The Sharia Debate in Britain: Sharia Councils and the Oppression of Muslim Women

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Abstract

The Archbishop of Canterbury’s recent suggestion that Sharia Councils be formalised within the British legal system received strong criticism on the basis that such an institution would oppress Muslim women. An examination of the separation of religion and the secular state suggests that women would in fact be better protected where there is state regulation of religious arbitration. International Human Rights law provides a hierarchy of values allowing provisions regarding gender equality to prevail over the right to freedom of religion. While concerns were expressed that Muslim women were not free to make their own choices due to pressures from within their communities, it is possible that such concerns could be addressed by educating women as to their rights and options within the secular state. There is room for Islamic family law provisions, which currently create a disparity between the rights of women and men within Muslim communities, to be interpreted in a way which is more consistent with human rights legislation within the UK. Strong comparisons can be made between the Headscarf Debate in France and the current debate in Britain. A better alternative to the French method of prohibiting practices which may oppress women is to protect the autonomy of women to choose, while ensuring that their choice is autonomous.

It is outwith the scope of this article to fully discuss issues of private international law which may be relevant, and therefore only the situation in the UK will be explored.

1. Introduction

The Lecture by the Archbishop of Canterbury at the Royal Courts of Justice on 7th February 2008¹ sparked what can only be described as a ‘modern-day “moral panic”’ directed against Islam, British Muslims, and the Archbishop himself.² The idea that Sharia law could be accommodated within the British legal system resulted in a tabloid outrage, with hysterical claims that Muslims living in the West were threatening the very basis of Western

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Behind what can only be described as sensationalist journalism, lay a valid suggestion by the Archbishop that Sharia Councils could be formally recognised under British law as a forum for family law arbitration. The UK now hosts a Muslim population of approximately 1.35-1.5 million: 2.7% of the UK population identified themselves as Muslim in the 2001 census, with large concentrations of Muslims in urban areas. The Archbishop’s comment that ‘Muslim communities in this country seek the freedom to live under Sharia law’ may not be as controversial as was initially suggested by the British press. In fact his comments were nothing new; in 2001 Yilmaz stated that ‘Muslims do not only wish to be regulated by the principles of Islamic law when they are living in a non-Muslim state; they also seek to formalize such an arrangement within the state’s own legal system.’

There has already been a substantial accommodation of Muslim religious requirements in the UK in the form of school uniform, burials and banking and financial systems so it is difficult to see why the suggestion of incorporating further Islamic legal principles into the British legal system caused such controversy.

One issue which recurred frequently in the media coverage surrounding the Archbishop’s lecture was that of the oppression of Muslim women under Islamic legal systems. The demands of some Muslim leaders for the establishment of a single Sharia Council, with state recognised jurisdiction in areas of Islamic family law, were met by criticisms that such an institution would subordinate women through gender-biased norms. In almost all Western Islamic communities, sensitive issues arise regarding women’s rights. Elisabeth Badinter considered religion to be a major impediment to women’s rights. Ramadan described the problems inherent in Islamic society as being far from the ideal of equality before God. He highlighted that although many scholars believe that there is nothing in the Qur’an to justify discrimination against women, such discrimination still occurs within Islamic culture. Further, in the minds of many Muslims in

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3 See A Lester and P Uccellari, ‘Extending the equality duty to religion, conscience and belief: Proceed with caution’ (2008) 5 EHRLR 567.
6 Williams (n1) at p. 263.
8 See McGoldrick (n 5).
9 See, for example, M Parris, “Allowing British Muslims recourse to Islamic law would be a charter for male dominance and peer-group bullying” The Times (London) available at <http://www.timesonline.co.uk/tol/comment/columnists/matthew_parris/article427241. ece>.
10 A Shachar, Multicultural Jurisdictions: cultural differences and women’s rights (CUP, Cambridge 2001) at p. 50.
11 E Badinter, Fausse Route (Jacob, Paris 2003).
western societies, doing that which is customary in their countries of origin is synonymous with faithfulness to Islamic teachings.

Particular concern after the Archbishop’s lecture was raised that Islamic law is unreasonable and patriarchal with a subordinating effect on Muslim women, which is inconsistent with secular and egalitarian Western law. Bano recognised that problems arose when affording rights to minority groups who persistently seek to challenge and violate equality and human rights notions. Where conservative interpretations of women’s rights within Islam prevail, women would be at risk of treatment under faith-based arbitration which may be inconsistent with human rights law. The Archbishop himself recognised that providing supplementary Islamic jurisdiction in some areas could reinforce repressive or retrograde elements in minority groups, with serious consequences for the liberties and rights of women. He described this dilemma as a ‘paradox of multicultural vulnerability...which arises when an identity group member’s rights as a citizen are violated by her identity group’s family law practices.’

