to it should be safeguarded and encouraged'.[28]

Drawing upon this work, Malik[29] describes the emergence of 'minority legal order(s)' in Britain, defined around two key aspects: 'first, by its distinct cultural or religious norms; second, by some 'systemic' features that allow us to say that there is a distinct institutional system for the identification, interpretation and enforcement of these norms'. This can be identified as Sharia Councils and other forms of Muslim dispute resolution processes. Malik puts forward a number of democratic participatory models that would allow both systems to operate with in-built democratic processes to deal with potential conflicts and tensions but also concludes that although there are good reasons to encourage cooperation between the state and minority legal orders, this cannot be implemented until further research is conducted to deal with how issues of justice and access to justice are addressed.[30] Again the concern is how to ensure the vulnerable members within groups are given adequate protection and safeguards.

Yet the question over the norms that act as the foundational bases upon which Muslim legal pluralism rests and the extent to which these forms can be tested, challenged and transformed is left largely unaddressed by both Eeklaar and Malik. While recognizing the problem of power and power relations in relation to norm-making whereby norms may be imposed by persons or elites within communities in order to advance their own interests or ideologies under the guise of the interests of the community they do not offer an adequate response to how this problem can be overcome. Whilst scholarship, therefore considers the effects of religious accommodation in terms of the nature and extent to which this is practiced within Muslim communities we also need to think through carefully the consequences for all members of communities including minorities within minority groups before a model of Muslim dispute resolution based upon the foundational principles of democracy and rights is adopted. What exactly is the basis upon which these processes

[26] See Klaus A Ziegert, 'Systems Theory and Qualitative Socio-Legal Research' in Reza Banakar and Max Travers (eds) *Theory and Method in Socio-Legal Research* (Hart Publishing 2005).
[27] See John Eekelaar, 'Law and Community Practices' in John Eekelaar and Mavis Maclean (eds) *Managing Family Justice in Diverse Societies* (Hart Publishing 2013).
[28] Ibid, 16.
[29] See Maleiha Malik, *Minority legal Systems in the UK: Multiculturalism, Minorities and the Law* (British Academy Policy Papers 2012) 12.
[30] Ibid 65.

operate that can lead to a potential re-allocation of family law disputes. Critics such as Shah (2014) argue that such models are, in the end, disempowering communities as they are simply constrained by liberal values, values that are 'apparently non- contestable' and do 'not problematize the potentially violent, oppressive, or absurd consequences of applying such a framework to non-liberal communities that is, communities that do not operate from within a liberal ethical framework'.[31] Not only is the western legal system inherently 'eurocentric' he argues but he challenges critiques of homogeneity…'for seldom is homogeneity regarded as a precondition to the recognition of various types of jurisdiction, while heterogeneity does not prevent recognition in different ways'.[32] Liberal Law in this reading is therefore a problem because it is based on a dominant cultural framework. This analysis should also not be taken as a claim that it is impossible for community dispute resolution mechanisms to develop alternatives to civil law mechanisms. Sharia councils, for example, themselves are products of the western Muslim diaspora, and not a result of a moral critique imposed from 'outside'. Observing the temporal conditions of sharia councils raises many issues concerning the relationship between religious identity, norms, power and politics. It is important to consider whether a parity model of gender equality could potentially allow Muslim women to be part of process of reshaping and reconceptualising community norms within community dispute resolution mechanisms- so how would this potentially take place and what would be the possible outcomes?

