

THE MATERIALIZATION OF LEGAL PLURALISM IN BRITAIN: WHY SHARI'A COUNCIL DECISIONS SHOULD BE NON-BINDING

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I. INTRODUCTION

When cultural friction beckons for a solution, it is hard not to search for a legal system that fuses cultural and religious differences into one cohesive governing mechanism. With this principle in mind, on July 3, 2008, the Chief Justice of Britain, Lord Chief Justice Nicholas Phillips, caused panic in Britain when he proclaimed:

there is no reason why Shari'a principles, or any other religious code, should not be the basis for mediation or other forms of alternative dispute resolution [with the understanding] . . . that any sanctions for a failure to comply with the agreed terms of mediation would be drawn from the Laws of England and Wales.¹

This announcement, coupled with the echoed sentiments of the Archbishop of Canterbury, caused a flurry of puzzled citizens and vehement objections across countries.²

The perception many have about Islam and Shari'a law has caused much of the uproar.³ Many view Shari'a law as a draconian system that promotes

1. Press Release, East London Mosque and London Muslim Center, Britain's Most Senior Judge Assures Muslims in Their Right for Equality Before British Law (July 4, 2008), <http://www.eastlondonmosque.org.uk/uploadedImage/pdf/ELM-LMC%20PR%20-%20LCJ.pdf>.

2. In 2008, the Archbishop of Canterbury emphatically stated that Shari'a law is "unavoidable." *Sharia Law in U.K. is 'Unavoidable,'* BBC NEWS, Feb. 7, 2008, http://news.bbc.co.uk/2/hi/uk_news/7232661.stm. For an example of some of the uproar that followed that statement, see Deborah Weiss, *Britain's No Sharia Campaign*, AMERICAN THINKER, Dec. 18, 2008, http://www.americanthinker.com/2008/12/britains_no_sharia_campaign.html.

3. TAHIR ABBAS, MUSLIM BRITAIN: COMMUNITIES UNDER PRESSURE 12 (2005). Seven features of Islamophobia [have been] identified: Muslim cultures are seen as monolithic; Islamic cultures are substantially different from other cultures; Islam is perceived as implacably threatening; Islam's adherents use their faith to political or military advantage; Muslim criticism of Western cultures and societies is rejected out of hand; the fear of Islam is mixed with racist hostility to immigration; and Islamophobia is assumed to be natural and unproblematic.

inequality between the sexes and encourages brutal punishments;⁴ thus, many fear its spread.⁵ What they may not realize is that Lord Chief Justice Phillips' statement was merely a reflection of what has been happening for the last year in Britain. Since August 2007, Shari'a councils have been settling disputes between Muslims on a voluntary, non-binding basis.⁶ Not until September 2008, did decisions made by Shari'a councils in Britain begin to be *legally* binding.⁷

Today, the Shari'a councils of Britain have found a way possibly to solidify the legality of their judgments so the British government will recognize them. Much as Jewish Beth Din courts have been doing for the last 100 years in Britain, Islamic courts are qualifying themselves as "arbitration tribunals" and intend to operate under Britain's Arbitration Act.⁸ As long as the Shari'a courts abide by the provisions set forth in the Arbitration Act, any decision made by the Shari'a court becomes binding.⁹ As such, the British government has created an outlet for parallel legal systems to acquire legitimacy.

II. STATEMENT OF PURPOSE

As multiculturalism becomes a day-to-day reality within the United Kingdom, a dichotomy between thought and action in regard to balancing cultural and legal norms emerges. One report suggests that 37% of British Muslims support some form of Shari'a law being implemented in the United Kingdom.¹⁰

4. See generally Amira Mashhour, *Islamic Law and Gender Equality—Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, 27 HUM. RTS. Q. 562, 563 (2005); DAVID SMOCK, U.S. INST. OF PEACE, SPECIAL REPORT NO. 150: APPLYING ISLAMIC PRINCIPLES IN THE TWENTY-FIRST CENTURY: NIGERIA, IRAN, AND INDONESIA 2 (2005) available at <http://www.usip.org/files/resources/sr150.pdf>.

5. See Laura Trevelyan, *Will Canada Introduce Sharia Law?*, BBC NEWS, Aug. 26, 2004, http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/3599264.stm. See generally Jihad Prevention Act of 2008, H.R. 6975, 110th Cong., §§ 2–4 (2008) (requiring that in order for aliens to enter the United States they must first swear that they will not advocate for the incorporation of Shari'a law within the country).

6. Abul Taher, *Revealed: UK's First Official Sharia Courts*, TIMESONLINE, Sept. 14, 2008, <http://www.timesonline.co.uk/tol/news/uk/crime/article4749183.ece> (including domestic violence, nuisance, divorce and inheritance cases).

7. *Id.*

8. See *infra* Part II. Jewish Beth Din courts have been using the precursor to the Arbitration Act for the last 100 years in order to make legally binding judgments for civil matters using Jewish law. Taher, *supra* note 6.

9. Taher, *supra* note 6.

10. Samia Bano, *Islamic Family Arbitration, Justice and Human Rights in Britain*, LAW, SOC. JUSTICE & GLOBAL DEV., Dec. 6, 2007, at 3, http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2007_1/bano.

Although this number is fiercely disputed,¹¹ the majority of British Muslims appear not to favor Islamic law used in mainstream British legal practice.¹² Such a statistic makes one wonder whether it is wise to heed Lord Chief Justice Nicholas Phillips' suggestion and to sanction Shari'a law as an alternative governing body of law for family law disputes under the Arbitration Act of 1996.¹³

The Arbitration Act was created in order to allow parties to "obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense . . . [by] . . . agree[ing] how their disputes are [to be] resolved, subject only to such safeguards as are necessary in the public interest . . ."¹⁴ Additionally, the arbitrator is held immune to liability for "anything done or omitted in the discharge or purported discharge of his functions as arbitrator," so long as it is not done in "bad faith."¹⁵ As the British court of appeals in *Halpern v. Halpern* stated, "arbitral tribunals can and indeed should decide disputes in accordance with the law chosen by the parties" under the Arbitration Act of 1996.¹⁶ As a result, the basis for determining "bad faith" is blurry. By using another culture's laws and norms, "bad faith" relates to the laws being applied.¹⁷ Although a judgment might be considered biased or sexist under traditional British law, the decision could still be considered fair under the alternative body of law being used.¹⁸ Unless the British legislature amends the Arbitration Act to prevent its use in matters involving religious law, Britain will be inadvertently sanctioning a parallel legal system which no longer embodies the values of British law regarding equal judicial treatment of men and women.

This Note argues that it is not wise to incorporate Shari'a Councils as tribunal bodies under the Arbitration Act or to allow their decisions to become legally binding. Part III summarizes and compares both Shari'a and British family law, including marriage, divorce, child custody, and inheritance. Part IV explains five options the British government could take to resolve the current British-Shari'a debate. First, this Note considers whether keeping the current system (allowing British Shari'a tribunals to hand down binding judgments through arbitration) is practical.¹⁹ Second, it considers whether regression to non-binding arbitration is a better alternative.²⁰ Third, this Note analyzes whether Shari'a courts should be abolished altogether and what implications this might trigger. Fourth, this Note considers whether the British government should make

11. *Id.*

12. *Id.*

13. *See infra* Part IV.

14. Arbitration Act, 1996, c. 23, § 1(a), (b) (U.K.).

15. *Id.* § 29(1).

16. *Halpern v. Halpern*, [2007] EWCA Civ 291, [2008] Q.B. 195, 214 (C.A.).

17. Shari'a law approves and accepts unequal treatment among men and women in a number of areas while British law does not. *See infra* Part III.

18. *See supra* note 17.

19. *See infra* Part IV(A)(1).

20. *See infra* Part IV(A)(2).

Shari'a court decisions non-binding and, additionally, require that Muslim couples seeking a divorce take the procedural steps required under Shari'a law, before a British court would grant the divorce. Finally, this Note explores the possibility of maintaining non-binding Shari'a tribunals, while using injunctive relief to remedy *ex post facto* disparities resulting from the Shari'a Council rulings.

After setting forth possible solutions to the debate, this Note will argue and explain why continuing to allow Shari'a Councils to act as binding arbitrators is dangerous. Additionally, it will argue that the British government should delegitimize all religious tribunals under the Arbitration Act through legislation and adopt a mixture of contingency divorce orders and *ex post facto* injunctive relief to remedy any disparities that remain despite the abolition of binding Shari'a Councils.

III. COMPARISON OF SHARI'A AND BRITISH LAW

A. Origins of Shari'a Law

Although Shari'a law cannot be summarized within a few pages, enough background will be provided to illuminate the relevant provisions for the current discussion. Shari'a law is a collection of Islamic principles by which Muslim societies abide.²¹ In Arabic, Shari'a literally means "a way to a watering place," and thus a path to be followed.²² Shari'a law draws its principles from five sources: the *Quran*, *Sunna* ("tradition"), *qiyas* ("analogy"), *igma* ("consensus among Muslim scholars"), and *Ijtihad* ("independent juristic reasoning").²³ God's word, recorded in the *Quran*, is the primary source of Shari'a law.²⁴ The *Quran* offers primarily ethical guidelines, not codified legal instructions, as some might believe.²⁵ Thus, the other sources are used to supplement what the *Quran* does not directly set forth.²⁶

21. Mashhour, *supra* note 4, at 565.

22. *Id.*; ROBERT DANNIN & JOLIE STAHL, BLACK PILGRIMAGE TO ISLAM 275 (2002); JAMILA HUSSAIN, ISLAM: ITS LAW AND SOCIETY 28 (2003).

23. Mashhour, *supra* note 4, at 566; *see* MICHAEL D. COOGAN, THE ILLUSTRATED GUIDE TO WORLD RELIGIONS 110 (Peter Bently ed., 2003).

24. *See* COOGAN, *supra* note 23, at 104; MALISE RUTHVEN, ISLAM IN THE WORLD 97 (2006); MILTON VIORST, IN THE SHADOW OF THE PROPHET: THE STRUGGLE FOR THE SOUL OF ISLAM 49 (2001); Mashhour, *supra* note 4, at 566.

25. *See* Mashhour, *supra* note 4, at 566.

26. *See id.* For a slightly different perspective on the interpretation of Islamic law, *see* CAROLY MOXLEY ROUSE, ENGAGED SURRENDER: AFRICAN AMERICAN WOMEN AND ISLAM 57 (2004).

Muslims consider *Sunna*, like the *Quran*, sacred.²⁷ Oral teachings and traditions embodying the Prophet Muhammad's behavior comprise *Sunna*.²⁸ The other three sources (*qiyas*, *igma*, and *ijtihad*) are based strictly upon human logic and reasoning. The "human component" is where much of the varying interpretation and disagreement arises amongst Islamic scholars, and what has caused Shari'a law to vary widely among Islamic communities.²⁹ As a result of the varying interpretations and applications of Islamic principles, an internal form of legal pluralism exists within Shari'a law.³⁰

B. Family Law Under Shari'a And British Law—Marriage, Divorce, Child Custody, Inheritance

1. Marriage

a. Shari'a Law – Civil Contracts

Muslims consider marriage an important aspect of life.³¹ In fact, Muslim men and women are expected to marry unless there are significant physical or monetary reasons that prevent them from living a married life.³² While English common law considers marriage a "contract based upon a voluntary private agreement by a man and a woman to become husband and wife,"³³ Shari'a law

27. See Mashhour, *supra* note 4, at 566; IGNÁC GOLDZIEHER & KATE CHAMBERS SEELYE, *MOHAMMED AND ISLAM* 43 (1917).

28. See ANNEMARIE SCHIMMEL, *ISLAM: AN INTRODUCTION* 52 (1992); Mashhour, *supra* note 4, at 566–67; Kristine Uhlman, *Overview of Shari'a and Prevalent Customs In Islamic Societies—Divorce and Child Custody*, § 1.0 (2004), http://www.expertlaw.com/library/family_law/islamic_custody.html.

29. See NDIVA KOFELE-KALE, *INTERNATIONAL LAW OF RESPONSIBILITY FOR ECONOMIC CRIMES: HOLDING STATE OFFICIALS INDIVIDUALLY LIABLE FOR ACTS OF FRAUDULENT ENRICHMENT* 121 (2d ed. Ashgate Publishing 2006) (1995); DAVID PEARL, *A TEXTBOOK ON MUSLIM PERSONAL LAW* 14–15 (1987); KNUT S. VIKØR, *BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW* 131 (2005); Mashhour, *supra* note 4, at 566–67.

30. Several Islamic schools of thought have emerged with contrary interpretations and ideas concerning Shari'a law: *Jabria*, *Tafwiz*, *Ikhtiar*, *Mutazilas*, *Ibn-Rushd*, and *Ikhwan-us-Safa*. See ABBAS ALI, *ISLAMIC PERSPECTIVES ON MANAGEMENT AND ORGANIZATION* 41–46 (2005). As a direct result, "[t]he [Islamic] legal system is diffuse, lacking coherence in codes and enforcement and entailing a multiplicity of authorities and sources of law." IHSAN YILMAZ, *MUSLIM LAWS, POLITICS AND SOCIETY IN MODERN NATION STATES: DYNAMIC LEGAL PLURALISM IN ENGLAND, TURKEY, AND PAKISTAN* 31 (2005).