Sharia Councils are made up of representatives of different schools of thought in Islam. Currently they are unofficial legal bodies which provide advice and assistance on Muslim family law matters; their main functions being mediation and reconciliation, issuing Muslim divorce certificates and providing expert opinion reports on issues of family law or custom. Currently Sharia Councils ‘have appropriated for themselves the role and position of parallel quasijudicial institutions’. Khaliq considers that a parallel but, as yet, unrecognised legal system is now in operation within Muslim communities in the UK. This has led to confusion as to the power, authority and jurisdiction of Sharia Councils, especially in relation to British Courts. Many Muslims advocate that British family law and legal principles cannot genuinely resolve family disputes for Muslims living in Britain. They therefore seek out Sharia Councils in order to uphold ‘the moral authority of the Muslim community’ regardless of the fact that Council verdicts are not legally binding.

While the law of the land should protect an individual’s right to religious identity and secure their freedom to fulfil religious duties,

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13 Bano (n 2).
14 ibid.
16 Williams (n 1).
17 ibid at p. 271.
19 Bano (n 2).
22 Bano (n 2).
23 Dr Masim, Chair of Birmingham Muslim Family Support Service and Shariah Council.
including those required by religious law, special consideration is required where such fulfilment would result in the limitation of human rights for some parties. The Archbishop expressed concern that recognising the authority of religious courts would deprive some members of the Islamic community of the rights and liberties granted to them as citizens, and recognised that the secular state could not license practices which would extinguish or limit valid rights.  

24 It is therefore evident that Sharia Councils could only be recognised as official arbitration bodies insofar as they are consistent with British law, human rights and gender equality.  

25 There are particular problems associated with the protection of women’s rights as perceptions of women under Islamic law are often inconsistent with gender equality and human rights provisions. However, Muslims in the UK are evolving independent infrastructures better suited to their religious requirements,  

26 and therefore it is likely that Muslim communities will continue to apply Islamic legal principles regardless.  

27 If the picture of a British Muslim woman painted by the media is to be believed, allowing this unofficial arbitration to continue could seriously limit their rights and liberties. This article will not dwell on the accuracy of this perception, but rather will discuss the role of the legal system in preventing discrimination against Muslim women.

It is possible that better protection for women within minority communities could be achieved through inclusion of their religious laws within the British system, in order that the secular state can regulate what is currently an informal community institution to ensure better consistency with the workings of these groups and human rights legislation.

2. Religion and the Secular State

There is no doubt that the relationship between religion and the secular state can be highly controversial and law makers must proceed with great caution when dealing with issues concerning religion and belief.  

28 The current debate in Britain represents the increasingly insistent demands from religious groups that religion and belief should have more weight in the public sphere. These demands must be balanced with the complex political and legal issues that arise when considering the discrimination of women associated with religion. Such issues have been well described by Sherene Razack in relation to the Sharia Law Debate in Ontario, Canada.  

29 Razack

24 Williams (n 1).


26 See Lester and Uccellari (n 3).

27 Razack (n 15).

28 Lester and Uccellari (n 3).

29 Razack (n 15).
describes the ‘Canadian feminist triangle’, where discussions surrounding the protection of women from religion feature an ‘imperilled Muslim woman’, ‘dangerous Muslim man’ and a ‘civilised European’. Feminist stereotyping seeks to justify stigmatising measures against Muslims as necessary to ensure women’s rights – the notion of the ‘imperilled Muslim women’ can be very powerful. Western states are culturally committed to human rights and gender equality and this commitment, when enacted through the three characters of the triangle, can portray an ideal of Western citizens as a modern people with a duty to bring pre-modern people up to speed.\textsuperscript{30} Under this approach, the Islamic community can be seen as preventing Muslim women from entering modernity, thus justifying civilised Europeans to ‘discipline’ minority communities in order to secure a modern state. Razack describes the modernity/pre-modernity distinction as a particularly dangerous view in justifying the limitation of citizenship rights for certain groups in society in the name of progress. Canadian feminists consider the ‘imperilled Muslim woman’ to be best protected by the state – achieved through the absolute separation of religion and law.\textsuperscript{31} The Islamic community and family unit are dangerous places, in their view, for a Muslim woman and the secular state is considered a women’s best protector and advocator of equality.\textsuperscript{32} However, Liisa Hajjar considers that a more complex assessment of women’s lives within their communities is required, as well as a move away from ‘cultural stereotypes that Muslim women are uniquely or exceptionally vulnerable’.\textsuperscript{33} Asad, too, calls for an abandonment of the romantic idea that the secular state represents progress from the pre-modern to modern.\textsuperscript{34}