As discussed earlier notions of choice, agency, autonomy, welfare and responsibility underpin feminist critiques of religious personal systems of law in the UK and its potential to promote equality, justice and human rights for women living within minority religious communities. This literature has been accompanied by a rise in Muslim feminist scholarship with critiques on rethinking and reinterpreting the meaning and practice of Muslim marriage, divorce and matrimonial rights upon breakdown of the relationship as part of a rethinking and reformulating of Islamic texts and intellectual thought and practice in order to 'accommodate' the needs of Muslims living in Muslim minority contexts. With a focus on issues of sexual rights, financial obligations, honour, authority, consent and choice this scholarship also provides important insights into the conceptual frameworks upon which issues of Muslim marriage and divorce in Islam are discussed in Muslim communities living in the 'west'. The emergence of Muslim family law in the UK must be understood as part of specific historical, social and political conditions under which postcolonial migrations emerge. Within this context feminist methodologies, ethnographic research and critiques of the 'Muslim female subject' have led to new understandings and critical approaches in the practice of Muslim family law in the UK. What is the potential of this scholarship to critically engage with Islamic feminist critiques on textual interpretations and new methodologies in re-reading sacred texts and their application to Muslim dispute resolution mechanisms?

Muslim feminist interrogation with issues of power, authority and the dynamics of power within the institutions of marriage, family, community in British Muslim communities reveals important insights into the ways in which the initiatives such as the new marriage contract and Muslim dispute resolution have been shaped, accepted, contested, resisted and challenged as part of new Muslim feminist scholarship.[33] This research also opens up important conceptual questions regarding issues of authority and power within Muslim diasporic communities and produces important insights into ways in which democratic models such as the 'Parity Democracy model'[34] may potentially remain limited in developing ways to challenge unequal intra community norms and values that may discriminate against

[31] Prakash Shah, *Family, Religion and Law. Cultural Encounters in Europe* (Routledge 2014) 49.
[32] Ibid 52.
[33] See Ziba Mir-Hosseini, Kari Vogt, Lena Larsen and Christian Moe (eds) *Gender and Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal Tradition* (I.B.Tauris 2015).
[34] See Ruth Rubio-Marin, 'A New European Parity-Democracy Sex Equality Model and why it won't Fly in the United States' (2012) 60(1) The American Journal of Comparative Law 99.

its most vulnerable members, Muslim women. Furthermore the multicultural context upon which Muslim communities operate must also include critiques of democracy, dialogue and power if we are to consider the plausibility of developing positive law obligations for religious group autonomy whilst respecting the rights of individuals.

Parity and Sharia Councils: The Question of Gender Equality

The 'Parity Democracy Model' is an important strategic intervention in promoting equality. While recognising the limitations of the formal substantive sex equality framework it seeks to enable women to participate equally in all domains of citizenship. Its rationale therefore includes a transformation and redefinition of the liberal autonomy paradigm from one of independence to interdependence. In this way it resonates closely to the work of Black feminist activists and scholars, who, for example, have long recognized this paradigm shift of separated public and private spheres as individual and state law relations to intersectional analyses whilst recognising the specific forms of subordination found in the family, home and community. Feminist scholarship has long addressed the fact that 'woman' is not a unitary category and instead it acts as a site of multiple contradictions with 'effects that may reinforce or undermine social divisions'.[35] We see in evidence that 'the lives of different categories of women are differentially shaped by articulating relations of power; and how under a given set of circumstances we ourselves are 'situated' in these power relations vis-à-vis other categories of women and men'.[36] The challenge of universalism is addressed by creating spaces of 'strategic essentialism'[37] framed from the vantage point of a dominated subject position. Models, which therefore aspire to 'parity', are important in relation to debates on rights, democracy and law. As Rubio-Marin states, 'it seems unlikely that one could press for a gender parity democracy model in the United States without integrating some conception of racial parity democracy. This makes the project more daunting and less viable both theoretically and politically because the forces of racism and patriarchy would presumably join in opposing it'.[38]