31. See KEITH HODKINSON, *MUSLIM FAMILY LAW* 89 (Croom Helm, Ltd. 1984); Uhlman, *supra* note 28, § 5.0;

32. See Uhlman, *supra* note 28, § 5.0.

33. See W.F. Craies, *Marriage*, in *ENCYCLOPEDIA OF THE LAWS OF ENGLAND WITH FORMS AND PRECEDENTS* 9 (A. Wood Renton & Max A. Robertson eds., 1908); SUSAN

considers marriage a civil contract between a man and woman that “legalizes intercourse and the procreation of children.”³⁴

Before a man and woman may enter into a valid Shari’a law marriage contract, certain conditions must be met.³⁵ Some of the conditions are as follows: both parties must be sane and have reached puberty; neither party may have been breast-fed from the same woman; men cannot marry antecedents or decedents of his wife nor the antecedents or decedents of any woman with whom he has committed adultery.³⁶ Additionally, Muslim women are forbidden from marrying non-Muslim men.³⁷ Contrarily, Muslim men may marry non-Muslim women.³⁸

Once all conditions have been met, the parties may negotiate entry into a marriage contract.³⁹ An offer (*ijab*) and an acceptance (*qabul*) are made during a marriage meeting.⁴⁰ Most Islamic jurists agree that the woman must be accompanied by a legal guardian in order to solidify the marriage contract on her behalf.⁴¹ However, two Islamic schools of thought have emerged on the issue of whether witnesses must be present.⁴² One requires that there be two male witnesses, or one male witness and two female witnesses present, while the other requires no witnesses at all.⁴³ Unlike the English common law tradition, Shari’a law permits marriage contracts to be made orally.⁴⁴

CARY NICHOLAS, ALICE M. PRICE, & RACHEL RUBIN, RIGHTS AND WRONGS: WOMEN’S STRUGGLE FOR LEGAL EQUALITY 26–28 (1986); Cornell Law School, Marriage: An Overview, <http://topics.law.cornell.edu/wex/marriage>.

34. See Uhlman, *supra* note 28, § 5.1.

35. See *id.*

36. See *id.* § 5.2.

37. See *id.*

38. See *id.*

39. See Uhlman, *supra* note 28, § 5.1. Islamic marriage contracts are conceptually very similar to prenuptial agreements used in the United States. See KATHERINE E. STONER & SHAE IRVING, PRENUPTIAL AGREEMENTS: HOW TO WRITE A FAIR AND LASTING CONTRACT 3–197 (2008).

40. A marriage meeting is the meeting where the parties enter into a marriage contract. See NATHAL L. DESSING, RITUALS OF BIRTH, CIRCUMCISION, MARRIAGE AND DEATH AMONG MUSLIMS IN THE NETHERLANDS 86 (2001); Jamila Hussain, *Family Law and Muslim Communities*, in MUSLIM COMMUNITIES IN AUSTRALIA 161, 170 (Shahram Akbarzadeh, & Abdullah Saeed eds., 2001); Uhlman, *supra* note 28, § 5.3.

41. See DAVID STEPHEN POWERS, LAW, SOCIETY, AND CULTURE IN THE MAGHRIB, 1300–1500, at 64 (2001); Uhlman, *supra* note 28, § 5.3.

42. See Uhlman, *supra* note 28, § 5.3.

43. See *id.* See generally EARLE H. WAUGH, SHARON MCIRVIN ABU-LABAN, & REGULA QURESHI, MUSLIM FAMILIES IN NORTH AMERICA 37 (Earle H. Waugh, Sharon McIrvin Abu-Laban, & Regula Qureshi eds., 1991).

44. See AHMED E. SOUAIAIA, CONTESTING JUSTICE: WOMEN, ISLAM, LAW, AND SOCIETY 63 (2008); Uhlman, *supra* note 28, § 5.3.

Another unique aspect of Islamic marriages is the dower (*mahr*).⁴⁵ A dower is a sum of money or valuable property that Muslim men pay their wives as a condition of marriage.⁴⁶ Husbands can pay it immediately upon marriage, or it can be deferred to an agreed-upon date.⁴⁷ It is intended to be the woman's property; nonetheless, the wife often uses the dower as a leveraging tool to prevent divorce.⁴⁸ By deferring payment of the dower until divorce, the wife can protect herself—depending upon the dower's value—because her husband will likely wish to avoid its payment.⁴⁹

Even after a man and a woman enter into a marriage contract, both parties have the option of modifying its terms, as long as the changes “further the object of the marriage and [do] not violate the Shari'a.”⁵⁰ When one party validly modifies, the other party must adhere to the modification.⁵¹ If any clause is breached, the marriage contract becomes void.⁵²

Every married couple must adhere to certain spousal rights and obligations.⁵³ The husband must provide necessities such as food, clothing, and shelter for his wife.⁵⁴ He must provide these in a manner that is proportionate to his financial means.⁵⁵ The home provided by the husband must be “habitable, private, and must not be occupied by other people—even the husband's relatives.”⁵⁶

Likewise, the wife's right to her husband's support is conditioned upon (1) the marriage being valid, (2) the wife acquiescing to intercourse at all “lawful” times, and (3) the wife obeying her husband.⁵⁷ The consequence of a wife not fulfilling any of the previous three requirements is that the wife must relinquish

45. See Uhlman, *supra* note 28, § 5.3. *Mahr* literally means marital gift. DON S. BROWNING, MARTHA CHRISTIAN GREEN, & JOHN WITTE JR., *SEX, MARRIAGE, AND FAMILY IN WORLD RELIGIONS* 171 (2006). Husbands give the *mahr* to their wives as a symbol of their serious, unfettered commitment to their wives and married life. *Id.* The *mahr* is similar to the Western tradition of a man giving a diamond ring to his fiancée. *Id.* All husbands are required to give their wives a *mahr*; however, there is no minimum or maximum standard set forth in the Quran. *Id.*

46. BROWNING ET AL., *supra* note 45; See Mashhour, *supra* note 4, at 564.

47. Muslim wives have the right to keep their husbands' property if the *mahr* has not been paid. See HUSSAIN, *supra* note 22, at 82; Uhlman, *supra* note 28, § 5.3.

48. See Uhlman, *supra* note 28, § 5.3. See generally ZIBA MIR-HOSSEINI, *MARRIAGE ON TRIAL: A STUDY OF ISLAMIC FAMILY LAW* 154 (rev. ed. 2000).

49. See Uhlman, *supra* note 28, § 5.3.

50. HODKINSON, *supra* note 31, at 90; see Uhlman, *supra* note 28, § 5.3.

51. See Uhlman, *supra* note 28, § 5.3.

52. See *id.*

53. *Id.* § 5.4. See also YVONNE YAZBECK HADDAD & JOHN L. ESPOSITO, *ISLAM, GENDER & SOCIAL CHANGE* 68 (Yvonne Yazbeck Haddad & John L. Esposito eds., 1998).

54. See Uhlman, *supra* note 28, § 5.4. See also HADDAD & ESPOSITO, *supra* note 53, at 68.

55. See Uhlman, *supra* note 28, § 5.4.

56. See *id.*

57. *Id.*

her right to her husband's support.⁵⁸ Furthermore, a wife may not work outside her home without her husband's permission and expect to receive support from her husband.⁵⁹

b. British Law – Regulated Marriage Contracts

British law, much like Shari'a law, views marriage as a contract between a man and woman.⁶⁰ However, contrary to Shari'a law, "the rights and duties of the parties are not left to be regulated by their own agreement, but are matters of municipal regulation over which they have no control."⁶¹ British law does not recognize prenuptial agreements as legally binding.⁶²

The Marriage Act of 1753 is the foundation for modern British marriage law.⁶³ Under the Marriage Act, marriages needed to be publicized through banns, or the parties need to obtain a license.⁶⁴ The marriage registrar had to be signed by the couple, the person conducting the ceremony, and two witnesses.⁶⁵

Today, marriage law in Britain still requires that the couple obtain a publication of banns, a marriage license issued by an ecclesiastical authority, or a registrar's marriage certificate. In addition, the couple, the person conducting the ceremony, and two witnesses must sign the marriage registrar.⁶⁶ Prior to obtaining a valid registrar's marriage certificate, a couple must first give the Registrar's Office notice of their intent to marry.⁶⁷ Neither party may be made to marry against his or her will,⁶⁸ nor may any party marry while still legally married.⁶⁹ Both parties must be age sixteen or older.⁷⁰

58. *See id.*

59. *See id.*

60. *See* JAMES THOMAS HAMMICK, *THE MARRIAGE LAW OF ENGLAND: A PRACTICAL GUIDE TO THE LEGAL REQUIREMENTS ASSOCIATED WITH THE PRELIMINARY MATTERS, SOLEMNIZATION, AND REGISTRATION OF THE MATRIMONIAL CONTRACT 2* (London, Shaw & Sons 1873).

61. *See id.*

62. Currently, prenuptial agreements are persuasive but not legally binding under British law; however, there is speculation that a parliamentary bill making prenuptial agreements binding could be drafted as early as 2012. Frances Gibb, *Pre-nuptial Agreements Could Become Legally Binding Under Law Commission Review*, *TIMESONLINE*, June 11, 2008, <http://business.timesonline.co.uk/tol/business/law/article/4112683.ece>.

63. *See* HAMMICK, *supra* note 60, at 4.

64. *See id.* Marriage banns are announcements of the individuals who plan to marry. *See* GEORGE G. MORGAN, *HOW TO DO EVERYTHING WITH YOUR GENEALOGY 77* (2004).

65. *Id.*

66. Marriage Act, 1949, 12, 13, & 14 Geo. 6, c. 76 (U.K.).

67. *Id.*

68. A marriage is considered forced where physical violence, threats of physical violence, or threats of suicide are used. *See* Forced Marriage (Civil Protection) Act, 2007,

Women's property rights fare considerably better under British law than they do under Shari'a law.⁷¹ Once a couple is legally married, all property owned individually by the husband and the wife prior to marriage becomes communal property, along with all property acquired after the marriage.⁷² In addition, unlike Shari'a which does not recognize the community property principle,⁷³ any inheritance the husband or wife obtains becomes community property.⁷⁴

2. Divorce

a. Shari'a Law – Divorce by Cultural Procedures and Their Inequality

Although divorce is discouraged, a Muslim couple can obtain a divorce "if good relations between the spouses become unbearable and impossible."⁷⁵ Muslims give deference to reconciliation because it is their belief that Allah⁷⁶ despises divorce.⁷⁷ Men and women may initiate divorce; however, certain procedural structures apply that enable men to divorce much more readily than women.⁷⁸

c. 20 (U.K.). However, penalties for forced marriage are not criminal. *Id.* Because victims would refuse to submit family members to criminal punishment, someone convicted of forced marriage will be subject to contempt of court punishments. *Id.*

69. See Marriage Act, 1949, 12, 13, & 14 Geo. 6, c. 76 (U.K.); Directgov, Marriage and Civil Partnership: Your Legal Obligations, http://www.direct.gov.uk/en/GovernmentCitizensandRights/RegisteringLifeEvents/MarriagesandCivilPartnerships/DG_175717 (last visited Sept 18, 2009).

70. Parties under the age of 18 must obtain parental consent prior to the marriage being legalized. Marriage Act, 1949, 12, 13 & 14 Geo. 6, c. 76 (U.K.); Directgov, *supra* note 69.

71. See *infra* Part III(B)(2), (4).

72. See Matrimonial Proceedings and Property Act, 1970, c. 45 (U.K.); see also ELISABETH COOKE, ANNE BARLOW, & THÉRÈSE CALLUS, COMMUNITY OF PROPERTY: A REGIME FOR ENGLAND AND WALES? (2006); William Rees-Mogg, *Divorced from the Realities*, TIMES (London), Feb. 13, 2006, available at http://www.timesonline.co.uk/tol/comment/columnists/william_rees_mogg/article730188.ece.

73. See Shahzad Q. Qadri, *Shariah and Estate Planning*, Nov. 2007, <http://www.wsba.org/media/publications/barnews/oct07-qadri.htm>.

74. See *supra* note 72.

75. Mashhour, *supra* note 4, at 571.

76. Allah is the god of Islam. See BADRU D. KATEREGGA & DAVID W. SHENK, ISLAM AND CHRISTIANITY: A MUSLIM AND A CHRISTIAN IN DIALOGUE 1 (1980).

