Recognition of Shariah Family Law in the UK: Assessing the Application of Shariah Succession within Scots Law in Theory and Practice

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Abstract

The practice of Shariah family law has been growing in the UK over the last few decades. This growth in practice has encountered a slow pace of recognition within the existing legal systems, which means that Muslims living in non-Muslim countries who wish to follow Shariah family law in their personal affairs, including marriage, divorce and succession, may face some obstacles in their ability to pursue these practices. This thesis seeks to clarify Shariah family law practices among Muslims and their recognition within the legal systems of England and Scotland. More precisely, this thesis concentrates on investigating the practice of Shariah succession among Scottish Muslims and its applicability to Scots law.

This research utilises mixed doctrinal and empirical methods in examining the research issues. The first part of the thesis conceptualises the broad acceptance of Shariah law in Europe. It begins by examining in context how Shariah law practices are tolerated within the scope of multiculturalism. Subsequently, it moves to examine the process whereby the European Convention on Human Rights may lean more toward restricting Shariah practice, unlike Christian practices, because of the influence of Christianity in shaping modern human rights law. It examines a recent case in Shariah succession practice which may show some flexibility in the accommodation of Shariah family law practices. The second part of the thesis assesses the practice of Shariah family law within domestic and private international law. This assessment demonstrates how failure to recognise Islamic marriages and divorces in the UK impacts on the practice of succession.

The last part of the thesis examines the perception of Shariah succession practice among Muslims in Scotland. An empirical approach was adopted because of the lack of case law and secondary literature in this area. It argues that despite the potential conflicts between Shariah and Scots law, an Islamic will could be applied within the framework of Scots law. However, it concludes that intestacy law may not be feasibly applied without the consent of all of the beneficiaries of the deceased's estate.

This thesis concludes that while Muslim heirs could maintain the rights assigned by forced heirship rules in Shariah law, other factors might hinder their wishes to apply those rules. This could be due to the amount and type of assets the deceased may leave, whereby applying the forced heirship rules may not satisfy the inheritance rules of Scots law.

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work, and has not been submitted for any other degree at the University of Glasgow or any other institution.

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Signature: Ahmad Alkhamis

Abbreviations

MCPs	Multicultural Policies
ECHR	The European Convention on Human Rights
ECtHR	The European Court of Human Rights
MFLO	The Pakistani Muslim Family Law Ordinance 1961
ECFR	The European Council for Fatwa and Research
PIL	Private International Law
ISC	The Islamic Shariah Council in Leyton
BSC	The Birmingham Shariah Council
PBUH	Peace Be Upon Him

Glossary

Al-wassiyyah Al-wājiba	The obligatory bequest
Awal	The doctrine of *awal* is the method applied if the value of the shares exceed the estate
Darura	Necessity
Faskh	Judicial dissolution of marriage
Fatwa	A legal opinion from a religious scholar
Fiqh	Shariah law jurisprudence
Fiqh Al-aqalliyyat	A call for a new interpretation of Fiqh called Fiqh for minorities
Ibadat	The Muslim's acts of ritual worship including praying and fasting.
Ijtihad	A new interpretation
Imam	Imam of a mosque (prayer leader)
Khula	Judicial dissolution of marriage or release from divorce in return for dower
Lex successionis	Rules of succession
Mahr	Dower
Maqasid Al-Shariah	Shariah's revelations
Maslaha	Welfare
Muamalat	The Muslim's acts involve personal transactions, such as sales and sureties, and family law, such as marriage, divorce, inheritance, etc.
Nikah	Muslim marriage

Nikah-only	Islamic marriage took place in the UK without formal registration
Niqab	Face veil
Radd	The doctrine of *radd* is where the assigned shares may be left short of the estate amount.
Ta'asil	The base or the denominator whereby the shares of heirs are transferred to numbers to calculate their exact share.
Tafwid	The wife's right to pronounce their divorce by delegate.
Talaq	The husband's unilateral pronouncement.
The lex situs	The law governing succession to immoveables.
The lex ultimi domicilii	The ultimate domicile of the deceased
Wassiyyah	The Arabic equivalent of will, which means a definite obligation.

Chapter 1 Introduction

1.1 Introduction

The debate over the place of Muslims and Shariah law in Europe, including the UK, has been ongoing since Muslims started spreading around the continent during the mid-twentieth century. These debates are often centred around the accommodation of Shariah law norms that are seen to conflict with the common values and traditions of European countries. Until the 1990s, there was an inaccurate assumption that immigrants, including Muslims, would eventually assimilate with their host countries' mainstream norms.[1] This assumption was based on the prediction that the adherence of British Muslims, for instance, to religious and cultural practices would be an issue for about two generations and, ultimately, British Muslims would submit to 'English behaviour' through education.[2] By the end of the 1990s, however, it was becoming increasingly evident that this assumption was inaccurate.[3] This also means that theories about immigrants being lost between two cultures, as Watson had suggested,[4] should perhaps 'be replaced by a more realistic assessment of the resultant pluralities'.[5] Of course, this would not apply to all Muslims in Europe, for in places the assumption of assimilation 'was not necessarily completely mistaken'.[6] Some Muslims might develop 'new forms of expressing their Islam' that would be 'more appropriate to the European context'.[7] However, the presence of Shariah law and custom in the UK remains firm, and contemporary debate is about its applicability and its accommodation.

The thesis seeks to examine the accommodation of Shariah succession law practices in Scotland and to assess their compatibility with Scots law. The main focus will be on law and legal provision, which will be examined by conducting a doctrinal analysis of the Scots law of succession, and by making comparison with the provisions of Shariah law. The key findings of this doctrinal analysis are supported by a limited empirical study.

However, the purpose of this study raises broader issues about the accommodation of Shariah that indicate the need to locate the aims of this study within a wider context, which in turn

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[1] Werner Menski, 'Muslim Law in Britain' (2001) 62 Journal of Asian and African Studies 127, 135.

[2] Sebastian M Poulter, *English Law and Ethnic Minority Customs* (Butterworth 1986), 3.

[3] Roger Ballard, *Desh Pardesh: The South Asian Presence in Britain* (Hurst & Company 1994), 8; Menski, 135; Jŗgen S Nielsen and Jonas Otterbeck, *Muslims in Western Europe* (Fourth, Edinburgh University Press 2016), 174.

[4] James L Watson, *Between Two Cultures: Migrants and Minorities in Britain* (Blackwell 1977), 3.

[5] Menski, 137.

[6] Nielsen and Otterbeck, 175.

[7] Nielsen and Otterbeck, 175.

raises theoretical issues. This involves examining the accommodation of Shariah law in general, within the context of multiculturalism and human rights within Western Europe. This will allow us to understand the different treatment of Shariah law in different countries across Europe. Another broader context is to investigate the level of recognition within private international law, and within family law in the UK. Assessing these additional elements provides a deeper understanding of the context in which the Shariah rules operate in the UK, and in Scotland in particular, that will set the scene for exploring the recognition of Shariah succession. I will argue that there are ways of accommodating Shariah law that could enable Muslims in the UK to maintain some level of Shariah family law practice, should they wish to do so.

1.2 The Scope of the Research

Against the wider context outlined above, the narrower scope of this research examines the recognition of Shariah succession law within the domestic laws of England and Scotland. The main concern is with Muslims living in the UK who may still have connections to Shariah law in relation to succession, and who want to ensure that Shariah rules are complied with. The findings in this thesis are relevant to that particular population, and do not imply that they are reflective of the views of all Muslim communities in the UK. Most of the literature and case law with regard to Shariah law in the UK is concerned with marriage and divorce, and there is an almost complete lack of case law regarding succession. Therefore, it has been helpful to investigate the treatment of family law more generally in order to measure how English and Scottish courts deal with Muslims' personal family issues, and to draw parallels with similar issues which may arise in relation to succession. Moreover, as succession law occupies a position at the intersection of family law and property law (at least as it is conceived in Scots law), the way in which family rules and practices are accommodated is highly relevant to succession law. This study assesses the practice of Muslims who adhere to Shariah family law, and how officials and courts have responded to these practices. This also allows for further assessment in the abstract of Shariah family law practices within domestic law, and whether these practices can be implemented within English or Scots law. While some studies have examined the Muslim practice of marriage, divorce and, to a small extent succession, Islamic marriages and divorces are subject to certain rules to keep them in line with English and Scottish legal systems.[8] However, this

[8] See Chapter 4 The Accommodation of Shariah Family Law within English and Scots Private International Law below.

inflexibility might lead Muslims in the UK to adopt informal ways of applying Shariah family rules.

Although this study focuses principally on Scotland, most of the literature is considered from an English law perspective, where the majority of Muslims in the UK live.[9] Consideration of the approach of English courts and commentators is useful in providing the context for other parts of the UK. However, the approach of Scots law to Shariah succession rules remains vague. Scotland is a small jurisdiction, where there is both a lack of consideration by the courts and a lack of secondary literature on the subject. It is worth pointing out that Scotland has its own jurisdiction with its own laws, and that within the law on property, family and succession, there is perhaps more distinctions from English law in the areas of property and succession law. In particular, unlike English law, Scots law does not have unlimited testamentary freedom. It might be supposed that this could make it more difficult for Muslims to execute their wishes in a Scots will than in an English one should they wish to follow Shariah rules. Due to the lack of primary and secondary sources, and in order to investigate this issue further, I conducted a limited empirical study in order to gather more information about the practice of Scottish Muslims, in particular whether Muslim heirs would be able to inherit the fixed shares assigned to them by Shariah inheritance rules while living in Scotland. As MacLean observes, 'recent debates about the role of religious systems of law in secular states, for example, Shariah law, are in urgent need of empirical background information'.[10] Moreover, studying in Glasgow, the largest base for Muslims in Scotland, encouraged me to begin to investigate Muslim practices of succession that have not been investigated before. This aspect of the study, although limited in nature, sheds some light on the attitudes of religious Muslims living in Glasgow, from the perspective of religious leaders and legal practitioners.

1.3 The Research Aim and Questions

This thesis started with a general study of how Muslim populations in Europe are accommodated within the context of multiculturalism and human rights to assess how European countries took different approaches to Shariah law. The principal research aim, as

[9] Khadijah Elshayyal, *Scottish Muslims in Numbers: Understanding Scotland's Muslim Population through the 2011 Census* (The University of Edinburgh: The Alwaleed Centre for the Study of Islam in the Contemporary World 2016) <https://www.ed.ac.uk/files/atoms/files/scottish_muslims_in_numbers_web.pdf> accessed 22 March 2022, 6.

[10] Mavis MacLean, 'Families' in Peter Cane and Herbert M Kritzer (eds), *The Oxford handbook of empirical legal research* (Oxford University Press 2010), 303.

explained above, is to assess the compatibility of Shariah succession law with Scots law. This aim led me to consider the position of Shariah law more generally, not just in relation to succession because, as explained above, succession law intersects with family and property law, which make both very relevant to succession law. Moreover, the lack of literature on succession in England or Scotland prompted me to draw on research in family law more generally. This inevitably led me to the literature on Shariah family law, which has been the subject of much more investigation by academics,[11] including its place within UK domestic law, which allowed for a doctrinal approach. This lack of literature and the lack of knowledge about the practice of succession encouraged me to conduct a limited empirical study in order to gain some information about the practice of religious Muslims living in Scotland, mainly because of the almost complete absence of any other academic literature on this specific topic. Therefore, that is how the aim of this study shaped the thesis structure, which is discussed in more detail below.

The main research questions that will guide this research are the following: (1) To what extent Shariah succession law is applicable and therefore recognised within English and Scots laws? This leads to: (2) Whether Muslim heirs in Scotland can maintain the rights assigned to them by Shariah succession law? Regarding the first question, I aim to clarify the position of Shariah family law within English and Scots law by examining its applicability and accommodation with domestic laws, because of the far greater resources in the area of family law which allow for assessing, by analogy, the implications for succession law with a particular focus on the law of succession. The second question then aims to clarify whether Muslim heirs could receive the shares assigned by Shariah forced heirship provisions in succession law without objection or obstacle within English or Scots law

[11] David Pearl and Werner Menski, *Muslim Family Law* (3rd edn, Sweet & Maxwell 1998); Sebastian M Poulter, 'The Muslim Community and English Law' (1992) 3 Islam and Christian–Muslim Relations 259; Manazir Ahsan, 'The Muslim Family in Britain' in Michael King (ed), *God's law versus state law: The construction of Islamic identity in Western Europe* (Grey Seal 1995); Werner Menski, 'Muslim Law in Britain' (2001) 62 Journal of Asian and African Studies 127; Samia Bano, 'Complexity, Difference and Muslim Personal Law': Rethinking the Relationship between Shariah Councils and South Asian Muslim Women in Britain' (University of Warwick Doctoral thesis 2004); Jemma Wilson, 'The Sharia Debate in Britain: Sharia Councils and the Oppression of Muslim Women' (2010) 1 Aberdeen Student Law Review 46; Shaheen Sardar Ali, 'Authority and Authenticity: Sharia Councils, Muslim Women's Rights, and the English Courts' (2013) 25 Child and Family Law Quarterly 113; Rebecca Probert, 'Determining the Boundaries Between Valid, Void and "Non-Qualifying" Marriages: Past, Present and Future?', *Cohabitation and Religious Marriage* (Policy Press 2020); Samia Bano, 'British Muslim Communities, Islamic Divorce and English Family Law' in Joanna Miles, Daniel Monk and Rebecca Probert (eds), *Fifty Years of the Divorce Reform Act 1969* (1st edn, Hart Publishing 2022).

should they wish to do so. Finally, I offer concrete suggestions about how this could be managed.

1.4 The Structure of the Thesis

The main focus of the thesis is to examine the accommodation of Shariah succession law practices in Scotland and to assess their compatibility with Scots law. Before discussing these elements, chapter 2 addresses the place of Shariah law in Europe.[12] It is important to set the scene for this study by examining in context how the Muslim practice of Shariah law, in general, is regarded within the scope of multiculturalism, and how these responses have arisen in Europe. The inclusion of the approach taken by English courts and commentators is intended to provide a contextual background to the central focus of this study, concerning Scots law, and to enable consideration of the wider British context in relation to the theoretical arguments relating to the multiculturalist and assimilationist models. There has been much greater consideration of this issue in the context of English law. This chapter includes a brief discussion of the ongoing political and academic debate about theoretical theories of multiculturalism and its implementation. It also touches on the role of colonialism and the way in which this has contributed to attitudes towards Shariah law today, looking particularly at the UK and France. It discusses how the postcolonial effect associated with multiculturalist approaches in the UK were more tolerant towards managing family law under Shariah than the assimilationist approach in France. The importance of this discussion is because 'understanding conceptions of law within a literary context can provide a valuable insight into our understandings of law and legal processes'.[13] This is essential in order to conceptualise the theoretical analysis and principles built around the accommodation of Shariah law in Europe, particularly the UK.

Another potential route to accommodating Shariah law in Europe lies in the European Convention on Human Rights (ECHR). Chapter 3 examines the accommodation of Shariah law practice in the ECHR, and the response of the European Court of Human Rights (ECtHR) to this practice in order to understand the motivation behind the reactions against Shariah law practices in major European countries.[14] Investigating Shariah law in this

[12] See Chapter 2 Cultural Diversity, Multiculturalism, and the Presence of Muslims in Secular Europe: Theoretical Perspectives below.

[13] Steven Cammiss and Dawn Watkins, 'Legal Research in the Humanities' in Dawn Watkins and Mandy Burton (eds), *Research methods in law* (Second, Routledge 2018), 90.

[14] See Chapter 3 Religion and European Human Rights below.

context suggested that tolerance towards Shariah law, as mandated by Article 9, might be very restricted when compared to Christianity. This chapter explores the case law of ECtHR in favour of securing European identity, particularly of the Christian tradition, unlike cases concerning the Islamic tradition. However, it also demonstrates that the Thrace minority situation[15] may suggest a more tolerant approach towards the accommodation of Shariah family law. Assessing these broader elements in chapters 2 and 3 provides a foundation for the rest of the thesis by providing a broad view of the European debate and the development of how to accommodate minority cultures, including religions.

The following chapter explores attitudes towards Shariah family law in England and Scotland by looking at the approach of the courts, as opposed to any particular public opinion. Chapter 4 assesses the extent to which Shariah law can be applied or accommodated by an English or Scottish court, either when applying their own rules of domestic law, or when rules of choice of law designate a particular foreign law as applicable.[16] It evaluates the recognition of Islamic marriages and divorces to those Muslims who still have ties with their countries of origin. It discusses the impact of English law's rules of formal validity on Muslim ceremonies in England; the very partial recognition given to polygamy; and the strict rules of recognition for non-proceedings divorces and their application to talaqs. This chapter also gives an overview of these issues: the interface between private international law (PIL) or conflict of laws and Shariah law. These topics are worth investigating, because the underlying attitudes might inform the possible approach to Shariah succession cases which may in future arise.[17] Moreover, it explains why there may be recourse to alternative bodies or devices to settle disputes in personal matters - including succession – other than those provided by English or Scots law. As we shall observe later in this thesis, there is a lack of UK case law concerning Shariah succession law.[18] Therefore, analysing family law cases may provide a helpful parallel in speculating as to how English and Scottish courts may deal with Muslim inheritance issues.

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[15] *Molla Sali v Greece* App No 2045214 ECHR 19 Dec 2018, for more details, see section 3.3.2 Succession: Thrace Minority in Greece below.

[16] See Chapter 4 The Accommodation of Shariah Family Law within English and Scots Private International Law below.

[17] Elaine E Sutherland, 'Nikah-Only Marriage: A Scottish Remedy?' (2020) 65 Journal of the Law Society of Scotland <https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-03/nikah-only-marriage-a-scottish-remedy/> accessed 30 November 2021.

[18] Sebastian M Poulter, *Asian Traditions and English Law* (Runnymede Trust with Trentham 1990), 75; Lisa Pilgram, 'British-Muslim Family Law as a Site of Citizenship' (PhD, The Open University 2018), 23.

Chapters 5, 6 and 7 focus on exploring succession law in English, Shariah and Scots law. Chapter 5 assesses the theoretical practice of succession among religious Muslims in the UK.[19] It examines the application of Shariah forced heirship rules within Scots testate and intestate succession. This study suggests that the compatibility question in intestacy law is very different from testacy, and that applying Shariah rules is far less likely to happen with the former. It also assesses the impact of compliance with the formality of marriage with a woman's inheritance. In testate succession, freedom of testation may appear to be far more flexible in accommodating Shariah forced heirship rules. This freedom is less restricted in England than in Scotland, where "legal rights" are likely to be an obstacle to accommodating Shariah rules.[20] Examining these issues is essential for two reasons, firstly to assess the applicability of Shariah succession within English and Scots succession rules and, secondly, to identify the potential conflicts between Shariah succession and Scots succession rules. This step also helped me to formulate the relevant questions that I would focus on in this study in assessing how Shariah succession is actually practised by Scottish Muslims.

Chapters 6 and 7 provide insights gained by conducting interviews with a small number of religious leaders and succession practitioners who have experience of advising Muslims who wish to take account of Shariah succession law. This approach was necessary, because there is no discussion of the practice of succession elsewhere in the literature. Interviews with experts in Shariah and Scots succession rules assess their experience of the applicability of the Shariah rules in both testate and intestate succession. I acknowledge that not all Muslims in Scotland will be aware of or want to apply the Shariah rules, and no attempt is made to generalise the findings from these interviews. However, they did provide some insights in the absence of other sources, and were helpful in leading me to explore alternative legal routes. Chapter 6 reports on the outcome of interviews that targeted a small number of experts in Shariah succession in Scotland. It demonstrates that the popularity of the Islamic will among Scottish Muslims is similar to the general Scottish public, in that only a minority of the population have drafted a will.[21] However, it reveals an interesting point about the applicability of Islamic wills within Scots law, despite the potential theoretical obstacle of legal rights.

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[19] See Chapter 5 Shariah Succession Law in the UK: Potential Conflicts with Scots Succession Law below.

[20] See section 5.3.3 Scottish Legal Rights and Testamentary Freedom below.

[21] See Chapter 6 The Practice of Shariah Succession Law within Scots Law below.

Chapter 7 continues discussion of the insights gained from those interviews, and explores different methods that Scottish Muslims could follow as an alternative to drafting an Islamic will if they wished to take account of Shariah law.[22] It explores how the size of the estate, whether large or small, may impact on opting for a Scottish will instead of an Islamic will. It also briefly assesses the practices of Muslims living in non-Muslim countries from the Shariah point of view. Moreover, it discusses the prevalence of intestacy among Scottish Muslims, and the role of Imams in providing information about Shariah inheritance in an informal way, which may result in a direct conflict with Scots intestacy law. This chapter also investigates the possibility of distributing the intestate estate in accordance with Shariah rules through the deed of variation. Moreover, it assesses the limited prospect of PIL rules as an alternative method for Scottish Muslims to apply Shariah succession. The limitation in involvement in succession also extends to Shariah councils in Scotland, although they may still provide information to Muslim inquiries about succession. This chapter concludes with assessing allegations of discrimination in Shariah succession, and how these are related to the wider context of Shariah family law.

1.5 The Question of Methodology and Methods

This section will summarise the research methods, how they are processed, and the challenges that emerged during the research. I will start by briefly explaining the research framework and the research design. This will involve the importance of adopting a mixed methodology to address my research questions. I will also explain the methods used for assessing the research questions and any adjustments to the chosen method.

1.5.1 Research Design

In the legal field, doctrinal scholarship has been the dominant paradigm by legal researchers, particularly in areas of private law.[23] This 'black-letter' approach[24] focuses on a 'positive-law-orientated' approach that references primary sources of legislations and court cases, and secondary sources of textbooks.[25] Doctrinal research could be used for defining 'the law on

[22] See Chapter 7 Other Options for Succession Practices of Scottish Muslims below.

[23] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research methods in law* (Second, Routledge 2018), 38.

[24] Michael Salter and Julie Mason, Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research (Pearson Education 2007), 68.

[25] Sanne Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' (2018) 02 Law and Method

a specific topic' or in a 'broader legal geographic jurisdictional context'.[26] In spite of its limitations, it has seemed effective for the last two centuries.[27] However, this approach has gradually been supplemented by other social research methods, such as empirical methods operate in addition to positive law.[28] This recent approach has often been termed legal scholarship, in order to distinguish it from the legal doctrinal scholarship.[29] Many legal scholars, involving Holmes,[30] Cotterrell,[31] Posner,[32] Gestel and Micklitz,[33] emphasise the importance of this approach to enrich 'traditional' legal doctrinal scholarship.[34]

This is not to undermine the position of a doctrinal approach within the legal field.[35] It is rather to urge for more engagement rather than a complete - as Watkins termed it - 'isolation from practice'.[36] This combination could be inspired by Holmes's observation from the nineteenth century that, 'for the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics'.[37] Many legal researchers and scholars have expected the emergence of socio-legal studies to challenge the dominant doctrinal approach in legal research.[38] However, an empirical approach may be conducted as a matter of necessity due to limitations in doctrinal materials,[39] since 'knowing the legal rules may give us little understanding of how decisions are actually made in

<http://www.lawandmethod.nl/tijdschrift/lawandmethod/2018/02/lawandmethod-D-17-00010/fullscreen> accessed 8 March 2021, 3.

[26] Hutchinson (n 23), 20.

[27] Hutchinson (n 23), 38.

[28] Taekema (n 25), 3.

[29] Taekema (n 25), 3.

[30] J Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457, 469.

[31] Roger Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25 Journal of law and society 171.

[32] Richard A Posner, 'The State of Legal Scholarship Today: A Comment on Schlag' (2008) 97 Geo. LJ 845.

[33] Rob Van Gestel and Hans-W Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?', 1.

[34] Van Gestel and Micklitz (n 33), 1; Hutchinson (n 23), 23-24.

[35] Mark Van Hoecke, *Methodologies of Legal Research : Which Kind of Method for What Kind of Discipline?* (Bloomsbury Publishing Plc 2013), 17; Dawn Watkins and Mandy Burton, *Research Methods in Law* (Second, Routledge 2018), 23-24.

[36] Hutchinson (n 23), 23.

[37] Holmes (n 30), 469.

[38] Fiona Cownie, Kung-Chung Liu and Christopher Heath, *Legal Academics: Culture and Identities* (Bloomsbury Publishing Plc 2004), 63-65.

[39] Cownie, Liu and Heath (n 38), 197-198; Mandy Burton, 'Doing Empirical Research: Exploring the Decision-Making of Magistrates and Juries' in Dawn Watkins and Mandy Burton (eds), *Research methods in law* (Second, Routledge 2018), 85.

practice; for this, empirical research may be necessary'.[40] If this were true, then the dominant mode in the law field could be 'concerned both with doctrine and with placing those doctrinal materials in their social context'.[41]

My research design took a combination of doctrinal and empirical methods. There are existing primary and secondary sources that covered most aspects of Shariah family law which allowed for a doctrinal approach (seen mainly in chapters 3, 4 and 5). These include research on Islamic marriage and divorce in both domestic and private international law. Therefore, the practice and applicability of Shariah family law are assessed through doctrinal scholarship. This method was necessary to fulfil the research, because when it comes to legal research, legal formalism as a method is indispensable. This method includes critical examinations of the relevant legislation and case law of three various jurisdictions, English, Scots and Shariah law, in order to establish an accurate statement of each law on research issues.[42] Furthermore, a comparative legal method was vital to this research. The functional method seems to fit, precisely when used to compare English, Scots and Shariah inheritance law to examine whether Shariah succession law fits theoretically within English and Scots laws. A further feature of this approach is that it deals with the legal responses without considering whether the compared institutions are legal or non-legal, so long as they are functionally equivalent.[43] Indeed, this is an important feature when examining the work of Shariah councils in the UK as non-legal institutions, compared to the response of UK legal institutions to Muslims' disputes.

1.5.2 Qualitative Approach

The availability of recent empirical studies on succession in England was helpful in examining the position of Shariah Succession law within English law. However, there were some limitations. There is an almost complete lack of literature regarding Muslims' practice of succession in Scotland, as well as a lack of case law throughout the UK.[44] This obstacle meant that an alternative approach had to be considered in order to learn something about the position of Scottish Muslims in Scots law. Therefore, I will outline the methods applied

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[40] Burton (n 39), 67.

[41] Cownie, Liu and Heath (n 38), 197-198.

[42] Hutchinson (n 23), 13.

[43] Mathias Reimann, Reinhard Zimmermann and Ralf Michaels, 'The Functional Method of Comparative Law', The Oxford Handbook of Comparative Law (Oxford University Press 2012) 342.

[44] Poulter, *Asian Traditions and English Law* (n 18), 75; Pilgram (n 18), 23.

in recruiting and selecting the interviewees and the various barriers encountered in recruitment for the qualitative interviews, which will be discussed in more detail below in chapter 6.[45]

Participation in these interviews was limited to a small number of Imams and solicitors who have knowledge of succession matters, and for their wide contacts within the Glasgow Muslim community. The hypothesis was that these participants will be the most likely to be consultant by Muslims families for their succession issues. Initially I had hoped to be able to interview members of the public to ascertain their views; however, this was not possible for a number of different reasons. To start with, the interviews were planned to be conducted at the beginning of the COVID-19 pandemic, which created a significant obstacle to contacting and approaching members of the public. The national lockdown in Scotland, with restrictions on transport across Scotland was also imposed for most of the last two years of my writing period (2020-2021). With that in mind, it was not easy to identify and recruit members of the public who were potentially affected by this issue, given the fact that the Muslim community in Scotland is about 2% of the wider population, and very little is known about their attitudes. That urged me to think more creatively about what I would be able to do as an alternative. I took the decision to reduce the interview component of this thesis to professionals within the Muslim community, in particular figures of authority who would be more likely to be approached by people who want to apply Shariah succession. Another reason is that the aims and scope of the planned interviews was very limited, and conducting interviews with the public might produce an overwhelming amount of data to deal with, particularly with the word limitation of the thesis. My aim was not to reflect the views of the Muslim community generally, but to gain an insight into how often these professional interviewees were asked for advice, and the content of advice that may have been given to families.

However, there is a very limited number of solicitors who promote will-writing specifically for Scottish Muslims. It was difficult to recruit solicitors because I found only one law firm that clearly promote will writing on their website. The other solicitor was recommended by one of the existing participants. Those two solicitors did not know each other, nor were they aware of other solicitors who specialise in Shariah succession.

[45] See Chapter 6 The Practice of Shariah Succession Law within Scots Law below.

Recruiting Imams was slightly more feasible because there are many of them in Glasgow, although not all of those I approached were willing to take part in the study. Also, not every Imam will have experience of dealing with Muslim issues regarding succession and family matters. It is usually only senior Imams in specific mosques who handle these matters. I visited the largest mosques in Glasgow and Edinburgh, among a few other mosques, and there were hesitations in some of the Imams, which entailed that for ethical reasons I could not proceed with the interviews. However, this scarceness might be related to the fact that writing a will may not be a common experience for Scottish Muslims. Indeed, writing a will is not a popular activity among the wider Scottish population, with over 60% of the adult population estimated to be without a will.[46]

Despite these limitations and the small number of interviewees, the fact that this study would be the first examination of its kind has provided an insight into the practice of succession, at least from an expert point of view, that was not previously available. To my knowledge, there are no studies which have addressed these issues in Scotland compared to the situation in England, where a number of studies have addressed related issues.[47] Moreover, the qualitative approach focuses on a limited number of sources, 'which are considered to be data-rich and thus worthy of study, and to examine them in-depth'.[48] This study should provide us with data that cannot currently be found in the literature, thus adding to our knowledge of the practice of succession among Scottish Muslims.

Like many qualitative studies, the insights gained from interviews do not claim to be representative or generalisable, and they do not provide a comprehensive picture of succession practice among Muslims in Scotland. Nor is the data representative of all Muslims in Scotland. The field of inquiry is focused on those Muslims who want to use Shariah law in relation to matters of testacy and intestacy, and the findings from the empirical work are relevant to that specific population, and are not intended to imply that they are reflective of the desires or actions of the members of all Muslim communities in Scotland or in the UK. Nevertheless, the experts I spoke to were able to provide insight into families

[46] Scottish Consumer Council, 'Wills and Awareness of Inheritance Rights in Scotland' (2006), 6.

[47] See section 5.4 Challenge of Testamentary Freedom in English Law below.

[48] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Herbert M Kritzer and Peter Cane (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010), 934.

who had consulted them, and were able to confirm that Shariah succession rules were problematic for some Muslims living in Scotland.

1.5.3 Clarifying Terminology

The terminology in this study may require further illustration to avoid confusion. In terms of Shariah or Islamic law, the former usage in the literature refers to the primary sources of Islam, the Quran and the Sunnah.[49] The latter refers to the sayings of the prophet Mohammad, peace be upon him (PBUH)[50], along with his practice of worship, which may include an interpretation of the provisions set forth in the Quran.[51] It should be noted that these two mechanisms are the main sources, and any later sources must be compatible with the Quran and the Sunnah in order to be valid as a source of Shariah. The term Islamic law, however, is generally used in reference 'to the entire system of law and jurisprudence associated with the religion of Islam' including Shariah primary sources (the Quran and the Sunnah) and 'the subordinate sources of law and the methodology used to deduce and apply the law' which is referred to as *Islamic jurisprudence, 'fiqh'*.[52] However, the terms Shariah law and Islamic law are used interchangeably,[53] which is why in this study I use the term Shariah law to refer to Islamic law. Furthermore, the scope of my study also includes a geographical element of England and Scotland. I refer to the term 'UK' when I am discussing the position of Muslims in the UK in general. However, if the discussion refers to the single jurisdiction of England or Scotland, a reference to Muslims in Scotland or Scottish Muslims (and the same for England) will be used to specify the location of certain practices.

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[49] Irshad Abdal-Haqq, 'Islamic Law - An Overview of Its Origin and Elements' (2002) 7 Journal of Islamic Law and Culture 27, 31.

[50] In Sharia tradition, after mentioning the Prophet Muhammad either in speaking or writing, Muslims are urged to pray for God's peace and blessings to be upon him, the abbreviation (PBUH) stands for (Peace Be Upon Him).

[51] Omar T Mohammedi, 'Sharia Compliant Wills: Principles, Recognition, and Enforcement' (2013) 57 *New York Law School Law Review* 261.

[52] Abdal-Haqq (n 49), 31, 32.

[53] Abdal-Haqq (n 49), 31, 32.

Chapter 2 Cultural Diversity, Multiculturalism, and the Presence of Muslims in Secular Europe: Theoretical Perspectives

2.1 Introduction

The importance of multiculturalism in Europe today lies not only in ensuring the just application of the law in order to prevent discrimination, but also, amongst other issues, in promoting legal and regulatory change for the sake of addressing minorities' distinctive needs.[54] It is necessary when discussing the presence of minorities, such as Muslims in Europe, to address multiculturalism and its challenges.[55] The main purpose of this study is to examine the compatibility of Shariah succession law with Scots law using a doctrinal legal approach. However, the object of this study raises wider issues that indicate the need to locate the objects of this study within a broader context, which in turn raises theoretical issues that need to be examined. The theoretical debate regarding cultural diversity and accommodation of foreign cultures provides insights into how far Shariah law could be acknowledged within western cultures.[56] Moreover, these responses are not uniform, so it is essential to examine how different models have been adopted throughout Europe in dealing with Shariah law.[57]

Furthermore, although this chapter discusses some elements of major European countries in dealing with Muslims, particular attention is paid to the UK as the location of this study. As stated above, English law in context has greater consideration of this issue, so it is referred to in order to provide a contextual background to the central focus of this study, concerning Scots law, and to enable consideration of the wider British context in relation to the theoretical arguments relating to the multiculturalist and assimilationist models. This can also be attributed to the fact that this study ultimately will consider attitudes to Shariah law in Scotland as the location of the empirical research.[58] This is essential in order to conceptualise the theoretical analysis and principles that have been built around the accommodation of Shariah law in the UK. The importance of this approach is because multiculturalism and postcolonial attitudes seem to contribute to the presence of Muslims

[54] Keith Banting and Will Kymlicka, 'Is There Really a Retreat from Multiculturalism Policies? New Evidence from the Multiculturalism Policy Index' (2013) 11 Comparative European Politics 577, 582.

[55] HA Hellyer, *Muslims of Europe: The 'Other' Europeans* (Edinburgh University Press 2009), 13.

[56] See section 2.2 Contemporary Theoretical Debates in Multiculturalism below.

[57] See section 2.3 Secularity Models Across Europe and section 2.4 The Multiculturalist and Assimilationist Approaches below.

[58] See Chapter 6 The Practice of Shariah Succession Law within Scots Law, and Chapter 7 Other Options for Succession Practices of Scottish Muslims below.

around Europe, particularly in the UK and their practice of Shariah law.[59] It allows us to measure the degrees of acceptance of Shariah law, in order to determine how far Shariah law can be tolerated and accommodated within the UK, which will set the scene for the rest of the thesis, in relation to the accommodation of Shariah family law practices, and what the empirical interviews revealed regarding to Shariah succession practice among Muslims in Scotland.

There is a sharp and divisive debate between two distinctive views regarding the growth of pluralism and multiculturalism.[60] The concept is rejected by those who regard it 'as ultimately undermining the state', and tolerated by those who believe either that the 'very idea of unitary state is a fiction or who believe that society does not require or cannot possess a shared culture'.[61] Moreover, some politicians have even blamed multiculturalism for 'a range of current ills' occurring within society, and declared their intent to retreat from this policy.[62] The UK's former Prime Minister David Cameron declared in 2011 that 'state multiculturalism' was responsible for security threats inside Muslim communities in the UK, and supported a shift toward a 'muscular liberalism' which he believed would promote liberalism and universal democratic values.[63] The 'rhetoric in this vein' in the UK has remained firm since then, to construe 'national identity in terms of a shared and cohesive set of values'.[64] Similarly, the German and French political classes have declared multiculturalism a failure in their countries, in 2010[65] and 2011[66] respectively.[67] These

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[59] See section 2.4.3 Dual Jurisprudence and Shariah Family Law in the UK: Postcolonial Effect below.

[60] Bryan S Turner and Berna Zengin Arslan, 'Sharia and Legal Pluralism in the West' (2011) 14 European Journal of Social Theory 139, 144.

[61] Turner and Arslan (n 60), 144.

[62] John R Bowen, *Blaming Islam* (MIT Press 2012), 17.

[63] David Cameron, 'PM's Speech at Munich Security Conference' (5 February 2011) <https://www.gov.uk/government/speeches/pms-speech-at-munich-security-conference> accessed 18 November 2021.

[64] Richard T Ashcroft and Mark Bevir (eds), *Multiculturalism in the British Commonwealth* (University of California Press 2019), 35; 'Shared Values Unite UK People, Says PM in Easter Message' *BBC* (16 April 2017) <https://www.bbc.co.uk/news/av/uk-39611866> accessed 19 January 2022.

[65] M Weaver, 'Angela Merkel: German Multiculturalism Has "Utterly Failed"' *The Guardian* (17 October 2010) <https://www.theguardian.com/world/2010/oct/17/angela-merkel-german-multiculturalism-failed> accessed 18 January 2022.

[66] 'Nicolas Sarkozy Joins David Cameron and Angela Merkel View That Multiculturalism Has Failed' *Dailymail* (11 February 2011) <https://www.dailymail.co.uk/news/article-1355961/Nicolas-Sarkozy-joins-David-Cameron-Angela-Merkel-view-multiculturalism-failed.html> accessed 18 January 2022.

[67] Bowen, *Blaming Islam* (n 62), 17.

declarations have intensified the debate about multiculturalism since then, and alternative policies have emerged in the field as replacements for multiculturalism.[68] Brexit has also become 'entangled' with the debate over multiculturalism, and was seen as a consequence of these debates concerning multiculturalism's failure.[69]

However, although these major European countries seem to be simultaneously moving away from multiculturalism, they show no consensus in their approaches towards multiculturalism.[70] Their differing approaches could be characterised as exemplifying two different models at opposite ends of the system (although presumably some countries will be somewhere in the middle). The first model, 'the Assimilationist' model, requires assimilation of minorities into the dominant culture (at least in the public domain), and toleration of minorities' differences is limited to the private sphere.[71] Conversely, the second model, 'the Multiculturalist' model, acknowledges and tolerates differences in both public and private spheres.[72] Both of these models can be observed when we examine the differing responses to various Shariah rules in European societies. For instance, the wearing of the headscarf (Hijab) in teaching and policing contexts is permitted in certain countries, including the UK, but is forbidden in others, such as France.