Intersectional analyses however raise important challenges while interrogating power relations and the defining of racial and sexual categories as oppositional and in conflict. The question of choice, consent, agency, capabilities and autonomy has long remained both an important and a vexed question for feminist scholars from multiple traditions including western and postcolonial feminist paradigms. The debates are underpinned by important questions of moral self and viable choices all taking place relationally under various the contexts of identity and belonging Feminist scholarship informs us that agency cannot be exercised without choice and the relationship between choice and agency is a complex one. This relationship between agency and choice becomes even more complicated within wider debates of identity, belonging and citizenship for women living within minority Muslim communities. For many feminists' autonomy and choice remain difficult and elusive concepts to define each overlapping but also pointing to points of departure and how individual meanings and interpretations challenge the very foundations upon which they maybe understood. Furthermore the acquiesce of choice is an important aspect of understanding how choice may operate.[39]

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[35] See Avtar Brah, *Cartographies of Diaspora: Contesting Identities* (Routledge 1993) 89.
[36] Ibid 93.
[37] See Gayatri Spivak, 'Can the subaltern speak?' in Cary Nelson and Lawrence Grossberg (eds.) *Marxism and the Interpretation of Culture* (Macmillan 1988).
[38] See Rubio-Marin (n 40) 105.
[39] See Rosemary Hunter and Sharon Cowan (eds) *Choice and Consent*: *Feminist Engagements with law and subjectivity* (Routledge 2007).

For many scholars, the question of personal autonomy and choice underpins debates on the recognition of religious councils and tribunals in Britain. The debates fall largely within two spectrums of scholarly work. The first can be described broadly as orientalist discourses which accord Muslim women little if any agency and personal choice as members of Muslim families and communities and the second points to the fact that all debates on equality and free choice are circumscribed by 'difference' along multiple and complex factors including, context, place and time with notions of belonging, identity and being. The extent to which free choice is therefore expressed can simply be one based on personal and strategic decision-making in the face of conflicting and competing demands.

Thus the language of choice, commitment and faith as described by the religious scholars fits in neatly with the discourse of belonging to a wider Muslim community (*Umma*) and the importance attached to the development and formation of a local Muslim community-identity. In this way the community space (inhabited by Shariah Councils) is deemed the obvious site upon which the long established practice of Muslim dispute resolution takes place. And in this respect it seems clear that the religious scholars seek to establish authority with respect to family law matters and require all participants to take the proceedings seriously. While the process of disputing itself reveals striking similarities to the development of family mediation in English family law, most religious scholars describe this process as distinct from the English family law approach to settling family disputes and the process is in fact framed as in opposition to state law mediation practices. It is also conceptualized in terms of a *duty* upon all Muslims to abide by the requirements of the Shariah and the stipulations of the Shariah Councils. This shared understanding stems from the belief that the secular space inhabited by English family law principles cannot bring about in itself genuine resolution of matrimonial disputes for Muslims living in Britain.

In my earlier research with the exception of one interviewee, all the women had contacted a Sharia Council voluntarily, notwithstanding guidance they may have received from family, friends and/or the local Imam. In most cases, initial contact had been made via the telephone, and this was followed up with an application form citing the reasons for seeking a religious dissolution of marriage. The most obvious questions concern the autonomy and independence of the women during this process of dispute resolution and their experience of mediation and reconciliation. Although not all women are marginalized and denied equal bargaining power during official mediation processes, there exists evidence to suggest that there is deep anxiety amongst many women at the prospect of initiating both official and unofficial mediation, an anxiety that persists throughout the process. Feminist scholars have warned of the dangers of trying to resolve marital disputes outside the protection of formal law. This may include situations where cultural norms deny women decision-making authority or where the mediator is not neutral and yet still provides the normative framework for discussion a situation which can transform the nature of the discussion and curtail the autonomy of the disputant. Roberts (2008) raises concerns that negotiations might well occur in private 'without the presence of partisan lawyers and without access to appeal'.[40] Some studies point to the fact that official mediation places women in a weak bargaining position, and encourages them to accept a settlement considerably inferior to one that they might have obtained had they gone through the adversarial process. Mediation can therefore promote a particular familial ideology that is based upon social control and patriarchal norms and values, and operates through subliminal, covert forms of power and coercion. In contrast, formal law provides protection against abuse in the private sphere, and so in response to the move towards private legal ordering, critics argue that mediation fails to deliver on the key issue of 'justice'. This can be described as a development of social and legal norms as one which