77. Mashhour, *supra* note 4, at 572.

78. See *infra* Part III(2)(a)(i), (ii).

i. Men's Right to Divorce

Traditionally, men hold the power of *talaq*, which enables a husband to divorce his wife simply by making a proclamation that the marriage has been dissolved.⁷⁹ The husband may only do so if he is an adult, sane, and making the decision himself.⁸⁰ There are two varieties of *talaq*: *talaq al Sunna* and *talaq al bidaa*.⁸¹ The former is consistent with Allah's teachings, while the latter is considered to be a modernization that is inconsistent with Allah's teachings.⁸²

The *talaq al Sunna* is enacted by a husband pronouncing his wish to divorce his wife during her menstruation period followed by a month-long period of sexual abstinence (*iddah*).⁸³ This pattern continues for a total of three months.⁸⁴ The primary purpose of the *iddah* is to ensure that the woman is not pregnant to avoid paternity disputes.⁸⁵ During the *iddah*, both the wife and husband are forbidden from marrying another person.⁸⁶ The *iddah* also provides a period during which the couple is encouraged to reconcile their differences.⁸⁷ During this time, the husband may recommence sexual intercourse with his wife with or without her consent if the husband revokes his divorce before the end of the three months.⁸⁸ Additionally, during the *iddah* period, the wife is expected to remain in "the matrimonial home unless she has an acceptable excuse for leaving it."⁸⁹

Once the *iddah* period is over, the divorce becomes irrevocable.⁹⁰ The wife is entitled to any deferred dower payment set forth in the marriage contract.⁹¹ This means that if the husband has a change of heart following the three-month *iddah* period, he must remarry his ex-wife – thereby entering into a new marriage

79. Mashhour, *supra* note 4, at 572.

80. Uhlman, *supra* note 28, § 6.1.

81. Mashhour, *supra* note 4, at 572.

82. *Id.*

83. If the woman is pregnant when the divorce proclamation is made, the *iddat* will continue until the wife delivers the child. *See* Mashhour, *supra* note 4, at 572–73; Uhlman, *supra* note 28, § 6.1.

84. *See* Mashhour, *supra* note 4, at 573.

85. During the *iddah*, Muslim husbands must still support their wives financially and to the same degree as before the divorce process began. *See* HUSSAIN, *supra* note 22, at 112; Uhlman, *supra* note 28, § 6.1. Once the *iddah* period is over, the husband no longer is required to financially support his wife. *See* Uhlman, *supra* note 28, § 6.1.

86. *See* M. MUKARRAM AHMED, ENCYCLOPEDIA OF ISLAM 310 (2007); Uhlman, *supra* note 28, § 6.1.

87. *See id.*; NATANA J. DELONG-BAS, WAHHABI ISLAM: FROM REVIVAL AND REFORM TO GLOBAL JIHAD 180 (2004); Mashhour, *supra* note 4, at 573.

88. *See* Uhlman, *supra* note 28, § 6.1.

89. *See id.*

90. *See* Mashhour, *supra* note 4, at 573.

91. Kecia Ali, The Feminist Sexual Ethics Project, Special Focus: Islam, Divorce (July 1, 2003), <http://www.brandeis.edu/projects/fse/Pages/divorce.html>.

contract, as well as providing a new dower.⁹² However, Shari'a law provides a cap on the number of times a couple may remarry each other.⁹³ Once a husband has divorced his spouse three times, he is prohibited from remarrying her unless she has married and divorced another man.⁹⁴

Conversely, a *talaq al bidaa* can be affected whereby the husband merely pronounces, "I divorce you. I divorce you. I divorce you."⁹⁵ This form of divorce is severely debated because it is not supported by the *Quran* or *Sunna*.⁹⁶ Nonetheless, many Muslims still believe this method of unilateral divorce by the husband is valid but not laudable.⁹⁷

ii. Women's Right to Divorce

There are four ways by which a Muslim woman can obtain a divorce on her own accord.⁹⁸ The first way is through "delegated *talaq*," which must be contracted for within the original marriage contract.⁹⁹ The couple may also agree to it as a modification to the marriage contract.¹⁰⁰ In other words, if both parties agree as part of the marriage contract, the wife may be given the right to unilaterally divorce her husband, just as he retains the right to unilaterally divorce her.¹⁰¹

The second, and standard, manner by which a wife can divorce her husband is called *khul*.¹⁰² If a woman exercises her right to *khul*, she must "give something for her freedom"—usually her dowry.¹⁰³ After a wife requests a *khul*, the husband is not permitted to reconcile without her consent.¹⁰⁴

92. See Mashhour, *supra* note 4, at 573.

93. See *id.*

94. See *id.*

95. See *id.*; Sona Khan, *Veil of Ignorance: Muslim Women's Talaq Trap*, EXPRESSINDIA.COM, Aug. 24, 2004, <http://www.expressindia.com/news/fullstory.php?newsid=35361>.

96. See Mashhour, *supra* note 4, at 573. Although this form of *taliq* is severely criticized, it gained peripheral legitimacy through Caliph Umar who "held it permissible to impose a certain restriction on loose tendencies to divorce which had crept in during his regime." ZAKIA A. SIDDIQI & ANWAR JAHAN ZUBERI, MUSLIM WOMEN: PROBLEMS AND PROSPECTS 34 (1993). As a result, it has become a typical practice. *Id.*

97. See Mashhour, *supra* note 4, at 573.

98. See *id.* at 574–75.

99. See *id.* at 574.

100. See *id.*

101. See *id.* at 573.

102. See *id.*

103. Mashhour, *supra* note 4, at 574 (citing the Quran, Sura 2, verse 128); see Uhlman, *supra* note 28, § 6.2.

104. Mashhour, *supra* note 4, at 574.

The third way is judicial intervention (*tafriq*).¹⁰⁵ Islamic schools of law differ widely regarding what constitutes a valid reason for the courts to get involved.¹⁰⁶ The most conservative view is that a court may grant a divorce if the husband cannot consummate the marriage or if the husband has disappeared.¹⁰⁷ More liberal schools of law allow a court to dissolve a marriage where physical abuse exists, where the husband is unable to support the family, where the husband has been missing for more than a year, or where the husband has a mental illness that puts the wife in danger.¹⁰⁸ As with all forms of divorce, the wife must complete the period of sexual abstinence known as the *iddat* period.¹⁰⁹

Although most Islamic jurists believe that divorce through judicial ruling is valid under certain conditions, any divorce decided in a secular court of law (not in a Shari'a court) is deemed invalid.¹¹⁰ This causes problems when a Muslim man divorces his wife in a civil proceeding, but not under Islamic procedures. The man, under both forms of law, is permitted to remarry, but the woman may not under Islamic law.¹¹¹ As a result, Muslim couples in the United Kingdom may bypass obtaining a divorce from the government courts.¹¹²

The final way a wife can procure a divorce is in the instance of breach of contract.¹¹³ Since marriage is a contract in Islam, any breach of mutually agreed upon terms in that contract is a valid ground for divorce.¹¹⁴ For example, a Muslim couple could place a provision in their marriage contract that says the husband cannot take multiple wives. Upon marrying the second wife, the first wife has grounds for divorce.¹¹⁵

105. *See id.*

106. *See id.* at 575; Uhlman, *supra* note 28, § 6.3 (stating that husband may use a judicial decree to obtain a divorce as well).

107. *See* Mashhour, *supra* note 4, at 575.

108. *See id.*

109. *See id.*

110. *See* Uhlman, *supra* note 28, § 7.0.

111. *See* Sameer Ahmed, *Pluralism in British Islamic Reasoning: The Problem with Recognizing Islamic Law in the United Kingdom*, 33 YALE J. INT'L L. 491, 492 (2008) (describing limping marriages as those marriages that are considered to be valid by the British government but considered to be dissolved by the Muslim community or vice versa); *see also* YILMAZ, *supra* note 30, at 150.

112. *See* Ahmed, *supra* note 111, at 492.

113. *See* Mashhour, *supra* note 4, at 575.

114. *See id.*

115. *See, e.g., id.* at 575–76.

b. British Law – Divorce Through Judicial Process

Originally, a couple's only option to procure a divorce was through a private act of Parliament.¹¹⁶ Because obtaining a divorce was a difficult process, women, especially abused women, typically chose to separate from their husbands; however, in doing so, they automatically relinquished financial support from their husbands.¹¹⁷ Today, divorce is obtained through the judicial process.¹¹⁸ Under the Matrimonial Causes Act of 1973, "a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably."¹¹⁹ There are five grounds upon which a British court will view a marriage as irretrievably broken: (1) adultery; (2) unreasonable behavior; (3) desertion for a continuous period of two years; (4) a two-year separation immediately prior to the divorce request with the other spouse's consent; and (5) a five-year separation immediately prior to the divorce request.¹²⁰ British law prohibits couples from divorcing before they have been married for one year.¹²¹ However, during the first year of marriage the couple is free to obtain a separation order from the court.¹²²

There are several steps in obtaining a divorce that make the process lengthy and cumbersome. First, the spouse seeking a divorce must attend requisite informational meetings at least three months prior to requesting the divorce.¹²³ These meetings are meant to provide the couple with important information regarding "marriage support services, protection available against violence, the type of financial problems which might arise following divorce, where and how to get legal advice and the availability of Legal Aid."¹²⁴

116. At one time, adultery was the only ground sufficient to warrant a divorce. A man needed to prove adultery while a woman needed to prove "aggravated" adultery (typically bigamy or incest). Meryll Dean, *The Family Law Act 1996 – Mending or Ending a Marriage?*, 1 DEUTSCHES UND EUROPÄISCHES FAMILIEN RECHT 47, 47 (1999), available at <http://www.springerlink.com/content/dn73hnmcc8h629q/fulltext.pdf>. Over time, Britain has moved away from this sexist mentality and placed women on equal footing with men. *See id.* at 47–49. Perhaps because of this gradual transformation, many British citizens cringe at the thought of reinstating some of the archaic gender norms that are present in Shari'a law. *See supra* Part III; *supra* note 2 and accompanying text.

117. *See* Hiam Brinjikji, Property Rights of Women in Nineteenth-Century England (n.d.) (unpublished manuscript, on file with author).

118. *See* Matrimonial Causes Act, 1973, c. 18 (U.K.).

119. *See id.*

120. *See id.*; Dean, *supra* note 116, at 47.

121. *See* Matrimonial Causes Act, 1973, c. 18 (U.K.).

122. When a couple seeks a legal separation, they must draft a Deed of Separation that will be enforced by the court. Deeds of Separation typically include terms used to divide the couple's assets and property, as well as to make arrangements for the care of children. *See* Family Law Act, 1996, c. 27 (U.K.).

123. *See id.*

124. Dean, *supra* note 116, at 50.

Additionally, these meetings provide an opportunity to visit with a marriage counselor.¹²⁵ Three months after the meetings are complete, one or both parties must submit a statement enumerating reasons the marriage has broken down irretrievably.¹²⁶ Next, there is a period of reflection and consideration.¹²⁷ The period of reflection and consideration is to last “nine months beginning with the fourteenth day after the day on which the statement is received by the court.”¹²⁸ This period can be extended by six months by either party’s request.¹²⁹ As part of the period, the couple must submit to the court an order or declaration as to how the couple has settled future financial arrangements.¹³⁰ The couple may, through choice or court order, use mediation to reach this financial resolution.¹³¹

Under some circumstances, a party may request and procure a court order prohibiting divorce.¹³² The court will grant such an order only where the “dissolution of the marriage would result in substantial financial or other hardship to the other party or to a child of the family,” and where “it would be wrong, in all the circumstances . . . for the marriage to be dissolved.”¹³³ However, this provision only encompasses the hardship caused by the divorce and not the breakdown of the marriage because it is conceivable that there is substantial hardship associated with every marriage breakdown.¹³⁴

The financial repercussions of divorce can be devastating for many British women.¹³⁵ However, in the landmark case, *White v. White*, the House of Lords determined that upon the dissolution of a marriage, the financially weaker spouse’s reasonable needs must be determined by fairness.¹³⁶ The court stated that it was unfair for a woman who reared her children at home for the benefit of her family and forewent the opportunity to establish a lucrative career to receive less than adequate support upon divorce.¹³⁷ Although the practice prior to *White v. White* was to award the wife less than fifty percent of the marital assets where more than enough money existed to meet the needs of both spouses, the new

125. *See id.* at 47; Family Law Act, 1996, c. 27 (U.K.).

126. *See* Family Law Act, 1996, c. 27 (U.K.).

127. *See id.*

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.* Some British feminists worry that mediation produces less desirable results than using legal counsel and judicial proceedings; however, no empirical evidence has been gathered to show any such correlation. *See* Dean, *supra* note 116, at 47.

132. *See* Family Law Act, 1996, c. 27 (U.K.).

133. *Id.*

134. *See id.*

135. *See, e.g.,* Nicole Martin, *Women Worse Off after Divorce.*, July 2007, TELEGRAPH.CO.UK, <http://www.telegraph.co.uk/news/uknews/1556706/Women-worse-off-after-divorce.html>.

136. *White v. White*, [2001] 1 A.C. 596, 599–600 (H.L.).

137. *Id.*

fairness standard places the financially weaker party on equal footing.¹³⁸ Although what is “fair” is debatable, the new British standard allows the financially weaker party to receive up to half of the marital assets; because women are typically the financially weaker party, the law is woman-friendly.¹³⁹

3. Child Custody

a. Shari’a Law – Differences in Legal and Physical Custody

Whereas British custody law focuses on the best interests of the child, Shari’a law has no such emphasis. Shari’a law considers the father the “natural guardian” of his children with the paternal grandfather as second-in-line to guardianship.¹⁴⁰ Usually, legal guardianship continues to transfer along the father’s bloodline where neither the father nor the paternal grandfather is able to take custody of the child.¹⁴¹ Although legal guardianship is reserved for the father,¹⁴² physical custody is typically given to the mother after a divorce.¹⁴³ The

138. See *id.*; Howard Paskins, *Divorce: Breadwinners Can No Longer Expect the Lion’s Share of a Court Settlement*, INDEP. (London), June 17, 2001, available at <http://www.independent.co.uk/money/tax/divorce-breadwinners-can-no-longer-expect-the-lions-share-of-a-court-settlement-751384.html>.