Muslims in the UK have a dual identity both as a citizen of the United Kingdom and as a member of the community of the faithful within Islam (\textit{umma}). The Archbishop considers it imperative that membership of one group does not restrict one’s freedom to live as a member of the other, overlapping group: religious groups of serious and profound conviction should not face stark alternatives of religious loyalty or state loyalty.\textsuperscript{35} To
achieve this, the Archbishop calls for a ‘deconstruction of crude oppositions’. Such a view does not sit easily with feminist calls for segregation of religion and state. For the majority of Muslims, Sharia law applies within the community; for those living in a predominantly non-Muslim setting this can create double standards and tension between the private and public spheres.\(^{36}\) It is difficult to see how Muslim women could be best protected by a system that forces them to choose between the secular state and their religious community, especially when their freedom to choose may be limited by social pressures, discussed further below. Therefore, better protection could be achieved by state regulation of religious and cultural practices, including Islamic arbitration.\(^{37}\)

While there are arguments against formalising the Sharia Council in Britain in order to limit the power of oppressive institutions, it is likely that the Sharia Council will continue to function as it is now without state regulation. Currently, women are forced to choose between religious loyalty and state loyalty, between secular law and Islamic law. Further, such a choice may be limited by constraints from within their communities. Islamic institutions are imbued with traditions of male dominance and women’s rights are interpreted differently under this regime, possibly in a way which conflicts with the secular law. By formalising the Sharia Council the state would have an opportunity to regulate the administering of Islamic law in order to ensure that institutions were complying with nationally acceptable policies on human rights and gender equality. This provides a compromise to the complete separation of law and religion. However, conflicts remain between human rights provisions on gender equality and traditional interpretations of Islamic law, therefore forcing Sharia Councils to abide by rules of gender equality could be considered an unjustifiable limitation of the right to religious freedom.

### 3. Freedom of Religion versus Gender Equality

The interplay of the right to religious autonomy and that of gender equality can only be described as a ‘clash’, resulting in religious groups being viewed as potential sources of human rights breaches across Europe.\(^ {38}\) This has been most evident in the claims of religious bodies for immunity from gender equality provisions on grounds of religious freedom.\(^ {39}\) Western societies have abandoned centuries of patriarchy to adopt an ethic of gender

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equality, therefore religious institutions with their authority rooted in century old texts and traditions have found themselves at odds with this relatively recent change in policy.

One perception of religious groups is that they provide ‘a haven against social and cultural change; they preserve ethnic loyalties, the authority of the family and act as a barrier against rationalized education and scientific explanation.’ In many traditionalist religions, women are subjected to the patriarchal power within the family and systematically dominated by men. Member practices defended in the name of religion are gender specific, and therefore impinge upon women’s rights to equality. Cultural practices defended in the name of Islam can preserve patriarchy within Islamic communities, at the expense of women’s rights: evident in the case of compulsory restrictive dress codes as discussed below. In this way, religion forms a core of cultural resistance to human rights and gender equality. The Human Rights Committee commented that:

Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes... State parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights... The rights which persons belonging to minorities enjoy under article 27 of the Covenant in respect of their language, culture and religion do not authorize any state, group or person to violate the right to equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.

It is clear that the role of the law in this context is to balance two rights of equal constitutional importance. International Human Rights law provides a theoretical hierarchy of values to resolve such issues within a constitutional framework. The Universal Declaration of Human Rights provides that freedom of religion includes protection of all behaviours implicated, and a right to enjoy one’s culture is primarily concerned with the protection of ethnic, religious and linguistic minorities. Rights in the European Convention of Human Rights have to be secured without discrimination.

References:

40 See Rivers (n 38).
42 See Raday (n 39).
43 Human Rights Committee General Comment 28, CCPR/C/21/Rev1/Add.10, 5, at p. 32.
45 Universal Declaration of Human Rights 1948, Article 18.
secures equality, non-discrimination, and equality between men and women.\textsuperscript{50}

The Convention on the Elimination of All Forms of Discrimination against Women was ratified by the UK in April 1986. Article 5(a) places an obligation on states to modify social and cultural practices in the case of a clash between such practices and gender equality.\textsuperscript{51} Article 2(f) of the Convention obligates states to modify or abolish customs and practices that discriminate against women.\textsuperscript{52} It is clear from such provisions that gender equality and non-discrimination of women must be protected over and above the right to religious and cultural freedom. This exception to the right of freedom of religion is further highlighted in Article 18(3) of the International Covenant on Civil and Political Rights which provides that: \textsuperscript{53}

\begin{quote}

\[ \text{[t]he right to manifest one's religion or beliefs...may be subject only to such limitations as are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.} \]

\end{quote}

The right of women to equal treatment as compared to their male counterparts would clearly justify a limitation of the right to religious freedom. The Convention on the Elimination of All Forms of Discrimination against Women Committee have recommended making cultural practices which discriminate against women illegal, including religious practices that are prejudicial to women.\textsuperscript{54}