'exists within society a network of social norms which is formally independent of the legal system, but which is in constant interaction with it. Formal law sometimes seeks to

[40] See Marian Roberts, *Mediation in Family Disputes: Principles of Practice* (Ashgate 2008).

strengthen the social norms. Sometimes it allows them to serve its purposes without the necessity of direct intervention; sometimes it tries to weaken or destroy them and sometimes it withdraws from enforcement, not in an attempt to subvert them, but because countervailing values make conflicts better resolved outside the legal arena'.[41]

Feminists have extensively critiqued this tenuous relationship between family and state intervention across a wide spectrum of disciplines. Yet it is precisely the fact that women have such divergent experiences of family mediation that renders problematic any proposals to develop family mediation as a more formalized process to suit the specific needs of minority ethnic communities. There seems to be an inherent conflict between recognizing identities as multiple and fluid and formulating social policy initiatives that are based upon specific cultural practices, precisely because cultural and religious practices are open to change, contestation and interpretation. At the very least, we must ensure that mechanisms are in place so that those who choose not to participate in such processes are not compelled to do so. It is in this context that concerns have been raised about how such proposals will lead to delegating rights to communities to regulate matters of family law, which is effectively a move towards some form of cultural autonomy. Maclean rightly asks: 'What are the implications for family justice of this move towards private ordering? Is this form of 'privatization' safe?'[42] Undoubtedly, in this context formal law provides protection against abuse in the 'private' sphere – the sphere in which this legal ordering operates. Maclean goes on to ask: 'is it dangerous to remove disputes from the legal system with the advantage of due process, plus protection of those at the wrong end of the far from level playing field, and visible negotiation and settlement which takes place of not in court than in the shadow of the law?'[43]

The debates in Ontario, Canada have also formed the backdrop to understanding this relationship between civil and religious law. In Ontario, the extent to which family disputes should be allowed to take part under the Ontario Arbitration Act was brought into sharp relief when the Canadian Society of Muslims sought to establish as Sharia Tribunal and use the Ontario Arbitration Act to resolve family law type disputes.

The demand for recognition of religious arbitration was made under the context of multiculturalism and underpinned by s15 of Charter of Rights and Freedoms, a charter which guarantees fundamental freedoms including religious equality. This commitment to cultural and religious pluralism is enshrined in the Multiculturalism Act 1985 and it is this context upon which debates on the limits of law, legality and rights are regularly debated and addressed. It is useful to evaluate the developments in Canada often referred to as the 'Ontario controversy' to consider not only the commonalities and differences between the two contexts but also questions of reform and positive law obligations.

The Arbitration Act 1991 was adopted in the Province of Ontario specifying the procedures that consenting parties could apply if they chose to resolve their disputes outside the adversarial civil law system. Of particular concern was its use among wider religious communities as traditionally the Act had been used by the Jewish Orthodox communities only to form tribunals to deal with commercial disputes and agreements (including performing religious divorces). Was this option available to all religious communities seeking to resolve matrimonial disputes? Whatever the answer to this question it became apparent that its use by Muslims communities in Canada was not only perceived as controversial but it was also unforeseen. The call itself was made by a former Muslim leader and President of the Canadian Society of Muslims, Syed Mumtaz Ali who argued that Muslims should be granted greater autonomy in matters of family law as existing provisions and constitutional

[41] See Eekelaar (n 33) 45.
[42] See Mavis Maclean, *Making Law For Families* (Hart Publishing 2000) 67.
[43] Ibid.