139. See Maxine Frith, *Breaking up is Hard to Do: Divorce – The Harsh Truth*, THE INDEP. (London), Feb. 3, 2006, available at <http://www.independent.co.uk/news/uk/crime/breaking-up-is-hard-to-do-divorce--the-harsh-truth-465439.html>. For example, in Britain,

An English court may well disregard a prenuptial agreement, particularly if one of the parties did not have independent legal advice. And it will tend to care more about [the wife’s] immediate needs than about whether assets were acquired during the course of the marriage, or predate it, or are the result of an inheritance. All assets are likely to be divided.

Divorce: Money in Misery, Feb. 5, 2009, ECONOMIST, available at http://www.economist.com/displaystory.cfm?story_id=13057235. Contrarily, in France, “any alimony (also called maintenance) will be less and for eight years at most; any prenuptial agreement will be binding. Only assets acquired during the marriage are up for grabs.” *Id.*

140. Uhlman, *supra* note 28, § 8.0.

141. *Id.*

142. Although a father may not have physical custody of his child, legal custody means that he has “legal authority over all decisions about [the child’s] welfare and schooling.” IRVING EPSTEIN, *THE GREENWOOD ENCYCLOPEDIA OF CHILDREN’S ISSUES WORLDWIDE: NORTH AFRICA AND THE MIDDLE EAST* 26 (Irving Epstein & Ghada Hashem Talhami eds., 2008).

143. Uhlman, *supra* note 28, § 8.0.

mother typically retains physical custody of the child “until the child reaches the age of custodial transfer.”¹⁴⁴ Custodial transfer means the child must be given to the legal guardian.¹⁴⁵ From that point on, the legal guardian is to have physical custody.¹⁴⁶ However, Islamic sects vary on the age at which this happens.¹⁴⁷ In general, boys are given back to the father between the ages of seven and nine.¹⁴⁸ The age of custodial transfer varies more for female children.¹⁴⁹ Some Islamic sects believe a female child should return to her father at puberty (usually between nine and eleven) while others believe a female child should not return to the custody of her father until womanhood.¹⁵⁰

Physical custody of an infant child will almost always be given to the mother.¹⁵¹ All Islamic jurists recognize a mother’s special right to the care of her infant child.¹⁵² Some Islamic countries have even gone to the extreme of sending young children with their mother if the mother is placed in prison.¹⁵³ Nonetheless, for the mother to be eligible for physical custody of her children after divorce, she must be a sane adult, be capable of nurturing the needs of the child, raise the child in the Islamic faith, and provide a home where the child is accepted.¹⁵⁴ Additionally, the mother cannot remarry and retain physical custody of her child from a prior marriage.¹⁵⁵ As soon as the mother does not meet one of these requirements, she must forfeit physical custody of her child.¹⁵⁶

b. British Law – Best Interest of the Child

Until the 20th Century, British fathers had the ultimate control over their families, including the physical custody of their children, “reflecting the elevated

144. *Id.*

145. *Id.*

146. *Id.*

147. Islamic Sharia Council, Islamic Perspective on Child Custody After Divorce, <http://www.islamic-sharia.org/children/islamic-perspective-on-child-custody-after-divorce.html> (last visited Sept. 18, 2009).

148. *See id.*

149. *See id.*

150. *See generally id.*

151. *See id.*; Uhlman, *supra* note 28, § 8.2.

152. *See* Islamic Sharia Council, *supra* note 147; Uhlman, *supra* note 28, § 8.2.

153. For example, in Saudi Arabia, almost half of the population in the Central Riyadh Woman’s Prison during the early 1980’s was young children. Uhlman, *supra* note 28, § 8.2.

154. These conditions apply to fathers with physical custody of the children as well. *See id.*

155. Uhlman, *supra* note 28, § 8.1.

156. *See id.*

legal status of a husband/father within the institution of marriage.”¹⁵⁷ This only began to change within the last hundred years.¹⁵⁸ Under the Guardianship Act of 1973, which has since been repealed, a mother reserved all rights associated with child custody, while the father had to apply to the court to receive any custody or visitation rights.¹⁵⁹ In 1989, the British Parliament changed its reasoning and determined that the well-being of the children will always be the chief concern of the court.¹⁶⁰ Under the Children Act of 1989, fathers gained a more equal footing.¹⁶¹ The British government enumerated within the Children Act, a list of factors for the courts to consider when determining the best interests of the child. This includes the following: the “wishes and feelings of the child concerned;” the child’s “physical, emotional and educational needs;” the effect a change in circumstances might have on the child; the child’s age, sex and background; perceived harms to the child; and the capabilities of the child’s parents or other custodian.¹⁶² Although custody laws seem to have become more neutral, mothers typically find themselves with primary physical custody of their children, while fathers usually have partial physical custody or visitation rights.¹⁶³

4. Inheritance

a. Shari’a Law – A System of Set Shares

Current Shari’a inheritance laws are likely a carry-over of inheritance rules implemented in the Arabian Peninsula prior to the *Quran*.¹⁶⁴ Under the *Quran*, a male is entitled to twice the share of a female in the same familial class.¹⁶⁵ Female relatives receive “fixed” shares,¹⁶⁶ however, the concept of

157. See MARY JANE MOSSMAN, *FAMILIES AND THE LAW IN CANADA: CASES AND COMMENTARY* 635 (2004).

158. See *id.*

159. International History of Child Support, History of Child Support in the UK, http://www.childsupportanalysis.co.uk/information_and_explanation/world/history_uk.htm (last visited Mar. 21 2009).

160. Children Act, 1989, c. 41 (U.K.).

161. See *id.*

162. See *id.*

163. See, e.g., EDWARD KRUK, *CHILD CUSTODY, ACCESS, AND PARENTAL RESPONSIBILITY: THE SEARCH FOR A JUST AND EQUITABLE STANDARD* (2008).

164. Dr. Abid Hussain, *The Islamic Laws of Inheritance*, <http://www.islam101.com/sociology/inheritance.htm> (last visited Nov. 25, 2009).

165. For example, a brother will inherit two times more than his sister. *Id.* Although there is a disparaging difference between the treatment of men and women, the Quranic law is far more beneficial to woman than the inheritance rules applied prior to the *Quran*. *Id.* Inheritance laws prior to the *Quran* dictated that any inheritance available was the property of the male relatives of the deceased. Women were completely overlooked. *Id.*

“fixed” shares for female relatives is misleading because that “fixed” share becomes diluted where there is a male counterpart; she will always receive half her male counterpart’s share.¹⁶⁷

Parents of the deceased receive a one-sixth share where the deceased has children or agnatic grandchildren (children of a son).¹⁶⁸ Where there are no children, the mother of the deceased receives an increased share of one-third.¹⁶⁹ In this situation, the father of the deceased no longer receives a fixed share.¹⁷⁰ Instead, the father of the deceased becomes a “residuary heir.”¹⁷¹ Residuary heirs receive whatever is left over after all other inheritance shares have been distributed pursuant to the *Quran*.¹⁷²

The deceased’s widow with no children or agnatic grandchildren fairs substantially worse than the decedent’s parents – she only receives a one-fourth share.¹⁷³ Worse yet is a widow who has children or agnatic grandchildren because her share is reduced to a one-eighth share.¹⁷⁴ If the decedent had multiple wives, the wives must equally divide the allotted share amongst themselves.¹⁷⁵

In a situation where a wife predeceases her husband, her surviving spouse automatically receives half the estate.¹⁷⁶ Although a decedent’s mother typically would receive one-third of the estate (given that the decedent had no children or agnatic grandchildren), in this case, the mother of the decedent can only receive one-sixth of the estate. The decedent’s father, however, receives the mother’s typical one-third share.¹⁷⁷ This is done to preserve the fundamental inheritance rule that a male receives twice the amount of his female counterpart.¹⁷⁸

Uterine siblings (those born of the same mother but different fathers) may not receive inheritance unless there are no descendants or antecedents.¹⁷⁹ In the absence of decedents and antecedents, a uterine sibling will inherit a one-sixth share of the estate.¹⁸⁰ Yet, if there is more than one uterine sibling, those siblings

166. Where there are no daughters in a family, daughters of the sons (agnatic granddaughters) receive the “fixed” shares. *Id.*

167. Because a male heir will inherit twice that of his female counterpart, a female’s “fixed” share is no longer fixed and becomes diluted by this principle. *See id.*

168. *See Hussain, supra* note 164.

169. *See id.*

170. *See id.*

171. *See id.*

172. *See id.*

173. Hussain, *supra* note 164.

174. *Id.*

175. If the decedent had children or agnatic grandchildren, his multiple wives have to split the one-eighth share. *See id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

must divide a one-third share amongst themselves, and the females receive half of what their brothers receive.¹⁸¹

b. British Law - Equality Within a System of Fixed Shares

In the Victorian Era,¹⁸² women typically inherited their property from their father.¹⁸³ Much like Shari'a law, sons and daughters were treated much differently.¹⁸⁴ Daughters "usually inherited personal property and [sons] more often real property."¹⁸⁵ As personal property typically consisted of "copyhold" property, sons inherited the more valuable properties.¹⁸⁶ Only where there were no sons could daughters inherit real property.¹⁸⁷

In the past, marriage wiped out the woman's existing property rights.¹⁸⁸ Under common law, once a woman married, any inherited property became her husband's property.¹⁸⁹ If her husband died, a woman's property rights were reinstated.¹⁹⁰ Typically, a woman would inherit one-third of her husband's estate.¹⁹¹ Upon remarrying, a woman forfeited any property she inherited from her deceased husband.¹⁹²

Today, in Britain, the default rules set forth in the Administration of Estates Act of 1925 govern the basic principles of inheritance.¹⁹³ Similar to Shari'a law, British law sets forth a system of set shares.¹⁹⁴ Where the decedent

181. Hussain, *supra* note 164.

182. Ilana Miller, The Victorian Era, <http://www.victoriaspast.com/FrontPorch/victorianera.htm> (last visited Mar. 19, 2009) ("The Victorian era is generally agreed to stretch through the reign of Queen Victoria (1837-1901).").

183. *See* Brinjikji, *supra* note 117.

184. *See id.*

185. AMY LOUISE ERICKSON, *WOMEN AND PROPERTY IN EARLY MODERN ENGLAND* 19 (1993).

186. Copyhold properties were basically sublets of a manor; typically the tenants of copyhold property were allowed to occupy the land for life. Real property, on the other hand, consisted of any personal belongings, as well as actual parcels of land. *See* Brinjikji, *supra* note 117.

187. *See id.*

188. *See id.*

189. *See id.*

190. *See id.*

191. ERICKSON, *supra* note 185, at 28.

192. *Id.* at 132.

193. The Administration of Estates Act relates to intestate succession, and thus applies when a party dies without a will. Administration of Estates Act, 1925, 15 & 16 Geo. 5, c. 23 (U.K.). The Administration of Estates Act "combine[s] two ideas: protection for the deceased's dependants and entitlement to inheritance amongst genealogically closer relatives." JANET FINCH ET AL., *WILLS, INHERITANCE, AND FAMILIES* 33 (1996).

194. *See* Hillary Hiram, *New Developments in UK Succession Law*, 10.3 ELECTRONIC J. COMP. L. 1, 11 (2006), available at <http://www.ejcl.org/103/art103-7.pdf>.

has no living children or other relatives, the decedent's spouse inherits the entire estate.¹⁹⁵ Conversely, if the decedent has no living spouse, the entire estate will go to either the children or another relative. The deceased's estate is distributed in two steps: "(1) the statutory legacy together with personal chattels; [and] (2) the residuary estate."¹⁹⁶

Statutory legacy refers to the fixed monetary limit set by the British government that a surviving spouse automatically receives where the deceased did not leave a will.¹⁹⁷ The surviving spouse also inherits the decedent's personal chattels.¹⁹⁸ The amount of the statutory legacy differs depending upon whether the deceased has living children or other relatives.¹⁹⁹ Where there are no living children or other relatives, the surviving spouse receives up to £200,000.²⁰⁰ On the other hand, where surviving children or other relatives exist, the statutory legacy is reduced to a maximum of £125,000.²⁰¹

The residuary estate simply means the value of the estate left over after the statutory legacy and personal chattels have been disbursed.²⁰² The residuary estate encompasses the entire estate where the decedent does not have a living spouse.²⁰³ Just as the statutory legacy differs depending upon whether children or other relatives exist, the residuary estate is treated differently depending upon whether there is a surviving spouse, children, or other relatives.²⁰⁴ Where both a surviving spouse and children or other relatives exist, the residual estate is divided in half.²⁰⁵ The surviving spouse receives half of the residuary estate, while the children or other relatives receive the other half with an interest in the surviving spouse's half upon death.²⁰⁶

195. The inheriting spouse must remain alive for twenty-eight days following the death of his or her spouse in order to receive any inheritance. *See id.*

196. *See id.*

197. *See id.*; FINCH, *supra* note 193, at 33.

198. *See Hiram, supra* note 194, at 11.