However, it appears that both of these models remain present in Europe, which has created challenges for minorities, particularly for the Muslim minority, even within the more tolerant multiculturalist model. Such challenges have resulted in ambiguity, and a lack of unanimity in the motives behind the reaction of European states towards Shariah law. The first section of this chapter will discuss core liberal responses to multiculturalist policy by discussing the work of modern commentators who have tried to assess the plurality of cultural diversity in Europe. The second section will focus on the influence of secularity in Europe in accommodating Shariah. The third part will assess the main pragmatic models that are used in European states to manage diversity, and will compare the two models discussed above where relevant. The last section highlights the debate around whether there has been a retreat from multiculturalist policy in Europe, particularly in the UK and France, following certain

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[68] See section 2.5.2 Is Multiculturalism Dead? and section 2.5.3 'Interculturalism' or 'Civic Integration': A New Approach? below.

[69] Ashcroft and Bevir (n 64), 12, 26. This is further discussed below in section 2.5 The Multiculturalism Debate after the 9/11 and 7/7 Attacks.

[70] See section 2.4 The Multiculturalist and Assimilationist Approaches below.

[71] Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Palgrave Macmillan 2000), 4, 6; Hellyer (n 55), 20, 21.

[72] Parekh (n 71), 4, 6; Hellyer (n 55), 20, 21.

key events. However, before embarking on this, I will briefly examine the emergence and settlement of Muslims in the UK, and how they have impacted the development of Shariah family law application in the UK.

The majority of Britain's immigrants are from Commonwealth countries.[73] Most of them were single male workers who 'were welcomed to come to Europe because Europeans wanted them to fill in the gap in cheap labour', wrongly assuming that they would return to their countries of origin.[74] With relation to the UK population, the latest Census data from 2011[75] highlighted that around 68%, two-thirds, of the British Muslim population were of Asian origin ethnicity, predominantly 38% from a Pakistani background.[76] Moreover, national statistics in 2019 highlighted the number of people who continued their stay in the UK either temporarily for work, family purposes or were granted permanent stay either through settlement or citizenship.[77] Although the number of citizenship grants for both Indian and Pakistani former nationals have seen a fall since their peak in 2014, they were the most frequent national groups applying between 1998 and 2019.[78] Moreover, Syrian immigrants started emerging in the figures for citizenship grants in the last decade; however, the Syrian figures in citizenship grants, compared to South Asian countries' figures such as Pakistan, still demonstrate an immense difference in numbers, 832 compared to 11,803 in 2018.[79] The Commonwealth countries remain the highest source of immigrants to the UK, which continues the ties between the UK and former British colonies.

Some migrants moved to Scotland with their families in that era to cover the shortage of labour, although settlement of migrants in England was then more widespread because the economic transformation was more significant in England.[80] However, the number of south

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[73] Joel S Fetzer and J Christopher Soper, *Muslims and the State in Britain, France, and Germany* (Cambridge University Press 2005), 26, 65.

[74] Hellyer (n 55), 44.

[75] The interactive results of the 2021 latest census in England are planned to be published after the submission date. The Scottish 2022 census are planned to be published from 2023 onwards.

[76] Office for National Statistics, 'Full Story: What Does the Census Tell Us about Religion in 2011? - Office for National Statistics' <https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/religion/articles/fullstorywhatdoesthecensustellusaboutreligionin2011/2013-05-16> accessed 8 April 2022.

[77] Home Office, 'How Many People Continue Their Stay in the UK?' (*GOV.UK*) <https://www.gov.uk/government/publications/immigration-statistics-year-ending-june-2019/how-many-people-continue-their-stay-in-the-uk> accessed 4 October 2019.

[78] Home Office (n 77).

[79] Home Office (n 77).

[80] Stefano Bonino, *Muslims in Scotland: The Making of Community in a Post-9/11 World* (Edinburgh University Press 2017), 19.

Asians settling in Scotland increased over the years, and most of them were from Pakistan.[81] The presence of Pakistani Muslims in Scotland has flourished over the years, and is still dominant, with 60% of Muslims in Scotland today being of Pakistani origins.[82] People of Pakistani ethnicity are the largest non-white ethnic group in Scotland, which also demonstrates 'that the links between Scotland and Pakistan are extremely strong'.[83]

Furthermore, research done on Scottish Muslims shows a high level of integration from many Scottish Muslims within Scottish society, despite the differences in social and cultural aspects. [84] In particular, the second generation of Muslims have a greater integration than their parents, due to being involved in Scottish education and learning the language.[85] The achievement of pupils from Pakistani ethnic minorities, as well as other South Asian ethnicities in Scotland 'matches or is above that of White UK pupils'.[86] This means that 'Muslim families have high aspirations for their children's education', which contribute to their overall integration and engagement with the mainstream society.[87] Moreover, the political sphere in Scotland has seen growing engagement and participation from Muslims, particularly of Pakistani ethnicity, who are still active today.[88] 1970 saw the first elected councillor in the UK from a Pakistani origin, followed by the first parliamentary constituency held by a Pakistani in Scotland in 1997.[89] Currently, the contribution of Scottish Muslims in Scotland's spheres of life is clear, and Muslims are contributing to politics and education within Scottish system.[90] These levels of achievement and engagement from Scottish Muslims within mainstream society amount to permanent settlement in Scotland.

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[81] Bonino (n 80), 20.

[82] Elshayyal (n 9), 15.

[83] Bonino (n 80), 26.

[84] Reza Bagheri, 'Integration: Halal Scots: Muslims' Social Integration in Scotland' in Peter Hopkins (ed), *Scotland's Muslims: Society, Politics and Identity* (Edinburgh University Press 2017), 276.

[85] Bagheri (n 84), 276.

[86] Elisabet Weedon and Sheila Riddell, 'Education: Educational Outcomes of Muslim Pupils in Scotland and Parents' Mobilisation of Different Forms of Capital' in Peter Hopkins (ed), *Scotland's Muslims: Society, Politics and Identity* (Edinburgh University Press 2017), 73.

[87] Weedon and Riddell (n 86), 75.

[88] Peter Hopkins and Peter Hopkins (eds), 'Introduction: Scotland's Muslims: Early Settlement, Current Context and Research Themes', *Scotland's Muslims: Society, Politics and Identity* (Edinburgh University Press 2017), 18.

[89] Hopkins and Hopkins (n 88), 18.

[90] Bonino (n 80), 28.

Research have also shown that younger generation of Scottish Muslims are politically active and engaging in the sphere in various ways.[91] Some research has indicated that a significant number of younger generations of Scottish Muslims tend to a 'selected dual form of identification'.[92] Younger Scottish Muslims make sense of their Scottishness in their identity either because they were born here, or because of their length of residence.[93] Based on these figures, this group of Scottish Muslims consider their national and faith identities as compatible with each other, and not in conflict.[94] That may allow us to conclude that at least some of the younger generation still want to involve Shariah law in their practice, which may justify the research claim that assesses Scottish Muslims' practice of Shariah succession.

This subsection follows the migration of Muslims into the UK and how that is linked to colonialism. It also highlights the fact that most of those migrants are of Pakistani origin and most of them settled in Scotland. Their settlement in Scotland, along with other ethnicities, has increased over the years, which has resulted in interaction and engagement with all aspects of life in Scotland today. However, there are many obstacles that may constitute difficulty for Muslim integration within mainstream society over the past decades, some of which might impact the first generation in particular, and some impact on women. Due to the limitations of the research scope, I will refer to the reference where these matters are discussed in detail.[95] Now, I will move to briefly examine the emergence of Shariah family law in the UK, and how Muslim migrants who settled in the UK have impacted on the progress of Shariah law application.

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[91] Robin Finlay, Peter Hopkins and Gurchathen Sanghera, 'Political Participation: Young Muslims' Political Interests and Political Participation in Scotland' in Peter Hopkins (ed), *Scotland's Muslims: Society, Politics and Identity* (Edinburgh University Press 2017), 94.

[92] Hopkins and Hopkins (n 88), 14; See also: Amir Saeed, Neil Blain and Douglas Forbes, 'New Ethnic and National Questions in Scotland: Post-British Identities among Glasgow Pakistani Teenagers' (1999) 22 Ethnic and racial studies 821.

[93] Hopkins and Hopkins (n 88), 14.

[94] Peter Hopkins, '"Blue Squares",'Proper'Muslims and Transnational Networks: Narratives of National and Religious Identities amongst Young Muslim Men Living in Scotland' (2007) 7 Ethnicities 61, 68.

[95] Peter Hopkins (ed), *Scotland's Muslims: Society, Politics and Identity* (Edinburgh University Press 2017).

2.1.1 Overview of Muslims migrations and settlement in the UK

The majority of Britain's immigrants are from Commonwealth countries.[96] Most of them were single male workers who 'were welcomed to come to Europe because Europeans wanted them to fill in the gap in cheap labour', wrongly assuming that they would return to their countries of origin.[97] In relation to the UK population, the latest Census data from 2011[98] highlighted that around 68%, two-thirds, of the British Muslim population were of Asian ethnic origin, predominantly 38% from a Pakistani background.[99] Moreover, national statistics in 2019 highlighted the number of people who continued their stay in the UK either temporarily for work, family purposes or were granted permanent stay either through settlement or citizenship.[100] Although the number of citizenship grants for both Indian and Pakistani former nationals has seen a fall since their peak in 2014, they were the most frequent national groups applying between 1998 and 2019.[101] Moreover, Syrian immigrants started emerging in the figures for citizenship grants in the last decade; however, the Syrian figures in citizenship grants, compared to South Asian countries figures such as Pakistan, still mark an immense difference in numbers, 832 compared to 11,803 in 2018.[102] The Commonwealth countries remain the highest source of immigrants to the UK, which continues the ties between the UK and former British colonies.

Some migrants moved to Scotland with their families after World War II to cover the shortage of labour, although settlement of migrants in England was then more numerous, because the economic transformation was more significant in England.[103] However, the amount of south Asian settlement in Scotland increased over the years, and most of them were from Pakistan.[104] The presence of Pakistani Muslims in Scotland increased over the years and is still dominant, with 60% of Muslims in Scotland today being of Pakistani

[96] Fetzer and Soper (n 73), 26, 65.

[97] Hellyer (n 55), 44.

[98] The interactive results of the 2021 latest census in England are planned to be published after the submission date. The Scottish 2022 census are planned to be published from 2023 onwards.

[99] Office for National Statistics (n 76).

[100] Home Office (n 77).

[101] Home Office (n 77).

[102] Home Office (n 77).

[103] Bonino (n 80), 19.

[104] Bonino (n 80), 20.

origin.[105] Pakistanis are the largest non-white ethnic group in Scotland, which also demonstrates 'that the links between Scotland and Pakistan are extremely strong'.[106]

Furthermore, research on Scottish Muslims shows a high level of integration amongst many Scottish Muslims within Scottish society, despite social and cultural differences.[107] In particular, the second generation of Muslims are more integrated than their parents, due to being involved in Scottish education and learning the language.[108] The achievement of pupils of Pakistani ethnic origin as well as other South Asian ethnicity in Scotland 'matches or is above that of White UK pupils' achievement average.[109] This means that 'Muslim families have high aspirations for their children's education', which contributes to overall integration and engagement with mainstream society.[110] Moreover, the political sphere in Scotland has seen growing engagement and participation from Muslims, particularly those of Pakistani ethnicity, which is still active today.[111] 1970 saw the first elected councillor in the UK from Pakistani origin, followed by the first parliamentary constituency held by a person of Pakistani ethnicity in Scotland back in 1997.[112] Currently, the contribution of Scottish Muslims in Scottish life is clear, and Muslims are contributing to politics and education within the Scottish system.[113] These achievements and the engagement from Scottish Muslims within mainstream society amounts to permanent settlement in Scotland.

Research has also shown that a younger generation of Scottish Muslims are politically active and engaging in Scotland in various ways.[114] Some research has shown that a significant number of younger Scottish Muslims tend to have 'selected dual forms of identification'.[115] Younger Scottish Muslims mark a sense of Scottishness in their identity either because they were born here or because of the length of residence.[116] Based on these figures, those Scottish Muslims consider their national and faith identities as compatible with each other and not in

[105] Elshayyal (n 9), 15.

[106] Bonino (n 80), 26.

[107] Bagheri (n 84), 276.

[108] Bagheri (n 84), 276.

[109] Weedon and Riddell (n 86), 73.

[110] Weedon and Riddell (n 86), 75.

[111] Hopkins and Hopkins (n 88), 18.

[112] Hopkins and Hopkins (n 88), 18.

[113] Bonino (n 80), 28.

[114] Finlay, Hopkins and Sanghera (n 91), 94.

[115] Hopkins and Hopkins (n 88), 14; See also: Saeed, Blain and Forbes (n 92).

[116] Hopkins and Hopkins (n 88), 14.

conflict.[117] That may allow us to conclude that at least some of the younger generation still want to involve Shariah law in their lives, and some Scottish Muslims may wish to know about the practice of Shariah succession.

This subsection shows the pattern of migration of Muslims into the UK and how that is linked to colonialism. It also highlights the fact that most of those migrants are from Pakistan, and a significant number of them settled in Scotland. Their settlement in Scotland, along with other ethnicities, has increased over the years, which has resulted in interaction and engagement with all aspects of life in Scotland today. However, there are many obstacles that may have presented difficulties for Muslim integration within mainstream society over the past decades, some of which might have impacted the first generation in particular, and some impacts on women. This study does not consider in detail other aspects of Muslim integration in Scotland. Its focus is on the problems presented by the rules of Shariah law for those who wish to continue to apply it in their family life.[118] Now I will move to briefly examine the emergence of Shariah family law in the UK, and the difficulties that may have been encountered by Muslims migrants who settled in the UK in the application of Shariah law.

2.1.2 Overview of Shariah Family Law in the UK

It is important to sketch the historical background in order to observe the expectations of Shariah law from earlier contexts compared to its current position in the UK. A significant part of the historical context will concern English law, because most of the literature is related to English law, due to the fact that the vast majority of Muslims (95%) settled in England.[119] This includes demands by Muslims to apply Shariah family law in the UK and their rejection by the authorities, as well as how Muslims have reacted to this rejection, which still affects Muslims today.

Muslims in Britain have gone through different stages in their demands to apply Shariah law, starting with calls for full recognition of Shariah personal law in the mid-1970s. These were rejected.[120] There are different ways to justify these calls, such as the existence of 'trans-

[117] Hopkins (n 94), 68.

[118] Hopkins (n 95).

[119] Elshayyal (n 9), 6.

[120] RD Grillo, *Muslim Families, Politics and the Law: A Legal Industry in Multicultural Britain* (Routledge 2017), 15; Andrea Buchler, *Islamic Law in Europe?: Legal Pluralism and Its Limits in*

nationalisation relationships'.[121] Some Muslims in the UK did not diminish their ties with their countries of origin, which has made the 'contemporary scene', as Grillo has described it, become 'often multi-jurisdictional and trans-jurisdictional'.[122] Officials in England have remarked that this status has contributed to 'an increasing number of family law cases with an international dimension'.[123] Undoubtedly, some Muslims in the UK are of dual nationality, which was evident in a number of court cases.[124] Furthermore, it is evident that to Muslims, Shariah law is 'an imperative guide for moral conduct',[125] and no law should have supremacy above God's law.[126] Therefore, Muslims' submission to non-Muslim laws is debatable amongst Shariah scholars, in the case of, for instance, granting a divorce from a Western civil court, which might not be a legitimately Islamic divorce.[127] These reasons might explain the robust respect of Muslims for religious norms in Shariah family law.

However, in the postcolonial era, precisely prior to the 1980s, British policy 'encouraged the development of local institutions to handle family disputes'.[128] Although this led to the government providing aid to some ethnic institutions that responded to high levels of Muslim demands for halal food and religious practices in general, this strategy was later altered due to a severe cut in government aid.[129] However, as Menski explained, the issue of recognition is not just about 'having places of worship or holding particular beliefs or values, but also involves putting into practice what one believes and acting in accordance with the values one holds in esteem'.[130]

European Family Laws (Routledge 2011), 81; Sebastian M Poulter, *Ethnicity, Law and Human Rights: The English Experience* (Clarendon Press Oxford 1998), 201.

[121] Grillo (n 120), 3.

[122] Grillo (n 120), 3.

[123] Judiciary of England and Wales, 'Annual Report of the Office of the Head of International Family Justice for England and Wales' (2013) <https://www.judiciary.uk/publications/international-family-justice-report-2012/> accessed 24 November 2020, 23.

[124] *Al-Bassam v Al-Bassam* [2004] EWCA Civ 857; *Chaudhary v Chaudhary* [1985] Fam 19; *Zaal v Zaal* [1983] 4 FLR 284; *Sharif v Sharif* [1980] 10 Fam Law 216; *Qureshi v Qureshi* [1972] Fam 173; *Quazi v Quazi* [1980] AC 744; *MA v JA* [2012] EWHC 2219; *H v S* [2012] 2 FLR 157; *H v H* [2007] Talaq Divorce EWHC 2945 Fam; *El-Gamal v Al-Maktoum* [2011] EWHC 3763 Fam; *El Fadl v El Fadl* [2000] 1 FLR 175; *Dukali v Lamrani* [2012] EWHC 1748 Fam.

[125] Grillo (n 120), 2.

[126] Menski (n 11), 137.

[127] John R Bowen, *On British Islam: Religion, Law, and Everyday Practice in Shariʿa Councils*, vol 62 (Princeton University Press 2016), 92.

[128] Bowen, *Blaming Islam* (n 62). 75

[129] Bowen, *Blaming Islam* (n 62). 76

[130] Menski (n 11), 138.

However, it has been observed that Muslims downgraded their demands for full recognition to calls for equal treatment with other racial groups that have been treated fairly under the Race Relations Act, 1976,[131] other than Muslims.[132] However, many commentators, who are experts in English, Scots and Shariah law, have called for recognition of some elements of Shariah family law since the 1970s.[133] For instance, Pearl believes that Muslims;[134]

> Cannot be cast aside by the English courts in an attempt to integrate the immigrants into the English community around them. This country has a multicultural history and the recognition of alien customs, so long as they do not fall below minimum standards of public policy, would appear to be a valuable contribution to the enhancement of racial harmony.

However, Poulter argues that if this became official policy, then certain elements of Shariah law 'are inherently incapable of legal recognition', as they fail to fit with 'multicultural flexibility' and the aims of 'core values' or 'shared values'.[135] What Poulter argued is that the law should 'allow and, where appropriate, facilitate the continued practice of ethnic minority customs and traditions'.[136] However, according to Poulter, this acceptance would not be absolute, in order to avoid clashes with the 'overriding public interest in promoting social cohesion'.[137] To express Poulter's approach in other words, as Menski explained, British authorities should respond positively to the ethnic minorities' requirements, and this response should be strict only within a 'set of shared values' in which an absolute legal recognition to these accommodations 'must not occur'.[138] Although this response might be 'purportedly liberal', it is clear that it maintains the position of English law as dominant in England.[139] As Bowen noted, 'If Muslims handled marriage and divorce themselves, then

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[131] Race Relations Act 1976 (The Act was repealed by the Equality Act 2010).

[132] Tariq Modood, 'Muslim Views on Religious Identity and Racial Equality' (1993) 19 New Community 513, 517.

[133] David Pearl, 'Muslim Marriages in English Law' (1972) 30 Cambridge Law Journal 120; Michael King and Haleh Afshar (eds), *God's Law versus State Law. The Construction of an Islamic Identity in Western Europe. London: Grey Seal* (Grey Seal 1995), 12; Menski (n 11), 159.

[134] Pearl (n 133).

[135] Sebastian M Poulter, 'Multiculturalism and Human Rights for Muslim Families in English Law' in Michael King and Haleh Afshar (eds), *God's law versus state law. The construction of an Islamic identity in Western Europe. London: Grey Seal* (Grey Seal 1995), 83.

[136] Sebastian M Poulter, 'The Limits of Legal, Cultural and Religious Pluralism' in BA Hepple and Erika M Szyszczak (eds), *Discrimination: the limits of the law* (Mansell 1992), 175.

[137] Poulter, 'The Limits of Legal, Cultural and Religious Pluralism' (n 136), 176.

[138] Menski (n 11), 136.

[139] Menski (n 11), 147.

the civil courts would, in effect, cede territory to them',[140] which is why 'English judges are reticent to take this step'.[141]

The Archbishop of Canterbury, Rowan Williams, gave a lecture in 2008 which attracted attention when he claimed that Muslims resolving their own matters in accordance with their tradition, albeit not conflicting with prevailing laws, are no different from other communities.[142] He challenged the belief that society could only tolerate a single set of values, claiming instead that 'our social identities are not constituted by one exclusive set of relations or mode of belonging'.[143] The Lord Chief Justice at that time, Lord Phillips, echoed Williams's statements, that since Shariah is here to stay, 'There is no reason why Shariah principles, or any other religious code, should not be the basis for mediation or other forms of alternative dispute resolution'.[144] Williams's statement may not be novel, where Werner Menski, a prominent scholar and expert on Shariah family law within the UK has declared, regarding the tension driven by Williams's statement, that he 'had said and written similar things to the Archbishop at least ten years before his talk'.[145] In spite all of the debate over the consequences of his statement, Menski asserted that Williams had made it clear that it merely implies 'that we have to think a little harder about the role and rule of law in a plural society of overlapping identities'.[146]

However, although these calls might attract 'considerable public and academic attention',[147] it seems to have made little if any attention to the authorities. For example, on some occasions, the issue is not about incompatibility with the 'shared values', but rather related to the public conception of Shariah. One of the recent actions that drew an immense 'outcry' was the Law Society's publication of guidance on Shariah wills for solicitors.[148] Although

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[140] John R Bowen, 'How Could English Courts Recognize Shariah' (2010) 7 University of St. Thomas Law Journal 411, 417.

[141] Bowen, 'How Could English Courts Recognize Shariah' (n 140), 418.

[142] Joel Daniels, 'Rowan Williams on Sharia, Secularism, and Surprise' (2014) 49 Journal of Ecumenical Studies 1; Bowen, *Blaming Islam* (n 62), 77.

[143] Rowan Williams, 'Civil and Religious Law in England: A Religious Perspective' (2008) 10 Ecclesiastical Law Journal 262, 265.

[144] 'Lord Phillips of Worth Matravers, Lord Chief Justice of Eng. and Wales, Speech at the East London Muslim Centre: Equality Before the Law (July 3, 2008)', *The Guardian* (3 July 2008) <https://www.theguardian.com/uk/2008/jul/04/law.islam> accessed 10 January 2020.

[145] Werner Menski, 'Fuzzy Law and the Boundaries of Secularism' (2010) 13 Potchefstroom electronic law journal 29, 38; chapter 4 of Pearl and Menski (n 11).

[146] Menski (n 145), 41.

[147] Lisa Pilgram, 'British-Muslim Family Law and Citizenship' (2012) 16 Citizenship Studies 769.

[148] Grillo (n 120), 17.

the Law Society eventually withdrew this guidance with an apology, they admit in their defensive statement that wills distributing assets in accordance with Shariah law are in line with English law.[149] This is an example of reluctance in adding any elements of recognition to Shariah law despite its compatibility with English law. This reaction against Shariah inheritance may be caused by the male-female ratio.[150] We should bear in mind that Shariah succession rules maintain a fixed share to women, which is applied in testate and intestate succession, unlike English freedom of testation, where women could end up with nothing, as we will see later in the thesis.[151]

However, as a result of these rejections, 'traditional concepts of informal dispute settlement' may become an alternative means which results in a 'powerlessness of the state in virtually all matters of family law, including 'succession and property laws'.[152] Although Poulter thinks that the English legal system is a 'reasonably flexible system',[153] he has admitted that it offers limited recognition to Shariah legal concepts.[154] The reluctance to recognise Shariah law has motivated Muslims to develop unofficial new hybrid rules.[155] Pearl and Menski argue that the preservation of Shariah rules, including succession, are 'fairly easy' for Muslims in England.[156] They believe that Muslims have tackled the issue of conflict with English law by developing a hybrid system, called (*angrezi shariat)* that has developed via an 'intricate combination of selective use of English legal rules and Muslim legal principles'.[157] These rules are basically a combination of domestic law and Shariah law, in which Muslims may have to both marry twice and divorce twice in order to satisfy English law and simultaneously adhere to Shariah law.[158] Another example of the hybrid system would be teaching English Muslims the method of making wills under English law while preserving

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[149] 'Society Defends Sharia Wills Practice Note' (*Law Gazette*, March 2014) <https://www.lawgazette.co.uk/practice/society-defends-sharia-wills-practice-note/5040519.article> accessed 24 November 2020.

[150] See section 5.2.1 Male-Female Ratio below.

[151] See Chapter 5 Shariah Succession Law in the UK: Potential Conflicts with Scots Succession Law below.

[152] Menski (n 11), 149.

[153] Poulter, 'Multiculturalism and Human Rights for Muslim Families in English Law' (n 135), 82.

[154] Poulter, 'Multiculturalism and Human Rights for Muslim Families in English Law' (n 135), 85.

[155] Pearl and Menski (n 11), 74.

[156] Pearl and Menski (n 11), 485.

[157] Pearl and Menski (n 11), 485. Angrezi Shariat as explained by Shaheen Ali in Authority and Authenticity: Sharia Councils, Muslim Women's Rights, and the English Courts, 126: Angrezi' means 'English' in Urdu; 'Shariat' denotes Shari'a but note the spelling which is how it is written and pronounced in Urdu.

[158] Pearl and Menski (n 11), 77.

the supremacy of Shariah law.[159] There is a lack of literature in relation to the position of Scottish Muslims with regard to writing an Islamic will within the Scots law framework.

However, Muslims have become 'skilled cultural navigators'[160] and have learned how to live a combined life in the UK, with the emergence of hybrid rules.[161] Although, as Modood asserts, it may not be feasible to be British and Muslim at the same time, British Muslims have learned to balance between Shariah and English law in a way that official law did not achieve.[162] However, there is no doubt that ethnic minorities become 'on their own terms' part of the 'British social order'.[163] Therefore, as Ballard has questioned;[164]

> Hence the underlying challenge is simple: how - and how soon - can Britain's white natives learn to live with difference, and to respect the right of their fellow-citizens to organise their lives on their own preferred terms, whatever their historical and geographical origins?

The answer to Ballard's question has been examined throughout this study, though it is a more or less negative response. Even though most British Muslims have opted for legal pluralism, dividing their loyalty between both legal systems, the harmonisation system raises potential concerns over Muslim loyalty.[165] A recent study examining the hybrid rules currently followed by Muslims in England observes that this system ought not to be perceived as 'an indication of lack of citizenship, belonging and identification with imaginary British core values'.[166] The study concludes that:[167]

> The creative navigations and legal innovations in the field of British-Muslim family law are in fact an expression of a sense of belonging being forged, and a place for Islam in Britain being negotiated that brings together different registers of British and Muslim law, not without contestations, but clearly overcoming perceived incompatibilities between occidental and oriental ways of life.

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[159] H Abdal-Haqq, A Bewley and A Thomson, *The Islamic Will* (Dar Al Taqwa Ltd 1995).

[160] Roger Ballard, *Desh Pardesh: The South Asian Presence in Britain* (Hurst & Company 1994), 31.

[161] Pearl and Menski (n 11), 76.

[162] Tariq Modood, *Not Easy Being British: Colour, Culture and Citizenship* (Runnymede Trust 1992).

[163] Ballard (n 160), 8.

[164] Ballard (n 160), 8.

[165] Menski (n 11), 153.

[166] Pilgram (n 18), 228.

[167] Pilgram (n 18), 228,29.

However, this hybridisation is not fully recognised under either English or Scots law, which creates a few obstacles that can hinder its value. Moreover, this 'extra-legal' strategy is one of the reasons behind minorities bypassing the state's laws and institutions and trying to resolve their issues within their own community.[168] This emergence, according to Menski, limited the intervention of English courts in Muslim disputes, in which - since the 1970s and 1980s - Muslim disputes declined.[169] Therefore, approaching the English and Scottish courts might not be always a satisfactory choice for Muslims, as we shall see in detail in chapter 4 below.[170] This failure of recognition *inter alia* has led Muslims to develop, in addition to the hybrid rules, 'their own quasi-legal mechanisms to solve difficult legal issues that arise in the community'.[171]

The informal dispute settlements are called Shariah councils and came into existence in the 1980s, in alliance with mosques, with the majority of councils set up by South Asian communities.[172] They aim to solve Muslim disputes - particularly in family law matters - that arise due to the mandatory application of English law.[173] The result is that these disputes primarily concern Muslim women who desire to obtain a divorce, with the striking outcome that over 90% of councils' work involves such cases.[174] This is due to many reasons, such as refusal of cooperation by the husband to pronounce the divorce,[175] or the absence of the husband.[176] In addition to these reasons, the review concluded that other reasons were associated with women's use of Shariah councils, such as failing to register a marriage, or family or community pressure for a religious divorce to accept that their relationship is over.[177] However, there is no evidence whether Shariah councils in England are involved in distributing the assets in accordance with Shariah inheritance law. As both the independent

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[168] Menski (n 11), 149.

[169] Menski (n 11), 158.

[170] See Chapter 4 The Accommodation of Shariah Family Law within English and Scots Private International Law below.

[171] Menski (n 11), 150.

[172] 'The Independent Review into the Application of Sharia Law in England and Wales' (UK Government 2018) <https://www.gov.uk/government/publications/applying-sharia-law-in-england-and-wales-independent-review> accessed 30 November 2021, 15.

[173] Pearl and Menski (n 11), 77.

[174] 'The Independent Review into the Application of Sharia Law in England and Wales' (n 172), 5; Ali (n 11), 130; Islam Uddin, 'In Pursuit of an Islamic Divorce: A Socio-Legal Examination of Practices Among British Muslims', *Cohabitation and Religious Marriage* (Policy Press 2020), 123.

[175] Raffia Arshad, *Islamic Family Law* (Sweet & Maxwell 2010), 35.

[176] Bowen, 'How Could English Courts Recognize Shariah' (n 140) 19.

[177] 'The Independent Review into the Application of Sharia Law in England and Wales' (n 172), 13.

review and Bowen observed, although the council's members might provide advice regarding general matters of Islamic law, they do not pronounce on asset distribution.[178] The rule of Shariah councils in Shariah family disputes may be influenced by the colonial treatment by British authorities of Indian Muslims, as discussed further below.[179] That has also impacted the manner in which Muslims in the UK settle their personal disputes with Shariah councils. This highlights the experiences of Muslims in the UK, and their attempts to navigate through different legal systems in the UK. Now I will turn to briefly discuss the core liberal responses to multiculturalist policy and cultural diversity in Europe.

2.2 Contemporary Theoretical Debates in Multiculturalism

The relationships between human nature and culture have been debated since ancient times. However, traditional thoughts on culture might not be helpful in shaping a coherent view of moral and cultural diversity in the modern era. For instance, the theory of monism, rooted in ancient Greek and in Christian thought, did not consider the role of culture in shaping human beings, nature or the good life, ignoring the significance of cultural diversity.[180] The Greeks did not consider the fact that different societies have different understandings of the structure of human nature, while the Christian rejection of the value of all other forms of religion, claiming that there is no salvation outside Christianity, is limited to say the least.[181] Instead, contemporary liberal responses to diversity have been shaped by assigning significance to shared human nature and the cultural embeddedness of human beings.[182] They have also redefined liberalism to make it more open to diversity, without breaching its commitment to certain universal values.[183]

2.2.1 Will Kymlicka: National Minorites vs Ethnic Minorites

Kymlicka regards culture as vastly important for human development in two respects. First, the role of autonomy in building people's life structure—such as deciding what is valuable—

[178] Bowen, *Blaming Islam* (n 62), 82; 'The Independent Review into the Application of Sharia Law in England and Wales' (n 172), 13.

[179] See section 2.4.3 Dual Jurisprudence and Shariah Family Law in the UK: Postcolonial Effect below.

[180] Parekh (n 71), 80.

[181] Parekh (n 71), 23, 29.

[182] Parekh (n 71), 80.

[183] Parekh (n 71), 80.

develops their capacity for choice. Secondly, culture contributes to stability—for instance, a sense of identification and belonging, human well-being, social solidarity.[184] Therefore, he believes in the right of minorities to maintain ties with their own cultures, as do Joppke and Taylor.[185] That may be why Kymlicka rejects Rawls' theory of political liberalism[186] because it both lacks coherence and is unfair for ethnocultural minorities.[187] He asserts that every state must decide on certain basic elements, such as the official language and public holidays, and that these decisions were made in a time of less cultural diversity—that is why most holidays are consistent with the Christian holy days.[188] Therefore, he rejects the neutrality theory, since a state will unavoidably endorse specific cultural identities, which would result in the disregard of other identities.[189]

However, Kymlicka believes cultural minorities have two distinct positions in the social spectrum; one being national minorities, and the other ethnic minorities. Kymlicka has 'defended the right of national minorities to maintain themselves as culturally distinct societies, but only if, and in so far as, they are themselves governed by liberal principles'.[190] However, liberals should be open-minded towards non-liberal claims, and not consider their point of view as an objection to tolerance, because liberals might learn valuable contributions from non-liberal viewpoints, instead of considering any dialogue with non-liberals as a matter of bargaining.[191] At the other end of the spectrum, ethnic minorities, such as newly arrived immigrants, are immensely different from those of national minorities in Kymlicka's scale, as they are not in a position to claim self-government or cultural autonomy.[192] Moreover, liberal states are entitled to impose liberal principles upon them, because they have waived their rights to their own culture by voluntarily choosing to leave their country of origin.[193]

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[184] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press 1996), 84.

[185] Christian Joppke, 'Multicultural Citizenship: A Critique' (2001) 42 European Journal of Sociology 431, 434; Taylor (n 39).

[186] John Rawls, *Political Liberalism: Expanded Edition* (Columbia University Press 2005), 442.

[187] Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 184), 108.

[188] Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 184), 114.

[189] Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 184), 108.

[190] Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 184), 153.

[191] Will Kymlicka, 'Liberalism, Dialogue and Multiculturalism' (2001) 1 Ethnicities 128, 134.

[192] Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 184), 170.

[193] Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 184), 170.

However, Parekh observes this distinction as a hierarchical division, in which national minorities are assigned a higher 'degree of moral importance, rights and status' than immigrants.[194] He asserts that older groups such as Jews 'have been allowed to maintain their illiberal institutions' and have 'a strong claim to maintain' self-government or cultural autonomy.[195] Kymlicka rejects Parekh's criticism, and explains his claim that 'these differential rights promote equality', because 'they reflect equal consideration for the different needs and circumstances of the various groups', and help them 'to achieve full and equal citizenship in the way that best reflects their circumstances'.[196] Although ethnic minorities may have no choice but to integrate with the dominant culture, he stresses that they are urged to retain some aspect of their culture, because integration into the dominant culture does not mean complete assimilation.[197] Therefore, Kymlicka places immense significance on the influence of culture in terms of their development as human beings.[198]

A) Religion is Not a Culture

Multiculturalism with regard to Muslims is more complicated, particularly from Kymlicka's point of view, as he dismisses religious groups as eligible candidates for multiculturalism.[199] As Kymlicka does not offer a proper justification for his stance, Modood, who is in favour of multiculturalism, characterises Kymlicka's approach as 'secularist bias'.[200] To elaborate on this argument, while Kymlicka rejects Rawls' neutrality theory, since he regards this theory as being unfair to ethnocultural groups, Modood asks the question: 'If it is unfair to ethnocultural groups, then is it not unfair to ethnoreligious groups?'.[201] Hellyer points out that religious groups' position to culture is either misunderstood or misinterpreted, because, while 'multiculturalism has predominantly been concerned with cultural groups per se, not specifically with religious groups', consideration of a religious group as a culture would occur only when designating it as a cultural group.[202] However, it could be argued that Kymlicka's view on religion's position within culture is that religion and language are

[194] Parekh (n 71), 104.

[195] Parekh (n 71), 104.

[196] Kymlicka, 'Liberalism, Dialogue and Multiculturalism' (n 191), 136.

[197] Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 184), 78.

[198] Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 184), 84.

[199] Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 184), 170.

[200] Tariq Modood, *Multiculturalism* (Polity Press 2013), 25.

[201] Modood, *Multiculturalism* (n 200), 24.

[202] Hellyer (n 55), 25.

categorically different: language is a necessary element to the functioning of the state unlike religion, which is optional.[203] Another difference is that in terms of languages, citizens are able to learn more than one language, whereas they are not capable of simultaneously worshipping different religions.[204] Therefore, the possibility of a multilingual state may be feasible, but a multi-religious state may not be. Modood believes these arguments make little sense, since Kymlicka's theory concerns ethnocultural groups: 'all culture contains elements that are no more necessary than religions, and some cultures are centred around religion'.[205] Indeed, Modood references diverse countries, such as Germany and India, to rebut Kymlicka's approach, as each country 'incorporates several organized religions and their legal principles', and does not imply that everyone has 'to believe in any or all the relevant faiths.'.[206]

2.2.2 Bhikhu Parekh: 'Rethinking Multiculturalism'

Returning to Parekh, he believes the question remains as to whether the host country has the right to enforce these liberal principles, particularly in the event of mass migration in which it is inappropriate 'to say that one's culture is confined to one's country'.[207] Moreover, the host culture does not appreciate minority cultures, whether national or ethnic, because of the consideration of the liberal view as being the universal model. [208] However, there might be a high chance that minorities may not believe in these principles to lead their internal spiritual life,[209] because it could be seen as one distinctive traditional culture, like any other culture.[210] Therefore, developing a liberal multiculturalist theory as the political-institutional basis of a multicultural society would exclude non-liberal, non-western societies which may not be attracted to liberalism.[211] That may be why Parekh sees Rawls' political liberalism theory[212] lacks space for diversity, for the reason that it is composed of individualist states, each of which 'has no resources to accommodate these [cultural differences] and other demands for

[203] Modood, *Multiculturalism* (n 200), 25.