arrangements failed to support the practice of their religious lives. The significance of ethnic, class and kinship differences within in Muslim communities was erased to promote the view that all Muslims were religiously obligated to use Sharia to resolve family law matters. Ashe and Helie refer to this as a form of 'religio-legal pluralism' whereby religious communities are given greater autonomy in family law matters but this is only enforceable via the power of state law and civil consent orders.[44] The fact that this form of religious pluralism would not only be endorsed but be supported by the state raised alarm bells for many, notwithstanding Muslim women's organisations. And what exactly would be the role of the courts in this process? How would this type of religious governance take place? The most important and defining factor in this form of religious pluralism was the continued use of and primacy of state law. As Baines explained, 'Ali did not propose to sever the relationship between arbitration tribunals and courts. Instead he sought to restrict the role of courts to purely procedural matters: judges should not be called upon to interpret sharia law.'[45]

Under this process the courts delegated to religious authorities in matters of family law. The fact that judges were unable to intervene in potential oppressive contexts based upon orthodox religious principles was of huge concern to many Muslim women and feminists. For example one prominent Muslim woman activist Shahnaz Khan explained,
'It is unlikely that all "consenting" adults particularly women, would willingly and gladly consent to arrange their lives according to laws which give them unequal status before the law. Although we may characterize some women as "choosing" no doubt they would experience a certain amount of pressure to conform. However should they decline to be governed by Muslim Personal Status Laws and find themselves ostracized by their families and their community, they would have to confront the discrimination of the larger Canadian population...'[46]

Of particular concern was the unproblematised use of Sharia law and the failure of Syed Ali and others to the potential of intra community inequalities and injustice experienced by vulnerable women. The argument that all Muslims are obligated to use Sharia principles to resolve matrimonial disputes is also flawed and open to dispute. Opposition, therefore came from various Muslim women's and feminist organisations including the Canadian Council of Muslim Women (CCMW) and the National Association of Women and Law (NAWL). The primary argument made was that the establishment of such tribunals led to a violation of freedoms offered to all women under existing legislation.

The Boyd Report, was then commissioned in response to calls for the establishment of a civil law system to incorporate Muslim family law matters into civil law and found that religious arbitration in family law matters should be allowed to continue as long as safeguards were put into place to which emphasized procedural safeguards to protect vulnerable parties who may be compelled to use these services. However this was opposed be the largest Muslim women's organisation in Canada (The Canadian Council of Muslim Women) arguing that this undermined the Canadian constitution which promotes 'equality before the law' for all its citizens. The resulting Boyd Report and critiques of Muslim women's choice in face of moves towards religious autonomy led to the introduction of Bill 27 by Ontarian Premier McGuinty intending to ban all religion based arbitration of family matters marking what Ashe and Helie describe as 'Ontario's commitment to religious pluralism and its rejection of legal- and specifically religio-legal-pluralism.' [47]

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[44] Ashe and Helie (n 2) 151.

[45] See Beverley Baines, 'Must Feminists Identify as Secular Citizens? Lessons from Ontario' in Linda. C. McClain and Joanna L. Grossman (eds) *Gender Equality, Dimensions of Women's Equal Citizenship* (Cambridge University Press 2009).

[46] Ashe and Helie (n 2) 152.

[47] Ashe and Helie (n 2) 156.

Canadian Muslim women's organisations challenged this proposal and the findings of the Boyd Report which called for the recognition of religious tribunals as long as some safeguards were in place. The furore led to the government rejecting that position. As Eekelaar (2013) points out:

'The result was that, while religious bodies may still carry out arbitration in family latters under the Arbitration Act they must do so according to the law of Ontario or of another Canadian jurisdiction. Furthermore, regulations require family law arbitrators to undergo training in the law of Canada, that cases are screened for 'power imbalances and domestic violence, by someone other than the arbitrator' and that a written record be kept of the proceedings.'[48]

Ayelet Shachar (2008) points out succinctly that 'The vision of privatized diversity in its fully-fledged 'unregulated islands of jurisdiction' variant poses a challenge to the superiority of secular family law by its old adversary: religion'.[49] This vision of privatized diversity can be applied to the new MAT if we understand privatized diversity as a model in which to achieve and possibly separate the secular from the religious in the public space, in effect encouraging individuals to contract out of state involvement and into a traditional non-state forum when resolving family disputes. This would include religious tribunals arbitrating according to a different set of principles than those enshrined in English law.