199. *See id.*

200. This amount has been in place since 1993. FINCH, *supra* note 193, at 33. This amount is not guaranteed. The value of the statutory legacy depends upon the residual value the estate has after all debts have been paid. *See Hiram, supra* note 194, at 11.

201. *See Hiram, supra* note 194, at 11; FINCH, *supra* note 193, at 33.

202. Typically, after the statutory estate is distributed, the estate is exhausted. FINCH, *supra* note 193, at 33. Only where there is property left over does the residuary estate exist. *See id.* The residuary estate includes the house in which a surviving spouse resides and owned by the deceased. *See Hiram, supra* note 194, at 11.

203. Hiram, *supra* note 194, at 11.

204. *Id.*; FINCH, *supra* note 193, at 33.

205. *See id.*

206. *See id.*

If the deceased is survived by his or her spouse but no children, the spouse retains half the residuary estate absolutely.²⁰⁷ When the deceased is survived only by his or her children and not his spouse, the children retain the entire residuary estate in a statutory trust.²⁰⁸ In the unfortunate case where the deceased does not have a surviving spouse or children, the residuary estate must be divided among his or her relatives in a particular order, depending upon who is still living: parents, brothers and sisters, half-brothers and sisters, grandparents, uncles and aunts, and finally, half-uncles and aunts.²⁰⁹ In all instances, male and female relatives are never distinguished when dividing the estate.²¹⁰

IV. ANALYSIS

A. Legal Theories: Searching for a Solution

Britain has permitted a parallel legal system to emerge by allowing Shari'a Councils to hand down binding arbitral awards based on Shari'a law.²¹¹ Deeply rooted friction among Muslims and non-Muslims in Britain incited this movement.²¹² To understand the conflict, it is important to understand its contributing factors: history, immigration, and culture.²¹³ The United Kingdom was a major trade participant in Muslim countries and has seen a steady increase in immigration from those countries²¹⁴—beginning with India in the 19th Century.²¹⁵ Since the initial wave of Muslim immigration, Muslim immigrants have continued to increase.²¹⁶ Some citizens of Muslim countries sought to better themselves financially, while others have sought refuge in Britain from oppressive

207. By retaining the residuary estate absolutely, the surviving spouse does not forfeit her half to her deceased spouse's living blood relatives upon her death as would occur if the couple had children. *See Hiram, supra* note 194, at 11.

208. *See id.*

209. *See id.*; FINCH, *supra* note 193, at 33.

210. *See Hiram, supra* note 194, at 11.

211. YILMAZ, *supra* note 30, at 49.

212. *See id.* at 49–51.

213. *See infra* notes 215–220 and accompanying text.

214. The Muslim population in Britain is growing ten times faster than the rest of British society. UK Visa Bureau, UK Immigration Causing Muslim Pop'n to Rise Ten Times Faster, <http://www.visabureau.com/uk/news/02-02-2009/uk-immigration-causing-muslim-popn-to-rise-faster-than-any-other-community.aspx> (last visited Mar. 20, 2009).

215. *See* U.K. in Afghanistan—Foreign and Commonwealth Office, Muslim Roots in British Soil, <http://ukinafghanistan.fco.gov.uk/en/about-uk/people-politics/multicultural-britain/muslims-in-britain/muslim-roots> (last visited Mar. 21, 2009) (hereinafter U.K. in Afghanistan); *see also* HUMAYUN ANSARI, 'THE INFIDEL WITHIN:' MUSLIMS IN BRITAIN SINCE 1800, at 27 (2004).

216. *See* U.K. in Afghanistan, *supra* note 215; ANSARI, *supra* note 215, at 27.

governments.²¹⁷ Although Britain is seeing more Muslim immigrants than ever before, many of those Muslim immigrants are not ready to abandon Muslim ideology, culture, and laws.²¹⁸ As a result, a strong sentiment exists in Britain among many Muslims, which takes the form of resentment towards assimilation and pride in one's culture;²¹⁹ "[i]t is evolving as an identity of 'unbelonging' in a 'culture of resistance' and in contest with hegemonic British identity."²²⁰

1. Implementing Shari'a in the Form of Binding Arbitration

Attempting to accommodate these strong sentiments of their Muslim constituents, beginning in September 2008, the Shari'a Councils began using the Arbitration Act as legal support for making their decisions binding and recognized by the British court system.²²¹ Similar to Jewish Beth Din courts, Shari'a Councils are now qualifying themselves as "arbitration tribunals,"²²² and, as long as the Shari'a Councils abide by the provisions set forth in the Arbitration Act, any decision made by the Shari'a Councils becomes legally binding.²²³ For example, Shari'a courts, as they are classified today, could settle an inheritance claim, and such a decision would be recognized by Britain as a legally binding

217. "During the first quarter of the 20th century it was estimated that there were around 10,000 Muslims in Britain. There are now between one and two million British Muslims (2% - 4% of the population), and over half of them were born in Britain." British Broadcast Corporation, Islam and Britain, http://www.bbc.co.uk/religion/religions/islam/history/uk_1.shtml (last visited Mar. 21, 2009). Over half of all British Muslims are under the age of seventeen. ABBAS, *supra* note 3, at 17.

218. Today, with over 600 mosques located in Britain, Islam is the second most prevalent religion practiced in Britain. See British Broadcast Corporation, *supra* note 217; TESSA BLACKSTONE, BHIKHU C. PAREKH, & PETER SANDERS, RACE RELATIONS IN BRITAIN: A DEVELOPING AGENDA 19 (1998).

219. As Jytte Klausen explains the problem: "European government leaders and the Greek chorus of talk shows and opinion pages cry, 'the problem with Muslims is that they won't integrate.' And Muslims cry back, 'the problem is that you won't let us in.'" JYTTE KLAUSEN, THE ISLAMIC CHALLENGE: POLITICS AND RELIGION IN WESTERN EUROPE 68 (2005). From British Muslims' perspective, the media has cast their faith in an unfavorable light and has caused mainstream society to shun them. See ABBAS, *supra* note 3, at 12, 15. See also BLACKSTONE, *supra* note 218.

220. ANSARI, *supra* note 215, at 9. Young British Muslims often relate with "global Islam" in order to forge a sense of belonging and "to see themselves as part of a potentially powerful community." *Id.* at 19 (explaining the source of British Muslims' discontent).

221. *Id.*

222. See *infra* Part II. Jewish Beth Din courts have been using the precursor to the Arbitration Act for the last 100 years in order to make legally binding judgments for civil matters using Jewish law. Taher, *supra* note 6.

223. *Id.*

decision.²²⁴ Unsurprisingly, a significant portion of the British Islamic community supports implementing Shari'a law through these binding tribunals.²²⁵ Perhaps because of this striking sentiment or perhaps because modern British culture gravitates towards a broader, cultural understanding,²²⁶ Shari'a law has been surreptitiously adopted under the Arbitration Act as a binding form of alternative dispute resolution.²²⁷ Labeling independent Shari'a courts as "arbitration tribunals" has allowed supporters of Shari'a law to incorporate Shari'a's basic principles alongside British law.²²⁸ As a result, Britain is sanctioning a "weak" form of legal pluralism.²²⁹

Over time, Shari'a courts have developed in cities across the United Kingdom, including London, Birmingham, Bradford, and Manchester.²³⁰ Since these courts have been structured to act as alternative dispute resolution tribunals, parties agree that decisions made by the tribunals will be binding and recognized by the British government.²³¹ Although the decisions made by these courts are recognized as binding under the Arbitration Act, "... [Shari'a] courts must meet

224. See generally Arbitration Act, 1996, c. 23, § 82(1) (U.K.).

225. One staggering report states that of the twenty-eight percent of Muslims who would like to live under Shari'a law in the United Kingdom, thirty-seven percent are between the ages of sixteen and twenty-four, while only seventeen percent are those age fifty-five or older. MUNIRA MIRZA ET AL, LIVING APART TOGETHER: BRITISH MUSLIMS AND THE PARADOX OF MULTICULTURALISM 5 (2007), available at http://www.policyexchange.org.uk/assets/Living_Apart_Together_text.pdf.

226. See, e.g., The Inter Faith Network for the United Kingdom, Statement of Inter-Religious Relations in Britain (1991), <http://www.interfaith.org.uk/publications/statement.pdf>.

227. E.g., Les Reid, *First UK Sharia Court Up and Running in Warwickshire*, COVENTRYTELEGRAPH.NET, Sept. 8, 2008, available at <http://www.coventrytelegraph.net/news/north-warwickshire-news/2008/09/09/first-uk-sharia-court-up-and-running-in-warwickshire-92746-21708478/>; Taher, *supra* note 6.

228. Taher, *supra* note 6.

229. YILMAZ, *supra* note 30, at 172.

230. Taher, *supra* note 6.

231. See Taher, *supra* note 6. For example, if a Muslim woman wishes to seek a divorce from the Shari'a Council, she must offer a written application for divorce to the Council with her reasons for wanting a divorce. YILMAZ, *supra* note 30, at 172. The Council then will attempt to contact her husband three separate times and advertise in the newspaper. *Id.* Once the Council contacts the husband, it tries to reconcile the parties. *Id.* If that proves futile, the Council has the discretion to grant the wife a *khul*. *Id.* The primary benefit of using a binding arbitration method is that parties will save time and money while still obtaining the finality of a judgment. ALBERT K. FIADJOE, ALTERNATIVE DISPUTE RESOLUTION: A DEVELOPING WORLD PERSPECTIVE 27 (2004). Additionally, some claim "that such proceedings may be more amicable than a trial, thus better preserving the relationship between the parties." *Id.* However, there are also numerous disadvantages associated with binding arbitration, including "a lack of sufficient appellate opportunities" available to parties; prohibited public access to records due to privacy and confidentiality concerns; and the destruction of relationships usually associated with litigation. *Id.*

three crucial standards—they must not preclude recourse to the courts, must not break fundamental tenets of the Human Rights Act, and the rights of women must be respected.”²³² With such standards in place, supporters shirk away from conceding that allowing these Shari’*a* tribunals to operate is a form of legal pluralism²³³—thus, the label “weak” legal pluralism.²³⁴

This solution should be broached with caution. Although the label “weak” implies this form of legal pluralism is harmless, it has important governing implications. In a weak legal pluralism system, there is one ultimate sovereign law with varying subcategories of law which function in a quasi-autonomous fashion.²³⁵ Weak legal pluralism can be divided into two categories: vertical and horizontal.²³⁶ An example of the vertical version of weak legal pluralism is “the United States with federated component states” because it has “hierarchically arranged higher and lower legal systems or cultures.”²³⁷ On the other hand, using Shari’*a* courts as binding arbitration tribunals takes the form of horizontal weak pluralism because the Shari’*a* court’s legal decisions have equal legitimacy as those decided by British courts.²³⁸

There are specific concerns regarding the use of Shari’*a* law under the Arbitration Act.²³⁹ Since the time of their inception, Shari’*a* courts in Britain have handed down over one hundred judgments in matters ranging from divorce to property disputes to cases involving domestic violence.²⁴⁰ This is worrisome for two reasons. First, Shar’*ia* law applies family law in a very different manner than under British law, which can be unduly detrimental to Muslim women residing in Britain.²⁴¹ For example, one case litigated in the Nuneaton Shari’*a* court involved

232. *Church of Scotland Backs Islamic Sharia Law Courts*, THE SCOTSMAN PUBLICATIONS LTD., Oct. 10, 2008, available at <http://news.scotsman.com/scotland/Church-of-Scotland-backs-Islamic.4578904.jp>.

233. Legal pluralism is defined as “the existence within a particular society of different legal mechanisms applying to identical situations.” YILMAZ, *supra* note 30, at 15.

234. *See id.* As Ian Galloway, convener of the Church and Society Council, describes the Shari’*a* Council, “it is [merely] a space, within a given community, for disputes to be resolved.” *Church of Scotland*, *supra* note 232.

235. Some typical sub-categories of law are “Native law, religious law, customary law, and personal law”—all of which are subject to the single sovereign law. YILMAZ, *supra* note 30, at 16.

236. *See id.*

237. *See id.*

238. Horizontal weak pluralism refers to a system “where the sub-cultures or subsystems have equal status or legitimacy.” *Id.* Currently, Pakistan uses this form of weak legal pluralism that the country calls a “personal law system.” *Id.*

239. *See supra* Part III.

240. *See* Taher, *supra* note 6.

241. For example, under Shari’*a* law a man can divorce his wife without ever going through formal divorce proceedings, as required under British law. *See supra* Part III(2)(a), (b). Under Shari’*a* inheritance laws, a woman automatically receives half of the share her male counterpart does, while under British intestacy laws, men and women receive equal

an inheritance dispute among two brothers and their three sisters.²⁴² The Shari'a court, following the *Quran*, awarded the brothers twice as much inheritance as the sisters.²⁴³ Additionally, in six cases involving domestic violence, "the judges ordered the husbands to take anger management classes and mentoring from community elders. There was no further punishment."²⁴⁴ Because these decisions can be binding under the Arbitration Act, British courts will recognize them.²⁴⁵ As a result, these decisions can only be overturned under limited circumstances.²⁴⁶

Second, "women in the Muslim community are often pressured into submitting to Shari'a courts, both by their families and by the *ummah* (Islamic community)."²⁴⁷ As discussed above, men usually fare better in these courts than

shares. *See supra* Part III(4)(a), (b). Under Shari'a child custody laws, a woman only maintains physical custody of her children until the custodial age of transfer. *See supra* Part III(3)(a). However, under British custody law, the best interest of the child takes precedence. *See supra* Part III(3)(b).