[204] Modood, *Multiculturalism* (n 200), 26.

[205] Modood, *Multiculturalism* (n 200), 26.

[206] Modood, *Multiculturalism* (n 200), 26.

[207] Parekh (n 71), 103.

[208] Parekh (n 71), 107.

[209] Parekh (n 71), 107.

[210] Parekh (n 71), 14.

[211] Parekh (n 71), 14.

[212] Rawls (n 186), 442.

differential treatment'.[213] This would result in a means to encourage 'some ways of life and discourage others, or even exclude them altogether' to avoid any conflicts with the political conception of justice.[214] For example, reinterpreting the principles of Shariah law 'in light of the democratic principles of equality of sexes and freedom of conscience' could be considered to endanger the integrity of the traditional texts of Shariah law.[215] Therefore, creating a society with a specific form of justice would not be possible unless people of different cultures lived together and developed common interests, culture, and possibly language, in order to share a common conception of justice.[216]

What may be more appropriate, in Parekh's view, is an appreciation and an accommodation of plural understandings of culture through adopting a theoretical framework that is capable of generating these understandings.[217] However, the approach Parekh suggests is still that of a robust liberalist orientation, which would attempt 'to keep the dialogue going to generate a body of collectively acceptable principles, institutions and policies'.[218] Certainly, such a dialogue requires the communities involved to endorse institutional preconditions like freedom of expression and equal rights in order to develop common sense values among the citizens in the long term, as otherwise it would not gain stability.[219] Their commitment to the community is for the common interest, and despite these communities' differences and potential challenges to one another's lifestyles, the commitment to a unified community would remain unaffected.[220]

This approach, as illustrated by Modood, abandons moral monism and cultivates less dependence on liberalism.[221] However, Modood thinks this idea is 'too restrictive of the meaning of a national identity'.[222] For instance, developing a British Islamic identity within this context would mean developing an Islam that was appropriate to a particular country's

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[213] Parekh (n 71), 90.

[214] Rawls (n 186), 195, 196.

[215] Parekh (n 71), 88.

[216] Parekh (n 71), 85.

[217] Parekh (n 71), 108.

[218] Parekh (n 71), 340.

[219] Parekh (n 71), 341.

[220] Parekh (n 71), 341.

[221] Tariq Modood, *Multicultural Politics: Racism, Ethnicity, and Muslims in Britain* (Edinburgh University Press 2005), 172.

[222] Modood, *Multicultural Politics: Racism, Ethnicity, and Muslims in Britain* (n 221), 175.

culture, which is complicated to conceptualise.[223] Another difficulty which would occur from this view is making assertions such as linking the French language with French identity, likewise the national identity of the Welsh.[224] Furthermore, Kymlicka agrees with Parekh's approach that non-liberal ethnicity should be able to challenge liberal principles, meaning that liberals should be open-minded towards non-liberal claims, and not consider their point of view as an objection to tolerance because it is inconsistent with liberal principles.[225]

As we have seen above, scholars such as Parekh dismiss views of total rejection of illiberal principles, because some cultural doctrines may not consider liberal principles to be universal principles. For instance, the inequality of women in Shariah succession law is incompatible with liberal principles, yet it is fair to say that the double share for males over females of the same rank (male-female ratio)[226] outlined in Shariah succession is rational, because it can be justified by 'the greater economic burden of males in society and under the law, in that they have to provide for the dower (*mahr*)[227] and maintain women financially'.[228] However, it is little wonder that there is limited consensus among scholars despite that the fact that they share liberal standpoints, because, as we have seen earlier, multiculturalism is a developing topic which is also affected by political standards. Therefore, the debate surrounding multiculturalism has unfolded, due to many reasons such as different approaches that each country adopts and the different circumstances that might impact political attitudes toward multiculturalism policy, such as the events of 9/11 and the London 7/7 attacks, which will be discussed further below.[229] Now I will turn to briefly discuss the secularity models to examine its role in accommodating Shariah.

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[223] Modood, *Multicultural Politics: Racism, Ethnicity, and Muslims in Britain* (n 221), 175.

[224] Modood, *Multicultural Politics: Racism, Ethnicity, and Muslims in Britain* (n 221), 176.

[225] Parekh (n 71), 111, 267.

[226] In Shariah succession, if the male and female heirs are from the same degree of relationship to the deceased e.g. the deceased's sons and daughters, the female receives half as much as the male. More details below in section 5.2.1 Male-Female Ratio.

[227] *Mahr* is a payment obligation on the husband to the wife once they entered into a marriage contract. it might be payable at once or it might be divided to prompt mahr (due immediately) or deferred mahr (due on the husband's death or on the divorce), for more on this, see; Mona Siddiqui, 'Mahr: Legal Obligation or Rightful Demand?' (1995) 6 Journal of Islamic Studies 14.

[228] Nadjma Yassari, 'Intestate Succession in Islamic Countries' in Kenneth GC Reid, Marius J de Waal and Reinhard Zimmermann (eds), *Comparative Succession Law* (Oxford University Press 2015), 424. See section 5.2.1 Male-Female Ratio below.

[229] See Section 2.5 The Multiculturalism Debate after the 9/11 and 7/7 Attacks below.

2.3 Secularity Models Across Europe

The European reaction to Muslim practices may reflect the whole identity of the continent, as there are three prominent characteristics shared among European countries. The first is the legacy of Christianity. Secondly there is secularism, which evolved as a reaction against the – then dominant – religious legacy. Secularism is often upheld as a key value in response to the emergence of Islam in European societies.[230] The final feature concerns political and legal principles, such as democracy, liberalism and human rights.[231] While there is no unanimous model in Europe for the relation between state and religions, it can be divided into three different models.[232] First, the existence of a state church, such as in England and Scotland, Sweden and Greece.[233] This model is interconnected with the second model the 'concordat-type arrangements', which is the predominant type in western Europe, apart from France.[234] This is a moderate form of secularism which refers to the cooperation agreement between the state and religious authorities, which may vary based on religious requirements and the historical context of a religion.[235] Finally, there is a radical form of secularism represented by the complete separation between the State and all religious organisations, exemplified by France and Switzerland.[236]

In relation to these models, the former Archbishop of Canterbury, Rowan Williams, put forward 'a concrete proposal of how different traditions can interact in a secular, pluralistic society without having to sacrifice a recognition of their own tradition's particularities'.[237] This argument is relevant to discussion of this topic, which will focus on two different models of citizenship which are expressed within European countries today.

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[230] Maurits S Berger, 'Understanding Sharia in the West' (2018) 6 Journal of Law, Religion and State 236, 255.

[231] Maurits S Berger, 'Understanding Sharia in the West' (2018) 6 Journal of Law, Religion and State 236, 254.

[232] *İzzettin Dogan and Others v Turkey* App No 6264910 ECHR 26 April 2016 [60].

[233] *İzzettin Dogan and Others v. Turkey* (n 232) [60].

[234] *İzzettin Dogan and Others v. Turkey* (n 232) [60]; Modood, *Multicultural Politics: Racism, Ethnicity, and Muslims in Britain* (n 221), 149.

[235] *İzzettin Dogan and Others v. Turkey* (n 232) [175]; Modood, *Multicultural Politics: Racism, Ethnicity, and Muslims in Britain* (n 221), 142.

[236] *İzzettin Dogan and Others v. Turkey* (n 232) [60]; Modood, *Multicultural Politics: Racism, Ethnicity, and Muslims in Britain* (n 221), 142.

[237] Daniels (n 142), 2.

2.3.1 Procedural Secularism

The first model is what Williams refers to as 'procedural secularism', in which decisions are made in accordance with the public interest.[238] While religious manifestations are equally practised, the state acts neutrally by considering the arguments of all sides and no privilege is given to a single religious group over another.[239] This might be viable in creating an interactive society no matter the background diversity. Consequently, this type of secularism may result in interactive pluralism, which Williams is optimistic could form 'a peaceful future of pluralistic society'.[240] Siddiqui also emphasises that this type of secularism may be the only way to embrace religious diversity in one society.[241] Since 'diversity succeeds when it is negotiated through multiple voices and competing claims', a state in this context will consider engaging citizens equally in constructive debate.[242]

This model arguably derived from Rawls' theory of state neutrality,[243] in that this scheme is likely not to be as effective as Williams wishes, particularly in a country with a dominant culture as is the case in most European countries. The neutral stance of the state cannot resist a common value derived from a certain religion, which results in the privileging of that religion.[244] For example, public holidays are designated within the interest of one religion such as Sundays, Easter and Christmas holidays.[245] However, this model offers tolerance towards minority cultures, as is the situation in the UK, where the debate surrounding Shariah-based practices is less tense than in France.[246] The UK desired to redefine British common values to tolerate difference, whereby 'difference was tolerable only in so far as it was in line with the majoritarian British sensibility'.[247] In spite of the fact that British sensibility is 'underwritten by racial, religious, and gendered formation', it is also affected

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[238] Daniels (n 142), 4.

[239] Shaheen Sardar Ali, 'Religious Pluralism, Human Rights and Muslim Citizenship in Europe: Some Preliminary Refelections on an Evolving Methodology for Consensus' in Maria Laetitia Petronella Loenen and Jenny Elisabeth Goldschmidt (eds), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Intersentia Antwerpen 2007), 314.

[240] Daniels (n 142), 5.

[241] Mona Siddiqui, 'Editorial: Sharia and the Public Debate' (2008) 9 Political Theology 261, 264.

[242] Mona Siddiqui, 'Editorial: Sharia and the Public Debate' (2008) 9 Political Theology 261, 264.

[243] Modood, *Multicultural Politics: Racism, Ethnicity, and Muslims in Britain* (n 221), 143.

[244] Ali, 'Religious Pluralism, Human Rights and Muslim Citizenship in Europe: Some Preliminary Refelections on an Evolving Methodology for Consensus', 319.

[245] Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 184), 114.

[246] Brenna Bhandar, 'The Ties That Bind: Multiculturalism and Secularism Reconsidered' (2009) 36 Journal of Law and Society 301, 315.

[247] Bhandar (n 246), 315.

by British colonial orientations, discussed further below[248], which tolerate differences.[249] This may explain the tolerance towards Shariah councils and Muslim women wearing various types of veils in the UK.[250]

2.3.2 Programmatic Secularism

The second concept of secularism in Europe is what Williams refers to as 'programmatic secularism', in which there is no place for religion in the public domain.[251] The development of this type of secularism is unappreciative of overt religious manifestation[252], meaning that there is no place for religious viewpoints in public debate. Religious manifestations are more likely to clash with this type of secularism, due to the public being unappreciative of their overt manifestation.[253] This explains the banning of religious symbols in public schools in France in 2004[254], followed the banning of the face veil in public places in 2010.[255] These bans emphasise that this secularist doctrine is an incontestable element of France, with roots going back to the nineteenth century, and has been enshrined in law since 1905.[256] This principle may be an 'ongoing project' which in its contemporary understanding emphasises individuals from different cultural traditions coming to terms with living together, bonded by citizenship ties.[257] Moreover, this type of secularism is also regarded by Williams to be a gateway to fundamentalist religion.[258] The exclusion of religion from the public domain

[248] See Section 2.4.3 Dual Jurisprudence and Shariah Family Law in the UK: Postcolonial Effect below.

[249] Bhandar (n 246), 315.

[250] Bhandar (n 246), 315.

[251] Daniels (n 142), 5.

[252] Maurits S Berger, 'Understanding Sharia in the West' (2018) 6 Journal of Law, Religion and State 236, 258.

[253] Maurits S Berger, 'Understanding Sharia in the West' (2018) 6 Journal of Law, Religion and State 236, 258.

[254] Bhandar (n 246), 315.

[255] Hakeem Yusuf, 'S.A.S v France: Supporting "Living Together" or Forced Assimilation?' (2014) 3 International Human Rights Law Review 277, 278.

[256] Bhandar (n 246), 316.

[257] John R Bowen, *Why the French Don't Like Headscarves: Islam, the State, and Public Space* (Princeton University Press 2008), 15.

[258] Daniels (n 142), 5.

would lead to isolating individuals from the mainstream in their separate cultures.[259] Because:[260]

> Once privatized, by being excluded from public discussion, fundamentalism seeks to replace the extant and reigning secular certainties with its own religious certainties.

This discussion allows us to assess which model of secularism is more tolerant to accommodate Shariah rules, in order to reflect on the objectives of this study. Although the procedural secularism model may be more tolerant than the other model, it is difficult to assume that such a model would be opened to accommodate illiberal principles enshrined in Shariah rules, such as the inequality of sexes in Shariah succession. The accommodation of these rules will be uncovered through this thesis, but it is important to continue examining wider issues around the practice of Shariah law more generally, and the extent to which it is tolerated in a European context. It is helpful at this point to examine how the two dominant models of secularism work in two major European states which have adopted different models in order to assess the level of tolerance toward Shariah rules in each state.

2.4 The Multiculturalist and Assimilationist Approaches

Many countries face unfamiliar challenges with distinct cultural communities, be those new arrivals or even long-established groups.[261] European countries have operated under the assumption that all types of citizen, no matter where they came from, would assimilate to the national culture of their residence, but this turned out to be a false assumption.[262] In Europe today, it is feasible to highlight two major differences in citizenship comparing a British model of multiculturalism and the French model of assimilation. These two countries have been the centre of the academic literature on immigration in different disciplines, because their extended history with immigration and the diverse population in these two countries.[263] However, before embarking on this in detail, it may be worthwhile examining

[259] Bowen, *Blaming Islam* (n 62), 26.

[260] Daniels (n 142), 5.

[261] Parekh (n 71), 5.

[262] Parekh (n 71), 5.

[263] For key works on this point; see footnote 1 in Sarah Hackett, '"Breaking Point"?: Brexit, the Burkini Ban, and Debates on Immigration and Minorities in Britain and France' (2018) 15 European Yearbook of Minority Issues Online, 169.

two specific examples that illustrate the effect of multiculturalist and assimilationist policy to conceptualise the responses to minorities by the UK and France.

Divorce (*talaq*) in Shariah law is usually pronounced by the husband, as it is he who has the capacity to do so. This demonstration of authority of male agency over female agency has been stated in the Quran: 'Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth'.[264] Ibn'Ashur, one of the most prominent scholars in interpreting the Quran, considers this verse as the original legislative procedure to subsequent rules, particularly in family provisions concerning women.[265] In Shariah law usually, the husband has the capacity to pronounce the *talaq*; however, a wife could terminate the marriage from their end. She can visit a judge to dissolve the marriage upon her request, where (*khula)* might involve a wife returning the *mahr*. Another way is that a judge can dissolve a marriage upon her request, provided that she provide legitimate grounds for dissolving the marriage, (*faskh)*, involving a fault, such as the husband's failure to consummate the marriage or causing harm to the wife. Finally, a wife has the right to pronounce the divorce by delegate, (*tafwid)*.[266]

In the UK, the phenomenon of Islamic divorce has caused certain difficulties for Muslim women. As it stands, if the marriage was not officially registered, a wife seeking to dissolve her marriage may need to visit a Shariah council if her husband refuses to divorce her. However, if the marriage was registered and she sought a civil divorce, it would not be accepted by her community until she obtained a religious divorce. As a consequence of this conflict Muslim women seeking a divorce in the UK are trapped between two legal systems, because obtaining a divorce in these conditions may require procedures in both religious and civil law.[267] To elaborate, unregistered Islamic marriages (*nikah-only*) will not be recognised in a civil court.[268] Therefore, obtaining a civil divorce is not an adequate option, which means the sole option, in this case, is to go to a Shariah council. John Bowen, however, believes the issue is linked to transitional marriages, which are a popular type of marriage among

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[264] *The Holy Quran*, 4:34.

[265] Muhammad al-Tahir Ibn'Ashur, *Tafsir Al-Tahrir Wa Al-Tanwir (Arabic)* (Dar al-Tunisiyyat li al-Nasyar 1984), 5/37.

[266] Muhammad Ibn Rushd, *The Distinguished Jurist's Primer: Bidâyat Al-Mujtahid Wa Nibayat al-Muqtasid*, vol 2 (Nyazee Imran Ahsan Khan tr, Garnet Publishing 2006), 71-87; Ali (n 11), 127.

[267] Siddiqui (n 241), 263.

[268] See section 4.3.1 Formal Validity of Marriages in the Conflict of Laws: Unregistered Nikah Marriages Celebrated in England below.

Muslims in the UK.[269] Most Muslims in the UK are from south Asian countries, so if their marriage ended in divorce, English or Scottish courts may not accept a divorce issued by foreign courts, because they follow specific criteria in order to recognise such divorces.[270] Therefore, Muslims may struggle to obtain the acceptance of divorce from one country, such as Pakistan, if it is issued by an English Court, and vice versa.[271] This is an example of the challenges that Muslims may face in the UK. Despite the tolerance described in the Multiculturalist model, responses may differ depending on the variation of religious practices.

In France, where they have adopted assimilation, a less tolerant approach than multiculturalism in the UK[272], there have been concerns over the religious headscarf. In the French town of Criel, three junior high school Muslim girls were excluded from the school for consistently wearing their headscarves.[273] This event, which took place in 1989, became known as the headscarf affair, and occurred in a school where half of the students were the children of Arab immigrants.[274] The school principal—who later became a parliamentarian—allegedly claimed that wearing an Islamic headscarf was a violation of the secularity principle, and that a French public school was a rigorously secular institution.[275] This decision was followed by the banning of the headscarf—among other religious symbols—from French schools by the Minister of Education in 1994.[276] Subsequently, it was recorded that more than 100 Muslim girls were ejected from school because of their refusal to comply with the ban.[277]

After officials had stressed that this decision would not be applied to symbols beyond the Muslim headscarf (such as the Jewish Kippa or Christian cross), the Minister of Education suggested that teachers should negotiate with Muslim parents to try and reach an

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[269] Bowen, *Blaming Islam* (n 62), 77.

[270] See section 4.4.1 Overseas Divorces Rules and *Talaq* below.

[271] Bowen, *Blaming Islam* (n 62), 77.

[272] See section 2.4 The Multiculturalist and Assimilationist Approaches below.

[273] Harry Judge, 'The Muslim Headscarf and French Schools' (2004) 111 American Journal of Education 1, 8.

[274] Chouki El Hamel, 'Muslim Diaspora in Western Europe: The Islamic Headscarf (Hijab), the Media and Muslims' Integration in France' (2002) 6 Citizenship studies 293, 297.

[275] Judge (n 273), 9.

[276] Hamel (n 274), 298.

[277] Carolyn Evans, 'The Islamic Scarf in the European Court of Human Rights' (2010) 2 Constitutional Law Review 164, 180. More on this is discussed below in chapter 3.

agreement.[278] Muslim parents rejected the whole idea: if their daughters were forced to attend school with bare heads, they would not allow them to go at all.[279] France's banning of the headscarf was the subject of immense criticism as it was perceived as singling out Islamic symbols from other religions.[280] A decade later, the French government passed a law - in 2004[281] - banning the wearing of all religious symbols in public schools, thus bringing a conclusion to the heated debate concerning the headscarf.[282] This was another example of a complicated challenge that the Muslim minority suffers from in an assimilationist European state.

2.4.1 France and the UK

These two examples may help us to understand how far the different models would accommodate Shariah law. The headscarves issues in France did not end with public school ban, it later extended to face veil's ban in public spaces in 2010.[283] However, the *talaq* in the UK is much wider issues, as it is associated with marriages (either inter into the UK or abroad) and it may affect the succession arrangements.[284] The issue of headscarves and face veil in public sphere and managing personal disputes in private sphere are more tolerable in the UK than in France, which is also associated with colonial effect.[285] The UK welcomes multiculturalism and may acknowledge minority's rights in both the public and private sphere.[286] Whereas France expects minorities to assimilate into the dominant culture in the public sphere, and tolerate their differences only in the private sphere.[287] Exploring these different models is important to understand how the family issues that this study focuses on began and why they thrived in the UK more than any other European country, as discussed further below.[288]

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[278] Hamel (n 274), 298.

[279] Hamel (n 274), 298.

[280] Hamel (n 274), 298.

[281] Law No. 2004-228 Of March 15, 2004.

[282] Bhandar (n 246), 316.

[283] See section 3.3.1 The Ban of Religious Symbols below.

[284] See section 4.4.2 The Implications of *Talaq* on Succession below.

[285] See section 2.4.2 The Supremacy of State Law in France: Postcolonial Effect and section 2.4.3 Dual Jurisprudence and Shariah Family Law in the UK: Postcolonial Effect below.

[286] Parekh (n 71), 4; Hellyer (n 55), 20.

[287] Hellyer (n 55), 20.

[288] See section 2.4 The Multiculturalist and Assimilationist Approaches below.

Subsequently, the response has taken the form of two models, in which the theoretical framework has been influenced by previous multiculturalism debates.[289] Firstly, there is a model which welcomes multiculturalism and responds to its demands by recognising each minority's rights in both the public and private sphere, such as in the UK.[290] Secondly, some countries expect whole or substantial assimilation of these minorities into the dominant culture in the public sphere, and tolerate their differences only in the private sphere, such as in France.[291] The former is referred to as multiculturalist, integrationist and pluralistic integrationism; while the latter is known as monoculturalist, assimilationist and neo-assimilationist.[292]

A multicultural society refers to a society with cultural diversity which accepts the fact that this society has more than one cultural community,[293] such as The UK and France. However, their response to cultural diversity might be a multiculturalist approach which refers to the response to this phenomenon—as a way of accepting diversity into public debate, such as in the UK.[294] Moreover, it could be a monoculturalist or assimilationist approach which refers also to a response to cultural diversity in which there is no place for minority concepts in the public debate, such as in France.[295] Nevertheless, the UK and France both resist the description of multicultural, due to the confusion of differentiating between these terms.[296] In the UK, the debate between conservatives and liberals revolves around whether calling the UK a multicultural society may lead to the disappearance of traditional culture, which is tied up with the concept of national identity.[297] In France, both sides resist this term, based on the strong notion of citizenship, in which tradition only recognises the French citizen, without any recognition of the minority concept.[298]

[289] Parekh (n 71), 4; Hellyer (n 55), 20.

[290] Parekh (n 71), 4; Hellyer (n 55), 20.

[291] Hellyer (n 55), 20.

[292] Parekh (n 71), 6; Hellyer (n 55), 20, 21.

[293] Parekh (n 71), 6; Hellyer (n 55), 14.

[294] Parekh (n 71), 6.

[295] Parekh (n 71), 6.

[296] Parekh (n 71), 6.

[297] Parekh (n 71), 6.

[298] Parekh (n 71), 7.

The institution of citizenship refers to a variety of policies which regulate various aspects of citizenship ranging from work regulations to a requirement for historical knowledge.[299] Both French and British models adopted liberal citizenship methods in shaping their legislation; however, the emphasis on minority groups marks the distinctive differences between both models.[300] France adopted the liberal-assimilationist state that is liberal in its statutes but with limited consideration of minorities' orientations.[301] Historically in France, the connection between citizenship and national culture was always linked with the concept of fraternity, in order to consolidate and protect the cohesion and self-governance of the democratic polity.[302] France is believed to be 'a single and indivisible nation based on a single culture'.[303] This idea is rooted in ancient history, including the monarchy, Empire and Republican eras, in which the central state was a reference for national identity.[304] During these eras, the central state aimed at diluting regional and linguistic differences for the purpose of creating a homogenous national culture.[305] This explains why the assimilation model is currently adopted in France, where differences would not be accepted unless they were in line with French culture.[306] An example of this is resistance to the headscarf in the public setting of schools, discussed earlier, because they are not in line with the country's assimilationist approach.

The UK, on the other hand, stands as a liberal multicultural state, where liberal policies are adopted with 'limited residency requirements for naturalisation'.[307] This allows the legislature to pair 'these liberal citizenship laws with multicultural institutions for communal recognition of its Muslim minority' among other minorities, in which the country emphasised religion as a mode of recognising and working with minorities.[308] For example, the funding of Islamic and other religious schools might illustrate state policy towards

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[299] David T Buckley, 'Citizenship, Multiculturalism and Cross-National Muslim Minority Public Opinion' (2013) 36 West European Politics 150, 153.

[300] Buckley (n 299), 156, 157.

[301] Buckley (n 299), 157.

[302] Ilias Trispiotis, 'Two Interpretations of "Living Together" in European Human Rights Law' (2016) 75 The Cambridge Law Journal; Cambridge 580, 596.

[303] Hellyer (n 55), 32.

[304] Tony Chafer, *Multicultural France* (School of Languages and Area Studies, University of Portsmouth 1997), 2.

[305] Chafer (n 304), 2.

[306] Hellyer (n 55), 32.

[307] Buckley (n 299), 156.

[308] Buckley (n 299), 156.

minorities.[309] The curriculum of these schools is set in accordance with universal standards, satisfying both the majority and the religious minority, which allows students to continue their lives in line with the majority.[310] Based on this example, Hellyer describes the UK approach to diversity in 'respecting differences to appoint, and not insisting upon complete uniformity' - such as in France - and the state's role ought to be a certain 'neutral standpoint'.[311] The UK's multicultural approach could in theory be more tolerant towards Shariah rules than the French assimilationist approach. These approaches could also be influenced by how each state used to deal with colonised countries in the colonial era.

2.4.2 The Supremacy of State Law in France: Postcolonial Effect

Colonisation has certainly contributed to shaping minority settlement in European countries—particularly Muslim minorities. The largest proportion of immigrants settled in Europe are rooted in these countries' colonialism.[312] For instance, in France, almost half of immigrants are from North African countries.[313] The conquest by France of these countries—Algeria, Morocco and Tunisia, all of which have a large Muslim population— stretches back to the nineteenth century, particularly 1830, when France conquered Algeria.[314] The first significant migration of Algerians to France was recorded during World War I, when France brought them to the country to serve in the army.[315] However, serious immigration took place after World War II, because of the labour shortage problem in Europe.[316] This wave, which took place right after the Algerian war, left the border open for male workers from Algeria and other north African countries.[317] Although restriction of immigration was introduced in 1974, in line with economic and oil crises, the wave continued with the reunification

[309] Hellyer (n 55), 38.

[310] Hellyer (n 55), 39.

[311] Hellyer (n 55), 39.

[312] Hellyer (n 55), 44.

[313] Fetzer and Soper (n 73), 26, 65.

[314] Fetzer and Soper (n 73), 63.

[315] Fetzer and Soper (n 73), 63; For more on this, see: John Horne, 'Immigrant Workers in France during World War I' (1985) 14 French Historical Studies 57.

[316] Fetzer and Soper (n 73), 63; Kathryn Kleppinger and Laura Reeck (eds), *Post-Migratory Cultures in Postcolonial France* (Liverpool University Press 2018), 2.

[317] Kleppinger and Reeck (n 316), 3.

programmes of male workers' families.[318] Thus, 'the history of later twentieth-century immigration largely correlates to France's former colonial empire'.[319]

Since the beginning of colonisation in the nineteenth century, French authorities have been very cautious in dealing with family law matters among their colonial subjects, and did not attempt to impose French civil law in the Maghrebi[320] colonies, since the cost of this attempt might be inflamed violence against colonial rule.[321] Furthermore, there was not a typical model applied to all colonial subjects.[322] Nevertheless, French colonial states that all the Maghrebi colonies 'handled family law in ways that protected or enhanced its power'.[323] For instance, one of the major aspects in manipulating Shariah family law was the attempt to codify it in Algeria in order to facilitate French Court work.[324] French courts, therefore, were instituted to apply Shariah family law and customary law, whereby Algerians would have the choice of opting for French courts or Islamic judges.[325] This rule, which aims to take advantage of the customary law that existed in some regions, resulted in division among Algerian regions between Shariah law, French law and customary codes, which also led to chaos, as judicial authorities deciding on competence were faced with inextricable complications.[326] However, in 1959, after 129 years of colonisation, the French introduced reforms in family law, with a code that mostly did not challenge Islamic family law.[327] However, tightening the grip on Algeria by facilitating bureaucratisation was the reason behind this gradually cautious change.[328]

This process resulted in the classification of family law matters as public, not private affairs, in the postcolonial era.[329] Since family law in the Maghrebi colonies was not left entirely to

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[318] Kleppinger and Reeck (n 316), 3.

[319] Kleppinger and Reeck (n 316), 3.

[320] Maghrebis or Maghrebian people or Maghrebians (or North Africans) are the inhabitants of the Maghreb countries including (Algeria, Morocco, Tunisia, Mauritania).

[321] Mounira Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco* (University of California Press 2001), 114.

[322] Charrad (n 321), 115.

[323] Charrad (n 321), 115.

[324] Charrad (n 321), 134.

[325] Charrad (n 321), 134.

[326] Charrad (n 321), 136.

[327] Charrad (n 321), 139.

[328] Charrad (n 321), 139.

[329] Bowen, 'How Could English Courts Recognize Shariah' (n 140), 417.

the religious community (similarly in India under the British) the French colonial state kept involving itself in regulating personal laws to enhance its grasp on the colonial subject.[330] This strategy strengthened the supremacy of state law in the personal sphere, whereby immigrants as postcolonial subjects in France were expected to acknowledge this norm by handing family matters to state law rather than a private institution, such as the situation in the UK with Shariah councils.[331] Therefore, immigrants from these countries 'brought to France ideas and habits about civil law that were forged in colonial experience and reinforced by post-colonial judicial reform'.[332]

2.4.3 Dual Jurisprudence and Shariah Family Law in the UK: Postcolonial Effect

As discussed above,[333] the situation in the UK's postcolonial context was significantly different. It is believed that the UK policy of liberalism was influenced by the legacy of colonialism.[334] British colonial policy in India was not to interfere with any of Indian religions (Hindu or Islam).[335] Moreover, what specifically limited the application of British laws in India was the British imperial policy to preserve and administer indigenous laws.[336] This policy adopted by the British colony in India allowed for a set of personal laws within each religion to regulate 'marriage and divorce, inheritance and succession, guardianship of minors, caste disputes, and religious endowments'.[337] This jurisdiction was then classified as private law, which was distinct from universally applicable laws that had jurisdiction over the territory of British India.[338] This mean that Muslims in India 'were governed by their own religious family law', and it was the British parliament that 'gave statuary force to a pluralistic system of family law'.[339] Therefore, given the fact that most of Britain's Muslims today are from postcolonial countries that had been subjects of the British Empire, 'these Muslims brought with them ideas and habits about personal status that had been developed

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[330] Charrad (n 321), 114.

[331] Bowen, 'How Could English Courts Recognize Shariah' (n 140), 417.

[332] Bowen, 'How Could English Courts Recognize Shariah' (n 140), 417.

[333] See section 2.1.2 Overview of Shariah Family Law in the UK above.

[334] Buckley (n 299), 156, 157.

[335] Nandini Chatterjee, 'English Law, Brahmo Marriage, and the Problem of Religious Difference: Civil Marriage Laws in Britain and India' (2010) 52 Comparative Studies in Society and History 524, 537.

[336] Chatterjee (n 335), 537.

[337] Chatterjee (n 335), 537.

[338] Chatterjee (n 335), 538.

[339] Buchler (n 120), 82.

under British rule of the Indies'.[340] Moreover, if the British had previously accepted this system in India, British Muslims see no reason why this accommodation should not take place in the UK.[341] This argument was observed by Bowen's interviews with Shariah council scholars, where a Pakistani scholar told him: 'Why don't they just let us take care of these matters… after all, that's what they did in colonial days'.[342]

Therefore, it may be correct to observe that colonialism has had a clear impact on Muslim settlement and accommodation in Europe, as we have discussed earlier in this section. While it may be true to say that Muslims in the UK would be allowed to settle their personal disputes in accordance with their beliefs, Muslims in France may not enjoy such advantages due to the supremacy of state law over personal matters as discussed above. However, the debate in this context has been constantly developing in accordance with new circumstances, since at least the middle of the last century.[343] Multiculturalism has been under much criticism during the last decade, and the debate surrounding its failure has increased ever since.

2.5 The Multiculturalism Debate after the 9/11 and 7/7 Attacks

There was 'a clear trend' toward accommodating diversity between the 1970s and 1990s.[344] This tendency has seen a 'backlash' since the mid 1990s, and a move towards ideas of 'nation building, common values and identity, and unitary citizenship'.[345] However, as Meer and Modood state:[346]

> To assess the validity of multiculturalism's retreat, it is important to distinguish between those pointing to a normative or factual tendency and others who have political motivation in rejecting Britain's multiculturalism.

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[340] Bowen, 'How Could English Courts Recognize Shariah' (n 140), 417.

[341] Buchler (n 120), 82.

[342] Bowen, 'How Could English Courts Recognize Shariah' (n 140), 418; For more on this argument, see Sebastian M Poulter, 'The Claim to a Separate Islamic System of Personal Law for British Muslims' in C Mallat and J Connors (eds), *Islamic Family Law* (Graham & Trotman 1990).

[343] Modood, *Multiculturalism* (n 200), 7.

[344] Will Kymlicka, 'Multiculturalism: Success, Failure, and the Future', 71.

[345] Kymlicka, 'Multiculturalism: Success, Failure, and the Future' (n 344), 71.

[346] Nasar Meer and Tariq Modood, 'The "Civic Re-Balancing" Pf British Multiculturalsim, and Beyond ...' in Raymond Taras (ed), *Challenging Multiculturalism European Models of Diversity* (Edinburgh University Press 2013), 78.

There might be a political tendency in recent years to use multiculturalism as a justification for most anti-social behaviours. As we have discussed in the introduction above, western European elites have accused multiculturalism of being responsible for 'all sorts of ills such as social fragmentation, ghettoisation, lack of patriotism and absurdly even terrorism'.[347] However, we might say that the anti-immigration tendencies across western Europe have created a stronger political right, whereas most of the rest of civil society (including academic voices) would be more accepting of multiculturalism. These tendencies may create an incoherence between theoretical understandings and the reality of multiculturalism: the theoretical stance denotes multiculturalism as the property of minorities, yet reality shows that the concept has been adopted by wider society as 'a nation-building device'.[348]

However, this desire for a homogenous culture accelerated throughout Europe after the 9/11 and 7/7 attacks, in which multiculturalism in western societies was no longer regarded in the same way even in countries such as the UK, which were considered to be supportive of the practice.[349] Elites in the European counties hosting the majority of European Muslims began to express concerns in response to various triggers.[350] Cameron's view was aimed at extremist Islam; Sarkozy's response was toward Muslims praying in the street, while Merkel's was motivated by concerns about the slow pace of Turkish integration.[351] Bowen argues that these statements 'err when they claim that normative ideas of multiculturalism shape the social fact of cultural and religious diversity' because 'such diversity would be present with or without a theory to cope with it'.[352] Moreover, he argues that state policies are not shaped by ideals of multiculturalism; indeed 'quite to the contrary', because each European country's 'distinct strategies represent the continuation of long-standing, nation-specific ways of recognizing and managing diversity'.[353] Cameron's 'rhetoric was

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[347] Bhikhu Parekh, 'Afterword: Multiculturalism and Interculturalism – A Critical Dialogue', *Multiculturalism and Interculturalism* (Edinburgh University Press 2016), 266.

[348] Christian Joppke, *Is Multiculturalism Dead?: Crisis and Persistence in the Constitutional State* (Polity Press 2017), 42.

[349] Silvio Ferrari, 'The Secularity of the State and the Shaping of Muslim Representative Organization in Western Europe' in Jocelyne Cesari and Seán McLoughlin (eds), *European Muslims and the secular state* (Ashgate Aldershot 2005), 48.

[350] Ana-Simina Sava, 'The Integration of the Muslim Communities in the European Union International Relations' [2016] Research and Science Today 60, 63.

[351] Bowen, *Blaming Islam* (n 62), 18; For more critics on these statements, see; John R Bowen, 'Europeans Against Multiculturalism' *Boston Review* (2011) <http://bostonreview.net/john-r-bowen-european-multiculturalism-islam> accessed 15 December 2020; Parekh (n 347); Joppke (n 348) ch 3.

[352] Bowen, 'Europeans Against Multiculturalism' (n 351).

[353] Bowen, 'Europeans Against Multiculturalism' (n 351).

strengthened after the 2015 election', by introducing legislation that added further restrictions on immigration.[354] Moreover, Brexit is also 'partly rooted' in the multiculturalism debate, according to Ashcroft and Bevir:[355]

> Resistance to immigrant multiculturalism was a substantial factor in the Leave vote. Immigration, multiculturalism, race, and security were frequently conflated in public discourse during the campaign, most succinctly in the UK Independence Party's notorious "Breaking Point" poster depicting a massed column of mostly nonwhite, young male migrants in southeastern Europe. This played into the narrative that multiculturalism has damaged social cohesion, making Brexit part of a broader contest over national identity. The emotive nature of nationalism complicated the debate, with immigrant multiculturalism—and thereby the EU—seen by some Leave voters as undermining what it means to be British.

Therefore, Meer and Modood firmly believe that immigration restrictions will be complicated further post-Brexit.[356]

Furthermore, Parekh regards this criticism of multiculturalism as 'deeply misguided'.[357] Certainly, it disregards internal diversity and homogenises its target.[358] Moreover, blaming multiculturalism for terrorism is 'deeply flawed'.[359] Multiculturalism does not encourage minorities to adopt such a lifestyle, and 'if some groups desire to have only minimum contact with the wider society and segregate themselves, multiculturalism respects them but does not itself seek such an outcome'.[360] Furthermore, feeling rejected by their European homes because of religious or cultural differences would be more likely to result in their moving to extremism, and not because they remain in their separate cultures'.[361] Bowen suggests that this might be the case with terrorist attackers in the London bombing in July 2005, in which some of those responsible for this attack were born, had grown up and graduated from British

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[354] Ashcroft and Bevir (n 64), 35; Immigration Act 2014.

[355] Ashcroft and Bevir (n 64), 37; See also: Richard T Ashcroft and Mark Bevir, 'Brexit and the Myth of British National Identity' (2021) 16 British politics 117; and Adrian Favell, 'Here, There and Everywhere: Nationalism after Brexit' (2020) 43 Ethnic and Racial Studies 1446.

[356] Nasar Meer and Tariq Modood, 'Accentuating Multicultural Britishness: An Open or Closed Activity?' in Richard T Ashcroft and Mark Bevir (eds), *Multiculturalism in the British Commonwealth* (University of California Press 2019), 55.