For Shachar there are real concerns of individuals being expected to live 'as undifferentiated citizens in the public sphere, but remain free to express our distinct cultural or religious identities in the private domain of family and communal life.'[50] For her and many other liberal scholars, the issue surrounds the contentious question of where private identity and life ends and public identity begins. She quite rightly points out that, if we are expected to express personal identities in the private, at which point in the public sphere do they cease to be so? Shachar also discusses the fact that the vision of privatized diversity will evoke different feelings for different people. For those who want to establish a pluralistic system of law that recognizes claims of culture and religion, this would not be so terrifying, but those who are 'blind' to these needs will see it as challenging the superiority of universal laws that apply to all:
'for others who endorse a strict separationist approach, or "blindness" towards religious or cultural affiliation, the idea that we might find unregulated "religious islands of binding jurisdiction" mushrooming on the terrain of state law is seen as evidence of the dangers of accommodating diversity, potentially chipping away, however slightly as the foundational, modernist citizenship formula of "one law for all"'.[51]

In 2011 a private members bill, the Arbitration and Mediation Services (Equality) Bill was introduced by Baroness Cox in the House of Lords. This Bill was reintroduced in October 2015 and 2016-17 and has generated considerable media attention as it aims to make clear the limits of arbitration and make amendments to the Arbitration Act to ensure its compliance with the Equality Act 2010 while seeking to outlaw discrimination on the grounds of sex. Clause 7 of the Bill proposes an amendment to the section of the Courts and Legal Services Act 1990 and criminalizes 'falsely claiming legal jurisdiction' to prevent the ousting of jurisdiction in matters of family and criminal law. Although the Bill does not specifically mention Islamic law it was widely believed to target Muslim communities and to attempt to limit the powers of organisations such as MAT and Shariah Councils. But for many scholars it raised the question of the extent to which state law should intervene in religious councils and tribunals. It has been criticized for promoting the idea that the practice of Muslim family

[48] Eekelaar (n 33).
[49] See Shacher (n 22) 573.
[50] Ibid 580.
[51] Ibid.

law is not only based upon unfair and unequal principles but specifically targets and discriminates against Muslim women as primary users of Muslim dispute resolution bodies. Furthermore the formalist top-down state interventionist approach as epitomized by the Bill in seeking to limit the powers of religious bodies as also been criticized as being predicated on fixed and homogenous notions of Islam and Islamic legal practice which fails to recognize the dynamism and pluralism within the communities themselves. As Eekelaar (2013) argues:

'It is a mistake to think of Shari'a as a monolithic system, impervious to change. In fact the bodies apply it in different ways, and it is subject to internal arguments and contestation. Might it be better to allow it to develop within its communities and responding to its internal critiques and influenced by the culture around it? Alongside this, its adherents could be encouraged to make more use of the civil law, including a greater readiness to enter legally recognized marriages without thereby severing their relationship with their religious norms'.[52]