242. Reid, *supra* note 227.

243. *Id.* Contrarily, under British intestacy laws, the law does not distinguish between female and male children. *See Hiram, supra* note 194, at 11.

244. Reid, *supra* note 227. Under British law, the outcome would likely have been different. The Family Law Act of 1996 "make[s] civil protection against domestic violence more effective." MARIANNE HESTER ET AL, MAKING AN IMPACT: CHILDREN AND DOMESTIC VIOLENCE 985 (2007). The relatively new legislation provides a set of remedies, including occupation orders and molestation orders. *See id.* These remedies are now available to a broader range of individuals, not just married couples. *Id.* Additionally, British law has added new criminal consequences for domestic violence. *Id.* at 978. Under the Protection from Harassment Act 1997, domestic abusers can now be charged with criminal harassment and "the more serious offense *involving fear of violence*." *Id.* These new criminal offenses offer new advantages to abused women.

First, the options for police protection and the use of the criminal law against men who continue to threaten, pester, and harass women after the relationship has ended, will be strengthened. Second, women without children who do not live with their abusers, and who cannot apply for injunctions . . . under the Family Law Act 1996, will now be able to gain protection In particular, criminal proceedings resulting in a conviction will mean that a restraining order can be attached.

Id. at 979.

245. *See* Arbitration Act, 1996, c. 23, § 66 (U.K.).

246. There are three ways an arbitral award may be overturned under the Arbitration Act: lack of substantive jurisdiction, serious irregularity, challenge to point of law. *See id.* § 67–69. Each of these means has its own set of limitations, making appeal difficult. *See infra* note 252.

247. *See* SHERENE H. RAZACK, THE EVICTION OF MUSLIMS FROM WESTERN LAW AND POLITICS 147–48 (2008).

women because of the disparities between the sexes under Shari'a law.²⁴⁸ Thus, an unfortunate outcome emerges; as enumerated earlier, there have been numerous decisions made by Britain's Shari'a tribunals that have placed a woman in a poorer position than she would have been had she litigated under British courts.²⁴⁹ These outcomes are especially worrisome when considering the pressure Muslim women receive from their family and community to solve disputes through this method.²⁵⁰

Another disturbing aspect to applying Shari'a law under the Arbitration Act is that "it is extremely difficult to upset a binding arbitral award[.]"²⁵¹ The practical implication of binding arbitral awards is that British Muslim women cannot easily appeal a decision handed down by a Shari'a Council.²⁵² On the

248. *See supra* note 244.

249. Taher, *supra* note 6; *supra* nn. 244–46 and accompanying text.

250. *See* Weiss, *supra* note 2; RAZACK, *supra* note 247, at 147–48.

251. FIADJOE, *supra* note 231, at 27.

252. *See id.* There are three ways an arbitral award may be overturned under the Arbitration Act: (1) lack of substantive jurisdiction; (2) serious irregularity; and (3) challenge to a point of law. *See* Arbitration Act, 1996, c. 23, § 67–69 (U.K.). Each of these means has its own set of limitations, making appeal difficult. *See id.* For example, an appeal based on "serious irregularity" requires that the party appealing show that at least one of nine circumstances occurred:

- (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
- (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
- (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
- (d) failure by the tribunal to deal with all the issues that were put to it;
- (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
- (f) uncertainty or ambiguity as to the effect of the award;
- (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
- (h) failure to comply with the requirements as to the form of the award;
- or
- (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

Id. § 68.

other hand, matters litigated in the general British court system can potentially go through several appeals.²⁵³

Although allowing Shari'a tribunals to hand down binding decisions may be detrimental to Muslim women's rights, preventing Shari'a tribunals from doing so will undoubtedly cause Muslims to point out the different treatment of Jewish courts.²⁵⁴ Britain has allowed religious Jewish courts (called Beth Din courts) to hand down decisions based on Jewish ideologies for over one hundred years.²⁵⁵ Surprisingly, the Jewish Beth Din courts do not appear to foster the volatile distrust and hostility that the Shari'a courts do.²⁵⁶ This is likely due to the fact that, although the Beth Din hears religious matters, those religious decisions are not recognized as legally binding.²⁵⁷ In fact, the only decisions made by the Beth Din that are recognized as legally binding under the Arbitration Act are civil actions, such as tort, contract, and intellectual property.²⁵⁸ No family law or criminal law matters are heard by the Beth Din.²⁵⁹ For example, a couple could seek a religious divorce from a Beth Din; however, that divorce would not be legally binding under British law.²⁶⁰ The couple would still need to go to a British family law court to get an official divorce.²⁶¹ On the other hand, Shari'a courts do not wish to limit the subject matter of their decisions to certain civil matters like

253. With regard to family matters, the British court system's hierarchy begins with the Magistrate Court, which is essentially the trial court. *See* DAVID KELLY, ET AL., BUSINESS LAW 55–56 (4th ed. 2005). The Family Divisional Court hears appeals from the Magistrate Court. *See id.* at 61. The Court of Appeals (Civil Division) hears appeals from the Family Divisional Court; however, both parties must consent to the appeal. Finally, the House of Lords hears appeals from the Court of Appeals. *See id.* at 62.

254. *See generally* JOHN V. CANFIELD, THE MIDDLE EAST IN TURMOIL 146–47 (2001).

255. Prior to the enactment of the Arbitration Act 1996, Beth Din courts operated under the Act's precursor. Nick Tarry, *Religious Courts Already in Use*, BBC NEWS, Feb. 7, 2008, available at http://news.bbc.co.uk/1/hi/uk_news/7233040.stm; RAZACK, *supra* note 236, at 156. Beth Din courts are typically used by British orthodox Jews to resolve a broad range of civil disputes (criminal disputes are never handled). *Id.* Each party must not only be Jewish but must also agree to have the Beth Din court act as a binding arbitrator. *Id.* Business disputes can also be heard by the Beth Din—so long as both companies are privately owned. *Id.* Additionally, “in the case of divorce, the parties must still obtain a civil divorce alongside the religious one.” This is in stark opposition to allowing the Shari'a Councils to hand down divorces that would be considered binding under British law. *Id.* *See* RAZACK, *supra* note 247, at 156; Taher, *supra* note 6.

256. *See* Faisal Kutty & Ahmad Kutty, *Shariah Courts in Ontario, Myth and Reality*, MEDIA MONITORS NETWORK, Mar. 9, 2004, <http://world.mediamonitors.net/content/view/full/5469/>.

257. THE CENTER FOR SOCIAL COHESION, THE BETH DIN: JEWISH LAW IN THE UK 1 (2009), available at http://www.socialcohesion.co.uk/files/1236789889_1.pdf.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

tort, contract, and intellectual property law.²⁶² If Shari'a Councils would limit the subject matter of their jurisdiction, that would ameliorate the concern.

Even though, under the Arbitration Act, decisions handed down from the Shari'a tribunals must not violate the Human Rights Act of 1998,²⁶³ it will be difficult to monitor these courts as they spread.²⁶⁴ Unless a complaint is made by the aggrieved Muslim woman, no action will be taken.²⁶⁵ Considering the stifling pressure many of these women receive from their families and community, it is unlikely any recourse will be taken.²⁶⁶ Many of the viewpoints promulgated by Shari'a law would be *per se* violations of the Human Rights Act of 1998 in terms of gender discrimination and inequality.²⁶⁷

Specifically, the European Convention on Human Rights lays out the basic human rights that everyone governed by signatories to the Convention shall possess.²⁶⁸ Although Muslims have the right to practice their religion under Article 9.2, "the freedom to manifest one's religion or beliefs shall be subject [to] . . . limitations as are prescribed by law and are necessary in a democratic society"²⁶⁹ Article 14 states that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex"²⁷⁰ However, Shari'a law discriminates based on sex in several

262. See Richard Edwards, *Sharia Courts Operating in Britain: Sharia Courts Have Been Operating in Britain to Rule on Disputes Between Muslims for More Than a Year, It has Emerged*, TELEGRAPH.CO.UK, Sept. 16, 2008, <http://www.telegraph.co.uk/news/uknews/2957428/Sharia-law-courts-operating-in-Britain.html>.

263. The Human Rights Act 1998 applies the principles enumerated in the European Convention of Human Rights and circumvents the need for a direct cause of action with the Convention. See Human Rights Act, 1998, c. 42 (U.K.). Rather, British citizens can now take human rights cases directly to British courts in hopes of saving considerable time and money. See *id.* The Human Rights Act 1998 prohibits any public authority from acting in a manner which violates the Convention—including courts and tribunals. See *id.*

264. See Elaine Sciolino, *Britain Grapples with Role for Islamic Justice*, N.Y. TIMES, Nov. 18, 2008, available at <http://www.nytimes.com/2008/11/19/world/europe/19shariah.html>.

265. See generally KERIM YILDEZ & LUCY CLARIDGE, TAKING HUMAN RIGHTS CLAIMS TO U.N. MECHANISMS 56 (2006), available at http://www.protectionline.org/IMG/pdf/UN_Manual_ONLINE.pdf.

266. See Kim Murphy, *Islamic Law Plays a Role in British Legal System*, LOS ANGELES TIMES, June 20, 2008, available at <http://articles.latimes.com/2008/jun/20/world/fg-sharia20>. For an example of the pressure some women face, see Zeinab Huq, *Sharia Law and Me*, GUARDIAN, July 1, 2009, available at <http://www.guardian.co.uk/commentisfree/belief/2009/jul/01/sharia-courts-islam>.

267. See Human Rights Act, 1998, c. 42 (U.K.).

268. See Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, available at <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>.

269. *Id.* at art. 9.2 (emphasis added).

270. *Id.* at art. 14.

ways. For instance, Shari'a law severely restricts a wife's ability to obtain a divorce based on her sex, which comes into question under Article 12, Right to Marry.²⁷¹ Shari'a law also reduces a *female's* share of inheritance, in the event that she has a brother, which comes into question under Article 1, Protection of Property.²⁷² Additionally, Shari'a custody law unfairly discriminates against women because it requires women to give up custody of their children at the age of custodial transfer, which comes into question under Article 12.²⁷³ Accordingly, binding application of Shari'a law will ultimately result in *per se* violations of the Convention.²⁷⁴ Thus, Britain, in its attempts to be multicultural and accepting of all faiths, has instituted an extreme form of religious freedom at the expense of women's rights, and, ultimately, this ambivalence will only hurt its citizens.

Nonetheless, if the statistics are correct, roughly 40% of Muslims in Britain support enforcing Shari'a law in Britain.²⁷⁵ It is unclear how many of those individuals are women. However, presumably there is a faction of Shari'a supporters within Britain who are women.²⁷⁶ It appears as though the women who support Shari'a law being implemented through binding arbitration envision the legitimization of Shari'a law as having a positive effect on the gender disparities

271. *See id.* at art. 16.

272. *See* Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, *available at* <http://www.echr.coe.int/nr/ronlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>.

273. *See id.* In fact, the House of Lords recently stated that "the Islamic legal code [is] 'wholly incompatible' with human rights legislation." Afua Hirsch, *Sharia Law Incompatible with Human Rights Legislation, Lords Say*, October 23, 2008, [GUARDIAN.CO.UK](http://www.guardian.co.uk), *available at* <http://www.guardian.co.uk/world/2008/oct/23/religion-islam>. The House of Lords' statement came after it heard a case involving a woman requesting that the court not send her back to Lebanon where she would be forced to give up custody to her child's abusive father because the child was at the age of custodial transfer. *Id.* The House of Lords concluded that sending the woman back to Lebanon would deprive the woman of

the mutual enjoyment by parent and child of each other's company [that] is a fundamental element of family life The fact is, however, that sharia law as it is applied in Lebanon was created by and for men in a male-dominated society The place of the mother in the life of a child under that system is quite different under that law from that which is guaranteed [by the European convention on human rights] . . . it is discriminatory, too, because it denies women custody of their children after they have reached the age of custodial transfer simply because they are women.

Id.

274. *See id.*

275. *See* Bano, *supra* note 10, at 3.

276. *Cf.* Trevelyan, *supra* note 5.

which exist in it.²⁷⁷ These women hope that bringing Shari'a law to the forefront will expose some of these disparities and incite the Shari'a Councils to apply Shari'a in a non-sexist manner.²⁷⁸ However, legitimizing religious law through sanctioning decisions made by binding arbitration tribunals does not ensure that the application of Shari'a law will change. In fact, the lack of transparency into these tribunals makes it uncertain whether the Shari'a Council will continue to perpetuate sex-discrimination or make a drastic change to the traditions and practices of Islam.²⁷⁹

2. Allowing Voluntary and Non-Binding Shari'a Councils to Work Alongside the British Legal System

Beginning in August 2007, British Muslims instituted informal Shari'a courts to handle a variety of domestic disputes focusing on family law.²⁸⁰ As decisions made by these courts were not legally binding,²⁸¹ they acted as an outlet for British Muslims to solve issues based on Islamic ideologies rather than British law.²⁸² There are two primary advantages to using non-binding arbitration over litigating in civil court: “[1] [w]here the parties accept the result of the non-binding arbitration, they may save considerably in terms of time and money . . . [and] [2] the proceedings may be more amicable than the trial process, thus helping to better preserve the relationship between the parties.”²⁸³

The non-binding arbitration tribunals were particularly beneficial to those British Muslims who chose to use them for several reasons. First, because many Muslims harbor great pride in their religion and culture and resist assimilating into British culture and law,²⁸⁴ these non-binding Shari'a courts allowed British

277. *See id.*

278. *See id.* For example, one Muslim woman said that she hoped women would be able to get as much out of a divorce as men under Shari'a law. *Id.* Additionally, she stated that it was fair that men received more under the Shari'a inheritance laws because men are responsible for supporting the women in their life. *Id.*

279. *See* Women's Rights and Sharia Tribunals in Ontario, Canada, Association for Women's Rights in Development (Dec. 2, 2008), <http://www.awid.org/eng/Issues-and-Analysis/Library/Women-s-Rights-and-Sharia-Tribunals-in-Ontario-Canada>.