[357] Parekh (n 347), 266.

[358] Parekh (n 347), 266.

[359] Parekh (n 347), 272.

[360] Parekh (n 347), 272.

[361] Bowen, *Blaming Islam* (n 62), 26.

universities.[362] This ought to be true because 'it is not just Muslims who have cut themselves off from the rest of the society'.[363] Figures show that as high as 40 percent of secondary schools across the UK 'only admit students who regularly attend a Catholic or an Anglican church'.[364] We should note that this happened in the UK, where the state's tolerance toward religions may be the most tolerant policy among western countries.

2.5.1 Muslim Migrants and Multiculturalism's Retreat

So, what precisely is wrong with multiculturalism if there is no clear law or policy on the topic in these countries?[365] The answer is related to resistance by Muslims to assimilate, caused by factors surrounding immigration.[366] In support of this view, The Pew Research Centre conducted a cross-national survey of European Muslims and concluded that 'states with more multicultural approaches to citizenship have Muslim minorities that are more tied to their religious identities, and less likely to identify primarily with their national community'.[367] Joppke avers that it is crystal clear that concerns surrounding multiculturalism—be they perceived or real difficulties—are not over general migration: it is central that Muslim migration is perceived to be causing 'the crisis of European multiculturalism'.[368] Indeed, a list of precipitating events tracked down by European accounts of the 'backlash against multiculturalism' found that Muslims were involved directly in eleven out of thirteen events between 2000 and 2006.[369] Moreover, Bowen observes that by 2004, French media and public opinion had identified that the French approach of secularism 'was deemed to be under threat from Islam'.[370] This singular focus on Muslims has been criticised as 'troubling and unfair'.[371] Certainly, these attitudes would

[362] Bowen, *Blaming Islam* (n 62), 26.

[363] Bowen, 'Europeans Against Multiculturalism' (n 351).

[364] Bowen, 'Europeans Against Multiculturalism' (n 351).

[365] Joppke (n 348), 2.

[366] Joppke (n 348), 2; Samia Bano, *Muslim Women and Shari'ah Councils: Transcending the Boundaries of Community and Law* (Palgrave Macmillan 2012), 11.

[367] Buckley (n 299), 170.

[368] Joppke (n 348), 2.

[369] Joppke (n 348), 46.

[370] Bowen, *Why the French Don't Like Headscarves: Islam, the State, and Public Space* (n 257), 33.

[371] Bano, *Muslim Women and Shari'ah Councils: Transcending the Boundaries of Community and Law* (n 366), 11.

'suggest a radical "otherness" about Muslims and an illiberalism about multiculturalism, since the latter is alleged to license these practices'.[372]

However, while multiculturalism might be politically useful to blame for segregation or lesser integration in Europe, this is certainly deeply misguided, and misreads history.[373] Hellyer is certain that there will be no discussion around Muslims in Europe if they 'were actually white, Christian and well off'.[374] He believes that:[375]

> The real issues occur because of a historical relationship with Islam as a powerful neighbouring civilisation (which sometimes did come into conflict with non-Muslim parts of Europe); because of a lack of capacity in European societies in terms of dealing with racial diversity (which they have never done before, although many other societies have done very well in this regard in history); and because of the fact that most of the communities that arrive from the Muslim world are poor, which creates a grassroots backlash from indigenous people who lose their jobs in this free market economy of competitiveness.

Furthermore, Muslims would not have come to Europe if colonialism had never taken place in their countries.[376] As mentioned earlier, most immigrants were single male workers who 'were welcomed to come to Europe because Europeans wanted them to fill in the gap in cheap labour'.[377] Therefore, it would be unreasonable for indigenous Europeans to ignore this fact and exclude the right of immigrants and their descendants from participating in shaping national identity.[378] However, whether these concerns around multiculturalism means it has lost its value is important to address because, as we have seen above, a multiculturalist approach constitutes a gateway to accommodate Shariah rules.

2.5.2 Is Multiculturalism Dead?

Declaring the death of multiculturalism, or retreating from it based on failures in integration, may be a mistaken conclusion.[379] In contrast to this political view, European policy has –

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[372] Nasar Meer and Tariq Modood, 'How Does Interculturalism Contrast with Multiculturalism?' (2012) 33 Journal of Intercultural Studies 175, 191.

[373] Bowen, *Blaming Islam* (n 62), 18; Parekh (n 347), 266.

[374] Hellyer (n 55), 44.

[375] Hellyer (n 55), 44.

[376] Hellyer (n 55), 44.

[377] Hellyer (n 55), 44.

[378] Hellyer (n 55), 44.

[379] Joppke (n 348), 2.

particularly in the West – witnessed in the past three decades an increasing shift towards multiculturalism, most notably during the last decade in which there has been significant debate regarding the multiculturalist retreat.[380] Banting and Kymlicka, prominent figures in the multiculturalism debate, observe a range of multicultural policies (MCPs) 'that affect the social, political, educational and economic integration of immigrants' in several European countries.[381] The evidence provided by the study demonstrates that the last three decades (from 1980 to 2010) has seen the adoption of multiculturalist policies across a large number of European countries.[382] Although France and the UK were among the few countries whose multiculturalism policies were stable, they significantly differed in the volume of adopted policies. The figures show that by 2010, France had accepted two of eight policies compared to what it had in the year 2000, whereas the UK adopted nearly six of eight.[383] This illustrates that the UK is ranked as the most multicultural country in Europe and had adopted immigrant integration through a multicultural approach.[384] However, this study, which focuses on whether MCPs are still alive, concludes that at least until 2010 'these policies have endured, and indeed in many cases expanded'.[385]

It is obvious that a significant number of commentators take issue with the political views on multiculturalism's failure.[386] Their view is that multiculturalism, as Kymlicka concludes, has 'strengthened' and 'had a positive effect'.[387] Those positive effects contributed to 'social cohesion', and 'reducing prejudice', leading to the conclusion that 'children are psychologically better adapted in countries with MCPs'.[388] However, the motivation for blaming multiculturalism by political elites is because this term is 'both vague and misdirected'.[389] Such pronouncements make little sense in light of our understanding of

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[380] Joppke (n 348), 37.

[381] Banting and Kymlicka (n 54), 583.

[382] Banting and Kymlicka (n 54), 584.

[383] Banting and Kymlicka (n 54), 585.

[384] Joppke (n 348), 37, 38.

[385] Banting and Kymlicka (n 54), 593.

[386] Kymlicka, 'Multiculturalism: Success, Failure, and the Future' (n 344); Will Kymlicka, 'The Rise and Fall of Multiculturalism? New Debates on Inclusion and Accommodation in Diverse Societies' (2010) 61 International Social Science Journal 97; Banting and Kymlicka (n 54); Joppke (n 348); Bowen, 'Europeans Against Multiculturalism' (n 351); Parekh (n 347); Tariq Modood, 'Multiculturalism, Interculturalisms and the Majority', *Multiculturalism and Interculturalism: Debating the Dividing Lines* (Edinburgh University Press 2016).

[387] Kymlicka, 'Multiculturalism: Success, Failure, and the Future' (n 344), 68.

[388] Kymlicka, 'Multiculturalism: Success, Failure, and the Future' (n 344), 82.

[389] Bowen, 'Europeans Against Multiculturalism' (n 351).

multiculturalism appearing in different forms rather than as one single object—thereby making a comprehensive definition of multiculturalism unfeasible.[390] It has been suggested that multiculturalism may be distinguished by different markers or terms depending on the context; whether that be language, race, religion or sexual orientation.[391] Hence, Joppke asserts that:[392]

> It is certainly misleading to argue that with respect to immigrants and immigrant-based ethnic minorities, in exclusive reference to whom the entire retreat or death debate is conducted.

Indeed, it is 'effective, albeit irresponsible, populist politics', for them, it is better than saying 'we got it wrong, now let's get it right'.[393]

2.5.3 'Interculturalism' or 'Civic Integration': A New Approach?

A White Paper on Intercultural Dialogue, "Living Together as Equals in Dignity", presented by the Council of Europe in 2008, which conducted an inquiry within its forty-seven member states, recommended that:[394]

> Old approaches to the management of cultural diversity were no longer adequate to societies in which the degree of that diversity (rather than its existence) was unprecedented and ever-growing.

Instead, the Council of Europe introduced the notion of intercultural dialogue.[395] This Paper, which was reported three years before the 2011 political statements discussed above, saw all member states of European council had endorsed unanimously the failure of multiculturalism, and recognised a 'consensus that we need a post-multicultural alternative, to be called interculturalism'.[396] In the same year, UNESCO came to the same conclusion in

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[390] Joppke (n 348), 45.

[391] Joppke (n 348), 45.

[392] Joppke (n 348), 45.

[393] Bowen, 'Europeans Against Multiculturalism' (n 351).

[394] Council of Europe, 'Living Together as Equals in Dignity: White Paper on Intercultural Dialogue': (2008), 9.

[395] Council of Europe, 'Living Together as Equals in Dignity: White Paper on Intercultural Dialogue': (n 394), 17.

[396] Will Kymlicka, 'Defending Diversity in an Era of Populism: Multiculturalism and Interculturalism Compared', *Multiculturalism and Interculturalism: Debating the Dividing Lines* (Edinburgh University Press 2016), 161.

its report about cultural diversity.[397] This paradigm does not reject multiculturalism, but neither is there a desire to return to assimilation. Instead, it 'incorporates the best of both, it takes from assimilation the focus on the individual; it takes from multiculturalism the recognition of cultural diversity', and it adds a dialogue based on 'equal dignity and shared values' to promote integration and social cohesion.[398] The principles and standards of the European Convention on Human Rights and of other Council of Europe instruments could not be trumped by majority or minority cultural traditions.[399]

However, with the strengthening of multiculturalist policies in mind, the shift from multiculturalism toward interculturalism could be, as Meer and Modood concluded, that 'the good interculturalism v. bad multiculturalism literature is essentially rhetorical rather than analytical'.[400] The 'central plot line' in Kymlicka's view on this shift is that it is not just about bringing interculturalism as a new method, but more about marking the failure of multiculturalism, and proposing interculturalism as a rescue.[401] Moreover, Parekh, as do Meer and Modood,[402] regards interculturalism as 'biased toward the majority' because it only allow minorities to express themselves 'within strict limits'.[403] Given that 'minorities are keen to participate in the collective life', they need resources which give them confidence in exploring and finding inspiration from their cultural heritage.[404] Parekh believes that 'multiculturalism is acutely aware' of these requirements, but 'interculturalism is not'.[405]

However, despite these debates and conflicts, Joppke believes that it might be useful to abandon both multiculturalism and interculturalism as terms, and perhaps opt instead for the term 'integration', which he believes includes most of the features that these two terms have.[406] Joppke considers that multiculturalism in Europe was never perceived as an aspect

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[397] Kymlicka, 'Defending Diversity in an Era of Populism: Multiculturalism and Interculturalism Compared' (n 396), 161.

[398] Council of Europe, 'Living Together as Equals in Dignity: White Paper on Intercultural Dialogue': (n 394), 19.

[399] Council of Europe, 'Living Together as Equals in Dignity: White Paper on Intercultural Dialogue': (n 394), 10.

[400] Kymlicka, 'Defending Diversity in an Era of Populism: Multiculturalism and Interculturalism Compared' (n 396), 158.

[401] Kymlicka, 'Defending Diversity in an Era of Populism: Multiculturalism and Interculturalism Compared' (n 396), 166.

[402] Meer and Modood, 'How Does Interculturalism Contrast with Multiculturalism?' (n 372), 188.

[403] Parekh (n 347), 277.

[404] Parekh (n 347), 277.

[405] Parekh (n 347), 277.

[406] Joppke (n 348), 56.

of national self-definition; rather it was viewed as a privilege of ethnic minorities.[407] Subsequently, and as a side effect post-multiculturalist policy, civic integration took a new view in which—apart from learning the language— liberal principles and values are expected to be accepted by immigrants, particularly those of an illiberal opposition, which the Muslim minority are assumed to be; therefore, this cannot be qualified as assimilation, unless liberalism is assumed to be a culture, which is not possible.[408]

However, Joppke questions whether such a policy is liberal enough to be compatible with a multicultural approach.[409] He raises moral questions such as threats to the liberalness of civic integration, in which cases preventing veiled women in France from gaining citizenship are rather a 'reassertion of assimilation' which is 'traded in morality'.[410] Indeed, the illiberal integration version limits the compatibility between multiculturalism and civic integration.[411] Loobuyck has asserted that 'civic integration and language acquisition programmes and tests are labelled as nationalistic assimilationist policies'.[412] Balancing these concepts of civic integration is critical because it is a 'moral panic' in which 'tolerating illiberal people might put liberalism at risk, while excluding illiberal people would itself be illiberal'.[413] It is in this manner that Joppke supports the view that civic integration policies are meant 'to secure the liberal-democratic baseline of a pluralistic society' rather than to protect the majority culture.[414]

2.6 Conclusion

I have argued that accommodating religious and cultural values is supported by writers such as Modood and Parekh. Other writers, such as Kymlicka, gave weight to the importance of cultural identity to minorities. Although they support minorities keeping their ties with their own culture or religion, they differ in how far minorities should keep that connection, particularly in order not to affect integration. For instance, illiberal principles are arguable

[407] Joppke (n 348), 2.

[408] Joppke (n 348), 45, 46.

[409] Joppke (n 348), 66.

[410] Joppke (n 348), 67.

[411] Banting and Kymlicka (n 54), 593.

[412] Patrick Loobuyck, 'Towards an Intercultural Sense of Belonging Together: Reflections on the Theoretical and Political Level', *Multiculturalism and Interculturalism* (Edinburgh University Press 2016), 235.

[413] Joppke (n 348), 75.

[414] Joppke (n 348), 75.

between significant toleration to these principles (because non-Western cultures may not consider liberal principles to be universal principles) or reasonable toleration in the sense of not considering any dialogue with non-liberals as a matter of bargaining. Moreover, Kymlicka differentiation between national and ethnic minorities and excluding religions from the culture sphere was rejected by writers such as Parekh and Modood as bias toward national minorities and lack of sense because of the significant position of religion in some cultures such as Islam.

Furthermore, secularity, Christian legacy and human rights,[415] which may shape the identity of European countries, plays a significant role in reacting to accommodating Shariah. The moderate form of secularism that accommodates all religious groups or what Williams called the 'procedural secularism' might be more accommodating than the radical form or 'programmatic secularism' in Williams terms. Nevertheless, the moderate form of secularism may not resist the influence of common values originating from the dominant culture. Although this may impact on the impartiality of a state between cultures, countries which adopted this form of secularism such as the UK tolerate and may accept the practices of other minorities within the country.

Moreover, multiculturalist approaches seem to be more tolerant towards Shariah rules and allow for more accommodation and application than the assimilationist approach. This was clear from the comparison between France and the UK and their adoption of these models. Muslims in the UK have the liberty to manage their personal disputes within their own culture, unlike the situation in France, where the supremacy of state law in the personal sphere overrides it. This differentiation has been influenced by colonialism. Given that immigrants to each country were mostly colonial subjects, each country's policy post-colonialism has been influenced by their policy during the colonisation era. Muslims in the UK, who were mostly colonial subjects, are influenced by the UK policy during the colonialisation era in managing personal matters in accordance with Shariah law. This was observed empirically among Muslims in England.[416] The empirical interviews I carried out in Scotland also indicate that Scottish Muslims tend to manage their personal matters such as *talaq* and succession internally and in accordance with Shariah law.[417]

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[415] See section 3.2.1 Christianity and Privatising Religion below.

[416] See section 2.4.3 Dual Jurisprudence and Shariah Family Law in the UK: Postcolonial Effect above.

[417] See Chapter 6 The Practice of Shariah Succession Law within Scots Law below.

However, blaming multiculturalism might be politically useful, but is arguably deeply misguided and flawed. The main concerns of European politicians were about liberalism dealing with illiberal people, mainly Muslims.[418] Islam appears to be the common focus of political statements, because it 'provides a soft target for aspiring cultural nationalists'.[419] For example, the perception that British national identity and social services are being threatened by immigrant multiculturalism is one reason behind Brexit.[420] However, the retreat of multiculturalism has not been on a policy level but rather on a rhetorical level.[421] The MCPs test shows that there is no retreat from multiculturalism in general, and whatever its replacement is, interculturalism or civic integration, they are merely 'layered on top of existing multicultural programmes, leading to a blended approach to diversity'.[422] Moreover, it can be argued that multiculturalism is not an obstacle to civic integration, particularly the integrated version, because 'more liberal and voluntary approaches to civic integration can be combined with a multicultural approach to form a potentially stable policy equilibrium'.[423]

All in all, these approaches sum up the reaction toward accommodating foreign cultures and religions. This context is important in order to examine the wider issues around the practice of Shariah law more generally, and the extent to which it is accepted in a European context. However, the discussion in this chapter is setting the scene of this study, which is helpful for locating the objectives of this study concerning the application of Shariah succession rules in a Scots law context. Understanding the bigger picture regarding the degree of acceptance of Shariah rules is essential guidance throughout the thesis. However, there are other contexts that may be relevant in Europe such as human rights. In the subsequent chapters, I will examine the European Convention of Human Rights to assess of its impact on accommodating Shariah law practices.

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[418] Joppke (n 348), 75.

[419] Bowen, 'Europeans Against Multiculturalism' (n 351).

[420] Ashcroft and Bevir (n 64), 231.

[421] Kymlicka, 'Defending Diversity in an Era of Populism: Multiculturalism and Interculturalism Compared' (n 396), 158.

[422] Banting and Kymlicka (n 54), 577.

[423] Banting and Kymlicka (n 54), 593.

Chapter 3 Religion and European Human Rights

3.1 Introduction

The past few decades have seen great shifts in the debate over the external manifestation of Islamic belief in secular European countries. Various Islamic practices may provoke different reactions from one country to another. For instance, the wearing of the face veil (*niqab*) or headscarf has provoked controversy in some European societies, and has been accused of being incompatible with Western culture,[424] whereas Islamic financial transactions have been embraced in the UK at a state level.[425] Although the ECHR provides a base level of tolerance which all contracting states must adhere to, legislation limiting Shariah-based practice has been passed by some states to mitigate the lack of interaction and integration. One example would be the French burqa bans.[426] This legislation and the judgments of the ECtHR in relation to challenges to such provisions have drawn immense criticism, for their lack of pluralism. Therefore, the influence of Christian theology on shaping modern religious freedom appear to be evident, since Christianity is the dominant religious tradition in Europe.[427]

Furthermore, the margin of appreciation is used by the ECtHR to justify a state's interference with human rights. This might mean that there really is no minimum tolerance for Shariah prescribed by human rights law. This is because Shariah law, unlike Christianity, does not represent the European tradition, which appears to be the touchstone against which the ECtHR would consider offering a contracting state a margin of appreciation to protect a state's identity.[428] However, this incompatibility with Shariah law might not be absolute, where Shariah family law might be offered as voluntary opt-out for Muslims minorities.[429] The focus of this chapter will be on the European liberal context, which will provide us with more understanding of the appropriate degree of tolerance towards Shariah law afforded by Article 9 of the ECHR, compared to Christianity. Human rights are a major protector of religious freedom in Europe, which is why this discussion shall also be informed by the law's

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[424] See section 3.3.1 The Ban of Religious Symbols below.

[425] For more on this, see: 'Islamic Finance in UK' (*GOV.UK*) <https://www.gov.uk/government/publications/islamic-finance-in-uk> accessed 10 February 2022; Ian Edge, 'Islamic Finance, Alternative Dispute Resolution and Family Law: Developments towards Legal Pluralism?' in Robin Griffith-Jones (ed), *Islam and English Law: Rights, Responsibilities and the Place of Shari'a* (Cambridge University Press 2013).

[426] See section 3.3.1 The Ban of Religious Symbols below.

[427] See section 3.2 The Influence of Tradition on Religion, and; section 3.3.1 The Ban of Religious Symbols below.

[428] See section C) Bias towards Christian Heritage in section 3.3.1 below.

[429] See section 3.3.2 Succession: Thrace Minority in Greece below.

response to Shariah succession law, by examining how far Shariah law practices are accommodated and possibly tolerated within the ECHR. This approach will then set the scene for this study's main objective, which is to conduct a legal examination looking at the application of Shariah succession rules within the scope of Scots law.

In this chapter, the introductory section provides a brief overview of the scope of religious freedom provided for by Articles 8 (Private and Family Life), 9 (Religious Freedom) and 14 (Prohibition of Discrimination) of the ECHR. This chapter will, however, focus on Article 9, because the cases involving Shariah law are based on alleged interference with religious freedom. The first section will briefly examine the influence of tradition on religious freedom in Europe. This discussion will set the scene for examining the scope of religious freedom afforded to Shariah law compared to other religions, particularly Christianity. Then, this chapter will discuss some of the most recent and significant cases of the ECtHR relating to Shariah law practice with Article 9 of the ECHR, particularly focussing on the leeway given by the ECtHR to a state under the concept of the margin of appreciation. The last section will consider a recent ECtHR decision concerning Shariah succession law to assess the position of Shariah inheritance law within the convention.

3.1.1 Overview of Freedom of Religion, Private and Family Life and Prohibition of Discrimination

Manifesting religious practice is recognised and legally accepted in European countries. Article 9(1) of the ECHR states:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Article 9 protects two interests: (i) the right to hold a belief and the right to change it; (ii) the right to manifest a belief. The former can be referred to as the internal aspect and the latter as the external aspect.[430] The internal aspect is protection of the unlimited right to embrace a particular belief and to change it, no matter whether the belief is religious or non-religious, and no interferences with this right are permissible.[431] The external aspects of the right

[430] James J Fawcett, Máire Ní Shúilleabháin and Sangeeta Shah, *Human Rights and Private International Law* (Oxford University Press 2016), 672.

[431] Fawcett, Ní Shúilleabháin and Shah (n 430), 672.

encompass the freedom to manifest a belief in public, although Article 9(2) provides that the right is a qualified one, in that it may be subject to limitations in prescribed circumstances:

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Despite the right to manifest a religious belief being guaranteed in public and private spheres, this does not entail an absolute right to do so, as it is merely highlights the fact that a religious belief may be practiced either way.[432] Therefore, interferences with the external right are permissible, provided that they meet the restrictions for interferences presented in Article 9(2) ECHR.[433] Since a person manifesting a religious practice might impact on others' rights to coexist as a religious group, the state has the right to impose certain limitations on the right to manifest a religious belief to 'ensure that everyone's beliefs are respected'.[434] Moreover, in order to be justified, state interference to limit freedoms set out in Articles 8, 9, 10 and 11 must answer three questions: (i) is the interference is in accordance with the law?; (ii) does it pursue one of the legitimate aims mentioned in Article 9(2)?; (iii) does it pursue that aim proportionately, i.e. in a manner which is necessary in a democratic society?[435]

Furthermore, additional protection is provided by Article 14 of the ECHR, which prohibits discrimination on any grounds 'such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.[436] However, interference only constitutes discrimination when it impacts upon the enjoyment of one or more Convention rights.[437] For instance, in *Savez Crkava "Rijec Zivota" and others v. Croatia,*[438] the ECtHR found a violation of Article 9 in relation to Croatia's refusal to grant several churches an agreement, which had already been granted to

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[432] Council of Europe, *Guide on Article 9 of the European Convention on Human Rights: Freedom of Thought, Conscience and Religion* (Council of Europe/European Court of Human Rights 2019), 11.

[433] Fawcett, Ní Shúilleabháin and Shah (n 430), 672.

[434] *Kokkinakis v Greece* App No 1430788 ECHR 25 May 1993, [33].

[435] Javier Martinez-Torron, 'Limitations on Religious Freedom in the Case Law of the European Court of Human Rights' (2005) 19 Emory International Law Review 587, 593.

[436] European Convention on Human Rights as amended (1950) (ECHR) Art 14.

[437] Council of Europe, 'Protocol 12 to the European Convention on Human Rights' ROme, 4.XI.2000 <https://www.echr.coe.int/Documents/Library_Collection_P12_ETS177E_ENG.pdf> accessed 20 November 2021, Article 1.

[438] *Savez Crkava "Rijec Zivota" and others v Croatia* App No 779808 ECHR 9 Dec 2010, [7].

similar churches, as it would have permitted them to provide state schooling and given legal effect to religious marriages. Accordingly, the ECtHR also found a violation of Article 14, on the basis of discriminating against the applicant's freedom to exercise their religion given by Article 9.[439] Before examining ECtHR case law concerning Shariah law practices, the next section will turn to the influence of European tradition on shaping religious freedom, in order to help us understand the nature of the conflicts with Shariah law rules in Europe. This will inform us of the overall approach towards Shariah law practices, including succession, by the ECtHR.

3.2 The Influence of Tradition on Religion

As discussed in the previous chapter, Christianity is one of the prominent characteristics that has shaped European identity.[440] Therefore, Berger is convinced that accommodating Shariah law in Europe is mostly opposed by 'cultural-religious values'.[441] In order to demonstrate his approach, he divided Western responses into two different groups: the political-legal response, as in 'this is how we have organised our society'; and the cultural-religious response, as in 'this is how we do things here'.[442] The cultural tradition of regulating religion is, he argues, not of a political-legal nature, but rather each society has a dominant culture which objects to Shariah rules.[443] In other words, most of the conflict between Western society and Islam is believed to be related to social behaviours.[444] For instance, by 2011, legislative proposals to ban the wearing of the Burqa were drafted by several European countries, but only passed in France and Belgium.[445] Although the reasoning behind this ban was diverse, all were concerned with cultural-religious values such as: problems with integration; oppression of women; disruption to public order.[446] Therefore, as Berger argues, 'Although the political-legal response (freedom of religion, rule of law, unambiguity of

[439] *Savez Crkava "Rijec Zivota" and others v. Croatia* (n 438), [93].

[440] See section 2.3 Secularity Models Across Europe above.

[441] Berger (n 230), 258.

[442] Berger (n 230), 256.

[443] Berger (n 230), 261.

[444] Berger (n 230), 261.

[445] Berger (n 230), 261.

[446] Berger (n 230), 261.

legislation) would rule against such bans, these arguments were overruled by the religious-cultural response'.[447]

However, the embodiment of Christianity in European culture is clear and worth highlighting, as it will contextualise the manner of European reactions to foreign religions such as Islam. Strasbourg jurisprudence have not attempted to define religion in a precise manner.[448] Instead, the ECtHR tends to opt for a wide definition.[449] This approach identifies the type of rights which freedom of religion or non-discrimination protects, which focuses the legal inquiry on the terms of freedom and discrimination instead of religion.[450] Still, there are some obstacles to this approach, since in any attempt to define the scope of religion-based rights the underlying nature of religion itself will necessarily be assumed.[451] 'Such assumptions rest on often unarticulated premises concerning the metaphysical, psychological, or cultural aspects of religion'.[452] Therefore, legal definitions, as Gunn argues 'may contain serious deficiencies' by unintentional incorporation of certain social and cultural attitudes concerning favoured religions, while failing 'to account for social and cultural attitudes against disfavoured religions'.[453] This leads to the question of whether the state is neutral in that position, which is not straightforward, particularly concerning the privatising of religion rooted in Christian theology.

3.2.1 Christianity and Privatising Religion

Danchin argues that Christianity in Europe has contributed significantly in shaping the state and its law, since it is the dominant religious tradition in Europe.[454] The idea of privatising religions from the public sphere began in the eighteenth century, particularly when the state

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[447] Berger (n 230), 263.

[448] Aaron R Petty, 'Religion, Conscience, and Belief in the European Court of Human Rights' [2015] George Washington International Law Review 807; Carolyn Evans, 'Pre-Kokkinakis Case Law of the European Court of Human Rights: Foreshadowing the Future' in Carolyn Evans, J Temperman and J Gunn (eds), *The European Court of Human Rights and the Freedom of Religion or Belief* (Brill | Nijhoff 2019), 15.

[449] Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights*, vol 1 (Oxford University Press 2001), 55.

[450] T Jeremy Gunn, 'The Complexity of Religion and the Definition of Religion in International Law Conference: Religion, Democracy, & Human Rights' (2003) 16 Harvard Human Rights Journal 189, 195; Peter G Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights' (2011) 32 Michigan Journal of International Law 663, 676.

[451] Gunn (n 450), 193.

[452] Danchin (n 450), 676.

[453] Gunn (n 450), 195.

[454] Danchin (n 450), 670.

started to be desacralized, thereby reducing the political authority of the churches.[455] This philosophy, according to Dunchin, characterised the state of religion as freedom of conscience, and left the public sphere to be shaped by the morality of justice.[456] According to Connolly, the logic of secularism in church-state separation is 'hypocritical' because 'it secretly draws cultural sustenance from the 'private faith' of constituencies who embody the European traditions from which Christian secularism emerged'.[457] The influence of Christianity did not vanish in the private sphere but remained a secret influence on the public sphere.[458] For example, it has been argued that Western marriages are influenced by Christian jurisprudence.[459] Moreover, Danchin regards the link between Christianity and Western law as an 'embarrassment for liberal theories of rights and their assumption of state neutrality'.[460]

Furthermore, Petty argues, as does Danchin,[461] that the religious heritage of Christianity in human rights, which encapsulates European identity, is clear.[462] To assess this argument, we need to elaborate on the link between Christian theology and human rights principles. Rowan Williams assumed that making legal rights a universal principle:[463]

> requires both a certain valuation of the human as such and a conviction that the human subject is always endowed with some degree of freedom over against any and every actual system of human social life. Both of these things are historically rooted in Christian theology.

There has been a compartmentalisation of religion by separating the spiritual and ritual aspects of religion.[464] Although this normative shift was enshrined in law during the twentieth century, the relationship between Christian theology and human rights has

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[455] Danchin (n 450), 670.

[456] Danchin (n 450), 670.

[457] William E Connolly, *Why I Am Not a Secularist* (U of Minnesota Press 1999), 91.

[458] Connolly (n 457), 91.

[459] Don S Browning, 'Modern Law and Christian Jurisprudence on Marriage and Family' (2008) 58 Emory LJ 31, 37; see also Kathryn O'Sullivan and Leyla Jackson, 'Muslim Marriage (Non) Recognition: Implications and Possible Solutions' (2017) 39 Journal of Social Welfare and Family Law 22.

[460] Danchin (n 450), 671.

[461] Peter G Danchin, 'The Emergence and Structure of Religious Freedom in International Law Reconsidered' (2008) 23 Journal of Law and Religion 455.

[462] Petty (n 448), 816.

[463] Williams (n 143), 272.

[464] Petty (n 448), 844.

remained, as was argued by Connolly earlier,[465] 'albeit silently'.[466] This silent influence was fundamental to the notion of religion in Article 9 ECHR, and its application by the ECtHR to be more accommodating of religious notions that have been shaped by Christian theology.[467]

The private nature of religion has been assumed by European societies as a requirement for a modern secular Europe, since secular law, which has been shaped by Christian theology, distinguishes between internal and external belief.[468] This separation 'is structurally biased towards those forms of religious belief which are essentially voluntarist, private and individualist'.[469] Furthermore, Saba Mahmood argues that human rights principles such as religious freedom 'are not neutral mechanisms for the negotiation of religious difference and that they remain quite partial to certain normative conceptions of religion'.[470] Consequently, ECtHR cases concerning European Muslims' claims within the public order sphere 'remain blind to this normative disposition of secular-liberal law to majority culture'.[471] Therefore, Danchin believes that it is wrong to assume that religious freedom is simply a matter of protecting individual rights from state interference or community attacks, because these rights are also 'tied to and dependent upon different models of state-religion accommodation and different traditions of religious tolerance and pluralism'.[472] The ECtHR here has adopted 'a form of secular fundamentalism' which contradicts 'its self-professed role as the overseer of the state', acting as the neutral organiser of the beliefs system within the state.[473]

However, this notion is barely applicable outside Western territories, since large numbers of non-Western cultures and traditions, such as Islam, reject aspects of human rights that exclude religion.[474] Religion in these traditions, as Witte observes, is almost 'inextricably

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[465] Connolly (n 457), 91.

[466] Petty (n 448), 817.

[467] Petty (n 448), 810.

[468] Petty (n 448), 844.

[469] Malcolm D Evans, 'Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions' in Carolyn Evans, Peter Cane and Zoë Robinson (eds), *Law and religion in theoretical and historical context* (Cambridge University Press 2008), 313.

[470] Saba Mahmood, 'Religious Reason and Secular Affect: An Incommensurable Divide?' (2009) 35 Critical Inquiry 836, 861.

[471] Mahmood (n 470), 859, 860.

[472] Danchin (n 450), 745.

[473] Evans, 'Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions' (n 469), 312.

[474] John Jr Witte, 'Law, Religion, and Human Rights' (1996) 28 Columbia Human Rights Law Review 1, 12.

integrated into every facet of life'[475] and of public character that represents people's identities.[476] However, from a Western perspective, as Danchin argues, Islam is seen as 'a threat to the secular political order' and 'not religion in its true, modern form'.[477] To elaborate, the main theme of a secularised Western system is to assert the individual's entitlement and interests via protection through law and the state, whereas, Shariah's main theme is to generate an enhanced society that collectively respects the law maker (Allah, "God").[478] Indeed, human rights are often interpreted in a manner similar to the understanding of religious doctrine, such as Islam, as universal and inalienable, and to be applied regardless of political or cultural orientations.[479] Moreover, Witte believe that the reason that 'many non-Western societies have neither accepted nor adopted the basic international declarations and covenants on human rights' is because of the domination of Western notions of rights on international law.[480] For example, the acknowledgment of Shariah as a sacred and divine is obvious in the preamble of the Cairo Declaration on Human Rights 1990:

> Believing that fundamental rights and freedoms according to Islam are an integral part of the Islamic religion and that no one shall have the right as a matter of principle to abolish them either in whole or in part or to violate or ignore them in as much as they are binding divine commands, which are contained in the Revealed Books of Allah and which were sent through the last of His Prophets to complete the preceding divine messages and that safeguarding those fundamental rights and freedoms is an act of worship whereas the neglect or violation thereof is an abominable sin, and that the safeguarding of those fundamental rights and freedom is an individual responsibility of every person and a collective responsibility of the entire Ummah.

Overall, this discussion has explored how Christian theology has influenced modern law around religious freedom, which might explain the tension between Shariah law and Western societies, particularly when Muslim believers tend to firmly grasp religious instructions on personal matters that contradict human rights principles, such as Shariah succession rules. The next section examine how Shariah law's rules have been addressed by ECtHR compared

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[475] Witte (n 474), 12.

[476] Silvio Ferrari, 'Law and Religion in a Secular World: A European Perspective' (2012) 14 Ecclesiastical Law Journal 355, 368.

[477] Danchin (n 450), 689.

[478] Neville Cox, 'The Clash of Unprovable Universalisms—International Human Rights and Islamic Law' (2013) 2 Oxford Journal of Law and Religion 307, 316.

[479] Petty (n 448), 816.

[480] Witte (n 474), 12, 13.

to Christian practices to assess the level of tolerance toward some Shariah law practices to further help us assess Shariah succession law's position.

3.3 ECtHR Margin of Appreciation and Shariah Practices

While many cases have been raised in the ECtHR challenging state decisions against Shariah law practices, seldom have these restrictions been condemned. Therefore, by not condemning such restrictions, the ECtHR appears to 'broaden national discretion' to restrict religious manifestation under the concept of a margin of appreciation.[481] The ECtHR 'is a supra-national body and therefore has reflected a degree of caution in not being seen to substitute its judgment for that of member states, particularly in highly political or controversial matters'.[482] Since the *Kokkinakis* decision, the first case held to be a breach of Article 9, the ECtHR has offered contracting a state margin of appreciation to justify its interference with individual rights set out in the Convention.[483] This doctrine, which is also now is mentioned in the preamble to the latest text of the Convention, might be read as ensuring that 'the role of national decision-making bodies has to be given special consideration and domestic authorities should enjoy a large margin of appreciation'.[484] Simultaneously, the margin of appreciation aims to maintain a balance between respecting the democratic procedure of each individual state, and the need for all states to come to terms with uniform minimum standards.[485]

3.3.1 The Ban of Religious Symbols

The ECtHR, in dealing with the issue of symbols in public services, such as ministries, courts and public hospitals and public schools, has divided them into two categories; public officials

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[481] Howard Charles Yourow, 'The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence' (1987) 3 Conn. J. Int'l L. 111, 159; Evans, 'The Islamic Scarf in the European Court of Human Rights' (n 277), 168.

[482] Evans, 'Pre-Kokkinakis Case Law of the European Court of Human Rights: Foreshadowing the Future' (n 448), 21.

[483] Stephanie E Berry, 'Religious Freedom and the European Court of Human Rights' Two Margins of Appreciation' (2017) 12 Religion & Human Rights, 198; Evans, 'Pre-Kokkinakis Case Law of the European Court of Human Rights: Foreshadowing the Future' (n 448), 29.

[484] Francoise Tulkens, 'The European Convention on Human Rights and Church-State Relations Pluralism vs. Pluralism Symposium: Constitutionalism and Secularism in an Age of Religious Revival: The Challenge of Global and Local Fundamentalisms - State Sovereignty and Constitutional Models for the Relation between Religion and the State' (2008) 30 Cardozo Law Review 2575, 2577.

[485] Effie Fokas, 'Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence' (2015) 4 Oxford Journal of Law and Religion 54, 58.

(state representatives) and public users.[486] It would be helpful to highlight some of these cases to understand why the ECtHR's classify religious symbols into these categories. Regarding officials, the state is able to rely on the state principles of secularism and neutrality as justification for its restrictions on religious symbols.[487] In order for officials to remain neutral, it must be ensured that public users will receive equal treatment, without any bias toward a specific religion.[488] That was illustrated in *Ebrahimian v. France,*[489] where the ECtHR did not condemn France for refusing to renew a Muslim woman's contract as a social assistant in the psychiatric department of a French public hospital because she refused to remove her Islamic headscarf at the workplace, since she did not comply with France's neutrality principle. On the other hand, since public users are not representatives of the state, they can freely manifest religious beliefs in public buildings and workplaces, since the ECtHR maintains a difference between public officials and ordinary citizens.[490] This reasoning might be at odds with the ECtHR decision on France's burqa ban in *S.A.S v. France.*[491] Because the ban in *S.A.S* concerns public users, which contradict the ECtHR approach that distinguishes between public officials and ordinary citizens 'who are by no means representatives of the State engaged in public service and are not bound, on account of any official status, by a duty of discretion in the public expression of their religious beliefs'.[492]

The decision in *S.A.S* is worth investigating in this section because of the adoption of the concept of living together under margin of appreciation which has been developing in ECtHR case law since then as a response to Shariah practices across Europe. This concept might be a cutting edge to any hope of more tolerance of Shariah law practices, and this assessment shall help us uncover the approach of the ECtHR toward Shariah law practices that shall add to the understanding of the border issues around Shariah law accommodation. It is also helpful in measuring the degree of tolerance giving to the Islamic symbols as compared to Christian symbols which have privilege over securing European identity.