In this international environment where equality prevails over religious freedom, it is difficult to see how the formalising of an institution which restricts the rights of women as compared to men can be justified. Arguments that minority communities should be permitted to preserve their traditions\textsuperscript{55} cannot be supported where the imposition of traditionalist values would result in women’s voices being silenced.\textsuperscript{56} There is a new priority to equality which must take precedence over freedom of religion. Equality has not been accepted at normative institutional levels within Islamic communities,\textsuperscript{57} and where the position adopted by religious bodies

\textsuperscript{48} European Union Charter of Fundamental Rights 2000, Article 20.
\textsuperscript{49} Above (n 48) Article 21.
\textsuperscript{50} Above (n 48) Article 23.
\textsuperscript{51} Article 5(a) states: “The Parties shall take all appropriate measures:...To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority of either of the sexes or on stereotyped roles for men and women.’
\textsuperscript{52} Under article 2(f), state parties agree: ‘to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: To take all appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.’
\textsuperscript{53} International Covenant on Civil and Political Rights, December 19, 1966.
\textsuperscript{54} See, for example, \textit{Re Guinea}, 25\textsuperscript{th} Session, Off Rep 1/56/38/rev1, 122 at p. 123.
\textsuperscript{55} As advocated by A MacIntyre, \textit{Whose Justice? Which Rationality?} (NDUP, Paris 1988).
\textsuperscript{56} P Winch, ‘Nature and Convention’ in R Beehler and A Drengson (eds), \textit{The Philosophy of Society} (Methuen, 1978) 15 at p. 16.
\textsuperscript{57} Raday (n 39).
is in-equalitarian it can at best be tolerated, but preferably constrained. Currently, Sharia Councils are embedded in traditional patriarchal values and it is difficult to see how the formalising of such bodies would do anything other than provide greater power to patriarchal institutions and thus increase the likelihood of the oppression of Muslim women. Maintaining the status quo, however, does not make Islamic communities within the UK any more equitable, and it is insufficient if the best the state can offer Muslim women who are dissatisfied with their unequal treatment under the current regime is a right of exit from their religious communities. A preferable course of action would be to encourage reform of religious and cultural traditions and ideas in accordance with equality, and such a reform of Islam within the UK would not be impossible. The Qur’an appears to be in favour of equality for both sexes, with women being considered equal to men in matters of rights: ‘And women shall have rights similar to the rights (men have) over them, according to well-known rules of equity’. Further, the Prophet Muhammad in his final sermon stated:

Fear God in matters concerning women. Verily women have rights against you. Just as you have rights against them.

The interpretation of religious texts depends very much on one’s viewpoint and the meaning attached to Qur’anic verses changes with time, with symbolic language interpreted creatively to suit a particular context. Future generations of British Muslim scholars are increasingly likely to have been born in the UK and their experience as citizens will greatly influence their interpretation of the sources. Further, Shachar’s theory of ‘transformative accommodation’ could come in to play. Where individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain matters, the interplay between jurisdictions with differing rules may result in both evolving over time. Thus the stark alternatives of religious and secular law would gradually soften to accommodate principles of each system and both could be improved by the experience. In this way, if the Islamic community were allowed to settle disputes, such as matrimonial disputes, within the Sharia Council as a forum for arbitration under the Arbitration Act 1996, it is likely that the application of Islamic principles which may discriminate against women would gradually alter over time to recognise national principles of gender equality. The role of the British legal system in this context would be to catalyze such an accommodation through the regulation of religious arbitration and the implementation of gender equality obligations. Thus, formalising Sharia Councils under the regulation

58 Raday (n 39).
59 The Qur’an 2:228.
61 60% of Muslims in Britain in 2001 were born in the UK: see M Anwar, “Muslim in Britain: Demographic and Socio-Economic Position” available at <http://www.primarycareonline.co.uk/humaneffect/muslim/chaplagain.htm>.
62 Shachar (n 10).
of the secular state could speed up the process of reform by constraining practices which are in-egalitarian, especially where immunity from human rights legislation is sought to maintain gender specific practices. A potential result of such co-operation between the Islamic arbitrators and the secular state is that future Islamic scholars will gradually interpret Islamic provisions in a way which is more consistent with gender equality concepts. While the rights of women to exit Muslim communities should be maintained where they do not feel their rights are being adequately recognised by Islamic institutions, it would be insufficient if this were all the state could offer. While some view the formalising of Sharia Councils as an empowerment of groups which do not always respect the rights of women, it is possible that formalisation could lead to better regulation, and thus egalitarian practices could be better restrained.