280. *See generally* Taher, *supra* note 6.

281. Non-binding arbitration allows individuals or their attorneys to recount and argue their case to an arbitrator who then makes his decision. The arbitrator's decision “is non-binding, the parties are not required to accept it. They are at liberty to commence proceedings [in civil court] if they are not satisfied with the decision.” FIADJOE, *supra* note 231, at 27.

282. Bano, *supra* note 10 at 12–14.

283. FIADJOE, *supra* note 231, at 27. *See* JANE JENKINS & SIMON STEBBINGS, INTERNATIONAL CONSTRUCTION ARBITRATION LAW 146 (2006).

284. *See supra* nn. 215–20 and accompanying text. “Assimilation proceeds more slowly when immigrants reside in intra-ethnic enclaves . . . and intra-ethnic interactions,

Muslims to delegate decisions in line with their religious and cultural beliefs.²⁸⁵ Although doing so fosters an element of continued disquiet between Muslims and much of the outside world,²⁸⁶ which advocates of cultural assimilation would detest,²⁸⁷ it is important to recognize cultural and religious differences within Britain without transgressing British law and societal norms in order to minimize unneeded friction.²⁸⁸ With this principle in mind, the second beneficial aspect of keeping Shari'a court decisions non-binding is that by doing so, the losing party is not bound by the decision.²⁸⁹ Not only do these non-binding Shari'a courts provide a means for Muslims to resolve matters in a manner in line with their cultural syndromes,²⁹⁰ they help to remedy recurring issues arising out of differences between Muslim and British culture. For example, "limping marriages"²⁹¹ are a perpetual problem in Britain.²⁹² A limping marriage "occurs when one partner, usually the wife, has secured a divorce before the English courts, but the social pressure from within the community prevents her remarriage because the divorce has not been accompanied by an Islamic dissolution, usually in the form of a *talaq*."²⁹³ By allowing Shari'a courts to act as non-binding arbitrators, British Muslim women who find themselves in a limping marriage have the opportunity to solve this problem by dissolving their marriage in a way that is recognized under Muslim cultural syndromes (a divorce granted by a Shari'a court) – the result: cultural compromise and cohesion.²⁹⁴ The social stigma many Muslim women face within their communities is lifted while simultaneously following British law. As Shari'a court decisions would be non-binding, Muslim immigrants would still be needed for the divorce to be

including membership in ethnocultural organizations, foster maintenance of heritage identity." COLLEEN A. WARD, STEPHEN BOCHNER, & ADRIAN FURNHAM, *THE PSYCHOLOGY OF CULTURE SHOCK* 109 (2001).

285. As recognized by The Inter Faith Network of the United Kingdom, there needs to be cohesive acceptance of all religions and their differences in order to live harmoniously. *See* The Inter Faith Network, *supra* note 226.

286. *See* MARY DE CHESNAY & BARBARA A. ANDERSON, *CARING FOR THE VULNERABLE: PERSPECTIVES IN NURSING THEORY, PRACTICE, AND RESEARCH* 369 (2d ed. 2008).

287. *See generally* LAWRENCE A. BLUM, "I'M NOT A RACIST, BUT . . ." *THE MORAL QUANDARY OF RACE* 216 (2002).

288. The differing treatment of women among Muslim societies and other European countries is one marked cultural difference, and "[i]t is unlikely that there would be much agreement on this important social issue should the matter come up in a meeting between members of these two societies." WARD, *supra* note 284, at 10.

289. *See generally* BRUCE HARRIS ET AL, *THE ARBITRATION ACT 1996*, at 279 (2003).

290. Cultural syndromes are "patterns of attitudes, beliefs, norms and [behaviors] that can be used to contrast groups of cultures." WARD, *supra* note 284, at 10.

291. JORGEN S. NIELSEN, *TOWARDS A EUROPEAN ISLAM* 82–83 (1999).

292. Ahmed, *supra* note 111.

293. JORGEN, *supra* note 291.

294. *See generally id.*

recognized under British law. The recourse available in British courts is the critical element of using non-binding arbitration tribunals. Fears of coercion by family members to seek judgments from the Shari'a Council and the potential for unequal rulings still remain, but at least there is the open opportunity to secure a gender-neutral ruling from the British courts for unsatisfied Muslim women, which would not be the case if the Shari'a court decisions were binding. Thus, one cohesive body of British law would remain in effect, supplemented by unofficial Shari'a rulings recognized by Muslim society.²⁹⁵

3. Excluding Shari'a Principles From the British Legal System Entirely

On the opposite spectrum, Britain could choose to make the Arbitration Act entirely inapplicable to religious courts. Long before Lord Chief Justice Nicholas Phillips' proclamation that Shari'a law has a place in British courts, Ontario, Canada grappled with this same matter.²⁹⁶ In 2004, the Ontario government, under the same reasoning Shari'a law is now being codified in Britain, permitted domestic matters to be decided by Shari'a tribunals under Canada's Arbitration Act of 1991.²⁹⁷ As in Britain, Jewish citizens, along with Ontario's Catholics, had already been using the Arbitration Act of 1991 as a means to settle their disputes in accordance with their own religious laws.²⁹⁸ To ensure Ontario's religious arbitration system was not being abused, the attorney general conducted an investigation that produced a report supporting the tribunals.²⁹⁹ Despite the attorney general's satisfactory report, the Ontario government responded by taking a drastically different approach than Britain has to the Shari'a quandary.³⁰⁰ After hundreds of people from across the world held protests to stop Shari'a law from manifesting itself in Ontario, the Premier of

295. Although using the Shari'a Council as a non-binding arbitrator does still provide a means to meld both British and Muslim ideologies, disadvantages do exist: non-binding arbitration may end up being too costly if parties are dissatisfied by the judgment rendered and seek to take the dispute to civil court; non-binding arbitration could be used as a way to gain an unfair advantage through previewing the opponent's case prior to taking the action to civil court; and "the process and results are private and so cannot be measured against objective standards of fairness[.]" FIADJOE, *supra* note 231, at 27.

296. Martha Minow, *Is Pluralism an Ideal or a Compromise?: An Essay for Carol Weisbrod*, 40 CONN. L. REV. 1287, 1294 (2008).

297. See NORA ROCK & VALERIE HOAG, FOUNDATIONS OF CRIMINAL AND CIVIL LAW IN CANADA 4 (2006); James Sturcke, *Sharia Law in Canada, Almost*, GUARDIAN.CO.UK, Feb. 8, 2008, <http://www.guardian.co.uk/news/blog/2008/feb/08/sharialawincanadaalmost>.

298. See Trevelyan, *supra* note 5.

299. Sturcke, *supra* note 297.

300. See Press Release, Ministry of the Attorney General, Ontario Passes Family Statute Law Amendment Act: Family Arbitrations to Be Based on Canadian Law Only (Feb. 15, 2006), *available at* <http://www.attorneygeneral.jus.gov.on.ca/english/news/2006/20060215-famend-EN.pdf>.

Ontario,³⁰¹ Dalton McGuinty, vowed to prevent Shari'a law and all other types of religious law from being incorporated into Ontario's legal system.³⁰² Within six months the Ontario legislature passed a law preventing all forms of binding arbitration based on religious ideologies from being used.³⁰³

This approach seems to solve the inequality issue among religious representation,³⁰⁴ but sterilizing the Arbitration Act from religious infiltration does little more than force those seeking to enforce Shari'a principles underground.³⁰⁵ This could be alarming because Muslim women often feel pressure from their families and community to seek out a Shari'a ruling from a *qadi* (Islamic judge) or guidance from an *imam*.³⁰⁶ By allowing a non-legitimized, underground market for Shari'a courts, the British government would increase the probability that Muslim women would be forced to seek and rely on "underground" judgments proffered by *imams*; the *imams*, in turn, can hand down harsher rulings as all

301. Premier is the title given to the first Minister of the Crown for Ontario. The Premier acts as Ontario's chief governmental official and oversees the Executive Council. Nation Master, Premier of Ontario, <http://www.nationmaster.com/encyclopedia/Premier-of-Ontario> (last visited Mar. 21, 2009).

302. *Ontario Premier Rejects Use of Shariah Law*, CBC NEWS, Sept. 11, 2005, available at <http://www.cbc.ca/canada/story/2005/09/09/sharia-protests-20050909.html>.

303. In 2006, the Ontario legislature passed the Family Statute Law Amendment Act, which was an attempt by the Ontario government to emphasize that "there is only one law and that is Canadian law." Press Release, *supra* note 300. The Ontario government intended this Act to protect women's rights while unifying Ontario under one Canadian body of law. *See id.*; Family Statute Law Amendment Act, 2006, S.O. c.1, Bill 27; ANNEMARIE PREDKO & JOHN D. GREGORY, UNIFORM L. CONFERENCE OF CAN. FAMILY ARBITRATION IN ONTARIO RECENT CHANGES 2 (2006), available at http://www.ulcc.ca/en/poam2/Faith_Based_Family_Arbitration_in_Ontario_En.pdf.

304. Both Britain and Ontario, either presently or in the past, accepted binding arbitration rulings based on Jewish and Catholic religious principles. For this reason, Muslims supporting the incorporation of Shari'a law in their respective countries have used this fact in rationalizing Shari'a's adoption. *See* Taher, *supra* note 6.

305. Delegitimizing religious courts will not prevent devoted followers from seeking out these religious courts. *Cf.* JAMES A. INCIARDI & LANA D. HARRISON, HARM REDUCTION: NATIONAL AND INTERNATIONAL PERSPECTIVES 120 (2000).

306. *See* Sangiv Buttoo, *Some Imams 'Biased Against Women'*, BBC NEWS, Dec. 17, 2008, http://news.bbc.co.uk/2/hi/uk_news/7783627.stm. Some suggest that "if [Shari'a] is driven underground, quasi-courts will proliferate in response to demand, without the necessary checks and balances." Sheema Khan, *Canadian Muslims Have a Fondness for Democracy, Peace—and Sharia Law*, GLOBEANDMAIL.COM, Jan. 28, 2009, <http://www.theglobeandmail.com/servlet/story/RTGAM.20090127.wcosharia28/BNStory/specialComment/?page=rss&id=RTGAM.20090127.wcosharia28>. For more information regarding Islamic judges and their roles, see LAWRENCE ROSEN, THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY 7–9 (1989).

transparency into the Shari'a court system has been removed. Ultimately, Muslim women and British society would be the victims.³⁰⁷

4. Requiring a Shari'a Council Decision Prior to Allowing a Formal Legal Decision

The fourth option is a promising attempt to compromise. It would recognize “the indispensability of religious law for some person[s] while preserving [Britain’s] interest[s].”³⁰⁸ This option would allow Shari'a courts to function as non-binding arbitration tribunals while simultaneously requiring British courts to ensure that there is no obstacle in the way of its judgments. The downside to this solution is that it would only apply to situations involving divorce – as divorces are a unique area in which an individual needs a legally enforceable ruling prior to remarrying – in order to solve the problem of limping marriages, which are currently a pervasive problem in Britain.³⁰⁹ Nonetheless, under this solution, a couple would seek a divorce through the British court system. Before granting the divorce, the court would institute a judicial order requiring the husband to go through the procedural steps in obtaining a valid divorce under Shari'a law – either through a *talaq al Sunna* or *talaq al bidaa*.³¹⁰ This method ensures that the husband goes through the process of eliminating any hindrances the wife may encounter in the Islamic community if she wishes to remarry.³¹¹ Furthermore, this solution protects a woman from the consequences associated with exercising her right to *khul* by forcing the husband to initiate the Islamic divorce procedure.³¹²

Analogous to this solution (requiring couples to receive a religious divorce prior to the courts granting a secular one) is the approach that a few states in the United States have taken. Although the United States has yet to implement the use of Shari'a law under its Federal Arbitration Act,³¹³ New York and Indiana both have indirectly enforced religious law in the context of Jewish divorces.³¹⁴

307. Cf. KATRI K. SIEBERG, CRIMINAL DILEMMAS: UNDERSTANDING AND PREVENTING CRIME 70 (2005) (stating that the government, by making prostitution and pimping illegal, increases the chances that prostitutes will be forced to sell their bodies and rely on their pimp, which causes further extortion and violence by the pimps and ultimately causes more harm to both the prostitute and society).