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[486] *Ebrahimian v France* App No 6484611 ECHR 26 Novemb 2015, [64].

[487] *Ebrahimian v. France* (n 486), [57, 64].

[488] *Ebrahimian v. France* (n 486), [64].

[489] *Ebrahimian v. France* (n 486), [64].

[490] *Ebrahimian v. France* (n 486), [64].

[491] *SAS v France* App No 4383511 ECHR 1 July 2014.

[492] *Ebrahimian v. France* (n 486), [64].

The ECtHR in *S.A.S*[493] 'provides legal and political shelter' for banning the face veil across Europe.[494] This case involved a French national woman, who had formerly worn a face veil, challenging a face veil ban which was introduced in France in 2010. The ECtHR acknowledged the interference of the French burqa ban with the right underlined in Article 8 and 9 ECHR.[495] However, the ECtHR accepted France's argument that this measure fell under the margin of appreciation to 'respect for the minimum requirements of life in society',[496] and that the veil is incompatible with the requirements of 'living together'.[497] The same conclusion was reached in two other cases raised against Belgium for the same ban in *Dakir v. Belgium;*[498] *Belcacemi et Oussar v. Belgium.*[499] However, in *Ahmet Arslan and Others v. Turkey,*[500] the subject was convicted by the Turkish authorities for wearing religious symbols in public places, an action that, apart from religious ceremonies, is prohibited under Turkish legislation.[501] Although the ECtHR in *Ahmet Arslan* found Turkey in violation of Article 9 ECHR in a similar religious symbols matter, the ECtHR stated in *S.A.S.* that the Burqa is different, because it covers the entire face, with the possible exemption of the eyes.[502]

The vagueness of the 'living together' concept, combined with the unlimited margin of appreciation granted to national authorities, has triggered considerable arguments against its potential abuse.[503] The ECtHR employed this concept to guarantee a collective life within a single society, improving social interaction and respecting the freedom of others.[504] To elaborate, the aim of this concept is to highlight the significance of showing the face in social interaction, as the visibility of the face is a social tie to living together in a community.[505]

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493 *S.A.S v. France* (n 491).

494 Eva Brems, 'SAS v. France: A Reality Check Thematic Articles: Perspectives on the Islamic Face Veil' (2016) 25 Nottingham Law Journal 58, 59.

495 *S.A.S v. France* (n 491), [110].

496 *S.A.S v. France* (n 491), [121].

497 *S.A.S v. France* (n 491), [153].

498 *Dakir v Belgium* App No 461912 ECHR 11 July 2017.

499 *Belcacemi and Oussar v Belgium* App No 3779813 ECHR 11 July 2017.

500 *Ahmet Arslan and Others v Turkey* App No 4113598 23 Februry 2010.

501 *Ahmet Arslan and Others v. Turkey* (n 500).

502 *S.A.S v. France* (n 491), [136].

503 Brems (n 494), 62.

504 Sarah Trotter, '"Living Together", "Learning Together", and "Swimming Together": Osmanoğlu and Kocabaş v Switzerland (2017) and the Construction of Collective Life' (2018) 18 Human Rights Law Review 157, 159.

505 Trotter (n 504), 158.

Therefore, Yusuf observes that living together might indicate that everyone is obliged to be available to communicate, in disregard of their consent in doing so.[506] Moreover, the dissenting opinion of judges Nussberger and Jäderblom in this case indicated that the right to respect for private life in Article 8 is recognised as being opposed to enforced social interaction, which grants a right to avoid communication.[507] Therefore, this decision is regarded by Yusuf as misdirected by the ECtHR, since neither Article 8 nor 9 refer to the concept of living together, or the need to respect the minimal values of a society.[508]

Having said that, Hunter-Henin argues that the law endorsed the social norms 'as to how to live together'.[509] The concept of 'living together' refers to the social concept 'this is how we do things here', raised by Berger earlier in this chapter.[510] However, there is a lack of reasoning to explain why the ECtHR legally 'backed' such social norms.[511] By adopting this norm, the concept of living together appears as if it 'was a legally justifiable aim' to maintain fundamental freedoms and public order.[512] This flaw might be understood as allowing the emergence of a 'forced assimilation policies against minorities' approach.[513] In other words, majority interests prevailed over minority interests, and the notion of living together involves the need for a minority to succumb to the preferences of a majority.[514] This impression is received from the fact that the Court accepted that the state perceived the face veil 'as breaching the right of others to live in a space of socialisation which makes living together easier of the state'.[515] It also could be argued that this 'assimilationist and secularising stance' is meant to be associated with the retreat of multiculturalism – discussed in the previous chapter[516] – rather than protecting minority rights and religious freedoms.[517]

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[506] Yusuf (n 255), 282.

[507] *S.A.S v. France* (n 491), [A8].

[508] Yusuf (n 255), 282; Aneira J Edmunds, 'Precarious Bodies: The Securitization of the "Veiled" Woman in European Human Rights' (2021) 72 The British Journal of Sociology 315, 319.

[509] Myriam Hunter-Henin, 'Living Together in an Age of Religious Diversity: Lessons from Baby Loup and SAS' (2015) 4 Oxford Journal of Law and Religion 94, 100.

[510] Berger (n 230), 256.

[511] Hunter-Henin (n 509), 100.

[512] Edmunds (n 508), 319.

[513] Yusuf (n 255), 284.

[514] Yusuf (n 255), 285.

[515] *S.A.S v. France* (n 491), [122].

[516] See section 2.5 The Multiculturalism Debate after the 9/11 and 7/7 Attacks above.

[517] Edmunds (n 508), 319.

This lack of legitimacy in the concept of 'living together' appears to impose a majority concern over minority conduct 'as a measure of social cohesion and mandatory engagement'.[518] The Netherlands rejected this justification because 'the subjective feeling of insecurity could not justify a blanket ban'.[519] However, Trispiotis argued that the living together approach of the ECtHR might count in favour of 'reinforc[ing] the connections between rigorous human rights protection and core principles underlying liberal democracy'.[520] Moreover, the French approach was believed to guarantee equality among citizens due to its reflection on social bonds in a society 'whose aim is to tie cultural association with democratic citizenship'.[521] However, this was not persuasive to commentators such as Brems, again due to the fact that 'the Court appears blind to the minority rights dimension'.[522] The reason for this overlap might be due to the fact that the Court accepted that the face veil is a threat to social interaction, but did nothing to examine the potential risk of whether a 'choice of society' is used as concealment of minority harassment.[523] In other words, there is no doubt that the Court was aware of France's type of secularism, but it did nothing to draw a line between liberal and fundamentalist secularism 'extending duties regarding religious neutrality from public officials to ordinary citizens in all public places seems highly problematic'.[524]

Furthermore, the Court's concern that this ban might render the subject isolated from society[525] was ignored in order to avoid breaching the right of others to socialise and live side by side.[526] Brems argued that if the Court acknowledged the potential isolation of these women, 'it seems difficult to consider the ban as a measure that may improve living together at least if this living together is supposed to include these women'.[527] Moreover, the Court's concern was indeed observable, on whether the banning of the Burqa contributed to social

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[518] Yusuf (n 255), 285.

[519] *S.A.S v. France* (n 491), [51].

[520] Trispiotis (n 302), 590.

[521] Trispiotis (n 302), 597.

[522] Brems (n 494), 70.

[523] Brems (n 494), 70.

[524] Teresa Sanader, 'SAS v France–the French Principle of "Living Together" and the Limits of Individual Human Rights' (*LSE Human Rights Blog*, 2014) <https://blogs.lse.ac.uk/humanrights/2014/07/14/s-a-s-v-france/> accessed 24 November 2021.

[525] *S.A.S v. France* (n 491), [146, 157].

[526] *S.A.S v. France* (n 491), [122].

[527] Brems (n 494), 69.

interaction.[528] According to a study conducted by the Open Society Foundation in France, which was presented to the ECtHR, demonstrated that this concept invalid to encourage social interaction, in which observation showed a decrease in social interaction by these affected women.[529] Indeed, in *Belcacemi* the same arguments of 'living together' were raised by the Belgian government as justification for their Burqa ban.[530] The applicant claimed that she chose to stay at home because of the surrounding pressure of this ban; therefore, she suffered from significant restrictions on her social life.[531] Indeed, as we have observed, the burqa ban does not contribute to increasing social interaction, at least to the women who are affected by the ban.

It is also worth highlighting the fact that people concerned by the possibility of Islamophobia might receive these judgments as a positive reaction confirming their fears.[532] The Court in *S.A.S.* expressed its concerns over the rise of intolerance and 'Islamophobic remarks' following the adoption of the Burqa Ban in 2010.[533] As an effect of this ban, public harassment did indeed occur. According to a study conducted by the Open Society Foundation in France, treating veiled women abusively gives the impression of having been granted implicit legitimacy by the ban.[534] Furthermore, these judgments allowed for alarming cases such as the burkini in France, where four armed police officers forced a Muslim woman to remove her burkini on a public beach.[535] This attitude could be perceived as 'a legally sanctioned form of gender-based violence, denigrating and humiliating women by stripping them of clothing'.[536] It also implied that the body of the Muslim woman could be interpreted as 'a symbol of terror'.[537] These restrictions, endorsed at a state level, have normalised harassment of Muslim women, and rendered them vulnerable to verbal and physical abuse in the street.[538] Moreover, the move toward undressing Muslim women could promote the

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[528] Brems (n 494), 68.

[529] Brems (n 494), 68.

[530] *Belcacemi and Oussar v Belgium* (n 499).

[531] Trotter (n 504), 159.

[532] Evans, 'The Islamic Scarf in the European Court of Human Rights' (n 277), 176.

[533] *S.A.S v. France* (n 491), [149].

[534] 'Unveiling the Truth: Why 32 Women Wear the Full-Face Veil in France' (*Open Society Justice Foundations*) <https://www.opensocietyfoundations.org/reports/unveiling-truth-why-32-muslim-women-wear-full-face-veil-france> accessed 24 November 2021.

[535] Edmunds (n 508), 320.

[536] Edmunds (n 508), 320.

[537] Kimberley Brayson, 'Of Bodies and Burkinis: Institutional Islamophobia, Islamic Dress, and the Colonial Condition' (2019) 46 Journal of Law and Society 55, 59.

[538] Edmunds (n 508), 320.

argument that the call for freedom for women is more concerned with endorsing a 'sexualised female form' rather than freeing covered women from oppression.[539]

Since the Court in such cases refused 'to engage with the reality of Muslim women's lives and the complex and multiple reasons for which different women wear the veil', it could be assumed that the Court was under the Western view that Shariah is oppressive to women.[540] Moreover, it may also be concerned that women might be under pressure from their families, particularly males, to wear such clothes.[541] Indeed, 'the ECtHR has endorsed state gendered and racialised security practices by presenting itself' as protecting Muslim women from Muslim men.[542] Nevertheless, it is a fact that all these cases 'were brought to the Court by female applicants, actively requesting protection of their right to manifest Islamic religious identity, seems to contradict the popular opinion that women of that identity are helpless victims of religious oppression'.[543] This was also confirmed by an empirical study conducted among face-veil wearing women which stated that all of the interviewees declared that they made up their own minds in doing so.[544] Remarkably, when these findings were presented to European audiences, most of them barely believed the facts, which affirms the deep-rooted characteristics of such an inaccurate assumption.[545]

A) Two Concepts of Margin of Appreciation

What could be left for the Court to justify its decision in *S.A.S* is the democratic process approach, through a margin of appreciation. Before examining this reasoning, it worth highlighting how the Court uses this doctrine. Letsas, in his well-known article, has observed two uses of this doctrine, substantive and structural, where the ECtHR may use it to say that

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[539] Ibrahim Abraham, 'The Veil and the Closet: Islam and the Production of Queer Space' [2007] Queer Space: Centres and Peripheries <https://www.academia.edu/4922258/The_Veil_and_the_Closet_Islam_and_the_Production_of_Queer_Space._Queer_Space_Centres_and_Peripheries_University_of_Technology_Sydney_2007_> accessed 5 September 2022, 2.

[540] Evans, 'The Islamic Scarf in the European Court of Human Rights' (n 277), 177.

[541] Edmunds (n 508), 318.

[542] Katherine E Brown, 'The Securitisation of Human Rights', *Handbook on Gender in World Politics* (Edward Elgar Publishing 2016) in; Aneira J Edmunds, 'Precarious Bodies: The Securitization of the "Veiled" Woman in European Human Rights' (2021) 72 The British Journal of Sociology 315, 319.

[543] Wojciech Brzozowski, 'Is Islam Incompatible with European Identity?', *University of Milano-Bicocca School of Law Research Paper* (2018), 8.

[544] Brems (n 494), 62; 'Unveiling the Truth: Why 32 Women Wear the Full-Face Veil in France' (n 534), 15.

[545] Brems (n 494), 62.

the applicant did not 'have the right she claimed', and 'for saying that it will not substantively review the decision of national authorities as to whether there has been a violation'.[546] He also believes that the ECtHR's failure to distinguish between them has raised confusion and controversy.[547] Examining these two concept aid our understanding of the use of this doctrine. The substantive concept, which mostly examines limitations to the rights set out in Articles 8-11, examines the state's authority in advancing collective goals that might interfere with individuals' rights.[548] This interference may not be a violation of individual rights, because the measures taken by the state in this interference are justified by the proportionate aim of advancing collective goals.[549]

The structural (or systematic)[550] concept, which amounts to the state deciding that it is better placed than an international court.[551] This concept falls into two broad categories.[552] First, if the asserted right in decided cases lacks a consensus among member states.[553] The category of the structural concept of the margin, as Letsas argues, has been used by the Court more often in decided cases, 'when interpreting personal sphere rights (Arts 8–11 ECHR) and in particular restrictions based on public morals'.[554] For instance, in *S.A.S*, the Court relied on the lack of consensus among member states in dealing with the face veil to grant France a wide margin of appreciation.[555] Secondly, the state will enjoy a margin of appreciation if the cases concern sensitive matters, and the Court acknowledges that the state is in a better place to examine them.[556] Since the Convention mechanism is subsidiary to the national authority, a state is in fact better placed to evaluate its local needs than an international court.[557]

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[546] George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 Oxford Journal of Legal Studies 705, 706.

[547] Letsas (n 546), 706.

[548] Letsas (n 546), 709-10.

[549] Letsas (n 546), 709-10.

[550] Oddný Mjöll Arnardóttir, 'Rethinking the Two Margins of Appreciation' (2016) 12 European Constitutional Law Review 27.

[551] Letsas (n 546), 721.

[552] Letsas (n 546), 722.

[553] Letsas (n 546), 722.

[554] Letsas (n 546), 722, 724.

[555] *S.A.S v. France* (n 491), [156].

[556] Letsas (n 546), 723.

[557] *S.A.S v. France* (n 491), [129].

Returning to *S.A.S,* the Court used the lack of consensus among European countries regarding the face veil to grant a state such a margin of appreciation.[558] This odd reasoning proved to be invalid, because at the time of delivering the judgment, only France and Belgium were against the face veil, although Germany, the Netherlands, Italy, Spain, Switzerland, and Denmark later followed the ban at municipal and national levels.[559] On the contrary, most of the remaining members do not invoke any general prohibition of the face veil; therefore, this argument, which was invoked by the ECtHR, would only be against the ban, which places the question of the validity of the lack of consensus over the reasoning in a doubtful position.[560] However, relying on a margin of appreciation does not provide any indication as to whether a state's interference with a particular right was permissible, which is an obstacle to creating a substantive theory to justify the conclusion reached by the Court.[561] As MacDonald indicates, if the Court's reasoning is that the measure was 'within the margin of appreciation of national authorities, it is really providing no reason at all but is merely expressing its conclusion not to intervene, leaving observers to guess the real reasons which it failed to articulate'.[562] This approach become more clearer as a matter of securing European traditional identity within the public setting of schools.

B) Shariah Symbols in Educational Institutions

The Court distinguishes between teachers and pupils in this matter. In general, headscarf wearing for students is not opposed, except in France, although it seems to be fairly controversial to wear a headscarf in a workplace in some European countries, such as Switzerland and France. In the education system, the state appears to have been given an extensive margin of appreciation, since countries will differ in rules regarding this field, due to different traditional impacts and different methods of maintaining public order. The margin of appreciation will be invoked 'when it comes to regulating wearing of religious symbols in educational institutions, especially in view of the diversity of the approaches taken by national authorities on the issue'.[563] This is why the Court found no violation of Article 9 ECHR in banning *Sahin*[564] from the University for wearing a headscarf. Similar

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[558] *S.A.S v. France* (n 491), [156].

[559] Trispiotis (n 302), 582; Edmunds (n 508), 317.

[560] Trispiotis (n 302), 588.

[561] Letsas (n 546), 714, 715.

[562] R MaCdonald, 'The Margin of Appreciation' in Macdonald, Matscher and Petzold (eds), *The European System for the Protection of Human Rights* (1993), 85.

[563] *Sahin v Turkey* App No 4477498 ECHR 10 Novemb 2005, [109].

[564] *Sahin v. Turkey* (n 563), [116].

standards were held before with *Karaduman,* when a Turkish university refused to issue a degree to a female student, on the basis of wearing a headscarf on her photo ID.[565] Evans challenges the approach that public institutions ought not to require a student to limit their religious freedom for the purpose of granting them a university degree, since these institutions have the burden 'to respect the human rights of all within a country'.[566]

Another controversial example is the prohibition of the wearing of religious symbols for primary and secondary school pupils in France. Following many complaints raised to the Court complaining about this ban, the Court considered that the ban fell within the state's margin of appreciation, because it aimed to protect the constitutional principle of secularism which is in line with the values laid down in the Convention.[567] To date, this ban is exclusive to France at a national level.[568] However, at an institutional level, there were similar actions taken in primary and secondary schools in England concerning banning the wearing of religious attire, such as the case *Begum v. Denbigh High School*[569]*,* albeit this concerned a measure taken in a single school.

Regarding teachers, the ECtHR attempts to strike a balance between a teacher's right to manifest their religion and the state's aim to maintain neutral public services.[570] For instance, in *Dahlab,*[571] which involved the sacking of a primary school teacher based on her refusal to remove her headscarf during teaching, the ECtHR dismissed her application because pupils aged between four and eight are 'more easily influenced than older pupils'. However, the Court was not definite in assessing the impact of the headscarf upon children.[572] This hesitation may invoke the argument that if the pupils were considered to be potential victims of religious influence, then why did the Court did not consider the fact that there was no harm caused by her dress, as no single pupil or parent had made a complaint during two years of teaching.[573] Moreover, Muslim children in the school could be harmed by the fact

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[565] *Karaduman v Turkey* App No 1627890Commission Decis 3 May 1993.

[566] Evans, 'Pre-Kokkinakis Case Law of the European Court of Human Rights: Foreshadowing the Future' (n 448), 21.

[567] *Gamaleddyn v France App No 18527/08; Aktas v France App No 43563/08; Ranjit Singh v France App No 27561/08; Jasvir Singh v France App No 25463/08 (ECHR 30 June 2009)*.

[568] See section 2.4.2 The Supremacy of State Law in France: Postcolonial Effect above.

[569] *R (on the application of Begum) v Denbigh High School Governors* [2006] UKHL 15.

[570] *Kurtulmus v Turkey* App No 6550001 ECHR 24 January 2006.

[571] *Dahlab v Switzerland* App No 4239398 ECHR 15 Febr 2001.

[572] Evans, 'The Islamic Scarf in the European Court of Human Rights' (n 277), 174.

[573] Evans, 'The Islamic Scarf in the European Court of Human Rights' (n 277), 175.

their teacher, who used to wear clothes as they do or as their mothers do, was forced outside the school because of her dress.[574] Furthermore, she did not tell her students about her religion when they asked her to explain her dress, nor did she encourage them to convert.[575] Therefore, there appears to have been no evidence of influence, in that her dress would make pupils feel that they should embrace their teacher's religion, as pupils are more influenced by how their parents live, by teaching their children their own religion and attending religious ceremonies.[576]

However, on the similar issue of religious symbols, the ECtHR in the case of *Lautsi v. Italy*[577] has drawn a different approach. The case involved whether displaying a crucifix in a state classroom contradicts Article 2 of Protocol 1 ECHR and Article 9 ECHR. The ECtHR emphasised the lack of evidence that the crucifix 'may have influence on pupils'; therefore, the Court found that it cannot be 'reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed'.[578] In both cases the Court acknowledged that both the crucifix and headscarf are religious symbols, and stated the lack of influence proven, even though the outcome of the two cases was different. To assess this conflict, the Court, under the margin of appreciation, accepted the Italian government's argument that displaying crucifixes in the classrooms is a result of a historical development, 'a fact which gave it not only a religious connotation but also an identity-linked one, now corresponded to a tradition which they considered it important to perpetuate'.[579]

C) Bias towards Christian Heritage

The tendency of the Court to use the margin of appreciation doctrine where there is a lack of consensus between states might explain why application of the doctrine in the context of religious freedom tends to be wide.[580] The national authority in a democratic society is given special weight, particularly when dealing with relations between the state and religious

[574] Evans, 'The Islamic Scarf in the European Court of Human Rights' (n 277), 176.

[575] Evans, 'The Islamic Scarf in the European Court of Human Rights' (n 277), 176.

[576] Evans, 'The Islamic Scarf in the European Court of Human Rights' (n 277), 176.

[577] *Lautsi v Italy* App No 3081406 ECHR 18 March 2011.

[578] *Lautsi v. Italy* (n 577), [66].

[579] *Lautsi v. Italy* (n 577), [67].

[580] Fokas (n 485), 58.

denominations.[581] As Berry notes, 'the secular or Christian traditions of the state have been accepted by the ECtHR to justify a wide [margin of appreciation] under Article 9 ECHR as there is a lack of consensus in relation to Church-State relations'.[582] For instance, the Court in this context allows the state a certain space to include its culture and tradition in interpreting religious rights,[583] such as in *Osmanoglu and Kocabas v Switzerland*.[584] The Court gave the state a wide margin of appreciation in terms of forming its curricula according to its needs and traditions, 'particularly where these matters arise in the sphere of teaching and State education'.[585] *Folgero v. Norway*[586] is another example where the Court has granted a state with a Christian tradition a margin of appreciation on the basis of lack of consensus.[587] In this case, the Court showed a willingness, as Berry demonstrates, 'to accept that the prioritisation of Christianity within the religious education syllabus fell within the State's Margin of appreciation'.[588] This stance appeared also in *Lautsi*, where the Court stated that it 'takes the view that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State'.[589]

This is regarded by Trotter as a broad idea of considering tradition with the aim of securing a European identity.[590] Despite the ECtHR standing against the influence surrounding religious symbols among young pupils in *Dahlab,*[591] the Court in *Lautsi* gave Italy a margin of appreciation regarding displaying a crucifix in a classroom, because it is part of the state tradition.[592] Therefore, it can be concluded that a headscarf does not signify tradition, but a crucifix does. This principle might explain the reluctance of the ECtHR to acknowledge the headscarf as a religious requirement, since the ECtHR would not acknowledge an action as a religious manifestation unless it is a religious requirement.[593] Evans argues that that many

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[581] *S.A.S v. France* (n 491), [129].

[582] Berry (n 483), 201.

[583] Fokas (n 485), 58.

[584] *Osmanoglu and Kocabas v Switzerland* App No 2908612 ECHR 10 January 2017, [95].

[585] *Osmanoglu and Kocabas v Switzerland* (n 584), [95].

[586] *Folgero and Others v Norway* App No 1547202 ECHR 29 June 2007, [89].

[587] Berry (n 483), 202.

[588] Berry (n 483), 202.

[589] *Lautsi v. Italy* (n 577), [86].

[590] Trotter (n 504), 168.

[591] *Dahlab v. Switzerland* (n 571).

[592] Trotter (n 504), 167.

[593] *Arrowsmith v UK* App No 705075Commission Decis 12 Oct 1978.

religious clothes are a religious requirement, and therefore are encompassed by Article 9.[594] Nevertheless, 'the Court was unwilling to state this explicitly in its judgment demonstrates its general reluctance to acknowledge the value and religious importance of many key religious practices outside of Christianity'.[595] This might demonstrate that the accommodation of religious external manifestations would not be acknowledged as a practice so long as it does not reveal a European identity. On the contrary, the case of *Hamidović*[596] might be seen as a shift. In this case, the Court condemned a violation of freedom of religion when *Hamidović* was punished because he refused to remove his Islamic skullcap while delivering evidence before a Court.

This idea of the rejection of Islamic culture may also be linked with Berger's argument discussed above,[597] that in terms of embracing new cultural or religious practices, the cultural response has prevailed over the legal response.[598] Indeed, by deferring to the state judgment the Court grants itself an exemption from deciding on sensitive cultural and political issues.[599] However, in other cases concerning an Islamic education syllabus, such as *Hasan and Eylem Zengin v. Turkey*, the Court did not grant the state a margin of appreciation concerning Islamic tradition.[600] This should not have been a surprise, because the Court had already decided in *Refah v. Turkey*[601] that Islam is inconsistent with neither the 'neutrality and impartiality' requirement nor the Convention's values. Danchin argues that the ECtHR in *Refah* and *Sahin* cases barely explained the inconsistency between Islamic norms and secularity, 'by broadly invoking the margin of appreciation rather than confronting more openly the relationship between neutrality and secularism'.[602] On that basis, the Court granting a margin of appreciation to Christian traditions would not necessarily imply that it would be extended to Islamic traditions.[603]

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[594] Evans, 'The Islamic Scarf in the European Court of Human Rights' (n 277), 167.

[595] Evans, 'The Islamic Scarf in the European Court of Human Rights' (n 277), 168.

[596] *Hamidovic v Bosnia and Herzegovina* App No 5579215 ECHR 5 Dec 2017.

[597] See section 3.2.1 Christianity and Privatising Religion above.

[598] Berger (n 230), 263.

[599] Fokas (n 485), 58.

[600] *Hasan and Eylem Zengin v Turkey* App No 144804 ECHR 9 Oct 2007; Berry (n 483), 202.

[601] *Refah Partisi and Others v Turkey* App Nos 4134098 4134298 4134398 4134498 ECHR 13 Febr 2003, [123, 128].

[602] Danchin (n 450), 723.

[603] Berry (n 483), 203.

Furthermore, there is disparity between the way in which the ECtHR treats Christianity and other religions such as Islam, justified by the reasoning that Christianity supports the right to freedom of religion and belief, whereas Islam is viewed as threat to these rights.[604] An example of this disparity is the case of *Choudhury v. UK*.[605] Mr. Choudhury brought litigation to the ECtHR against the UK, claiming a religious freedom infringement following blasphemous attacks on Islam in Salman Rushdie's The Satanic Verses.[606] Having been rejected by the English courts on the basis that the then English law of blasphemy is restricted to Christianity, the Commission refused Mr. Choudhury's application on the basis that the ECHR does not oblige a state to protect all religious sensibilities.[607] This decision was in conflict with both previous and successive decisions by the commission and the Court regarding attack on Christianity.[608]

Can the bias against Islam be denied? it would be difficult to deny, particularly with the noticeable influence of Christianity in privatising religions. As Ferrari has indicated, it can be regarded as 'a component of a larger trend that opposes a way of envisioning and practising religion that is not exclusive to Islam but is transversal to many historical religions, including Christianity'.[609] Ferrari differentiates between two religious facts: religion might be an individual choice, such as converting to a religion or belief, or might be a sense of belonging, being born into a specific religion without a choice.[610] The former is an act of freely chosen conscience, and the latter an unchosen religion, which is adopted by tradition.[611] Placing the emphasis on individual freedom, the 'public sphere will be open to those religions which are ready to recognise individual freedom in their internal organisation'.[612] If, otherwise, the emphasis is placed on identity-based religion, 'traditional

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[604] Danchin (n 450), 705.

[605] *Choudhury v UK* App No 1743990 Comm Decis 5 March 1991.

[606] *Choudhury v. UK* (n 605).

[607] *Choudhury v. UK* (n 605).

[608] The commission, prior to this case, upheld in *Gay News Ltd. v. United Kingdom* for the British government's prosecution against a magazine that published a poem an offensive to Christianity. Also, in *Otto-Preminger-Institut v. Austria*, the Court upheld for the Austrian government for confiscation of a film that constituted an attack on Christian religion. See also *Wingrove v UK* App No 1741990 ECHR 25 Novemb 1996, [57], the Court upheld for the British government's refusal to permit certification for a film, Visions of Ecstasy, that offended Christians, on the basis that 'the refusal to grant Visions of Ecstasy a distribution certificate was intended to protect "the rights of others", and more specifically, to provide protection against seriously offensive attacks on matters regarded as sacred by Christians'.

[609] Ferrari (n 476), 368.

[610] Ferrari (n 476), 368.

[611] Danchin (n 450), 727.

[612] Ferrari (n 476), 370.

religions will be appointed as gatekeepers of the public sphere and access to it will be granted only to those minority religions that have a doctrine and an organisation which is not too far from that of the dominant religion in a country'.[613] Indeed, privatising religions led European authorities and Courts to examine every religion on the basis that it was influenced by the heritage of Christianity. Therefore, it might be true to say that other religions such as Islam must be compatible with these norms in order to be tolerated and accepted by the West.

D) Post-Brexit Human Rights

It might be perceived that the conflict between the assumption of a political tendency and recent state reactions toward diversity have resulted in a situation where 'unexpected, and often unwanted, meeting of people with different cultural and religious background have revived or strengthened doubts about Islam being compatible with European identity'.[614] The discussion about post-Brexit policy could be connected to earlier discussion about rejection of multiculturalism policy by European leaders, including the UK.[615] As suggested in chapter 2, the rhetoric that multiculturalism failure is associated with 'resistance to immigrant' led to Brexit.[616] As regard to human rights, Wright argues that the political campaign from Brexit triggered reconsidering 'the balance between individual rights and the communal good'.[617] This could be related to the current rhetoric rise that suggest 'migrants, minority groups have fewer rights'.[618] She emphasised that Brexit 'could result in significant consequences for the protection and promotion of human rights in the UK'.[619] Moreover, Edwards also emphasises the impact of Brexit and identity discourses on anti-Muslims that generated 'dangerous factions and divisions and celebration of "us" and "them"'.[620] She stresses that:[621]

> [The] "us and them" mentality has further emboldened far-right groups and led to an escalation in assaults on Muslims, a rise in online hate crime and a corresponding fear and sense of exclusion within Muslim communities.

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[613] Ferrari (n 476), 370.

[614] Brzozowski (n 543), 4.

[615] See Section 2.5 The Multiculturalism Debate after the 9/11 and 7/7 Attacks above.

[616] Ashcroft and Bevir (n 64), 37; See also: Ashcroft and Bevir (n 355); and Favell (n 355).

[617] Rebecca Wright, 'Human Rights in a Post-Brexit UK' (2019) 90 The Political Quarterly 350, 350.

[618] Wright (n 617), 350.

[619] Wright (n 617), 354.

[620] Susan SM Edwards, *The Political Appropriation of the Muslim Body: Islamophobia, Counter-Terrorism Law and Gender* (Palgrave Macmillan 2021), 8.

[621] Edwards (n 620), 12, 77.

Brexit seems to shadow minorities rights in the UK and might deteriorate their ECHR rights with the escalation of hate speech against them, particularly Muslims.

3.3.2 Succession: Thrace Minority in Greece

This section will take the more theoretical discussion of religion to examine its implications for succession by examining a recent case concerning a challenge against Shariah succession brough before the ECtHR. The Muslim community in Western Thrace in Greece exclusively are subject to Shariah family law, including succession. This is traced back to the Ottoman Empire, in which the Treaty of Lausanne 1923 (the Treaty) protected their right to apply Shariah in personal matters.[622] For a century now, Shariah experts (Muftis) in Thrace have been adjudicating in family law, such as marriage, divorce and succession.[623] The recent case of *Molla Sali v. Greece*[624] raised in the ECtHR as a consequence of this law. This case involved a deceased Muslim who left a will to his wife, leaving her his entire estate. Subsequent to the deceased's death, his two sisters challenged the will, claiming their share of the estate in accordance with Shariah law. They claimed that the fact both they and the deceased belonged to the Thrace community subjected his estate to Shariah law. The claimants were unsuccessful in both the Greek First Instance and Appeal Courts, on the basis that the deceased was still a Greek national who enjoyed the legal rights provided by civil law, and his submission to the Mufti jurisdiction was merely optional.[625] However, the Greek Court of Cassation allowed the appeal, holding that the deceased adhered to the Islamic law of succession, which is a section of Greek domestic law with specific application to Greek Muslims.[626]

The wife took the issue to the ECtHR, claiming that:[627]

> 'Imposing on someone, against his or her wishes, a right protecting the religious minority to which he or she belonged encompassed an element of discrimination on grounds of religion and did not pursue a legitimate aim'.

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[622] Eleni Kalampakou, 'Is There a Right to Choose a Religious Jurisdiction over the Civil Courts? The Application of Sharia Law in the Minority in Western Thrace, Greece' (2019) 10 Religions 260.

[623] Kalampakou (n 622), 260.

[624] *Molla Sali v. Greece* (n 15).

[625] *Molla Sali v. Greece* (n 15), [12, 15].

[626] *Molla Sali v. Greece* (n 15), [17].

[627] *Molla Sali v. Greece* (n 15), [101].

On that basis, the ECtHR held Greece to be in violation of Article 14 ECHR taken with Article 1 protocol No 1, in which:[628]

> 'Refusing members of a religious minority the right to voluntarily opt for and benefit from ordinary law amounts not only to discriminatory treatment but also to a breach of a right of cardinal importance in the field of protection of minorities'.

Eventually, Greece made a move towards amending the existent law, even prior to the ECtHR verdict in *Molla Sali*. In December 2018, a few days before the ECtHR judgment in this case, Greece passed a law demonstrating that family matters are no longer under Mufti competence, unless both parties agree to adjudicate by Shariah Jurisdiction.[629]

Article 9 (2) promises exclusive competence to European members' sovereignty to regulate and govern the relations between authorities and religious aspects.[630] Therefore, the ECtHR's conduct in all previous cases examined this relation, and whether a state dealt with an arising issue within its competence given by the ECHR.[631] In *Molla Sali*, the ECtHR raised a new approach in relation to dealing with European Shariah statutes' compatibility with the ECHR.[632] The ECtHR implied that states could recognise Shariah law status for a minority, although they are not obliged to do so.[633] This recognition is not an obligation under human rights, 'but as a positive measure within the margin of appreciation of the state to protect the rights of the members of the minority'.[634] It also emphasised the importance of 'free self-identification', where in certain circumstances in which a state endorsed religious statutes, such as Greece's Muslim minority, the adherence to such rules ought to have a voluntary opt-out.[635] The ECtHR here referred to Article 3 of the Framework Convention for the Protection of National Minorities which states that 'every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such'.

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[628] *Molla Sali v. Greece* (n 15), [157].

[629] Kalampakou (n 622), 261.

[630] Wasif Shadid and P Sjoerd Van Koningsveld, 'Muslim Dress in Europe: Debates on the Headscarf' (2005) 16 Journal of Islamic Studies 35, 39.

[631] Shadid and Van Koningsveld (n 630), 39.

[632] Nikos Koumoutzis and Christos Papastylianos, 'Human Rights Issues Arising from the Implementation of Sharia Law on the Minority of Western Thrace—ECtHR Molla Sali v. Greece, Application No. 20452/14, 19 December 2018' (2019) 10 Religions 300.

[633] *Molla Sali v. Greece* (n 15), [155]; Kalampakou (n 622), 262; Kyriaki Topidi, 'Religious Pluralism and State- Centric Legal Spaces in Europe: The Legacy of the Molla Sali Case' (2021) 18 European yearbook of minority issues 33, 42.

[634] Kalampakou (n 622), 264.

[635] *Molla Sali v. Greece* (n 15), [157].

However, the negative right of this Article is not limited in the same way as the positive right, in which opting for a civil code is 'completely free', as the positive aspect of opting for a minority statue instead of the civil code is limited to the sense that 'no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice'. This suggests that even if Shariah law rules were adopted at a state level, Muslims ought not to be obliged to adhere to them as much as they can freely opt for domestic law and abandon Shariah law.

However, apart from the voluntary opt-out, the ECtHR was not clear enough 'on the degree and preconditions for [Shariah family law] to be found compatible with the ECHR'.[636] Because of the limitations of ECtHR jurisdiction, it did not 'delve into broader questions of whether Islamic law, Greek civil law or some blend thereof should govern the family and personal status of Thrace Greek Muslims'.[637] However, a recent Resolution of Parliamentary Assembly of the Council of Europe welcomed the Greek legislative change that abolished compulsory application of Shariah and provided a free exit alternative if both parties agree to replace civil law with Shariah law. The report also found that:[638]

> The Court has ruled that Sharia law is incompatible with the Convention, but obviously this does not mean that there is absolute incompatibility between the Convention and Islam, since the Court has recognised that religion is 'one of the most vital elements that go to make up the identity of believers and their conception of life' [*Otto-PremingerInstitut v. Austria*, judgment of 20 September 1994, para. 47]. Accordingly, the Court's relatively firm position should not be taken as a rejection of elements of Sharia or of Islam as a whole, whilst taking into account the existence of structural incompatibilities between Islam and the Convention which, as far as Sharia law is concerned, are sometimes absolute and sometimes relative.

Although this might be perceived as an 'ambivalent framework',[639] this statement might indicate some level of tolerance that Shariah law may enjoy within an ECHR framework. However, the rapporteur of the Resolution, Antonio Gutierrez, in the Addendum to the

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[636] Topidi (n 633), 42.