4. The Autonomy of Muslim Women

One issue that recurs frequently in the literature surrounding the Sharia debate in Britain is that of the autonomy of Muslim women. If a well-educated woman of sound mind makes an informed decision to use the services of the Sharia Council, is it right that the law steps in and limits her choice in order to protect her from discrimination? The Archbishop considered this as part of his lecture and recognised a reluctance on the part of the dominant right-based philosophy that underlies British law to recognise the right of an individual to refuse to act upon the legal recognition of a right. Thus, if Muslim women are legally recognised as having a right to equal treatment with men, the law will enforce this right regardless of the wishes of the women themselves. This concept is especially difficult to understand where the refusal of a Muslim woman to act upon the legal recognition of a right will not deny anyone else protection of their rights. The Archbishop comments:

It would be a great pity if the immense advances in the recognition of human rights led, because of a misconception about legal universality, to a situation where a person was defined primarily as the possessor of a set of abstract liberties, and the law’s function was accordingly seen as nothing but the securing of those liberties irrespective of the custom and conscience of those groups that concretely compose a plural modern society.

The feminist rejection of religious arbitration does not take into account those women who seek to live a faith-based life according to the rules of Islam, regardless of the fact it may limit their human rights, and who wish to use the services of the Sharia Council as they see it as more applicable to

63 Williams (n 1) at p. 273.
64 ibid at pp. 273-4.
their family issues than the secular law. Raday advocates that genuine consent to accept certain religious practices should be accepted as valid even if it is to the disadvantage of the party accepting such practices. The liberty to choose is an essential part of the freedom of religion and the right to equal autonomy of an individual. Muslim citizens in the UK have demanded respect for their religion in society, and there has been strong participation of women in this process.

However, the critical question regarding the autonomy of Muslim women is whether their apparent consent can be considered valid where they are under pressure from patriarchal communities to subject themselves to unequal treatment: ‘[f]amily, in the theory of liberal democratic politics, threatens the freedom and purity of individual judgment and decision. Under the influence of family, the citizen instead of voting according to his or her beliefs may vote for those whom he or she finds personally unworthy.’

Consent of Muslim women cannot be assumed from their silence, so the state must increase the possibility of genuine consent and verify its existence. Hirschmann suggested that male pressure may have become so prevalent in religious communities that it has become a way of life, and has resulted in women becoming instruments of their own oppression. Further, consent cannot be recognised where the choice of members of the oppressed group to exercise an autonomous choice to dissent is limited, or where any dissenters face pervasive oppression or discrimination. McGoldrick has suggested that evidence of pervasive oppression should be sought first, rather than assuming that there will be a problem with women’s consent in a patriarchal society.

Bano’s survey of Muslim women found that women expressed the desire to choose whether or not they used the services of the Sharia Council rather than secular courts. Concerns exist that women could be pressured into accepting faith-based arbitration. Canadian feminists in Ontario called for safeguards to be built into the Arbitration Act in order to protect women from being coerced into arbitration by their families and communities. The Canadian government refused to build in such safeguards, and therefore they sought for the government to prohibit the use of Islamic law under the Arbitration Act altogether.

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65 See Razack (n 15).
66 Raday (n 39).
68 Ramadan (n 12) at p. 105.
71 McGoldrick (n 5).
72 Bano (n 2).
73 Women’s Legal Education and Actin Fund, “Submission to Marion Boyd in Relation to her Review of the Arbitration Act” (17 September 2004) <http://www.leaf.ca/legal-
However, consent cannot be considered valid where there are very limited or non-existent alternatives for women within their communities. It is imperative that the state take measures to give women greater power to dissent, and one way of achieving this is through educating women of their rights. Consent should be informed by mandatory disclosing of all options available so that decisions can be based on full information. The state must ensure high levels of women’s literacy and the education curriculum should expose all children to information regarding human rights, including gender equality. Further, women dissenters must have feasible economic options, and better education would allow women some independence from patriarchal family support. Although it is suggested by some groups that women are restricted in their ability to object to their unequal treatment within Islamic society, there is widespread existence of dissent among women in traditionalist cultures and religious communities, suggesting that this picture may not be entirely accurate. Therefore, if adequate opportunity to dissent exists for Muslim women, it would be unjust to ignore their voice in this debate by considering that their consent is not valid: if alternative options are available and women are still choosing to use Sharia Councils, it is not the duty of the secular state to prevent them on the grounds of unequal treatment on the basis of gender. It is likely that women who do choose to use Sharia Councils do so because they wish to live a faith based life in accordance with Islamic tradition, and they consider an Islamic arbitration to be more applicable to their circumstances, especially in matters of family law. Therefore, where the secular state can ensure that consent is genuine, (by educating Muslim women about their rights and the options available to them and by providing protection to dissenters) preventing Muslim communities from settling disputes within Sharia Councils would be an unjustified limitation on their religious autonomy. Thus, formalising Sharia Councils would better serve Muslim women as it would allow them to settle disputes under Islamic law when that is their wish, whilst ensuring that they are protected from being coerced into religious arbitration by state regulation ensuring genuine consent.