308. Laureve Blackstone, Note, *Courting Islam: Practical Alternatives to a Muslim Family Court in Ontario*, 31 BROOK. J. INT'L L. 207, 228 (2005).

309. Ahmed, *supra* note 111.

310. See *supra* Part III(B)(2)(a)(i).

311. See YILMAZ, *supra* note 30, at 150.

312. See Mashhour, *supra* note 4, at 574.

313. See Federal Arbitration Act, 9 U.S.C. §§ 1-14 (2006).

314. See *Goldman v. Goldman*, 554 N.E.2d 1016, (Ill. App. 1990) (ordering a husband to obtain a Jewish divorce); *Kaplinsky v. Kaplinsky*, 198 A.D.2d 212, 212–13 (N.Y.A.D. 2 1993) (stating that a former husband was properly held in contempt for not obtaining a

New York's statute is a strident example of the quasi-application of this line of reasoning because it requires that the divorcing couple show that the appropriate steps have been taken so that both parties are free to remarry, including having obtained a religious divorce.³¹⁵

5. Addressing Ex Post Facto Disparities Through Injunctive and Other Equitable Relief

The last way to address the enforcement of Shari'a law in Britain is for British courts to exercise the equitable remedy of mandatory injunction, requiring the offending party to remedy the wrong done.³¹⁶ Unlike the previous proposition,³¹⁷ this would be a purely *ex post facto* remedy.³¹⁸ Again, under this scenario, Shari'a tribunals would function as non-binding arbitral tribunals; mandatory court injunctions would strictly be used in situations where inequities arise out of Shari'a law, such as limping marriages.³¹⁹ For example, using this mechanism, a Muslim couple would obtain a divorce in British court. If the husband then refused to divorce his wife under Shari'a law, the British court could order an injunction compelling the couple to receive a divorce certificate by a Shari'a council.

B. A Workable Solution

In coming to a solution for the British Shari'a debate, the ultimate question is how Shari'a law's incorporation should be handled in Britain, in order to allow religious freedom and to respect personal preferences, yet ensure basic principles of human rights and British law remain intact. A brief look at the basic Shari'a principles undoubtedly reveals that the Islamic body of law treats men and

Jewish divorce as the Court ordered); N.Y. DOM. REL. LAW § 253 (McKinney 1999 & Supp. 2004).

315. N.Y. DOM. REL. LAW § 253 (McKinney 1999 & Supp. 2004).

316. Because an injunction is an equitable remedy, it is under the English courts' discretion to grant. RAYMOND YOUNGS, ENGLISH, FRENCH, AND GERMAN COMPARATIVE LAW 317 (1998). Usually, English courts are willing to grant injunctive relief "unless the harm done is trivial, an injunction would be oppressive and money would be a sufficient compensation for the harm. *Id.*

317. *See supra* Part IV(A)(4).

318. For example, such a remedy would only be available after the court had granted a divorce to a Muslim couple, and, thereafter, the former husband refused to follow through with a Shari'a condoned divorce in the attempt to prevent his former wife from remarrying.

319. *See supra* note 291 and accompanying text.

women with stark differences.³²⁰ Due to the disparities British Muslim women face, the British government must proceed with caution. Diving head first with arms wide open as the Archbishop of Canterbury suggested is dangerous. This is a matter that must be handled with delicacy. An all-inclusive approach, like Britain is currently implementing, is troublesome, especially because the majority of British Muslims have no quandary with a singular legal system where Shari'a principles are not being implemented.³²¹ These Muslims recognize the long-standing classical Islamic approach that states Muslims must obey the law of the land in which they reside.³²² Following this reasoning, British Muslims obtain a valid marriage license under British law and proceed to conduct a religious ceremony at their Mosque to validate the marriage under Shari'a law.³²³

Among the estimated thirty-seven percent of British Muslims who wish to have some form of Shari'a law implemented in Britain,³²⁴ it is unclear whether they actively seek to have Shari'a govern criminal matters. However, it is apparent that Shari'a councils have included domestic violence cases and hope to increase the number of "smaller" criminal matters on the docket in the future as well.³²⁵ Per the Arbitration Act, an arbitration tribunal should never hear any criminal matter, such as domestic violence.³²⁶ The fact that there is such little oversight that Shari'a Councils have been able to include smaller, criminal matters in their repertoire, and hope to settle more criminal matters in the future, is disconcerting.³²⁷

That is not to say that the Shari'a debate is without a compelling argument. There are compelling reasons that so many wish to implement some

320. As the authors of *Islam, Gender, & Social Change* explain, Islamic civil status laws are implicitly sexist while Islamic personal status laws are explicitly sexist. HADDAD & ESPOSITO, *supra* note 53, at 108. For example, a woman is transferred from her father to her husband at the time of marriage, men are permitted to have multiple wives, men may obtain a divorce much easier, and women may inherit only half the share that her male counterpart does. *See id.*; *supra* Part III.

321. Bano, *supra* note 10.

322. W.A.R. SHADID & P.S. VAN KONINGSVELD, POLITICAL PARTICIPATION AND IDENTITIES OF MUSLIMS IN NON-MUSLIM STATES 89 (W.A.R. Shadid & P.S. Van Koningsveld eds., 1996).

323. *See* Marriage Act, 1994, c. 34 (U.K.).

324. Bano, *supra* note 10.

325. Edwards, *supra* note 262.

326. *See* Arbitration Act, 1996, c. 23, § 82(1) (U.K.).

327. As Britain's shadow Home Secretary recently stated: "If it is true that these tribunals are passing binding decisions in the areas of family and criminal law, I would like to know which courts are enforcing them because I would consider such action unlawful. British law is absolute and must remain so." Edwards, *supra* note 262. In all six domestic violence matters heard by Shari'a courts, the wives have chosen to withdraw their complaint. *See id.* *See also* Taher, *supra* note 6. Muslim supporters laud such a result because the "marriages were saved and couples [were] given a second chance." Edwards, *supra* note 262.

form of Shari'a tribunal in Britain – particularly, the egregious existence of limping marriages.³²⁸ However, there is no guarantee that by allowing Shari'a tribunals to act as binding arbitrators, these tribunals will grant more unilateral divorces initiated by women. In fact, the opposite may be true; there is no guarantee that a wife will be able to obtain a *khul* from the Shari'a Council,³²⁹ especially since there is no uniform body of Shari'a law.³³⁰

Another problematic symptom of enforcing decisions handed down by Shari'a tribunals is that decisions handed down by third-party binding arbitrations usually cannot be appealed.³³¹ Section 69(1) of the Arbitration Act provides that: “Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.”³³² However, the appeal cannot be heard by a court unless all parties to the proceeding agree or by leave of the court.³³³ This means that a British Muslim woman can request and be granted an appeal by leave of court if the tribunal's judgment will substantially affect the woman's rights and is of importance.³³⁴ There is an important caveat; if prior to generating a judgment from the arbitration tribunal the parties agree to waive all rights to appeal, there is no ability to appeal under Section 69.³³⁵ This is particularly problematic because women often feel compelled by their family and community to seek a ruling from the Shari'a Council, which may also make them more likely to agree to such a waiver.³³⁶

Furthermore, it is difficult to hold Shari'a Councils accountable as there is very little transparency within these courts.³³⁷ Although the Shari'a Councils advertize themselves as “act[ing] in the best interests of Muslim women . . . ,”³³⁸ such a comment instills little confidence when the diminutive transparency into these councils has shown that women are receiving worse judgments than they

328. Ahmed, *supra* note 111. Hayrettin Karaman, an Islamic jurisprudence professor, suggests that the systemic problem of limping marriages could be easily remedied by Muslim women contracting for the right to unilaterally divorce their husbands within the original marriage contract. See YILMAZ, *supra* note 30, at 170. However, this solution is oversimplified as it fails to take into account that the husbands would have to be agreeable to such a provision. *See id.*

329. *See* Murphy, *supra* note 266.

330. *See supra* Part III(A).

331. *See* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 2–3 (2008).

332. Arbitration Act, 1996, c. 23, § 69(1) (U.K.).

333. *See id.*

334. *See id.*

335. MOSES, *supra* note 331, at 51.

336. *See, e.g.,* Murphy, *supra* note 266.

337. There is very little empirical data on the Shari'a Councils within Britain. *See* Bano, *supra* note 10, at 14.

338. *Id.* at 15.

would have under British Courts.³³⁹ Muslim women do not appear to be seeking relief from the British courts³⁴⁰ – an important aspect in arriving at a solution.

Rather than continue to allow these tribunals to function as barriers to equitable treatment for women under British law, the British government should consider taking Ontario's approach by enacting legislation that prohibits all religious tribunals from handing down binding awards under the Arbitration Act.³⁴¹ The legislation would render the Shari'a Councils *legally* impotent. Almost assuredly, they will remain functioning as unofficial, private governing bodies.³⁴² Their existence from the beginning was as a result of Muslim disquiet in Britain, which has yet to change; thus, delegitimizing their rulings will not deter the Shari'a Council's presence.³⁴³

As a result, it is necessary to take into account the disparities British Muslim women will undoubtedly still face, such as limping marriages. To cauterize the inequitable results that are byproducts of Shari'a law, the British government should adopt both contingency orders and *ex post facto* injunctive relief.³⁴⁴ In an instance where a husband wishes to divorce his wife, British courts would order a Muslim couple to obtain a divorce certificate from the Shari'a Council prior to granting a legal divorce. If the husband does not wish to divorce his wife, the British courts could still grant her a divorce and grant an injunction compelling her unwilling husband to obtain a divorce certificate from the Shari'a Council. The easiest way to encourage British Muslim women to use British

339. See *supra* nn. 243–45 and accompanying text; see, e.g., Murphy, *supra* note 266.

340. Cf. Edna Fernandes, *Sharia law UK: Mail on Sunday gets exclusive access to a British Muslim court*, MAILONLINE, July 4, 2009, <http://www.dailymail.co.uk/news/article-1197478/Sharia-law-UK--How-Islam-dispensing-justice-side-British-courts.html#ixzz0Mh2eC5r8>.

341. Press Release, *supra* note 300.

342. There are four reasons Shari'a Councils will continue to operate in Britain:

Firstly, under Muslim tradition, family issues are purposively left to 'extra judicial' regulation and diasporic communities continue this tradition and resolve disputes within this sphere. Secondly, Muslims do not recogni[z]e the authority and legitimacy of western secular law on par with Muslim law and therefore deliberately choose to resolve disputes through a non-adversarial process. Thirdly the familial notions of [honor] and shame prevent familial disputes from being discussed in the 'public sphere' and subsequently religious laws are given greater potency and legitimacy within the communities. And finally, the failure of the state to recognize these plural legal orders has [caused] [. . .] the development of these 'alternative' dispute resolution processes within the private sphere.

Bano, *supra* note 10, at 10–12, 13–14.

343. See generally Taher, *supra* note 6.

344. See *supra* Part IV.A.4, IV.A.5.

courts is to delegitimize the binding nature of Shari'a Council decisions, while simultaneously maintaining a process which recognizes and attempts to remedy some of the specific cultural and religious difficulties Muslim women face. Whether the Shari'a Council is recognized as a legitimate governing body by the British government will not have an effect on its presence in the Muslim community; however, by delineating its lack of power, hopefully, Muslim men and women will be more likely to seek judgments through British courts, thereby seeing more favorable results.

V. CONCLUSION

Permitting religious groups to use the Arbitration Act to bind citizens to religious principles and laws has allowed a form of weak legal pluralism to emerge.³⁴⁵ Shari'a Councils are the most recent religious governing bodies to discover the legislative loophole.³⁴⁶ Due to the cultural friction that exists, British Muslims are extremely community-centric.³⁴⁷ As a result, British Muslim women often feel compelled to submit to Shari'a Councils for management of domestic affairs, which often leads to poorer results for women than had they received a judgment from a British court.³⁴⁸ By continuing on this path, Britain is facilitating the conflict between British law and Shari'a law and, ultimately, hurting women and British society. The legitimacy of these Shari'a Councils, along with all binding religious tribunals, should be abolished through legislation. The cultural friction that exists among Muslims and non-Muslims in Britain makes it necessary to keep some form of functioning Shari'a Council to remedy limping marriages and other socio-religious inequities.

With these thoughts in mind, this Note proposes three possible mechanisms to create a solution to the British Shari'a debate. First, Shari'a Councils would remain functioning as non-binding tribunals as they have been in the past. Second, contingent upon granting a practicing Muslim couple a divorce, British courts would require the Muslim couple to obtain a Shari'a divorce certificate from one of these non-binding Shari'a Councils prior to the court granting the couple a legal divorce. Third, in the event that one of these Shari'a Councils hands down a wrongful ruling based on the parties' sex, a Muslim woman could seek relief in British courts and afterwards, the court could grant an injunction requiring that these non-binding Shari'a tribunals act in a manner congruous with British law. It is important to delegitimize these councils by taking away their legal power. It is also important to recognize that their presence

345. See YILMAZ, *supra* note 30, at 172.

346. See *supra* Part I.

347. See *supra* Part IV(A).

348. See HADDAD & ESPOSITO, *supra* note 53, at 108.

is crucial. Any solution to the British Shari'a debate must be a balance between cultural and religious awareness, gender equality, and British legal supremacy.