[637] Iakovos Iakovidis and Paul McDonough, 'The Molla Sali Case: How the European Court of Human Rights Escaped a Legal Labyrinth While Holding the Thread of Human Rights' (2019) 8 Oxford Journal of Law and Religion 427, 438.

[638] Parliamentary assembly of the Council of Europe, 'Compatibility of Sharia Law with the European Convention on Human Rights: Can States Parties to the Convention Be Signatories to the "Cairo Declaration"?' (2019) Doc. 14787 para 29 <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25246&lang=en> accessed 24 November 2021.

[639] Topidi (n 633), 45.

Report, questioned that, since the Court in *Molla Sali* ruled that '[a] person's religious beliefs cannot validly be deemed to entail waiving certain rights if that would run counter to an important public interest',[640] he argued that:[641]

> 'Whether or not equal treatment of men and women is such an "important public interest", or to what extent Muslim believers may voluntarily subject themselves to Sharia rules deviating from this principle, and how to ensure the truly voluntary nature of any such choices are questions that will remain to be examined in the process of implementation of this judgment.'

This leaves room for a 'broader discussion' for European law to build a relationship with Shariah, particularly since Europe has become more cosmopolitan than before.[642] It may be difficult for the principles of Shariah succession law to be accommodated within the Convention because of incompatibility with human rights principles. Nevertheless, a voluntary opt-out, should the parties agreed to adjudicate their disputes in accordance with Shariah rules, may be sufficient to allow Muslims to adhere to Shariah law norms in Europe. Moreover, given the adoption of various policies discussed in the previous chapter, states who have adopted assimilation might not agree with this approach. France for instance, is determinedly committed to the 'one identity' model, which rejects any form of diversity if it is not compatible with French identity. On the other hand, a multicultural policy would be more relevant and may endorse a free opt-out for Shariah rules, such as we have seen in Greece. The UK may also have a similar policy, with the operation of Shariah councils within the country, which suggests a level of tolerance for Shariah practices within the state's law.

3.4 Conclusion

To conclude, it appears from reviewing these ECtHR cases that European countries have latitude to impose restrictions on religious practices under a margin of appreciation for many reasons, such as giving a state an advantage to protect its identity, achieving integration among communities in society, and that a case might not be worth full consideration, in order to avoid dealing with a complex issue.[643] The ECtHR in these cases may have 'betrayed its

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[640] *Molla Sali v. Greece* (n 15), [155].

[641] Antonio Gutierrez, 'Compatibility of Sharia Law with the European Convention on Human Rights: Can States Parties to the Convention Be Signatories to the "Cairo Declaration"?' (2019) Addendum to the Report Doc. 14787 Add <https://pace.coe.int/en/files/25298/html> accessed 24 November 2021.

[642] Iakovidis and McDonough (n 637), 438.

[643] Evans, 'Pre-Kokkinakis Case Law of the European Court of Human Rights: Foreshadowing the Future' (n 448), 14, 17.

core function of protecting human embodiment based on a universal shared bodily vulnerability, which underpins cultural differences'.[644] However, despite the lack of legal basis for 'mandatory engagement', and to the aim of promoting social interaction within a society,[645] the Council of Europe has adopted the concept of 'living together' as justifiable grounds for restraints on religious freedom because it 'coexists with the fundamental rights of others and with the right of everyone to live in a space of socialisation which facilitates living together' which 'may justify the introduction of restrictions on certain religious practices'.[646] This development reinforces adherence to this concept in the legal sphere, hence it could be assumed that 'living together' will be employed in future cases as justification for a state's limitation on Human Rights, including freedom of private life, thought and religion.[647]

The responses to Shariah in Europe also show, apart from the unique situation of Greece, that there is some inflexibility in restricting Shariah, resulting from bias toward Christianity that has shaped the design of modern religion and has privatised religion from the public sphere. However, the ECtHR's responses to the Thrace minority may show some flexibility toward accommodation of Shariah family law. Although the Court in *Refah* condemned Shariah as 'incompatible with the fundamental principles of democracy',[648] this incompatibility, as asserted by the council of Europe, should not mean 'a rejection of elements of Sharia or of Islam as a whole'.[649] For instance, in *Molla Sali*, it seems to show some flexibility by endorsing 'the possibility for a member state to create a particular legal framework in order to provide religious communities a special status entailing special privileges'.[650] Moreover, a voluntary opt-out could mitigate any potential harm to the parties involved, particularly concerning equality, since women would have the choice to opt for civil jurisdiction instead of simply following Shariah law.

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[644] Edmunds (n 508), 320.

[645] Yusuf (n 255), 285.

[646] Parliamentary assembly of the Council of Europe, 'Freedom of Religion and Living Together in a Democratic Society' (2015) Resolution 2076 <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22199&lang=en> accessed 24 November 2021.

[647] Trispiotis (n 302), 606.

[648] *Refah Partisi and Others v. Turkey* (n 601), [123].

[649] Parliamentary assembly of the Council of Europe, 'Compatibility of Sharia Law with the European Convention on Human Rights: Can States Parties to the Convention Be Signatories to the "Cairo Declaration"?' (n 638).

[650] Iakovidis and McDonough (n 637), 445.

This discussion may indicate that Shariah succession rules could be accommodated within the ECHR framework, despite the conflicts caused by incompatibility between Shariah law principles and ECHR principles. However, like Thrace's exemption with optional free opt-out, the UK may have reached a similar accommodation with regard to the adjudication of Shariah councils in family matters, particularly marriage and divorce. Such flexibility does not satisfy the Assembly which, in the same way as it calls for Greece to abolish compulsory Shariah, is also concerned about Shariah councils in the UK, and their role in discrimination against women 'in divorce and inheritance cases'.[651] In the next chapter, it will be helpful in building the theoretical part of this research to explore how the UK deals with family law matters involving foreign laws such as Shariah.

[651] Parliamentary assembly of the Council of Europe, 'Sharia, the Cairo Declaration and the European Convention on Human Rights' (2019) Resolution 2253 <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25353> accessed 24 November 2021.

Chapter 4 The Accommodation of Shariah Family Law within English and Scots Private International Law

4.1 Introduction

Having considered the social and political boundaries of tolerance in chapter 2 and 3, by examining the wider cultural and religious picture across Europe, and how Muslims living in Europe are affected by general cultural approaches as well as supra-national law (ECHR), this chapter considers the legal mechanisms for permitting tolerance of Shariah law in areas of family law. International private law is the area of any legal system that is used to resolve disputes involving foreign subjects.[652] More specifically, it is the area of private law in every legal system that contains the regulations that provide its courts the authority to decide on, for example, 'the rules of jurisdiction to be followed by its courts' and 'the system of law which is to be applied by those courts to determine the rights of the parties in cases involving foreign elements ("choice of law")'. [653] Foreign elements mean a contact with legal systems other than English or Scots law, and this contact exists 'because property was situated there, or because the parties are not domiciled or resident in England' or Scotland.[654] PIL rules appear to be the most direct way a system of private law can show tolerance, by directly applying rules from another legal system. Conflict of laws is another term for international private law, and its rules are frequently referred to as conflict rules. [655] Conflict cases are ones that have a foreign element, although not all cases with a foreign component are necessarily in "conflict", in which case the court may proceed under the presumption that the foreign law's provisions are identical to those of domestic law. [656]

The practice of Shariah family law among Muslims in the UK has been thriving through the country since the 1950s.[657] However, the English legal system[658] is reluctant to grant official recognition to Shariah law practices, because Western legal systems' approach to distinguishing between what is, and what is not, law, is to 'remain purposely blind to social convention and so-called cultural practices'.[659] This could explain the rejection of the calls

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[652] Elizabeth B Crawford and Janeen M Carruthers, *International Private Law: A Scots Perspective* (4th edn, W Green 2015), 1.

[653] Crawford and Carruthers (n 652), 1.

[654] L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012), [1-001].

[655] Crawford and Carruthers (n 652), 1.

[656] Crawford and Carruthers (n 652), 1.

[657] See section 2.4.3 Dual Jurisprudence and Shariah Family Law in the UK: Postcolonial Effect above.

[658] See section 2.1.2 Overview of Shariah Family Law in the UK above to understand why English legal system is mentioned in the Scottish context.

[659] Pearl and Menski (n 11), 57; Berger (n 230), 263.

for full recognition of Shariah personal law in the UK in the mid-1970s.[660] Moreover, the formal requirements of English and Scots law for family matters, such as marriage and divorce as discussed below, when combined with the applicable PIL rules, are a further reason for this rejection.[661] For instance, Islamic marriages (*nikah*) celebrated in England are mostly classified by English courts as non-marriages due to their lack of formality. Furthermore, a bare *talaq* effected anywhere in the UK is not recognised on any grounds, as they are not civil proceedings.[662] These restrictions affect Muslims who are unwilling to abandon Shariah law either as a way of life or as a religion.[663]

This negative stance from the English legal system has allowed space for the unofficial emergence of new hybrid rules.[664] These rules adopted by British Muslims are basically a combination of domestic law and Shariah law, in which Muslims may have to both marry twice and divorce twice in order to satisfy English or Scots law while simultaneously adhering to Shariah law.[665] This also includes drafting their Islamic wills within the domestic law framework.[666] However, some of these hybridised practices may still conflict with either English or Scots law, which may create a number of obstacles for Muslims. Therefore, it is necessary to engage with the responses of English and Scots courts to Shariah family law, in order to understand the conflicts between these legal systems and how they are to be resolved.

This chapter will investigate the conflicts caused by Shariah family law in England and Scotland, discussing the family law issues encountered by Muslims and the extent to which PIL may resolve those conflicts. The majority of the literature discussed concerns English law, where the majority of UK Muslims live, even though this study is primarily focused on Scotland. Scotland is a small jurisdiction, and their approach to Shariah law remain vague. In order to set the scene for other regions of the UK, it is helpful to consider the approach of English courts and commentators. It is important to note that Scotland has its own jurisdiction with its own legal system, and that the fields of property, family, and succession

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[660] Menski (n 11), 141.

[661] Menski (n 11), 141.

[662] Family Law Act 1986 ss.44(1) and 52(4), 5(a); *Chaudhary v Chaudhary* (n 124); *Sulaiman v Juffali* [2002] 1 FLR 479; Adrian Briggs, *Private International Law in English Courts* (Oxford University Press 2014), 923.

[663] Menski (n 11), 128.

[664] Pearl and Menski (n 11), 74.

[665] Pearl and Menski (n 11), 77.

[666] See section 5.4 Challenge of Testamentary Freedom in English Law below.

law may be dissimilar to English law. These differences will be observed when discussing these points in detail below. However, most of these conflicts are dealt with by PIL rules, which are, at a level of generality, largely similar between England and Scotland. It is the role of PIL rules to designate a particular legal system to govern a question, which means that Shariah law could be directly applicable if a choice of law rule designates a legal system where Shariah law principles apply. Shariah family law conflicts with both substantive domestic law (e.g. the rejection of unregistered Islamic marriages celebrated in England, and polygamy) and private international law (e.g. the rejection of some overseas divorces either on the grounds of procedural informality, or on the grounds of contradicting public policy).

I aim to clarify the position of Shariah family law within English and Scots law by examining its applicability and accommodation with domestic laws. Moreover, although, as we shall see later in this thesis, there is a lack of case law concerning Shariah succession law, the vastly greater resources available in the field of family law allow for assessment, by analogy, the implications for succession law.[667] Analysing family law cases is helpful in order to measure how English and Scottish courts deal with Muslims' personal issues, because similar issues may arise in relation to succession. The recognition of marriage and divorce discussion is mainly considered because of their ultimate connection with the main focus of this study, the applicability of Shariah succession rules within Scots succession law. Moreover, these topics aid our understanding of the refusal to recognise some elements of Shariah family law, and how they impact Muslims' personal matters on issues including succession. For example, if a *nikah* marriage is not recognised in English law, then it means that women will have no rights in succession, as they do in accordance with Shariah law. Hence, it is helpful to examine English and Scottish approaches to *nikah* and *talaq* in order to assess their overall approach to Shariah family law cases and to assess the implications of these elements on succession.

However, in terms of succession rules, since some Muslims in the UK may still have a transitional attachment to Shariah family law,[668] PIL rules may provide some assistance to those Muslims who are not willing to settle in the UK permanently, or have a firm intention to return to their country of origin. For instance, the recent decade has witnessed vast immigration from countries in conflict, such as Syria.[669] Those immigrants might be still

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[667] Poulter, *Asian Traditions and English Law* (n 18), 75; Pilgram (n 18), 23.

[668] Pilgram (n 18), 183.

[669] See section 2.4.3 Dual Jurisprudence and Shariah Family Law in the UK: Postcolonial Effect above.

attached to their country of origin, and we could assume that they fled their countries to avoid the conflict there, and some of them may intend to return to their country of origin if that becomes possible.

The assessment of the possibility to apply Shariah succession through PIL will be discussed later in the thesis when assessing possible routes for Muslims who want to apply Shariah.[670] However, since this chapter will discuss the rules of PIL, it provides a brief illustration of the PIL rules of succession, and then illustrates the factors that determine the capacity and status of an individual. This will assist later on the thesis when we will assess how PIL rules might be helpful for some Muslims in the UK from different backgrounds in arranging their assets in accordance with their domicile of origin. The second section assesses how the conflict of laws deal with the recognition of foreign marriages, both monogamous and polygamous, including marriages that took place in the UK with foreign form, and how these impact Muslims in the UK. The next section covers the recognition of foreign divorces and how English and Scottish courts respond to *talaq*. It also discusses the potential challenges of public policy on *talaq* recognition. However, some terminology may require further illustration, although all are described when first mentioned in the thesis. The term *nikah* refers to an Islamic marriage whereas a *nikah-only* refer to unregistered *nikah* marriage. Moreover, to distinguish the term *talaq* from bare *talaq*, the former refers to an oral *talaq* that is pronounced by the husband and registered formally in the relevant country where it is recognised whereas the latter refers to an oral *talaq* without any formal registration.

4.2 Conflict of Laws Rules in Succession

As stated above, Shariah law may be directly relevant if a choice of law rule identifies a legal system where Shariah law principles are applicable because it is the function of PIL rules to identify a certain legal system to govern a question. The English and Scottish choice of law rules in succession (*lex successionis*) 'differentiates between the law governing succession to moveables (the ultimate domicile of the deceased) [the *lex ultimi domicilii*] and that governing succession to immoveables (the *lex situs*)'.[671] Further, English and Scots law distinguish between formal validity and essential validity for testate succession. The Wills Act 1963 provides generous rules for formal validity, but essential validity will always

[670] See section 7.2.4 Potential Application of Shariah Succession Through Conflict of Laws Rules.

[671] Crawford and Carruthers (n 652), 680.

be referred to the domiciliary law for moveables and the *lex situs* for immoveables.[672] In intestate succession, the immoveable property of the intestate deceased will be governed by the law of the country where the property was situated.[673] In contrast, the law of the deceased's ultimate domicile will determine succession to the moveable property, wherever located.[674]

The effect of this is that Shariah legal systems may govern the distribution of the deceased estate via PIL rules if (a) the deceased dies domiciled in a state that is governed by Shariah law or (b) leaves immoveable property in that state. That means that we need to understand the underlying rules of domicile to help ascertain the chances of Shariah succession implementation within English and Scots PIL rules.[675] For instance, would it be possible for a Scottish Muslim to retain a domicile of origin thereby ensuring the application of Shariah rules to their estate? While there needs to be a Scottish domicile to apply Scots law to the moveable assets, this may not ever be challenged because the assumed position, without argument, is that Scots law applies by default. However, some Muslims in Scotland might have retained the connection with their country of origin, such that they have not acquired a domicile of choice in Scotland, which means a Scottish court might give effect to that law to govern their estate. Moreover, if they have immoveables located in their country of origin, then PIL would apply Shariah rules to these assets.[676]

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[672] Wills Act 1963 s.1, s.2(1)(c); Briggs (n 662), 788; Crawford and Carruthers (n 652), 689.

[673] Collins (n 654), [27R-017]; James Fawcett, Cheshire and Peter North, *Cheshire, North & Fawcett: Private International Law* (Paul Torremans ed, Fifteenth, Oxford University Press (OUP) 2017), 1351; Crawford and Carruthers (n 652), 684.

[674] This rule raises a potential problem relating to enforcement and inconsistent judgements over the moveable properties that were not located in the foreign territory at the time of the judgement. To elaborate, if the deceased died while domiciled in England and left property in England, Germany and Saudi Arabia, and the Saudi court gave judgment that A is entitled to the deceased moveable property, this judgment would not prevent an English court from deciding a contrary entitlement for property located in England or Germany. Nevertheless, if that moveable property were brought from Saudi Arabia to England, English law will apply Saudi judgment to this particular property. This example was mentioned in the English case of *Al-Bassam v Al-Bassam* discussed further below.

[675] The rules of domicile are also important concept for the essential validity of marriage as discussed in section 4.3.2 Essential Validity of Marriage in the Conflict of Laws: Polygamous Marriages below.

[676] Additionally, for English Muslims, the deceased must have died while domiciled in England and Wales in order for a claim to be made under the Inheritance (Provisions for Family and Dependants) Act 1975 s.1(1).

4.2.1 Domicile of Origin

Succession and wills amount to a substantial amount of domicile cases in English and Scots law, i.e. succession remains one area where the connecting factor of domicile is still used.[677] Given the central role of domicile, it is worth discussing the potential application of that concept in this context. In English law, the father's domicile at the time of the birth of the child will be the child's domicile of origin if the child was legitimate and born during the father's lifetime.[678] If any of these two conditions are not met, the child will take his mother's domicile at the time of the birth.[679] In Scots law, the above rule was applicable[680] before it was replaced by the Family Law (Scotland) Act 2006, where a child will receive their parents' domicile if; '(a) his parents are domiciled in the same country as each other; and (b) he has a home with a parent or a home (or homes) with both of them'.[681] If these two conditions are not met, then 'the child shall be domiciled in the country with which the child has for the time being the closest connection'.[682] Domicile of origin is an important element, because it revives if domicile of choice is lost and no new domicile was acquired.[683] It is also a question that does not depend on place of birth, which may potentially persist across generations.

4.2.2 Domicile of Choice

As for domicile of choice, any person above the age of 16 has the legal capacity to acquire or change their domicile.[684] It must be clarified that the question here if the person's domicile of origin is outside of Scotland or England, is whether or not they have obtained a domicile of choice in Scotland or England. It is not about retaining intention in favour of the domicile of origin. To elaborate, the burden on proving the acquisition of domicile of choice and abandoning the domicile of origin rests on the party alleging the change of domicile.[685] This means that in the absence of clear proof of the acquisition of a domicile, then the domicile

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[677] Crawford and Carruthers (n 652), 108.

[678] Collins (n 654), [6R-025].

[679] Collins (n 654), [6R-025].

[680] Crawford and Carruthers (n 652), 89, 90.

[681] Family Law (Scotland) Act 2006, s.22(1)(2).

[682] Family Law (Scotland) Act 2006. s.22(3).

[683] Briggs (n 662), 126; Crawford and Carruthers (n 652), 94.

[684] Domicile and Matrimonial Proceedings Act 1973 c. 45, s.3(1); Family Law (Scotland) Act 2006, s.22(4); Crawford and Carruthers (n 652), 93.

[685] *Fuld (No3)* [1968] P 675, 685; *Ramsay v Liverpool Royal Infirmary* [1930] AC 588.

of origin continue.[686] This is illustrated by *Ramsay v Liverpool Royal Infirmary*,[687] where a deceased lived the greater part of his life in Glasgow and then moved to Liverpool for the remaining thirty five years of his life, which was not enough to acquire an English domicile of choice. Even though the deceased described himself in his will as a 'Glasgow man' three months before his death, the court did not lay its judgment on this declaration, but on the failure of the appellant to provide proof of acquisition of domicile of choice. in a similar vein, in *Qureshi v Qureshi*, the court 'was satisfied that the husband at all times during his residence in this country intended to return to Pakistan; and that he had never lost his Pakistani domicile of choice'.[688]

Furthermore, in *Rehman v Hamid*[689] concerned the validity of the will of a deceased Muslim, where a deceased mother having moved to England after marriage, returned to Pakistan after the death of her husband. She made a will in 2017 leaving her entire estate to her great-nephew. The 2017 will was challenged by the beneficiaries of an earlier will made in 1993 on bases that involved her capacity and the lack of conformity to Shariah law; that is, the applicable law of her domicile. The court was satisfied that the deceased died domicile in Pakistan, and the claimant has failed to discharge 'the evidential burden of establishing that there was a domicile of choice in England'.[690] The court granted 'a stay of the English proceedings in so far as they relate to the validity of the 2017 will until determination of that issue in the proceedings in Pakistan'.[691] This case affirms the fact that without a clear proof of acquisition of domicile of choice, the domicile of origin will be sustained. This case also demonstrates the potential application of Shariah law by an English court.

However, the rules are 'unclear',[692] and it might be difficult to illustrate the whole interpretation of the law, but this section describes the main rules that I believe are relevant to the discussion regarding succession. To acquire a domicile of choice, then 'the

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[686] Leon Trakman, 'Domicile of Choice in English Law: An Achilles Heel?' (2015) 11 Journal of Private International Law 317, 324.

[687] *Ramsay v Liverpool Royal Infirmary* (n 685).*Ramsay v Liverpool Royal Infirmary* (n 1203).

[688] *Qureshi v Qureshi* (n 124), 193.

[689] *Rehman v Hamid* [2019] EWHC 3692 Ch.

[690] *Rehman v Hamid* (n 689), [46].

[691] *Rehman v Hamid* (n 689), [64].

[692] English and Scottish Law Commission, 'Private International Law: Law of Domicile' (1987) Law Com. No. 168, Scot. Law Com. No. 107 para 5.8 <https://www.lawcom.gov.uk/project/private-international-law-law-of-domicile/> accessed 20 December 2021.

combination of residence and intention of permanent or indefinite residence' must be met.[693] Residence here 'means very little more than physical presence', in which 'residence in a country for the purposes of the law of domicile is physical presence in that country as an inhabitant of it'.[694] However, the length of residency could be an important factor to prove the intention to reside in a country.[695] The intention, on the other hand, can be acquired by a Muslims intention to 'reside permanently or for unlimited time'.[696] However, there are no differences between someone intending to live in a country permanently who considers their decision to be revocable, and another who has a firm intention to live in a country and has no intention to change their mind.[697]

To decide whether a person has acquired a domicile of choice, the court must consider 'any circumstance which is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country'.[698] However, these circumstances might be decisive in one case and disregarded in another, since there is 'no circumstance or group of circumstances which furnishes any definite criterion of the existence of the intention'.[699] Even the declaration of one's intention to settle in a certain country might be disregarded in some cases.[700]

Furthermore, there are a number of circumstances that have been considered as relevant to the issue of intention by the court to determine the domicile of choice, such as the form and content of their will, where they were divorced, or their learning or not learning the local language.[701] For the latter circumstance, a person who lives in another country could retain their domicile of origin by not assimilating into the foreign culture.[702] This could be a factor for some British Muslims, particularly those who prefer living in distinct environments that are consistent with their language and religion, which have resulted in a lack of integration

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693 Collins (n 654), [6R-033]; Briggs (n 662), 127; Crawford and Carruthers (n 652), 95.

694 *Inland Revenue Commissioners v Duchess of Portland* [1982] 1 Ch 314, 318, 319.

695 Collins (n 654), [6-036].

696 Collins (n 654), [6-039].

697 Collins (n 654), [6-040].

698 Collins (n 654), [6R-046].

699 *Drevon v Drevon* [1864] 34 LJ Ch 129, 133; cited in Collins (n 654), [6-048].

700 *Ross v Ross* [1930] AC 1, 6; Collins (n 654), [6-051]; Crawford and Carruthers (n 652), 100.

701 There are many cases in these regards in English and Scottish courts cited in Collins (n 654), [6-049].

702 *Irvin v Irvin* [2001] 1 FLR 178.

with their host society.[703] Moreover, the court might examine the motives for choosing one's residence, to examine whether this motive will cease with the residence upon its accomplishment, that might preclude acquiring the domicile of choice.[704]

However, it may be significant that 'there is a presumption against the acquisition of a domicile of choice by a person in a country whose religion, manners and customs differ widely from those of his own country'.[705] However, this presumption is less weighty, because, as was established in *Casdagli v Casdagli,*[706] this person has 'voluntarily' and 'deliberately' resided and intended to make his home in this foreign place.[707] It might also be true to say that the presumption has less grounding in reality in a modern, interconnected world. Moreover, naturalisation is no longer decisive with the factor of intention.[708] So far, we have seen that the court considers both residence and intention, by examining the circumstances of the person's life in order to determine their domicile. Although it may seem that it is difficult to determine whether a person can acquire a domicile of choice based on examining their living circumstances, it may be equally true that it is not implausible. I will address this question later on in the thesis when assessing possible routes for Muslims who want to apply Shariah succession rules.[709] Now I shall proceed to examine the recognition of marriage to assess its implication on succession.

4.3 Recognition of Marriages in the UK

As a general rule, a marriage is regarded as formally valid provided that the marriage is valid under the law of the place where marriage took place, that is the *lex loci celebrationis*.[710] However, from 1860, English and Scottish courts began to observe a distinction between formal and essential validity of the parties to marry.[711] Questions concerning essential

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[703] Shaheen Sardar Ali, 'Religious Pluralism, Human Rights and Muslim Citizenship in Europe: Some Preliminary Refelections on an Evolving Methodology for Consensus' in Maria Laetitia Petronella Loenen and Jenny Elisabeth Goldschmidt (eds), Religious Pluralism and Human Rights in Europe: Where to Draw the Line? (Intersentia Antwerpen 2007) 57.

[704] Collins (n 654), [6-055].

[705] Collins (n 654), [6-050].

[706] *Casdagli v Casdagli* [1919] AC 145, 180.

[707] *Casdagli v Casdagli* (n 706); *Ali v Ali* [1968] P 564; *F v F (Divorce: Jurisdiction)* [2009] 2 FLR 1496.

[708] *Wahl v Att-Gen* [1932] 147 LT 382 HL; Collins (n 654), [5-041].

[709] See section 7.2.4 Potential Application of Shariah Succession Through Conflict of Laws Rules.

[710] Collins (n 654), [17R-001], I should note that the new edition appeared too late to be incorporated; Family Law (Scotland) Act 2006, s.38(1); Crawford and Carruthers (n 652), 332.

[711] Collins (n 654), [17-002]; Crawford and Carruthers (n 652), 283.

validity of marriage such as capacity (subject to certain exceptions), which involves *inter alia* consanguinity and lack of age, are subject to the dual domicile test, that is must be in line with the ante-nuptial law of each party.[712] For instance, in *Brook v. Brook*[713] the court held the marriage of a man to his deceased wife's sister under Danish law to be void, despite its being valid under Danish law, on the basis that both parties were domiciled in England, where such marriages are not recognised. Moreover, in *Sottomayor v De Barros (No.1),*[714] the marriage was held to be void despite being valid under English law, on the basis that the marriage was not valid under the law of Portugal, their common ante-nuptial domicile. However, in *Ogden v Ogden,*[715] a French domiciled man married an English domiciled woman in England, irrespective of his parents' consent required by French law held to be valid because the parental consent was classified as a matter of form, which was governed by the English *lex loci celebratonis*.[716] This decision emphasised the prevalence of *lex loci celebrationis,* at least in relation to form, in all decisions concerning the validity of the marriage.[717]

However, if the dual domicile test does not validate the marriage, the English court may apply an intended matrimonial home as an alternative to governing the validity of the marriage.[718] This approach, which was tested in English law, held the marriage in *Lawrence v Lawrence*[719] to be valid despite the dual domicile test resulted in invalidation of the marriage. This was because the parties intended to domicile in England which recognise such marriage, so this should prevail over the test. Nevertheless, few cases since have used this test, because:[720]

> A policy of favouring validity could give weight to the place of celebration, the intended matrimonial home, or the domicile or habitual residence of either party, and indeed to other factors. Such flexibility might come at the cost of some uncertainty… In order to ensure certainty, a marriage should always be

[712] Collins (n 654), [17R-057]; Family Law (Scotland) Act 2006, s38(2); Crawford and Carruthers (n 652), 337.

[713] *Brook v Brook* [1861] 11 ER 703.

[714] *Sottomayor v De Barros (No1)* [1877] 3 PD 1.

[715] *Ogden v Ogden* [1908] P 46 CA.

[716] *Ogden v Ogden* (n 715), 57; Collins (n 654), [17-062].

[717] Collins (n 654), [17-061].

[718] Collins (n 654), [17-065]; Crawford and Carruthers (n 652), 337.

[719] *Lawrence v Lawrence* [1985] Fam 106.

[720] Collins (n 654), [17-067].

> upheld when each party has, by the law of his or her antenuptial domicile, the capacity to marry the other.

This approach was never adopted by Scots law, and now it cannot, after the Family Law (Scotland) 2006 Act affirmed the dual domicile rule, which excludes any chance to advance 'an alternative argument on choice of law' such as the intended matrimonial home approach.[721]

Furthermore, all marriages celebrated within the UK must be monogamous, in accordance with the Matrimonial Causes Act 1973[722] and the Marriage (Scotland) Act 1977.[723] Under s.41 of the Marriage Act 1949, buildings of religious worship, such as mosques, can be registered as for the solemnisation of marriages, although only 21% of mosques have done so.[724] These marriages are considered by English law as monogamous marriages, irrespective of whether the personal law of the parties concerned permits polygamy.[725] Moreover, if a civil registry marriage is followed by a religious ceremony, English law will only recognise the civil marriage, so that the following religious ceremony will have no legal effect.[726] However, the matter that has generated intense controversy are marriages celebrated in England without civil registration, such as unregistered Islamic marriages. These unregistered marriages may be polygamous, a form of marriage that is prohibited under English law, unlike in Shariah law. However, unregistered Islamic marriages have been categorised by English courts as non-marriages – recently reconceptualised as 'non-qualifying ceremonies' - because the marriage 'deliberately conducted altogether outside the Marriage Acts'.[727] This will result in the denial of an application for a decree of nullity that allows the spouses, particularly the wife, to receive ancillary financial provision, which would differ from the case if it was held to be void.[728] The next section will focus on these two aspects of marriage as common forms where Muslims struggle to meet domestic laws.

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[721] Family Law (Scotland) Act 2006, s.38(2); Crawford and Carruthers (n 652), 337.

[722] Matrimonial Causes Act 1973, s.11(d).

[723] Marriage (Scotland) Act 1977, s.24, as amended by Marriage and Civil Partnership (Scotland) Act 2014; Family Law (Scotland) Act 2006, s.38(3).

[724] English Law Commission, 'Getting Married: A Consultation Paper on Weddings Law' (Law Commission 2020) 247 <https://www.lawcom.gov.uk/project/weddings/> accessed 28 February 2022, 223.

[725] *Qureshi v Qureshi* (n 124), 182, 86.

[726] *Qureshi v Qureshi* (n 124), 186.

[727] *A-M v A-M* [2001] 2 FLR 6 [55].

[728] Collins (n 654), [17-006].

4.3.1 Formal Validity of Marriages in the Conflict of Laws: Unregistered Nikah Marriages Celebrated in England

There are three possible ways of conducting a marriage among Muslims in the UK: entering into an Islamic marriage contract without state recognition (*nikah-only* marriage); two separate ceremonies of *nikah* and civil marriages; or 'a dual ceremony' recognised by Shariah and civil law, which occurs in mosques that are also registered for marriage registrations.[729] A valid *nikah* contract 'occurs if, and only if, a man and woman who are not prohibited from marrying agree to marry, and marry before witnesses', and the bride must receive *mahr* from the groom.[730] A potential further condition, which is the subject of debate among Islamic jurists, is the consent of the bride's legal guardian.[731] Islamic marriages known as *nikah* are different from a sacred 'Christian conception of a marriage ceremony which informed the development of the formalities encapsulated in the 1949 Act'.[732] This is because a *nikah* does not require an overt ceremony, so that a domestic home, which is not recognised under English law as a marriage venue, will be considered equally valid as a mosque for contracting Islamic marriages.[733] Moreover, a valid *nikah* ceremony does not rely on 'the performance of any recorded ceremony or documentation',[734] only requiring the parties' capacity, consent, and attendance of witnesses.[735]

Over 30% percent of Muslim marriages are not civilly registered,[736] although some estimates put the figure as high as 80%.[737] The main reasons for failing to register are stated to be 'down to a failure to complete the preliminaries of marriage (giving notice) and undertake the civil ceremony'.[738] This may be because of lack of knowledge of the need to register the marriage; a reluctance to 'engage with secular marriage at all';[739] or the matter being

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[729] Ali (n 11), 118.

[730] Bowen, 'How Could English Courts Recognize Shariah' (n 140), 414.

[731] For more on legal guardian, see: Ibn Rushd (n 266), 9.

[732] O'Sullivan and Jackson (n 459), 23; see also *Hyde v Hyde* [1866] LR 1 P 130, 135; and Browning (n 459), 37.

[733] Edge (n 425), 127.

[734] O'Sullivan and Jackson (n 459), 23.

[735] Arshad (n 175), 48.

[736] Miranda Fisher, Shabana Saleem and Vishal Vora, 'Islamic Marriages: Given the Independent Review into the Application of Sharia Law in England and Wales, What Is the Way Forward?' [2018] Family Law Review 552, 552.

[737] RD Grillo, 'Comment on the Report of the Siddiqui Review Panel, 2018' (2018) 7 Journal of Muslims in Europe 283, 292.

[738] Fisher, Saleem and Vora (n 736) 553.

[739] 'The Independent Review into the Application of Sharia Law in England and Wales' (n 172) 14.

delegated to the husband.[740] Although *nikah-only* marriages will not be recognised under English law,[741] there are variations in the courts' approach, as discussed below, in dealing with *nikah-only* marriages taking place in the UK.

A) English Courts' Response to *Nikah* Marriages

Section 11 of the Matrimonial Causes Act 1973 provides that the marriage should be void if 'the parties have intermarried in disregard of certain requirements as to the formation of marriage'. However, the 1949 Act is not clear in determining 'when marriage will be valid and when it will be void',[742] and the matter is left for the court to examine, relying on each case's facts.[743] This 'can be problematic', because English law 'does not expressly state the consequences of failing to comply with requirements of marriage, it very much depends on the subjective state of mind of the parties'.[744] Indeed *A-M v A-M,*[745] concerning an unregistered Islamic polygamous marriage, introduced the category of "non-marriage". Hughes J. decided that the marriage was 'deliberately conducted altogether outside the Marriage Acts and never intended or believed to create any recognisable marriage'; therefore, the couple were in a non-marriage.[746] The reliance on 'the hallmarks of marriage' alone in *A-M* did not satisfy Bodey J. in *Hudson v Leigh.*[747] Therefore, although this constitutive case did not, in fact, involve a Muslim couple, Bodey J. established a set of factors that have been said to constitute 'the first step in providing some form of judicial guidance regarding the law of non-marriage'.[748] These are: [749]

(a) whether the ceremony or event set out or purported to be a lawful marriage including whether the parties had agreed that the necessary legal formalities would be undertaken; (b) whether it bore all or enough of the hallmarks of marriage including whether it was in public,

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[740] Grillo (n 737), 292.

[741] Marriage Act 1949 s.44.

[742] Rebecca Probert, 'When Are We Married? Void, Non-Existent and Presumed Marriages' (2002) 22 Legal Studies 398; O'Sullivan and Jackson (n 459), 24.

[743] *Hudson v Leigh* [2009] EWHC 1306 Fam [79].

[744] Vishal Vora, 'The Continuing Muslim Marriage Conundrum: The Law of England and Wales on Religious Marriage and Non-Marriage in the United Kingdom' (2020) 40 Journal of Muslim Minority Affairs 148, 154, 55.

[745] *A-M v A-M* (n 727).

[746] *A-M v A-M* (n 727) [55].

[747] *Hudson v Leigh* (n 743).

[748] Vora, 'The Continuing Muslim Marriage Conundrum: The Law of England and Wales on Religious Marriage and Non-Marriage in the United Kingdom' (n 744), 155.

[749] *Hudson v Leigh* (n 743) [79].

whether it was witnessed whether promises were made; (c) whether the three key participants (most especially the officiating official) believed, intended and understood the ceremony as giving rise to the status of lawful marriage (d) whether the failure to complete all the legal formalities was a joint decision or due to the failure of one party to complete them.

The court in this case and subsequent cases involving Muslim couples has, although not exclusively, taken these factors into account to decide on the classification of the ceremony. A similar conclusion of marking the marriage as non-marriage was followed in *Sharbatly v Shagroon*[750] involving a Saudi couple and *Dukali v Lamrani*[751] involving a Moroccan couple.

A recent case, *Akhter v Khan,*[752] gave false hope to Muslim women for a new stance, where the court of first instance held that an unregistered Islamic marriage which took place in the UK was a void marriage, falling within the scope of section 11 of the 1973 Act, and therefore granted the wife a decree of nullity. However, this stance did not last for long, as the Court of Appeal reversed the first instance judgment, re-establishing the previous position but altering the terminology.[753] The Court of Appeal agreed with Williams J's disquiet about the term non-marriage, declaring that he felt 'instinctively uncomfortable' and that it 'might rightly be regarded as insulting'.[754] Therefore, the Court of Appeal preferred the label of a "non-qualifying ceremony" 'to signify that they were outside the scope of both the 1949 and the 1973 Acts'.[755] It is worth analysing this case, as it might be the coup de grace to any hope of recognising *nikah-only* marriages in English courts.

The most intriguing aspect at first instance was the argument raised by the wife regarding human rights. She claimed that a potential characterisation of non-marriage violated her fundamental rights under Articles 6, 8 and 12 of the ECHR, since 'Muslim women do not receive a fair trial because it excludes them from making a financial claim against a man with whom they had a marriage'.[756] Although the court did not consider the statutory

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[750] *Sharbatly v Shagroon* [2012] EWCACiv 1507.

[751] *Dukali v Lamrani* (n 124) see also El-Gamal v Al-Maktoum [2011] EWHC 3763 (Fam); Al-Saedy v Musawi (Presumption of Marriage) [2010] EWHC 3293 (Fam).