5. In-equal Islamic Legal Provisions: The Case of Inheritance

There are several examples of Islamic family law which are perceived by Western societies to treat women unfairly, one of which will be discussed below. When compared with Western legal ideas, these rules can seem to be disadvantageous to women, failing to respect their right to equality.
However, these rules must be examined with consideration of the entire Islamic regime as, in their proper context, the perception that they are unequal may be a misconception.\textsuperscript{76}

The Archbishop considered that strict application of Sharia rules of inheritance would be perceived as disadvantaging women in a way which was unacceptable in the eyes of the majority community.\textsuperscript{77} The Qur’an provides that: ‘God directs you as regards your children’s inheritance to the male a portion equal to that of two females.’\textsuperscript{78} At first glance, the idea that daughters are given half the share in inheritance compared to their brothers would suggest that they are being disadvantaged as they are considered inferior to men in their worth.\textsuperscript{79} However, inheritance must be viewed as complementary to other branches of Islamic family law, in which case the inheritance of females must be considered in light of their right to dower and maintenance as a wife, and their right to maintenance as a mother and daughter. The true equality of the provisions regarding inheritance can be seen when understood within the structure of the Muslim family and when social values and responsibilities are taken into account.\textsuperscript{80} Inequality in the distribution of an estate is not due to gender or inferiority,\textsuperscript{81} but rather to reflect the financial obligations of male family members to maintain females. Thus any apparent inequality in the Islamic law is actually inherent wisdom of the requirements of society.\textsuperscript{82}

Women had a different role in Arabian society when the Qur’an was revealed. The Qur’an ensured that women inherited in their capacity as wives, mothers and daughters and therefore rules which may have been equitable under traditional family arrangements may be difficult to apply in modern society and ensure equitable results. For example, Muslim women in the UK may choose not to marry or have family. Some schools of thought within the Islamic community have relaxed the strict interpretation of provisions of Sharia law regarding inheritance to allow the deceased to make a will:\textsuperscript{83}

Many countries have reformed classical inheritance law so as to protect and even enhance the rights of women and to provide greater freedom for the testator to bequeath certain portions as he or she wishes.\textsuperscript{84}

\begin{footnotesize}
\begin{enumerate}
\item Williams (n1) at p. 268.
\item The Qur’an 4:11.
\item See Engineer (n 60).
\item NJ Coulson, \textit{Succession in the Muslim Family} (CUP, Cambridge 1971) at p. 1.
\item M Iqbal, \textit{The Reconstruction of Religious Thought in Islam} (Kazil, 1981) at pp. 169-179.
\end{enumerate}
\end{footnotesize}
The Islamic rules of inheritance, when viewed in the context of Islamic family law in general, are equitable only insofar as traditional family arrangements exist. However, in modern day Britain, different arrangements may exist as compared with society at the time of the revelation of the Qur’an. While some freedom is provided for the testator to take account of such differences, this may not go far enough to ensure that women inherit fairly. Again, if women consent to this disparity, their autonomy should be respected, provided that their consent can be verified as genuine. Where Muslim women object to their unfair treatment, reasonable alternatives should be available, such as those provided by the rules of intestate succession in English and Scottish law. Formalising of the Sharia Council in this context would require an understanding that women had a right of appeal to the secular courts, and that secular law would be considered to prevail over religious rules where women were not treated equally. Shachar’s notion of ‘transformative accommodation’ could once again apply in this context, aiding growth of Islamic law to better recognise human rights.85

6. The Headscarf and The Sharia Debate – a comparison

The truth about the hijab is far from simple. It presents a serious challenge to the West. It challenges our ideas of what’s most important in our own culture and the points at which we draw the line of tolerance. One such point is the equality of women with men. The sight in this country of women, and particularly of young girls, heavily swathed and covered up as if there were not capable of going about as freely as a man, as if there were something about them which needed hiding, is genuinely offensive both to the informed and to the uninformed. ... It immediately suggests a belief system in which women are inferior to men, which is intolerable here.87

The above statement represents a general feeling among Western citizens regarding the incorporation of Muslim communities into European society. The questions raised by the debate surrounding headscarves and veils are pertinent when applied to the discussions regarding formalising Sharia Councils. It appears that British multi-cultural society draws the line at allowing practices which oppress women to be incorporated into the British system in whatever form.