But what are the experiences of Muslim women using religious mechanisms of dispute resolution in family law matters? Do religious tribunals promote patriarchy and gender inequality? At present, we have three significant pieces of research which provide important insights into how Sharia councils in Britain govern as alternative dispute resolution mechanisms in the field of family law. In my work, *Shariah Councils and Muslim Women: Transcending the Boundaries of Community and Law* I draw three key conclusions from undertaking extensive empirical research with 5 shariah councils and interviews with 25 British Muslim women. Firstly the claim that seeing culture and forms of religious practice as a mode of legitimizing claims to power and authority dramatically shifts the way we understand the debate on liberalism and universalism versus relativism. In other words that view that Muslims increasingly seek the freedom to live under sharia is not only extremely problematic but fails to capture the complexity of British Muslim identity as fragmented, porous and hybrid. Second, anthropological scholarship points to the importance of locating gender and gender relations as key sites to the debate; thus, the ways in which Muslim women engage with sharia councils in Britain illustrates how processes and concepts of sharia law are mobilized, adopted and transformed. Underlying this process are power relations that define the nature of the interaction, define meaning of sharia within sharia councils and construct possibilities of change and action. Finally an essentialised understanding of Muslim religious practice does not reflect the experience of British Muslim women. A more dynamic understanding of British Muslim identity is required, which does not label the needs of Muslims to accommodate sharia as fixed but understands this process as temporal, with shifts from cultural to religious practice and vice versa. Elham Manea argues that limited recognition of legal pluralism and multiculturalism has led to the recognition of culture and religion as homogeneous that ignores individual voices and arguments and the expense of collective arguments.[53] In particular her empirical research with sharia councils and Muslim women users of these bodies found examples of practices such as forced marriage, under age marriage, condoning domestic violence, criminal sanctions and inequities in inheritance.

Conclusion

For many liberal scholars the practice of religious personal systems of law raises the paradox of what Shachar refers to as 'multicultural vulnerability', namely the dilemma of

[52] Eekelaar (n 33) 32.
[53] See Elham Manea, *Women and Shari'a Law: The Impact of Legal Pluralism in the UK* (I.B. Tauris 2016).

protecting individual choice and personal autonomy with group and community rights. The arena of family law succinctly illustrates this conflict, as Shachar explains:

'Clearly, when the state awards jurisdictional powers to the group in the family law arena, it enhances the group's autonomy. At the same time, this re-allocation of legal authority from the state to the group may also expose certain individuals within the group to systemic and sanctioned in-group rights violations'.[54]

Such concerns also mirror current debates over the establishment of 'Sharia courts' in Britain and the accommodation of plural systems of family law. Some form of accommodation will include a shift of dispute resolution from the public to the private sphere and this raises serious concerns on how power is then effectively reconfigured from the state to the family and community. From such a perspective the differential treatment of women in the process of marriage and divorce can lead to a conflict between equality and autonomy and the conflicting interests of the protection of family, culture and religion as enshrined by the norms and values of Sharia councils and the MAT.

As to the question of gender parity as a model of governance and reform it provides an important starting point for Muslim women to explore ways in which their use is based upon choice, gender equality and justice. As Anitha and Gill (2009: 168) point out:
'Women exercise their agency in complex and often contradictory ways, as they assess the options that are open to them, weigh the costs and benefits of their actions, and seek to balance their often competing needs with the expectations and desires. While there remains a need to recognise gendered power imbalances at the same time there also remains a need to respect women's exercise of agency…We need to give more support to those women who wish to express their subjectivity within the framework of the communities of which they perceive themselves to be such a fundamental part.'[55]

Furthermore, the process of 'reform' within communities is often a long and fractured one, contextual and dependent upon multiple variables including state support and subsidy. Narratives from Muslim women using religious mechanisms of dispute resolution reveal both the strategic and the complex use of these bodies. In the case of Muslim legal pluralism we can then see in evidence different forms of mobilizations with underlying cultural and religious meanings which interact, conflict and re-order themselves according to the different communities in which they are located and state law, and vice versa. We see also that the decision-making processes produce an internal legal structure- a process of mixing-up, overlapping and often in conflict. The application of gender parity can also mean conflicts meanings of equality and community recognition or legitimacy of various legal and social domains that mix up notions of law and decision-making.

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[54] Shachar (n 22) 98.
[55] See Sundari Anitha and Aisha Gill, 'Coercion, Consent and the Forced Marriage Debate' (2009) 17(2) Feminist Legal Studies 165.

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