[752] *Akhter v Khan* [2018] EWFC 54.

[753] *Attorney General v Akhter* [2020] EWCA Civ 122.

[754] *Akhter v Khan* (n 752) [8].

[755] *Attorney General v Akhter* (n 753) [64].

[756] *Akhter v Khan* (n 752) [15].

provision of 1973 Act to be inconsistent with fundamental rights,[757] it agreed with the claimant that Article 8 'supports an approach … of a decree of a void marriage rather than a wholly invalid marriage',[758] and concluded that 'the approach should be somewhat more flexible in particular to reflect the Article 8 rights of the parties'.[759] However, the Court of Appeal rejected this argument, relying on the Strasbourg case of *Serife Yigit v Turkey*.[760] The ECtHR found no violation of Article 8 in the state's interference with not recognising a religious marriage, because the couple did not comply with state formalities to register their marriage.[761]

While the Court of Appeal agreed that 'the expression non-marriage should be reserved only to those situations such as acting or children playing where there has never been any intention to genuinely create a marriage',[762] they rejected the notion that a genuine intention to create a marriage without solemnisation shall be held as a void marriage.[763] They insisted that ceremonies without solemnisation ought not to be held as void, because of non-compliance with the formal requirements.[764] This rejection is meant to:[765]

> Prevent the regulatory system being fundamentally undermined and in a manner which would be contrary to the need for certainty in the interests of the parties and in the public interest, we would have decided that there are some ceremonies of marriage which do not create even void marriages.

The Court of Appeal asserted that the question of the validity of the marriage shall be determined at the day of the ceremony: 'It would make no sense for its legal effect to fluctuate depending … on future events'.[766] This judgment may put an end to the question triggered before this case, 'whether priority should be given to the intention of the parties or to the form of the ceremony'.[767] However, Bano describes the overruling of the Court of

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[757] *Akhter v Khan* (n 752) [91].

[758] *Akhter v Khan* (n 752) [80].

[759] *Akhter v Khan* (n 752) [94].

[760] *Serife Yigit v Turkey* App No 397605 ECHR 2011.

[761] *Serife Yigit v Turkey* (n 760) [101].

[762] *Akhter v Khan* (n 752) [81].

[763] *Akhter v Khan* (n 752) [83].

[764] *Attorney General v Akhter* (n 753) [63,125].

[765] *Attorney General v Akhter* (n 753) [63].

[766] *Attorney General v Akhter* (n 753), [124].

[767] Rebecca Probert, 'The Evolving Concept of Non-Marriage' (2013) 25 Child and Family Law Quarterly 314, 318; see also WK Leong, 'Formation of Marriage in England and Singapore by

Appeal as a return to 'a more orthodox reading of the law', one that left a mother of four children who had been religiously married for 18 years 'with no financial remedies for her benefit in English law'.[768] Moreover, as Sandberg describes it, 'While Williams J. had focused on the unfairness of the category of non-marriage, the Court of Appeal was more concerned with preserving the certainty of the category of marriage'.[769] Sandberg applauds the appeal court decision in reversing 'a flawed solution to the unregistered religious marriages issue', although the problem 'still remains'.[770] In a situation where a dispute arises between parties to an unregistered marriage, they would have no choice other than using an 'inadequate' solution, such as Shariah councils.[771] However, there may be exceptions or ways to improve the situation which must be considered to mitigate the issues around *nikah* marriages within English law.

B) Inconsistent treatment of non-Christian religions

The response of the English courts to unregistered marriages has drawn criticism, despite the recent development in *Akhter*. Moreover, English courts have decided in certain cases that unregistered marriages were void marriages. In *Gereis v Yagoub,*[772] the couple went through a Christian marriage, and 'knowingly and wilfully failed to comply' with the formalities stated in the 1949 Act. The court held that the church ceremony was in line with the 'hallmarks of an ordinary Christian marriage'.[773] Clearly that the marriage Act 'is deeply influenced by its history' because 'acceptance of marriages that depart from the standard of church of England procedure has been slow'.[774] This decision may allow us to argue that English courts discriminate against religious minorities, such as Muslims, as was the case in *Gereis*. Although the parties did not give notice, nor were they married in a registered building, as was the case for *nikah-only* marriages discussed above, the marriage was held

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Contract: Void Marriage and Non-Marriage' (2000) 14 International Journal of Law, Policy and the Family 256, 269.

[768] Bano, 'British Muslim Communities, Islamic Divorce and English Family Law' (n 11), 249, 250.

[769] Russell Sandberg, 'Unregistered Religious Marriages Are Neither Valid nor Void' [2020] Cambridge Law Journal 237, 239; *Attorney General v Akhter* (n 753) [10].

[770] Russell Sandberg (n 769), 240.

[771] Russell Sandberg (n 769), 240.

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

[773] *Gereis v Yagoub* (n 772), 858; Probert, 'When Are We Married? Void, Non-Existent and Presumed Marriages' (n 742), 400; Jonathan Herring, *Family Law* (5th edn, Pearson Education Limited 2011), 48.

[774] Probert, 'When Are We Married? Void, Non-Existent and Presumed Marriages' (n 742), 418.

to be void.[775] As Probert argued that the distinction in this case between Christian and other non-Christian denominations:[776]

> Would be indefensible if a marriage in an unlicensed church of a Christian denomination should be held to be valid whereas one that was conducted in a similarly unlicensed non-Christian religious building was held to be a non-marriage.

Furthermore, there are several exemptions in English law that allow for recognition of specific religious or cultural marriages without the need for a civil ceremony, as otherwise mandated by English law. Those who marry 'according to Anglican or Quaker rites, and Jews' undertaking their religious ceremony 'are not required to go through a separate civil marriage', because the religious marriage 'is recognised by the state as creating a valid English marriage'.[777] Non-Anglican churches and other religions, such as Islam, must have their religious buildings registered and nominate an authorised person 'to act on behalf of the superintendent registrar to register the marriages held there'.[778] Although the privilege given to Jews is because they are considered by English authorities as 'legal aliens',[779] Probert suggests extending to 'all religions the privileges enjoyed by Jews and Quakers' and the English Church (Anglican).[780] Poulter believes that 'the privileges accorded to Jews and Quakers reflected religious toleration' at their time of enactment.[781] However, he asserts that 'in the twentieth century they symbolise religious discrimination', since 'there can surely be no justification for the preservation of what has now become a rather embarrassing historical anomaly'.[782]

Moreover, recognising Islamic marriages would be no different to the exemptions made for Anglicans, Quakers and Jews.[783] There is no sense in not accommodating marriages under

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[775] Probert, 'The Evolving Concept of Non-Marriage' (n 767), 328; Rebecca Probert and Shabana Saleem, 'The Legal Treatment of Islamic Marriage Ceremonies' (2018) 7 Oxford Journal of Law and Religion 376, 390.

[776] Probert, 'When Are We Married? Void, Non-Existent and Presumed Marriages' (n 742), 403; Probert and Saleem (n 775), 390.

[777] Marriage Act 1949 s.26(1); Edge (n 425), 126.

[778] Edge (n 425), 126.

[779] Probert, 'Determining the Boundaries Between Valid, Void and "Non-Qualifying" Marriages: Past, Present and Future?' (n 11), 16.

[780] Probert, 'When Are We Married? Void, Non-Existent and Presumed Marriages' (n 742), 407.

[781] Poulter, *Ethnicity, Law and Human Rights: The English Experience* (n 120), 205.

[782] Poulter, *Ethnicity, Law and Human Rights: The English Experience* (n 120), 205.

[783] Marriage Act 1949 s.26(1); Edge (n 425), 126.

Shariah law while others enjoy a tolerant exemption. Prakash Shan firmly calls for recognition of *nikah-only* marriages.[784] He believes that 'the Christian presuppositions of the official legal order make it difficult to understand that marriage actually means different things to different groups of people'.[785] He questions whether although the *nikah* is different from a Western marriage, 'should the way in which Muslim communities understand the former simply be dismissed or be assimilated to Western norms?' [786] He argues for the need for a 'more flexible' response to the 'diverse circumstances in a realistic manner'. [787] Moreover, there are other proposals to tackle marriage recognition, such as the 'mutual opt out process' of both parties to abandon legal recognition;[788] or 'removing the state's control over the marriage ceremony' by simply ensuring that 'the recognition of a marriage is a procedural process rather than state management of a ceremony'.[789] These proposals would allow everyone, including Muslims, to determine the status of their marriage in accordance with their beliefs.[790] Additionally, the exemptions made by English law for other denominations shall find it helpful to include Shariah law, as there would be no need of establishing a new exemption for Shariah law.

All in all, in spite of the strong argument that the lack of formality should not be treated as seriously as the lack of intention or consent, as with play marriages,[791] the Court of Appeal established the approach that intention to marry without solemnisation will be categorised as a non-qualifying ceremony that has no legal effect to protect 'the regulatory system' from being fundamentally undermined.[792] Statistics show that there are a significant number of marriages in the Muslim community without legal registration.[793] This failure leaves parties to *nikah-only* marriages in a vulnerable position, where no financial remedies will be granted

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[784] Prakash Shah, 'Judging Muslims' in Robin Griffith-Jones (ed), *Islam and English Law: Rights, Responsibilities and the Place of Shari'a* (Cambridge University Press 2013), 148.

[785] Shah (n 784), 152.

[786] Shah (n 784), 152.

[787] Shah (n 784), 152.

[788] Zainab Naqvi, 'Nikah Ceremonies in the UK: A Tool for Empowerment?', *Cohabitation and Religious Marriage* (Policy Press 2020), 105.

[789] Rehana Parveen, 'From Regulating Marriage Ceremonies to Recognizing Marriage Ceremonies', *Cohabitation and Religious Marriage* (Policy Press 2020), 101.

[790] Parveen (n 789), 101.

[791] Probert, 'When Are We Married? Void, Non-Existent and Presumed Marriages' (n 742), 409.

[792] *Attorney General v Akhter* (n 753) [63].

[793] It has been observed by empirical studies that over 30% percent of Muslim marriages are not civilly registered, Fisher, Saleem and Vora (n 736), 552; But some estimates put the figure as high as 80%, Grillo (n 737), 292.

to the parties.[794] Moreover, in the event of a spouse dying intestate, Muslim spouses would not be recognised as spouses by English law, and, therefore, would not gain their specified rights, due to their failure to register the marriage.[795] A spouse's share in English intestacy law could amount to the entire estate in the absence of children.[796] However, some of the suggested solutions could be viable to mitigate this issue, bearing in mind that all of these may not require a radical reform of the current laws.

C) The Rule of Cohabitation in Unregistered Marriages

In English law, both parties of unregistered marriages could rely on a presumption of marriage arising from their cohabitation and reputation.[797] The presumption in England is most often used if the marriage was celebrated a long time ago or abroad.[798] As Herring suggests that, where a couple are living together, believe themselves to be married, and present themselves as married, the law may presume they are legitimately married.[799] However, there has been significant confusion 'as to what is being presumed',[800] whether it is the ceremony or the fact that the couple who lived together for a lengthy period 'will be presumed to have married'.[801] The *Chief Adjudication Officer v Bath*[802] blurred the functions of these two presumptions, in which it:[803]

> Gave the impression that the presumption could validate a ceremony that did not comply with the law if the relationship of the parties had subsisted for a considerable time… [and create] an expectation that the presumption would only apply if there had been a long period of cohabitation after the ceremony.

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[794] O'Sullivan and Jackson (n 459), 26.

[795] O'Sullivan and Jackson (n 459), 29.

[796] Administration of Estates Act 1925 s.46.

[797] William Rayden, *Rayden's Law and Practice in Divorce and Family Matters in All Courts* (Joseph Jackson ed, 12th edn, Butterworths 1974), 527, 29; Herring (n 773), 52, 53.

[798] Herring (n 773), 47.

[799] Herring (n 773), 52.

[800] Rebecca Probert, 'The Presumptions in Favour of Marriage' (2018) 77 The Cambridge Law Journal 375, 375.

[801] English Law Commission, 'Getting Married: A Consultation Paper on Weddings Law' (n 724), 273.

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

[803] English Law Commission, 'Getting Married: A Consultation Paper on Weddings Law' (n 724), 273; See also Probert, 'The Presumptions in Favour of Marriage' (n 800).

Therefore, the presumption here is whether there was a ceremony at some point,[804] in which a party 'must be able to point to some evidential foundation for the possibility that some marriage ceremony or event must or may have occurred at some time'.[805] This means that the presumption 'does not depend on the couple having lived together for any minimum period of time'.[806] However, the cohabitation period should not be ignored completely as illustrated by Probert that:[807]

> A complete absence of cohabitation might raise the suspicion that the parties did not regard the ceremony as valid for some reason, but the duration of the parties' subsequent cohabitation can have no logical bearing on the likelihood of whether or not the ceremony was valid. Of course, the duration of the relationship might make the courts more reluctant to find that the original ceremony did not comply with the law, as in the earlier decisions of the ecclesiastical courts. The lapse of time might also make it more difficult to establish non-compliance. But this is not the same as requiring there to have been a lengthy period of cohabitation.

For example, although the relationships in both *A-M* and *Dukali* were held to be non-marriages, the court only allowed the wife in *A-M* to rely on cohabitation to have the marriage recognised. The parties in *A-M* had been cohabiting for twenty years,[808] unlike *Dukali,* where a period of cohabitation of seven or eight years was not sufficient, in which it was apparent that a longer period of time must be required.[809] Moreover, in *A-M,* there was the possibility of contracting a lawful Islamic marriage in an Islamic country, as there was no clear evidence to the contrary, disproving the possibility of a celebration of an unregistered Islamic marriage.[810] What was held in these two examples may support Probert's argument that short cohabitation may have relucted the presumption of the ceremony's validity, whereas the lengthy cohabitation would make it difficult for the court to presume that the ceremony did not occur at some point. However, the English law commission proposed in the consultation paper on weddings law that 'the presumption based

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[804] Probert, 'The Presumptions in Favour of Marriage' (n 800), 376.

[805] Collins (n 654), [17-049].

[806] English Law Commission, 'Getting Married: A Consultation Paper on Weddings Law' (n 724), 288.

[807] Probert, 'The Presumptions in Favour of Marriage' (n 800), 392.

[808] *A-M v A-M* (n 727) [40].

[809] *Dukali v Lamrani* (n 124) [33].

[810] Collins (n 654), [17-049].

on cohabitation and reputation should be formally abolished', because it 'was the product of historical circumstances that no longer prevail'.[811]

Furthermore, a number of commentators on the unregistered marriages issue call for a remedy of the duration requirements in cohabitation to bring Islamic marriages to the state of being 'legally consequential'.[812] As we have seen above, it is clear that English law 'has no legislative provision that specifically provides cohabitants with financial relief in the event of the ending of a relationship that has generated economic disadvantage'.[813] A remedy to the cohabitation rule may mitigate such an issue.[814] For instance, Vora proposed a 'tiered model of cohabitation classification' which relies on the duration of the relationship 'if the couple underwent a religiously valid marriage ceremony'.[815] Nash regards Vora's proposal as 'less radical' than other proposals which call for recognition of *nikah-only* marriages, such as Shan's,[816] 'as it confers a similar degree of legal significance upon the couple's relationship itself'.[817] Whatever model is used, affording some legal consequence to cohabitation will secure the position of Muslim spouses if marriage law were not to be changed.

D) Scots Law Approach to Cohabitation and Marriage Registration

The position in Scotland regarding cohabitation is more exhaustive than English law. In Scotland, if a woman were recognised to be a cohabitant, in which case may be awarded a sum of money on application to the court but only if the deceased died intestate, although cohabitants are clearly not spouses in law. In the Family Law (Scotland) Act 2006, a cohabitant has certain rights in regard to household goods and property upon the relationship ending otherwise than by death, or upon one cohabitant dying intestate.[818] To establish

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[811] English Law Commission, 'Getting Married: A Consultation Paper on Weddings Law' (n 724), 289, 290.

[812] Patrick S Nash, 'Sharia in England: The Marriage Law Solution' (2017) 6 Oxford Journal of Law and Religion 523, 534; Vora, 'The Continuing Muslim Marriage Conundrum: The Law of England and Wales on Religious Marriage and Non-Marriage in the United Kingdom' (n 744), 159, 60; Russell Sandberg (n 769), 240.

[813] Russell Sandberg (n 769), 240.

[814] Russell Sandberg (n 769), 240.

[815] Nash (n 812), 534; for more on this proposal, see: Vora, 'The Continuing Muslim Marriage Conundrum: The Law of England and Wales on Religious Marriage and Non-Marriage in the United Kingdom' (n 744), 159, 60; Vishal Vora, 'The Problem of Unregistered Muslim Marriage: Questions and Solutions' (2016) 46 Family Law 95, 98.

[816] Shah (n 784), 148.

[817] Nash (n 812), 534.

[818] Family Law (Scotland) Act 2006, ss.25-30; Crawford and Carruthers (n 652), 347.

cohabitation for the purpose of triggering one of the rights mentioned in ss.25-30, the law states that the court shall pay regard to: the length of the cohabitation period; the nature of the relationship during that period; and any financial arrangements.[819] Although the courts have found cohabitation to be established over a period of less than six months,[820] it is not possible 'to advise with certainty as to whether the law would regard a particular couple as being cohabitants for the purposes of the Act'.[821] Moreover, the 2006 Act does not confer on cohabitants the full rights and privileges afforded to spouses, and a cohabitant would lose out if there is a pre-existing spouse. It should be noted that this legislation is 'conflict of laws blind', except in claiming succession on the basis of cohabitation, where the claimant must have been domiciled in Scotland at the time of the deceased's death.[822] However, although these rules have come under criticism, and the Scottish Law Commission is consulting on reforming them,[823] cohabitants in Scotland have stronger rights and are more protected than those in their position in England.

Furthermore, marriage registration in Scotland, which follows more receptive and tolerant formalities than England, allows that a marriage can take place anywhere, provided that the parties to the marriage hold a marriage schedule from their local registrar, and so long as the marriage is celebrated with the presence of the parties in front of a registered celebrant and two witnesses.[824] The celebrant-based approach has been applied in Scotland for decades with no issue. So far, the non-marriage issue has not arisen in Scots law, where 'no issues of unregistered Muslim marriage in Scotland have been reported'.[825] The question of 'how a Scottish court would classify *nikah-only* marriage is unknown'[826] and whether a Scottish court held such marriages to be void 'is not entirely clear-cut'.[827] However, Sutherland

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[819] Family Law (Scotland) Act 2006 s. 25(2).

[820] *Mullen v Mullen* 1991 SLT 205.

[821] Crawford and Carruthers (n 652), 348.

[822] Family Law (Scotland) Act 2006, s.29; Crawford and Carruthers (n 652), 348.

[823] Scottish Law Commission, 'Discussion Paper on Cohabitation' (2020) 170 <https://www.scotlawcom.gov.uk/files/1115/8270/8061/Aspects_of_Family_Law_-_Discussion_Paper_on_Cohabitation_DP_No_170.pdf> accessed 30 November 2021.

[824] Marriage (Scotland) Act 1977 s.13.

[825] Vishal Vora, 'Unregistered Muslim Marriages in England and Wales: The Issue of Discrimination through Non-Marriage Declarations' in Yasir Suleiman and Paul Anderson (eds), *Muslims in the UK and Europe II* (Cambridge University Press 2016), 141; Sutherland (n 17).

[826] Sutherland (n 17).

[827] Garry Sturrock, 'Islamic Marriage and Divorce in Scotland; Will the English Decision of Akhter v Khan Change the Position?' (*Brodies LLP*, 2018) <https://brodies.com/insights/international-divorce-advice/islamic-marriage-and-divorce-in-scotland-will-the-english-decision-of-akhter-v-khan-change-the-position/> accessed 30 November 2021.

suggests that a Scottish court might take a different approach to the English courts and 'conclude there was something to be declared void'.[828] Sutherland relied on Eric Clive's argument that there should be a distinction between marriages that involve 'some semblance of marriage' and other marriages that have 'nothing to be declared invalid'.[829]

However, the English marriage procedure for religious ceremony requires deciding a place of ceremony, that is, a registered religious building, before giving notice to the local registrar office.[830] Therefore, a number of authors suggest that what might resolve the issue in England is the procedure implemented in Scotland, whereby persons are authorised as 'celebrants'[831] instead of buildings being authorised as state registrars, which places the responsibility for complying with the marriage formalities on a professional person.[832]

E) English Law Commission Report on Wedding Laws Reform

The English Law Commission has recently published its report regarding reforms of wedding laws, which suggested a few amendments, some of which were discussed above. For example, in the report, the celebrant-based system in Scotland was discussed and the commission proposed that 'independent celebrants were to have the option of being authorised as officiants'.[833] The report also recommended that *nikah-only* marriages be valid if 'the couple complete the in-person stage of the preliminaries and consent to be married in the presence of an officiant'.[834] In the event of failure to do so, the marriage shall be held as void rather than non-qualifying.[835] This recognition will help reduce 'the circumstances in

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[828] Sutherland (n 17).

[829] Eric M Clive and Scottish Universities Law Institute, *The Law of Husband and Wife in Scotland* (4th edn, Published under the auspices of the Scottish Universities Law Institute [by] W Green 1997); Sutherland (n 17).

[830] 'Marriages and Civil Partnerships in England and Wales' (*GOV.UK*) <https://www.gov.uk/marriages-civil-partnerships/plan-your-ceremony> accessed 28 February 2022.

[831] Marriage (Scotland) Act 1977 s.8(1)(a)(ii).

[832] Edge (n 425), 130; Nash (n 812), 542; Vora, 'The Continuing Muslim Marriage Conundrum: The Law of England and Wales on Religious Marriage and Non-Marriage in the United Kingdom' (n 744), 160.

[833] English Law Commission, 'Celebrating Marriage: A New Weddings Law' (2022) 408 <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/07/A-new-weddings-law-LC-report.pdf> accessed 30 August 2022, 163.

[834] English Law Commission, 'Celebrating Marriage: A New Weddings Law: Summary of Report' (2022) 408 <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/07/Weddings-summary-report_.pdf> accessed 30 August 2022, 35.

[835] English Law Commission, 'Celebrating Marriage: A New Weddings Law: Summary of Report' (n 834), 35.

which couples find themselves in a marriage which has no legal effect'.[836] The report also suggests removing the provision which allows for recognition of Anglican, Quaker and Jewish marriages, in the absence of a civil ceremony, 'to ensure that all types of wedding can take place according to the form and ceremony agreed between the couple and the officiant'.[837] These recommendations from the law commission could be helpful to mitigate the above discussed issues with regard to *nikah-only* marriages. From recommending giving legal effect to Islamic marriages, to bringing all types of marriages to the same level in the eyes of the law, the English law commission recommendations seem to be sensible in regard to criticism of the current law.

4.3.2 Essential Validity of Marriage in the Conflict of Laws: Polygamous Marriages

The importance of this section is to examine the recognition of polygamous marriages, which are an aspect of Shariah family law practice, whether they could be recognised in English and Scottish courts, and the consequences of this recognition. This would involve recognising a polygamous marriage entered outside England or Scotland for the purpose of allowing for a divorce proceeding to take place in an English or Scottish court, and granting the second wife a right to succession.

The Quran permits polygamy for Muslims, with verse 4:3 reading: 'marry those that please you of women, two or three or four'.[838] However, polygamous marriages are permitted only under a condition of equality; if a man is not capable of fulfilling this condition, then only monogamous marriage is religiously sanctioned. As verse 4:3 reads: 'But if you fear that you will not be just, then [marry only] one ... That is more suitable that you may not incline [to injustice]'.[839] Indeed, polygamous marriages that result in an injustice of treatment in intimacy or expenditure among wives are prohibited.[840] Furthermore, bigamy is the offence

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[836] English Law Commission, 'Celebrating Marriage: A New Weddings Law: Summary of Report' (n 834), 35.

[837] English Law Commission, 'Celebrating Marriage: A New Weddings Law' (n 833), 205.

[838] *The Holy Quran* (n 264), 4:3.

[839] *The Holy Quran* (n 264), 4:3.

[840] Ibn Kathir, *Tafsir Al-Qur'an Al-Adhim (Arabic)* (Mohammad Hussain ed, 1st edn, Dar al-Kutub al-Elmiah 1999), 2/85; Ibn'Ashur (n 265), 4/226; AA Al-Qurtubi, *Al-Jami'Li Ahkam Al-Quran (Arabic)* (Ahmad Al-barduni and Ibrahim Atfays eds, 2nd edn, Dar al-Kutub al-Misriyyah 1964), 5/20.

of marrying a person while being already married to someone else.[841] To distinguish between polygamy[842] and bigamy, polygamy is living with one family (albeit with multiple wives), whereas bigamy would involve separate marriages, in which the former could avoid infringing the law 'through the creative use of transnational or plural legal contexts'.[843]

Although the English Courts have been dealing with polygamous cases from as early as 1866 in *Hyde v Hyde*[844], the issue with Muslim polygamous marriages intensified in the UK post-World War II, when post-colonial workers sought reunification with their families.[845] Immigration laws 'exclude second wives['] [entry into the UK] by simply refusing to recognise the validity of their marriage'[846] as both English and Scots law consider a marriage void if either party was lawfully married to another party at its inception.[847] However, given the complication and volume of legal challenges raised against the British Embassy in Pakistan regarding the refusal of entry to second wives, the Immigration Act 1988 banned the entry of second wives to the UK, regardless of the domicile question, with an exemption that the 'first' wife is not in UK or has not successfully applied for entry.[848]

English law previously considered any marriage conducted in a place that permitted polygamous marriages as a potentially polygamous marriage even if at its inception neither party has any spouses.[849] However, the Private International Law (Miscellaneous Provisions) Act 1995 amended the Matrimonial Causes Act 1973, to consider 'a marriage is not polygamous if at its inception neither party has any spouse additional to the other'.[850] Since then, 'English law has assimilated an actually monogamous Muslim marriage (foreign or English) to the status of any other monogamous English marriage'.[851] This recognition does

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[841] Katharine Charsley and Anika Liversage, 'Transforming Polygamy: Migration, Transnationalism and Multiple Marriages among Muslim Minorities.' (2013) 13 Global Networks 60, 61.

[842] Polygamous marriages have two forms: polygyny and polyandry. The former concerns the entitlement of a man to have more than one wife, while the latter concerns a woman having more than one husband, Collins (n 654), [17-136].

[843] Charsley and Liversage (n 841), 62.

[844] *Hyde v Hyde* (n 732).

[845] Prakash A Shah, 'Attitudes to Polygamy in English Law' (2003) 52 The International and Comparative Law Quarterly 369.

[846] Shah (n 845), 384.

[847] Matrimonial Causes Act 1973 s.11(b); Marriage (Scotland) Act 1977 s.5(4)(a).

[848] Immigration Act 1988 s.2; Shah (n 845), 388.

[849] Collins (n 654), [17R-135].

[850] Matrimonial Causes Act 1973 s.11(d) as amended by the Private International Law (Miscellaneous Provisions) Act 1995.

[851] Edge (n 425), 133.

not include actually polygamous marriages, in which English law maintains 'the refusal to recognise an actually polygamous marriage entered into in the UK'.[852] The only circumstances in which an actually polygamous marriage will be recognised as one is if it took place in a country that legally recognises polygamous marriage, and so long as both spouses domiciled at that point in countries which permit polygamy, which will be valid under English and Scots law provided that either spouse was not domiciled in England[853] or Scotland[854].

This recognition of polygamy in the UK is not of a general nature, and is only recognised for limited purposes, such as divorce or succession, or preventing a subsequent monogamous marriage, and granting the second wife (or in some cases the husband) a decree of nullity.[855] For instance, in *Baindail v Baindail,*[856] in granting a petition of nullity to a woman in a polygamous marriage, the English court stated that it is 'undesirable … to attempt to lay down any comprehensive rule as to the manner in which a polygamous marriage ought to be regarded by the courts of this country'.[857] Another example is in *Hashmi v Hashmi,*[858] where a wife in a polygamous marriage was granted a decree nisi of nullity, the court holding that a void marriage in English law but 'recognised by the law' of the husband's domicile as a valid subsisting marriage … English law would recognise the children of that marriage as legitimate'.[859]

Furthermore, the Offences Against the Person Act 1861 criminalises bigamous marriages.[860] This offence will be committed even if the personal law of the spouses permits polygamy, such as Muslims if they have gone through two monogamous marriages in England.[861] In Scotland, until 2014, bigamy was a common law offence,[862] but is now codified in the

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[852] Edge (n 425), 133; Collins (n 654), [17R-164].

[853] Matrimonial Causes Act 1973, s.11(d); Collins (n 654), [17R-173]; Crawford and Carruthers (n 652), 330.

[854] Marriage (Scotland) Act 1977, s.2(3)(b); s.5(4)(b); Matrimonial Proceedings (Polygamous Marriages) Act 1972, s.2; Crawford and Carruthers (n 652), 330.

[855] Collins (n 654), [17-191; 17-193; 17-197]; Crawford and Carruthers (n 652), 326.

[856] *Baindail v Baindail* [1946] 122 CA.

[857] *Baindail v Baindail* (n 856), 127.

[858] *Hashmi v Hashmi* [1972] Fam 36.

[859] *Hashmi v Hashmi* (n 858).

[860] Offences Against the Person Act 1861 s.57.

[861] *R v Naguib* [1917] 1 KB 359.

[862] Gerald H Gordon, James Chalmers and Fiona Leverick, *The Criminal Law of Scotland* (4th edn, W Green/Thomson Reuters 2017), [54.02].

Marriage and Civil Partnership (Scotland) Act 2014.[863] Moreover, on whether recognising polygamous marriages in the UK would result in indictment for bigamy, Dicey et al. explains:[864]

> For if a British citizen… whose personal law permitted polygamy married two wives in the country where he was domiciled, it is inconceivable that he would be prosecuted for bigamy in England. His conduct was lawful by his personal law and by the law of the place where he acted, and there would be strong reasons of a public nature against a prosecution.

4.3.3 The Implications of *Nikah* and Polygamous Marriages on Succession

The above issues which may impede the recognition by an English court of an Islamic marriage have implications on Muslims in different aspects of family life. The above section examined how English and Scots law respond to Islamic marriages, which bring us to this section to examine its relevance with succession. The false recognition of *nikah* marriages presents an issue to Muslims' (particularly women) when asking in claiming ancillary relief and rights on the intestacy of a spouse. Statistics shows that there is a significant number of marriages in the Muslim community without legal registration.[865] This means as we have observed, rejection of any claim to financial relief that women would receive in the divorce. Also, in case intestacy rules apply, as will be discussed in the following chapter, Muslims' spouses in *nikah-only* marriages would not be recognised as spouses by English law, and, therefore, will not gain their specified rights due to the failure to register the marriage. Although they might have a chance to apply for a financial provision within the 1975 Act,[866] their share will not be an automatic right as if they were recognised as a spouse. Because those who apply for a financial provision within the 1975 Act need to approve needs and hardship for their claim to be approved.[867]

However, the circumstances regarding succession may differ with a polygamous marriage. Children of polygamous marriages are entitled to inherit, provided that the marriage is valid by the personal law of the parents, since 'it is immaterial that the husband married more than

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[863] Marriage and Civil Partnership (Scotland) Act 2014 s.28.

[864] Collins (n 654), [17-192].

[865] Fisher, Saleem and Vora (n 736), 552; Grillo (n 737), 292.

[866] *Jassal v Shah* [2021] EWHC 3552 Ch.

[867] See section 4.4.2 The Implications of Talaq on Succession below.

one wife or that the succession is governed by English law'.[868] For instance, in *Bamgbose v Daniel,*[869] the Privy Council granted the children of a Nigerian polygamous marriage the right to inherit from their father who died intestate while domiciled in Nigeria. Dicey et al. suggests that the result in *Bamgbose* 'would have been the same if the father had acquired an English domicile after the celebration of his marriages and before his death'.[870] Furthermore, a wife in a valid polygamous marriage is entitled to inherit, regardless of their domicile. In *Re Sehota,*[871] although the husband left his entire estate to his second wife, the court granted the first wife's application to be treated as a wife in accordance with section (1) (a) of the Inheritance (Provisions for Family and Dependants) Act 1975 on the basis that 'it would be strange if "the wife" in the Act of 1975 must be construed as restricted in its meaning only to monogamous marriages', since s.47 of the Matrimonial Causes Act 1973 permits the award matrimonial relief to parties who have been in polygamous marriages.[872]

This means that English courts, for example, would grant a woman who entered a polygamous marriage outside the UK a financial relief, and right to inherit but not to a woman who entered an unregistered monogamous Islamic marriage in the UK. This approach is seen by Edge as 'inequitable'.[873] It seems unfair for the law to hold Muslim marriages invalid for a lack of form, as the formalities are really of minor importance. Although many suggestions for lawmakers are triggered in academic literature to help mitigate *nikah* issue,[874] it seems that some Muslims, both men and women, may also be reluctant to engage with the domestic law. For the reason that the husband might neglect the registration, 'wishing to keep family-held assets out of the purview of the English law on community property'.[875] Another interesting fact regarding avoiding registration of marriage might be expressed by women who 'had built up assets through work, inheritance, or financial settlement on divorce, and wanted to protect those assets in the event of any future

[868] Collins (n 654), [17-193]; Crawford and Carruthers (n 652), 326.

[869] *Bamgbose v Daniel* [1955] AC 107 PC.

[870] Collins (n 654), [17-193].

[871] *Re Sehota* [1978] 1 WLR 1506, 1510.

[872] A polygamous wife's entitlement also applies on intestacy: see *Official Solicitor v Yemoh* [2011] 4 ER 200.

[873] Edge (n 425), 134.

[874] See section C) The Rule of Cohabitation in Unregistered Marriages; and section D) Scots Law Approach to Cohabitation and Marriage Registration in 4.3.1 above.

[875] Grillo (n 737), 292.

separation'.[876] That is to say, the purpose of not registering the marriages from both men and women may be to avoid involving the English courts in succession, or to frustrate an application of financial relief. This might be associated with the fact that there is a lack of case law concerning Shariah succession law in UK courts.[877] The next section will consider the recognition of religious divorce, whether informally or involving foreign proceedings to assess its implication on succession.

4.4 Conflict of Laws Rules for the Recognition of Religious Divorces

Domestic civil courts in the UK are the only authorities that have the competence to issue divorces or annulments in the country.[878] Otherwise, decrees granted in the UK in non-judicial proceedings will have no legal effect, and not be recognised by English or Scottish courts.[879] However, there is one exemption which has been made by English law, concerning Jews, in which the English court, prior to issuing a divorce decree, might ask the parties involved in divorce proceedings to obtain a *get* (a divorce decree obtained by the religious institution of Jews' Deth Bin).[880] In certain circumstances 'the court may order that a decree of divorce is not to be made absolute until a declaration made by both parties that they have taken such steps as are required to dissolve the marriage in accordance with those usages is produced to the court'.[881] In this regard, the English court in *AI v MT*[882] delayed its proceedings while waiting for the religious Beth Din to take place. This religious authority delivered its judgment eighteen months later, followed by the English court's consideration of that judgment.[883] This exemption was enacted in favour of women who might end up trapped by a religious organisation that allows the husband to refuse to cooperate,[884] since

[876] This was suggested by the Muslim Council of Britain to English law commission, see English Law Commission, 'Getting Married: A Consultation Paper on Weddings Law' (n 724), 283.

[877] Poulter, *Asian Traditions and English Law* (n 18), 75; Pilgram (n 18), 23.

[878] Family Law Act 1986 ss.44(1) and 52(4), 5(a), See *Solovyev v Solovyeva* [2014] EWFC 1546.

[879] Family Law Act 1986 ss.44(1) and 52(4), 5(a); *Chaudhary v Chaudhary* (n 124); *Sulaiman v Juffali* (n 662); Briggs (n 662), 923.

[880] Matrimonial Causes Act 1973 s.10A 1(a), as amended by Divorce (Religious Marriages) Act 2002, s 1(1).

[881] Matrimonial Causes Act 1973 s.10A (2), as amended by Divorce (Religious Marriages) Act 2002, s 1(2).

[882] *AI v MT* [2013] EWHC 100 Fam.

[883] *AI v MT* (n 882).

[884] Briggs (n 662), 923.

granting a civil divorce without a religious divorce will have serious consequences for women, particularly on remarriage.[885]

This vulnerable position of women was also a reason to call for including Islamic divorce in the Matrimonial Causes Act 1973, since, as we will see later, Muslim women can end up trapped between two legal systems if the husband refuses to grant a woman a religious divorce, despite having had a civil one. Although dissolving the marriage in Shariah described above, it may worth quoting here too. In Shariah law usually, the husband has the capacity to pronounce the *talaq*; however, a wife could terminate the marriage from their end. She can visit a judge to dissolve the marriage upon her request, where *khula* might involve a wife returning the *mahr*. Another way is that a judge can dissolve a marriage upon her request, provided that she provide legitimate grounds for dissolving the marriage, *faskh*, involving a fault, such as the husband's failure to consummate the marriage or causing harm to the wife. Finally, a wife has the right to pronounce the divorce by delegate, *tafwid*.[886]

Although the Divorce (Religious Marriages) Act 2002 - which provides for the Jewish exception – permits its extension to other religions by statutory instrument,[887] there have been no such instruments made.[888] The argument that this act only provides for Jews, and therefore denotes discrimination, was rejected by the Court of Appeal in *Kandeel v Hands*[889] on the basis that the Act 'provided a legislative mechanism for religious usages other than Jewish ones to become prescribed by the Act which was considered perfectly reasonable'.[890] However, an independent review presented recently to Parliament suggested adding Muslim marriages to this clause, but there was no response to this suggestion in the recent report of wedding reform.[891]

4.4.1 Overseas Divorces Rules and *Talaq*

English courts, in proceedings concerning the recognition of foreign divorces, have never examined on what grounds the divorce was issued to measure its applicability with English

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[885] Collins (n 654), [18-035].

[886] Ibn Rushd (n 266), 71-87; Ali (n 11), 127.

[887] Matrimonial Causes Act 1973 s.10A (6), as amended by Divorce (Religious Marriages) Act 2002, s 1(6).

[888] Edge (n 425), 132.