McGoldrick considered that the custom of veiling is inherently unequal as Muslim women are recognisably Muslim, while Muslim men are

85 Shachar (n 10).
86 The term ‘headscarf’ in the context of this debate refers to three different types of garment, the burqa (a top to toe covering with a veiled window), the veil (a top to toe covering with an open slit) and the hijab (a scarf over the head tied under the chin). These terms are used interchangeably in the section below.
not. There is a strong patriarchal element in societies where women veil, and it is likely that male dominance within communities means that women veil because men tell them to: ‘the veil has been a key symbol used by patriarchy to mark and identify women’s bodies and identities’. Veiling may limit a woman’s ‘basic capabilities’ according to Nussbaum, in that it undermines their right to self-respect and non-humiliation, it prevents them being treated on a par with others, and it violates protection from discrimination on the basis of gender. Women have the right not to suffer discrimination by the imposition of forms of veiling that impose asymmetrical requirements of modesty on men as compared with women and that reinforce patriarchal aspects of Islamic communities. Roald describes Muslim women wearing veils in the West as a symbol of the oppression of women, and fears that they are likely to be considered to be making a political statement by their non-Muslim neighbours. She considers that veiled women ‘may evoke anger from non-Muslim Westerners because they believe her to be betraying the struggle for women’s rights by submitting to her own oppression while wearing the veil.’ The wearing of the veil implies that women accept a second-class role in society, ‘in the shadow, downgraded and submitting to men. The fact that some women demand it does not change its meaning. We know that dominated people are the most fervent supporters of their domination.’ Therefore the fight against the veil is not aimed at restricting the choice of Muslim women as to what they can wear, rather it is a fight for the liberty of women and to secure their human right to equality. While some believe that the veil marks women as a second-class citizen, an alternative view is that uncovered women are seen as sexual objects while covering makes people look at a woman as a human being rather than simply a female. Further, the elimination of such temptation leads to a sound society with stable family relations, which benefits the community as a whole. Ramadan recognises that many women in the West now wear the headscarf as an indication of their right to respect their religious customs and to give a visible sign of the modesty in which they wish to be approached. While it is wrong that Muslim women may be forced into wearing the veil or face persecution by their communities if they refuse, restricting the autonomy of women by denying them the right to wear the veil cannot be considered a valid solution: ‘we should take a stand against those who force women to

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88 McGoldrick (n 5).
89 Hirschmann (n 70) at p. 354.
90 Nussbaum (n 75) at p. 79.
91 Raday (n 39).
93 *ibid* at p. 259.
95 Roald (n 92).
96 *ibid*.
97 Ramadan (n 12).
wear the headscarf – and those who would force them not to wear it. Ramadan considers that the promotion of an ‘Islamic feminism’ should not mean the uncritical acceptance of Western behaviour and culture, and therefore that women should remain free to choose to wear traditional Islamic dress and that it should be a matter of individual consent, although such consent can be highly suspect in patriarchal communities.

Such issues sparked a massive debate in France, where Muslim feminists launched scathing attacks against the practice of veiling and provided enthusiastic support for the French government banning the hijab in schools. It was felt that problems arose as schoolgirls were pressured by males within their communities to wear the veil (or voile) and that the veil was intrinsically attached to the dignity and equal status of women. The Family Planning Movement justified banning headscarves in schools, thus: ‘women wearing the voile are a sign of sexist discrimination incompatible with a secularist and egalitarian education.’ Such groups believe that Muslim societies seek to make women ashamed of their bodies and that this shame lies behind the wearing of a headscarf. Some believe that this concept must be fought even at the cost of the well-being of schoolgirls, for example by providing mixed toilet facilities even where there is a genuine risk of attack by male pupils. State intervention regarding Islamic clothing was justified as a method ‘to liberate those who collude in fundamentalism by failing to sign up to gender-equality’.

Muslim religious dress is widely worn in public in the UK, including within secular schools. Headscarves are a common sight, although the burqa is rarer, except in London where a third of the population are from ethnic minorities. While the UK has adopted a more multicultural and tolerant attitude to Muslim dress than that expressed in France, and has not enacted legislation to prohibit the wearing of headscarves in British schools, Muslim dress has still been an issue of conflict within the education system. The Shabina Begum case sparked a nationwide debate regarding

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99 Ramadan (n 12).
100 Raday (n 39).
101 JR Bowen (n 94).
103 Bowen (n 101) at p. 209.
104 Rivers (n 38).
105 McGoldrick (n 5) at p. 173.
108 McGoldrick (n 5) at p. 204.
issues of Islamic dress.¹¹⁰ Such debate centred on the pressure women and girls face from within their communities to wear the headscarf.¹¹¹ Baroness Hale considered that an adult woman can wear whatever she wants, even if this is perceived by some as her colluding in ‘fundamentalist’ oppression. However, she stated that schools have a duty to support female pupils who wish to distance themselves from their communities, and also those who wish to adopt their dominant culture.¹¹²

The Qur’anic provisions regarding the veiling of women are ambiguous,¹¹³ leading many feminists to reject the suggestion that the veil is a religious requirement: rather they consider it as nothing more than a cultural tradition. If headscarves are not worn as religious clothing, this may imply support for the view that they are a political manifestation or a sign of obedience to the patriarchal authority of Muslim communities and families, and as such a ban upon headscarves within the UK could be argued as not infringing religious freedom. However, in accordance with the commitments of British society to tolerance, inclusion and multiculturalism, a better solution would be to respect a woman’s autonomy to wear what she pleases, and to ensure that her choice is well-informed and not subject to community pressure. Therefore the secular state must protect those who choose not to wear Islamic dress, as well as the rights of those who chose to veil.

Critical issues raised in the discussions surrounding the Headscarf Debate can provide valuable insight when applied to the current debate in Britain. It is clear that British society, while encouraging inclusion and multiculturalism, will not permit the inclusion of measures or systems which do not respect human rights and particularly gender equality. Such discrimination is seen as incompatible within the secular society, however it is difficult to justify measures to alleviate this issue which come at the expense of a woman’s right to personal choice. The public perception of women who consent to unequal treatment under Islamic regimes is that they are betraying the fight for women’s rights. Ironically it is because of, and not in spite of, these rights that women should remain free to choose both to wear a headscarf and to seek Islamic arbitration. It is the duty of the secular law to ensure that a woman’s right to choose is respected, that such a choice can be made autonomously, and that instances of inequality in Islamic law are gradually reformed through regulation of the Sharia Councils.

¹¹² R(SB) v Governors of Denbigh High School [2006] 2 All ER 487 at pp. 516-518.
7. Conclusion - How best to protect Muslim women

Arguments against formalising Sharia Councils within Britain in order to limit the power of oppressive institutions must be met with evidence that Muslim women are better protected by state regulation of these institutions. Failure to formally recognise Islamic legal institutions operating in Britain would force these institutions to continue operating in the private sphere, where women are at the mercy of their communities. In some areas, women have little choice but to seek arbitration within the Sharia Council, as, for example, when the Islamic community does not recognise a secular divorce, and therefore maintaining the status quo would not result in protection of women’s rights. By formalising the Sharia Council and subjecting Islamic legal institutions to secular state regulation, arbitrators could be encouraged to comply with national human rights and gender equality legislation.

While the right of Muslim women to exit their communities where they feel they are being treated unfairly should be maintained, it would be inconsistent with human rights legislation if this was the best the state could offer. In order to properly protect the autonomy of individuals with regards to religious freedom, states should ensure that individuals are not limited in their choice to practice religion by possible limitations of their right to gender equality. It is therefore imperative that states work with religious groups to improve recognition of human rights, rather than limiting the choice of those seeking to live a faith based life.

Islamic communities within Western societies in particular are well suited to ‘transformative accommodation’. Qur’anic interpretations are imbued with cultural undertones based on the interpreter’s personal experience. Thus interpretation of religious texts within patriarchal societies may create a disparity between the rights of males and females, rather than the texts themselves providing for such a disparity. The increasing percentage of Muslims living in the UK which were born here increases the likelihood that interpretation of the Qur’anic text by future generations will better reflect the values of British society. The role of the secular state in this context is to catalyze re-interpretation of the texts achieved through co-operation between secular institutions and religious communities. State regulation of a formalised Sharia Council could seek to constrain inequitable practices and ensure greater conformity with human rights legislation. Such co-operation could provide precedent for recognition of gender equality within Islamic communities.

While it is hoped that co-operation between the secular state and religious communities will lead to better recognition of women’s rights over time, it is clear that alternatives should be available where Muslim women object to unfair treatment. Formalising of the Sharia Council should be undertaken on the understanding that women have a right of appeal to secular courts, and that secular law will prevail over religious rules where the secular law would provide better protection of human rights.

114 Shachar (n 10).
The role of the state should not be to limit a women’s choice by prohibiting religious practices which may be unequal between the sexes, such as Islamic arbitration and Islamic dress. It is true that women may be pressured into consenting to unequal treatment within their communities, but the risk of such coercion should not be used to justify measures which would limit the autonomy of Muslim women. Rather, the state should provide better opportunity for women to dissent by ensuring that alternative options are available. Further, women must be educated as to their rights so that all decisions can be based on full information: the state must ensure high women’s literacy rates and education regarding human and gender equality rights within Islamic communities. By ensuring genuine consent of Muslim women to traditional practices, rather than seeking to prohibit such practices, the state can fulfil their obligations with regards to gender equality legislation, whilst not restricting those who wish to live a faith based life in accordance with Islamic traditions. Thus, formalising the Sharia Council could ensure that women have a forum in which to settle disputes using Islamic law, while protecting them from being coerced into accepting inferior treatment. While British society struggles with the notion of allowing systems which do not respect human rights to function within the UK, legislative regulation of these systems should not come at the expense of a woman’s right to personal choice. Rather, the secular law should ensure that a woman’s right to choose is respected, and should provide frameworks within the formalising of the Sharia Council to ensure that such a choice can be made autonomously.
Appendix: 2001 Census Result

Available at <http://www.statistics.gov.uk/ci/nugget.asp?id=293>

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