[889] Kandeel v Hands [2010] EWCA Civ 1233, as cited in: Edge (n 425), 132.

[890] Edge (n 425), 132.

[891] 'The Independent Review into the Application of Sharia Law in England and Wales' (n 172).

rules,[892] except in cases where there is a contradiction with public policy.[893] Instead, they examine whether the foreign divorce is 'proceedings' or 'non-proceedings'.[894] These two clauses, which signify the first step of the recognition test, will be discussed below. Throughout this discussion, the English and Scottish courts position toward *talaq* will be revealed. Before embarking on the recognition test, we need to examine the effect of *nikah-only* marriages on overseas divorce recognition. The English court would not recognise an overseas divorce if the marriage failed to comply with the formal requirements of the *lex loci celebrationis.* This was raised in cases such as *Dukali*[895] *and Sharbatly*.[896] Despite obtaining a foreign divorce decree, which otherwise be recognised under English law as we will see in this chapter, both applicants failed to obtain any financial remedy, because their marriage was formally invalid and therefore not a marriage in the first place.[897]

A) Divorce Obtained by Means of Proceedings

Section 46(1) of the Family Law 1986 Act sets out the recognition of overseas divorces, in which an overseas divorce that was 'obtained by means of proceedings' will be recognised if either party to the marriage, at the date of commencement of proceedings, was habitually resident, domiciled in, or a national of that overseas country.[898] The 1986 Act defines 'proceedings' as 'judicial or other proceedings',[899] with no additional clarification to what constitute 'proceedings'.[900] North suggests that the phrase is 'limited to cases involving some act external to the parties themselves' where registration or any form of approval are involved.[901] This denotes 'the mandatory involvement of a state agency, or a state-sanctioned church authority'.[902] Therefore, the Pakistani Muslim Family Law Ordinance 1961 (MFLO) procedure would be regarded by English law as 'proceedings' divorce.[903] For instance, in

[892] Collins (n 654), [18-033].

[893] *Gray v Formosa* [1963] P 259.

[894] Family Law Act 1986 s.46.

[895] *Dukali v Lamrani* (n 124).

[896] *Sharbatly v Shagroon* (n 750).

[897] *Dukali v Lamrani* (n 124) [43]; *Sharbatly v Shagroon* (n 750) [34].

[898] Family Law Act 1986 s.46.

[899] Family Law Act 1986 s.54(1).

[900] Fawcett, Cheshire and North (n 673), 1017.

[901] Fawcett, Cheshire and North (n 673), 1017.

[902] Fawcett, Ní Shúilleabháin and Shah (n 430), 690.

[903] *H v H* (n 124) [79, 80].

Quazi v Quazi,[904] the House of Lords recognised the *talaq* proceedings of MFLO to fall under the phrase 'judicial or other proceedings'.[905] The MFLO required the husband, having divorced his wife, in addition to notifying her, to notify the chairman of an arbitration council for reconciliation.[906] This procedure satisfied the House of Lords to conclude that 'the *talaq* and the notice to the civil judge', who was to be the chairman, taken together with notification of the respondent 'are "proceedings" within the sense' of Judicial or other proceedings.[907]

Moreover, the decree would be considered as being granted by means of proceedings even if the agency has no decision-making power or provided no judicial hearing, such as the case with Lebanon's *talaq* in *El Fadl v El Fadl,*[908] and Saudi Arabian *talaq* procedures in *H v S.*[909] In *El Fadl*, the mandatory registration of an oral divorce satisfied the court to recognise it as falling within s46 (1).[910] The position, however, in the Saudi case is to some extent different. Saudi divorce only needs to be pronounced orally by the husband, so was recognised as falling within s46 (1), due to registration under Saudi law being to some extent mandatory.[911] The judge concluded that 'In my judgment that can properly be described to have developed into and has been applied as proceedings'.[912] This may reveal that any mandatory registration to the bare *talaq* would be recognised as 'proceedings', such as the case with Pakistani, Lebanon and Saudi Arabian' procedures in registering *talaq* cases.

B) Divorce Obtained Otherwise than by Means of Proceedings

Furthermore, s.46(2), states that non-proceedings' divorce will be effective, if certain requirements were met. First, both parties to the marriage, at the date which the divorce was obtained, were domiciled in that country, or one party was domiciled in that country and the other party was domiciled in another country that recognised the divorce. Secondly, 'neither

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[904] *Quazi v Quazi* (n 124).

[905] Family Law Act 1986 s.45, the cases was decided under Recognition of Divorces and Legal Separations Act 1971 (c. 53), ss. 2(a), 8(2)(b) (as amended by Domicile and Matrimonial Proceedings Act 1973 [c. 45], ss. 2(4), 15(2).

[906] *Quazi v Quazi* (n 124), 768.

[907] *Quazi v Quazi* (n 234), 817; This approach was also held in the Scottish case of *Ahmed v Ahmed* 2006 SLT 135.

[908] *El Fadl v El Fadl* (n 124).

[909] *H v S* (n 124) [53]; see also MET v HAT (Interim Maintenance) [2015] 1 F.L.R. 576.

[910] *El Fadl v El Fadl* (n 124), 188.

[911] *H v S* (n 124) [60].

[912] *H v S* (n 124) [60].

party to the marriage was habitually resident in the United Kingdom throughout the period of one year immediately preceding that date'.[913] This latter stipulation is to prevent a UK citizen from having the advantage to travel to another country for a divorce,[914] although this is not a requirement for the recognition of 'proceedings' divorce under s.46(1). For instance, in *Chaudhary v Chaudhary,*[915] by refusing recognition of the bare *talaq*, the court distinguished the facts in *Chaudhary* from *Quazi*, where in *Chaudhary* 'both parties were resident and domiciled in England at the date of the bare *talaq'*. This distinction encouraged the court to refuse recognition in *Chaudhary,* because the husband's main reason for obtaining a divorce from Kashmir 'was to obtain the collateral advantage of preventing the wife from obtaining the financial relief to which she would be entitled under an English divorce'.[916] Indeed, English law settled its approach on not recognising merely an oral *talaq*, without any formal procedure.

However, English law used to be flexible on the bare *talaq* pronounced in England. For instance, in *Qureshi v Qureshi*[917], the court recognised that a bare *talaq* took place in England from a person domiciled in Pakistan. This decision was based on common law, prior to the intervention of statutory law in the Domicile and Matrimonial Proceedings Act 1973 (replaced by the Family Law Act 1986), which reversed the implications of this case.[918] Today, as in s.44 of 1986 Act discussed above, English law will not recognise a bare *talaq* that takes place in England.[919] For instance, English law takes no notice of religious divorces taking place in England,[920] as 'whatever they may be, are a complete irrelevance so far as English law is concerned'.[921] This was also confirmed in the relevantly recent case of *Hussain v Parveen,*[922] where a *talaq* pronounced in a letter which was converted into a divorce certificate by a mosque in England before it was sent to the wife in Pakistan and

[913] Family Law Act 1986 s.46.

[914] Pearl and Menski (n 11), 100.

[915] *Chaudhary v Chaudhary* (n 124), 48.

[916] *Chaudhary v Chaudhary* (n 124), 48.

[917] *Qureshi v Qureshi* (n 124).

[918] *Chaudhary v Chaudhary* (n 124); Pearl and Menski (n 11), 92.

[919] Family Law Act 1986 ss.44(1) and 52(4), 5(a).

[920] *Qureshi v Qureshi* (n 124), 186.

[921] Briggs (n 662), 923.

[922] *Hussain v Parveen* [2021] EWFC 73.

formally registered was declared a nullity in the UK because 'the proceeding had been transnational and could not be recognised in the UK under the Family Law Act 1986 s.46'.

C) Critique of The Distinction in Foreign Divorce Recognition

Ahead of enacting the 1986 Act, the Government rejected the Law Commission's proposal (Law Com. No. 137 and Scot. Law Com. No. 88)[923] that suggested treating "bare" *talaqs* in this country as procedural,[924] i.e. that they should be treated as a 'proceedings' divorce. In other words, the proposal suggested including an act to 'judicial or other proceedings' to 'constitute the means by which a divorce may be obtained in a country, and which are done in compliance with the law of that country'.[925] Instead, as Pearl observes, the effect of s.46(2) 1986 Act seeks to:[926]

> Encourage (perhaps one should rather say, force) members of ethnic minority communities to make use of the domestic English legal provisions rather than taking recourse to overseas law and then seeking recognition of such actions through private international law.

The distinction, which is developed by case law, 'is now clearly made between the divorce obtained by proceedings', such as *talaqs* obtained in Pakistan and Bangladesh, and 'the divorce obtained otherwise than by means of proceedings', such as *talaqs* obtained in India or Pakistani Kashmir.[927] To elaborate, Pakistan and Bangladesh have reformed the classical Islamic *talaq* in the MFLO, unlike India and Pakistani Kashmir, where classical bare *talaqs* are still enforced without mandatory procedures.[928] This distinction, which was rejected by the Law Commissions, is 'now enshrined in tablets of stone' between a Pakistani *talaq* such as *Quazi* and a Kashmiri *talaq* such as *Chaudhary*[929] and 'certainly not justified by the limited reforms introduced into Pakistan law'.[930] In *Chaudhary* the court held, contrary to *Quazi*, that a bare *talaq* does not fall within 'other proceedings', concluding that:[931]

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[923] Law Commission No.137; Scotland Law Commission No.88.

[924] David Pearl, 'Family Law Act 1986, Part II' (1987) 46 The Cambridge Law Journal 35; Collins (n 654), [18-105].

[925] Collins (n 654), [18-105].

[926] Pearl and Menski (n 11), 99.

[927] Pearl (n 924), 36.

[928] *B v Entry Clearance Officer, Islamabad (Pakistan)* [2002] UKIAT 04229; *NC (bare talaq − Indian Muslims – recognition) Pakistan* [2009] UKAIT 00016 [18]; *Chaudhary v Chaudhary* (n 124), 26.

[929] *Chaudhary v Chaudhary* (n 124).

[930] Pearl (n 924), 38.

[931] *Chaudhary v Chaudhary* (n 124).

> "Judicial or other proceedings" must be given a construction which restricts recognition to a narrower category of divorces than all divorces obtained by any means whatsoever which are effective by the law of the country in which the divorce was obtained.

Although the approach to *talaq* recognition seems to be settled, with the requirement of formal procedure, at least to have occurred, this distinction has come under criticism for irrationality.[932] While the intention behind it was to provide protection and access to domestic courts to women living in the UK, there is a possibility that the divorce proceedings might be unilateral and biased towards women.[933] For instance, the MFLO procedure suspends the *talaq* for 90 days in case the parties reconcile in the interim period.[934] This *talaq*, which is treated as 'proceedings' under the 1986 Act, is of a unilateral nature, which means that only the husband can pronounce the *talaq*, unlike the *khula,* which is a procedure that would be consensual between both parties and non-prejudicial, and is considered by the 1986 Act as a 'non-proceedings' divorce.[935]

Furthermore, Dicey et al. believe that the distinction between these two categories is 'unclear'.[936] Although the Family Law Act 1986 defines 'proceedings' to mean 'judicial or other proceedings',[937] there is ambiguity in this phrase, and the Family Law Act 'contains no direct guidance on the meaning of the phrase'.[938] For instance, in *El Fadl,* concerning pronouncing a bare *talaq* in Lebanon, the Court held that the requirement of Lebanese law to register the bare *talaq* in a Shariah court after the bare *talaq* satisfied the English law sufficiently constituted 'proceedings'.[939] It was held that the validity of the divorce relies on 'at least in part, on what can properly be termed proceedings',[940] in which the effect of the phrase 'at least in part' is, as Dicey argues, 'obscure'.[941] What might ease the ambiguity of

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[932] Fawcett, Ní Shúilleabháin and Shah (n 430), 691; MP Pilkington, 'Transnational Divorces Under the Family Law Act 1986' (1988) 37 International and Comparative Law Quarterly 131, 137.

[933] Fawcett, Ní Shúilleabháin and Shah (n 430), 691; Pilkington (n 932), 137.

[934] Fawcett, Ní Shúilleabháin and Shah (n 430), 691.

[935] Fawcett, Ní Shúilleabháin and Shah (n 430), 691.

[936] Collins (n 654), [18-102].

[937] Family Law Act 1986 s.54(1).

[938] Collins (n 654), [18-107].

[939] *El Fadl v El Fadl* (n 124).

[940] *El Fadl v El Fadl* (n 124).

[941] Collins (n 654), [18-107].

drawing a distinct line between 'proceedings' and 'non-proceedings', particularly in cases concerning a bare *talaq*, is by quoting what Hughes J said in *El Fadl:*[942]

> The clear-cut dichotomy between a bare *talaq* and another single form of *talaq* does not necessarily exist (in the jurisdiction in which it may have been obtained) so that the law of the country in question and the particular process undertaken must be examined from case to case to answer what is a question of English law.

This argument, which concerns the clear distinction between 'proceedings' and 'non-proceedings', may be significantly relevant to the refusal of recognition of overseas divorces stated in section 51 Family Law Act 1986, in which this section seems to be more resistant to 'non-proceedings' divorces.

D) Public Policy and Recognition of Foreign Divorces

The recognition of foreign divorce stated above may fail if either party raises one of the challenges stated in s.51 of the Family Law Act.[943] The grounds of refusal in s.51 regarding 'proceedings' divorce include whether either party did not receive proper notice of the proceedings or took an opportunity to take part in the 'proceedings'.[944] Moreover, where a bare *talaq* is held to be 'non-proceedings', the s.51grounds of refusal include failure to obtain an official document from the country where the divorce took place (or from a third country if either party was domiciled in another country at the relevant date) proving the divorce is effective under that law.[945]

English courts' recognition of Islamic divorce has varied due to the discretion that the court has regarding recognition of foreign divorces, depending on each case's facts, along with the distinction, 'proceedings' and 'non-proceedings', stated in s.46.[946] For example, in *Zaal v Zaal,*[947] although the Court considered the overseas divorce to fall within 'other proceedings', it used its discretion to refuse to recognise a *talaq* pronounced by the husband,

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[942] *El Fadl v El Fadl* (n 124) (Quoted in H v S [2011] EWHC B23 [23]).

[943] Family Law Act 1986 s.51.

[944] Family Law Act 1986, s.51(3)(a).

[945] Family Law Act 1986, s.51(3)(b).

[946] Family Law Act 1986 s.46.

[947] *Zaal v Zaal* (n 124) The judgment was based on Recognition of Divorces and Legal Separations Act 1971s.8, as amended by Domicile and Matrimonial Proceedings Act 1973 (c. 45), ss. 2(4), 15(2) which was revoked by the family law act 1986. However, section 51 of family law act include the same revoked clauses.

since the wife 'only knew about the *talaq* after she had been irrevocably divorced', and giving formal recognition, in this case, would be manifestly contrary to public policy.[948] On the contrary, the court did not use its discretion to refuse recognition of the *talaq* in a number of cases, such as *Quazi, El Fadl* and *H v H.*[949] For instance, despite the fact that the wife in *H v H* 'was not given notice of the divorce nor the opportunity to take part'[950] Sumner J relied on Hughes J's conclusion in *El Fadl:*[951]

> … I am satisfied that however much a unilateral divorce without notice may offend English sensibilities, comity between nations and belief systems requires at least this much, that one country should accept the conscientiously held but very different standards of another, where they are applied to those who are domiciled in it… I am satisfied that where, as here, the *talaq* is the prevailing form of divorce in the country of both parties, where it had been validly executed there, so that the marriage is at the end in the country, where it was contracted, and to which both parties belonged and where there is no evidence of forum shopping, not only does public policy not call for non-recognition, in the end it summonses recognition.

It appears from the above-mentioned cases concerning the *talaq* that the old approach in *Zaal* has given way to a more cosmopolitan approach favouring recognition. For instance, in *Quazi,* on the question of discretion to refuse recognition based on s.51, the first instance judge stated that:[952]

> It is important that the courts in this jurisdiction should appreciate that we have living in our community persons who have a religion different from those with which we are familiar and with its own particular devout customs, obligations and rights. I see nothing contrary to public policy in the recognition of the *khula* or the *talaq*.

The Court of Appeal stated in response to this approach:[953]

> It was a matter for his discretion; he considered all the facts, and fell into no error of law. Even if I might have exercised the discretion differently, it would be wrong to interfere: but, in truth, I think he was right.

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[948] *Zaal v Zaal* (n 124); see also *Sharif v Sharif* (n 124).

[949] *H v H* (n 124).

[950] *H v H* (n 124) [83].

[951] *El Fadl v El Fadl* (n 124), 190, 91.

[952] *Quazi v Quazi* (n 124), 782.

[953] *Quazi v Quazi* (n 124), 826.

However, I think the chances of recognising a *talaq* will be relatively more possible if the *talaq* is held to be 'proceedings'. A mandatory registration to the bare *talaq* would, to a larger extent, give it statutory recognition in the UK based on the foreign law rules. This was evident in *Quazi, El Fadl, H v H* and *H v S*, where the *talaq* in all these cases was held as 'proceedings', and the court did not use its discretion to refuse recognition of the *talaq* based on section 51. This approach seems to an extent to be following the Law Commission's recommendations discussed earlier, where the courts in these cases have examined in part the compliance with the law of the overseas country. For instance, in *El Fadl* and *H v S*, the court relied on the mandatory registration of a divorce by the relevant countries in the failure of a registration to recognise the divorce as 'proceedings'. However, this may not be the case if the bare *talaq* was held as 'non-proceedings' then the clause of one-year residence immediate to the date of proceedings, which applies only with 'non-proceedings', will considerably affect recognition. Therefore, given the variation of case law in response to *talaq* and the critique of this distinction discussed above,[954] the Law Commission's historic recommendations to abolish this distinction and assess the compliance with the law of the overseas country may provide an improved platform to recognise *talaq* within the UK.

4.4.2 The Implications of *Talaq* on Succession

A bare *talaq* appears to be difficult to receive recognition, particularly for British nationals, which may raise conflicts to some British Muslims regarding succession. As discussed earlier in this section, *nikah-only* marriages will not be granted a divorce decree in English courts because of lack of formality. Moreover, English and Scottish courts in cases of recognition of foreign divorces validate whether the marriage complies with the formal requirements of the *lex loci celebrationis.* In such cases, the foreign divorce decree will be rejected because of the invalidity of their marriage.[955] This results in spouses failing to obtain their right as an heir in intestate succession, despite they still inheriting in accordance with Shariah rules.

Furthermore, if the divorce is not recognised it does not even usually mean that the marriage was not valid. Hence, they may still be entitled to succession given that they are still married in the eyes of English or Scottish law, but their divorce is the one that was not recognised. However, we should bear in mind that the spouses whose divorce was not recognised by the

[954] See section C) Critique of The Distinction in Foreign Divorce Recognition in 4.4.1 above.

[955] *Dukali v Lamrani* (n 124) [43]; *Sharbatly v Shagroon* (n 750) [34].

English or Scottish courts are still divorced in Shariah law and therefore in the eyes of their family. If one spouse died and the estate was distributed among the heirs, the surviving spouse is not an heir in the eyes of Shariah law. Although the spouse, in this case, is entitled to succession in English or Scots law, it may be difficult to seek their right to succession within those legal systems. They may waive their right to succession because they went into another *nikah* marriage or English or Scottish courts may not have authority to decide on the assets due to the domicile of the deceased.[956] Therefore, in this case, failing to recognise their *talaq* may result in a failure to receive their right to succession.

4.5 Conclusion

We learned in this chapter how far English and Scottish courts accept and apply Shariah law. PIL is not hostile to Shariah law, where Shariah legal systems may govern the distribution of the deceased estate via PIL rules if it was designated as applicable, such as if the deceased leaves immoveable property in a state that is governed by Shariah law. However, Islamic marriage recognition, both *nikah* and Polygamous marriages, have implications on Muslims' right of succession. The rejection of unregistered Islamic marriage would constitute a barrier against the spouse's intestacy rights, which may leave for women in the UK in a vulnerable position. While this rejection is more about failing to meet the formalities of domestic law rather than the incompatibility of marriages contracted by Shariah, recognition of these marriages would provide a platform for accommodating Shariah law in English courts. Moreover, despite that polygamy arguably is extremely inconsistent with Western Christian traditions embodied in English and Scots marriage law,[957] English law seems to offer more protection to spouses in a polygamous marriage than they do to spouses in an unregistered marriage, which is surprising. However, with rising calls for the recognition of unregistered Islamic marriage,[958] the recent proposals from the independent review and the Law Commission might be a promising move toward correcting these errors. [959]

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[956] See section 7.2.4 Potential Application of Shariah Succession Through Conflict of Laws Rules.

[957] *Hyde v Hyde* (n 732), 135.

[958] Edge (n 425), 143; Shah (n 784), 148; Nash (n 812), 534.

[959] 'The Independent Review into the Application of Sharia Law in England and Wales' (n 172); 'Faith Practices: Written Statement' HCWS442 <https://www.parliament.uk/written-questions-answers-statements/written-statement/Commons/2018-02-01/HCWS442> accessed 30 November 2021; English Law Commission, 'Weddings' (2020) <https://www.lawcom.gov.uk/project/weddings/> accessed 30 November 2021.

Moreover, related to the issue of unregistered marriage, a bare *talaq* pronounced by a Muslim in the UK will not be recognised whatsoever. The only alternative way to recognise a *talaq* is if it is granted in a foreign country and is recognised here. The legislation appears to make it difficult for a bare *talaq* to receive recognition, particularly for British nationals. Recognition will mostly be granted if the bare *talaq* is followed by a form of procedure that satisfies the foreign country where the *talaq* occurred, such as in Pakistan, Lebanon, and Saudi Arabia. However, it might be subject to challenge on the grounds of public policy, that one of the spouses was not given notice to the proceedings or a chance to participate in it. Although the UK may be more tolerable toward Shariah law than other part of Europe, toleration might not be accurate for some of Shariah family law practices in the UK because other religions enjoys some privileges in practicing their family law that is not allowed to Muslims. These difficulties will certainly have an effect on Muslims living in the UK, where refusing to recognise a form of divorce or *nikah-only* marriage impacts Muslims' right to succession.

However, on the other side, some Muslims may be reluctant to engage with domestic law. It was suggested that the reason may be associated with avoiding English or Scottish courts' engagement in the family assets and succession. [960] Another interesting fact is that also women might share this interest in which they may wish to avoid registration of marriage to protect their assets.[961] That may allow us to say, non-registration of the marriages may be connived in by both men and women may be to avoid involving the English courts in succession. This is an aspect of Shariah family law practice inadequately dealt with within the UK, as there is a lack of court cases relating to Shariah succession disputes. There is a pressing need to investigate this issue in order to try to find a resolution to the actual practice of Shariah succession. However, before embarking on that matter, in the next chapter I will discuss domestic succession laws in relation to Shariah, succession, in order to illuminate potential conflicts that might arise from applying Shariah succession within domestic legal frameworks. This will contribute to the investigation of Shariah succession within Scots succession law.

[960] Grillo (n 737), 292.

[961] This was suggested by the Muslim Council of Britain to English law commission, see English Law Commission, 'Getting Married: A Consultation Paper on Weddings Law' (n 724), 283.

Chapter 5 Shariah Succession Law in the UK: Potential Conflicts with Scots Succession Law

5.1 Introduction

Applying Shariah inheritance law is one of the difficult questions facing Muslims in the UK and across Europe.[962] There are a significant number of Muslims living in the UK, most of whom have migrated from Islamic countries,[963] and who still have a transitional attachment to Shariah family law.[964] As discussed in chapter 2, a tolerant British approach to multiculturalism plays a part in Shariah family law recognition. This tolerance is rooted in the colonial era, when Muslims under British rule in the empire were allowed to practice family law in the private sphere. However, it continues to impact British Muslims today, due to the fact that most of them are from former British colonial countries.[965] This may be associated with the fact that there is a lack of case law concerning Islamic succession in UK courts.

Legal systems around the world consider succession, which regulates the arrangements of a person's assets and liabilities after death,[966] in one of three categories: as an aspect of property law, family law, or 'a separate subject in its own right'.[967] Chapter 4 of this study examined Shariah family law, because there is more evidence of the Muslim practice of *nikah* and *talaq*. As we have seen, English and Scottish courts respond to Shariah family law by restricting recognition of non-procedural actions, such as the *nikah-only* marriage and oral *talaq*. However, the real focus of this study is to assess the applicability of Shariah succession law within Scots succession law, as an aspect of family law, to assess the wider treatment of family law practices. This chapter continues from the previous chapter in assessing the legal mechanisms for permitting tolerance of Shariah law in family law fields.

However, the succession question remains unsettled, since little is known from the literature about how Muslim families deal with succession in Scotland, nor is there case law to assess

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[962] Ahsan (n 11) 27.

[963] Office for National Statistics (n 76), around 68% of the British Muslim population were of Asian origin countries, predominantly 38% from a Pakistani background.

[964] Pilgram (n 18), 183.

[965] See section 2.4.3 Dual Jurisprudence and Shariah Family Law in the UK: Postcolonial Effect above.

[966] R Kerridge, AHR Brierley and David Hughes Parry, *Parry & Kerridge The Law of Succession* (13th edn, Sweet & Maxwell/Thomson & Reuters 2016), 1.

[967] George L Gretton and Andrew J M Steven, *Property, Trusts and Succession* (Bloomsbury Professional 2021) <https://www.bloomsburyprofessionalonline.com/view/property_trusts_succession/property_trusts_succession.xml> accessed 22 March 2022, [26.1].

the Shariah succession position within English or Scots domestic law.[968] In order to understand the position of Shariah succession for Scottish Muslims, empirical work was undertaken with experts in Shariah succession in Scotland to attempt to gain a greater insight into the practice of succession by Scottish Muslims.[969]

However, before examining the empirical work, the focus of this chapter will be on substantive succession law, in order to assess the difficulties that Shariah succession law may pose in relation to English and Scots domestic law. Scotland has its own jurisdiction with its own laws and that the law of succession is distinctive from English succession law. The focus will mainly be on Scots succession law, in order to identify any potential conflicts between Scots law and Shariah law. In particular, this chapter will examine the potential conflict of Islamic will (*wassiyyah*)[970] with a Scottish will because legal rights imposed in Scots testate law may impact the application of *wassiyyah*. Moreover, it will explore conflicts between Scots intestacy law rules and Shariah forced heirship rules, which would affect compatibility between the two systems.

The first section of this chapter briefly discusses Shariah succession rules, which includes the definition of heirs and how to calculate their shares. The second section focuses on the possible conflicts in applying Shariah succession in Scotland. This includes examining Scots intestacy law to assess the implications of applying Shariah forced heirship rules, as well as the implications of legal rights when applying Shariah succession in *wassiyyah* within the UK. Through this chapter, I attempt to extract the main points of conflict that might arise when applying Shariah succession rules, in order to assess the practice of Shariah succession in Scotland. Given the scope of this research, the rules of succession law will not be discussed in a comprehensive way, only where relevant to those points of conflict. The following section will briefly consider the discussion of English law in testamentary freedom in order to enrich the discussion of common principles that are shared between the two legal systems of England and Scotland and to point out the differences between the two systems in testamentary freedom which may impose further theoretical restriction on applying Shariah succession within testate Scots law. I have been selective in terms of English law, looking only at testate succession, because it has most relevance, and is most similar to,

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[968] Poulter, *Asian Traditions and English Law* (n 18), 75; Pilgram (n 18), 23. Poulter confirmation up to 1990, a recent confirmation by Pilgram confirming that up to 2017 no cases concerning Sharia inheritance have been raised before an English court.

[969] See Chapter 6 The Practice of Shariah Succession Law within Scots Law and Chapter 7 Other Options for Succession Practices of Scottish Muslims below.

[970] The term *wassiyyah* is the Arabic equivalent of will, which means a definite obligation.

Scots law and the main focus of this research is Scotland. The last section will discuss whether public policy rules may impact on applying Shariah succession.

5.2 Shariah Succession Rules

The structure of Shariah succession was set out by the Quran,[971] and the Sunnah[972] allowed subsequent scholars, particularly in the first three Islamic centuries, to set out a detailed formulation of succession rules.[973] These scholars were the prophet's PBUH companions who accompanied the prophet during his life and were therefore guided by him. Shariah succession law does not differentiate whether the deceased is male or female, and both male and female heirs benefit from the inheritance. Verse 4:7 of the Quran reads: 'For men is a share of what the parents and close relatives leave, and for women is a share of what the parents and close relatives leave, be it little or much - an obligatory share'.[974] However, prior to distributing the estate, priority is given to funeral expenses; debts and liabilities, involving the wife's deferred dowry, the *mahr*.

Shariah succession law, as Yassari describe it, 'is fundamentally grounded in the concept of forced heirship' that limits the deceased freedom to dispose their assets.[975] Because the assets will be transferred in 'a predefined way to those considered to be best entitled to it, rather than to those whom the deceased might prefer'.[976] This also means that 'the two systems of testate and compulsory intestate succession coexist'.[977] The idea of forced heirship might be a novel concept in the context of Shariah succession law because it is more commonly used with civil law jurisdiction. The forced heirship rules apply to the whole estate if there is no

[971] *The Holy Quran* (n 264) specified the shares for parents, spouses, children, full and half-brothers, the verses that describe the shares are 4:7; 4:11; 4:12 and; 4:176.

[972] There are around 18 hadith concerning inheritance shares, such as grandparents' shares, the unborn child, will limitations.

[973] Mohammedi (n 51), 264; Zainab Chaudhry, 'The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law' (1997) 61 Alb. L. Rev. 511, 527.

[974] *The Holy Quran* (n 264), 4:7.

[975] Nadjma Yassari, 'Compulsory Heirship and Freedom of Testation in Islamic Law', *Comparative Succession Law* (Oxford University Press 2020) <https://oxford.universitypressscholarship.com/10.1093/oso/9780198850397.001.0001/oso-9780198850397-chapter-21>, 629.

[976] Noel James Coulson, *Succession in the Muslim Family*, vol 1091 (Cambridge University Press Cambridge 1971) cited in; Yassari, 'Compulsory Heirship and Freedom of Testation in Islamic Law' (n 975), 629.

[977] Yassari, 'Compulsory Heirship and Freedom of Testation in Islamic Law' (n 975), 633.

will, or to two-thirds of the estate if the deceased left a will.[978] Thus, a testator's freedom to dispose of their assets in Shariah is restricted to a maximum of one-third.[979] It should be mentioned that this would be the ideal situation in Islamic countries where Muslims need to bequeath no more than a third of the estate, and the forced heirship rules will be applied to the remaining two-thirds. However, this may not be adequate in non-Islamic countries, such as Scotland, where Muslims are urged to set out bequests and the division of forced heirship in a *wassiyyah* covering the entire estate,[980] otherwise Scots intestacy law will govern their free estate.

5.2.1 Male-Female Ratio

Shariah succession rules elevate the status of women,[981] in contrast to the 'patriarchal' scheme of pre-Islamic succession whereby only males who were able to protect the tribe were entitled to inherit.[982] The male-female ratio applies in four cases, as explained in Table 5-1 and Table 5-2 below in relation to the deceased's children, to spouses, parents and to full and consanguine siblings.[983] This rule in Shariah succession means that if the male and female heirs are from the same degree of relationship to the deceased e.g. the deceased's sons and daughters, the female receives half the amount that the male does.

However, the prevalent idea that women inherit half as much as men might be inaccurate. The double share for males over females only applies if the male and female heirs are from the same degree of relationship to the deceased e.g. the deceased's sons and daughters.[984] That means the ratio is not applicable if the deceased, for instance, leave a daughter and a brother. Moreover, there are many cases where women inherit equally to men. For example, as shown in Table 5-1 and Table 5-2 below, parents receive one sixth each, in cases where the deceased had children. In addition, males and females can share the estate equally in a

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[978] Mohammad Ibn Othaimeen, *Al-Sharh al-Momtea Ala Zad al-Mostagnea (Arabic)* (Dar Ibn al-Jozi 2002), 154; Yassari, 'Intestate Succession in Islamic Countries' (n 228), 424. The term wasiyyah is the Arabic equivalent of will, which means a definite obligation.

[979] Yassari, 'Compulsory Heirship and Freedom of Testation in Islamic Law' (n 975), 633.

[980] Abdal-Haqq, Bewley and Thomson (n 159), 35; Ahsan (n 11), 27; Zaki Badawi, 'Muslim Justice in a Secular State' in Michael King (ed), *God's Law Versus State Law: The Construction of an Islamic Identity in Western Europe* (Grey Seal 1995), 79.

[981] Chaudhry (n 973), 513.

[982] Yassari, 'Intestate Succession in Islamic Countries' (n 228), 422.

[983] Salah Al-Din Sultan, *Women Inheritance and Equality Debate* (1st edn, Nahdhat Masar 1999), 10.

[984] Yassari, 'Intestate Succession in Islamic Countries' (n 228), 424.

number of cases, such as a husband and a sister; a daughter and a father; a daughter and a brother.[985] Moreover, women inherit more than men in many cases. For instance, if the deceased is survived by a daughter, a father and a husband, the daughter will be entitled to half of the estate, the husband will receive a quarter and the residue will go to the father.[986] Another example would be if the deceased is survived by a daughter and parents, where the daughter will be entitled to half of the estate, the mother will receive one sixth, and the residue goes to the father.[987] This is simply because the male and female heirs are not of the same rank, which is the limitation of this principle.

Drawing from the discussion of human rights in chapter 3,[988] it might be true that the male-female ratio might pose issues with anti-discrimination laws adopted by European jurisdictions. To justify the male-female ratio principle, as Thompson observes, 'it is important to recognize that informal equality of women may be more achievable when Islamic inheritance laws are viewed within this wider context of the Islamic inheritance and family law system as a whole'.[989] The male-female ratio can be justified by 'the greater economic burden of males in society and under the law, in that they have to provide for the *mahr* and maintain women financially'.[990] Men in Shariah family law are obliged to provide for their wife, regardless of whether the wife is capable of providing for herself or not.[991] For example, if a wife has a property it belongs to her alone, unlike the husband's property which is communally used for the benefit of the whole family.[992] Hence, women have a lesser share under Shariah succession because the wife has no financial burden.[993] That is why Chaudhry argues that 'the amount each spouse is set to inherit under Sharia law is determined not by their gender, but rather by their financial obligations'.[994]

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[985] Ibn Rushd (n 266), 411-419; Pearl and Menski (n 11), 452-468.

[986] Pearl and Menski (n 11), 455.

[987] Pearl and Menski (n 11), 459.

[988] See section 3.3.2 Succession: Thrace Minority in Greece above, and section 7.3.2 Discriminatory Practices and Human Rights below.

[989] Brooke Thompson, 'Do Islamic Succession Laws for Muslim Women Violate the Current Human Rights Framework? Developing an Ethical Working Model for Muslim Minority Nations' (2016) 13 Muslim World Journal of Human Rights 45, 57.

[990] Yassari, 'Intestate Succession in Islamic Countries' (n 228), 424.

[991] Many contemporary fatwas asserted this point. see: 'Regarding Disputes between Husband and Employed Wife' (International Islamic Fiqh Academy 2005) Decision Resolution 144 (2/16) <https://www.iifa-aifi.org/ar/2174.html> accessed 27 October 2020.

[992] Mohammedi (n 51), 278.

[993] Mohammedi (n 51), 278.

[994] Chaudhry (n 973), 540.

Men are also obliged to provide for their children until puberty.[995] Many scholars differentiate between sons and daughters, where the daughters shall be provided for permanently or until they are married.[996] This means that there is a financial burden on men, unlike women who have no obligation to provide for the family. Only in the absence of the husband, the wife, along with her husband's heirs, have an obligation to provide for their children each one of them is obliged to provide an amount equal to their share of the deceased's estate.[997] This means a very limited financial burden on women. Therefore, inheritance shares are designed to ensure more equity between the genders in the whole structure of Shariah family law.[998] Therefore, it could be argued that Shariah succession law is neither 'gender-discriminatory, nor based on concepts of gender inferiority'.[999]

It is worth noting that it is not the purpose of this research to evaluate this view, nor Shariah succession law in general. Rather, the purpose of this illustration of the principles and the common rules of Shariah succession is to assess whether they could be implemented within Scots law. More on the applicability of the ratio principle will be discussed in chapters 6 and 7 below. The next section briefly explains forced heirship entitlement.

5.2.2 The Definition of Heirs

Like most legal systems, the right of a person to inherit rests on their relationship with the deceased, either by blood or marriage.[1000] Moreover, the heirs in Shariah inheritance are designated by the rule of proximity, where closer heirs exclude more remote heirs.[1001] The whole estate without a will or two thirds with a will shall be distributed among 'specifically identified blood relatives as well as the surviving spouse in a predefined and fixed

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[995] Salah Al-Din Sultan, *Alimony and the Issue of Equality* (1st edn, Nahdhat Masar 2001), 9.

[996] Sultan (n 995), 15.

[997] Kuwait Ministry of Awqaf and Islamic Affairs, *Encyclopaedia of Islamic Jurisprudence (Arabic)*, vol 41 (Kuwait Ministry of Awqaf and Islamic Affairs, 2002), 80, 81.

[998] Chaudhry (n 973), 542; for more detailes, see; Pearl and Menski (n 11), 473; Yassari, 'Intestate Succession in Islamic Countries' (n 228), 433; Sir James Norman Dalrymple Anderson, *The World's Religions: Animism, Judaism, Islam, Hinduism, Buddhism, Shinto, Confucianism* (Inter-Varsity Fellowship 1965), 349.

[999] Chaudhry (n 973), 516. More of this will be discussed below in section 7.3.2 Discriminatory Practices and Human Rights.

[1000] Ibn Rushd (n 266), 411. I will rely on this reference in particular, because it is one of the most cited Islamic traditional jurisprudence that cite and analyse the differences among Muslim scholars. A book of comparative Sharia law that records the view of all four Sunni schools; Hanafi, Maliki, Shafi'i and Hanbali.

[1001] Yassari, 'Compulsory Heirship and Freedom of Testation in Islamic Law' (n 975), 631.

manner'.[1002] In general, there are three types of inheritors, according to their blood relationship to the deceased: the descendant heirs, i.e. the deceased's offspring; the ascendant heirs, i.e. the deceased's parents; and the collaterals, which include the deceased's brothers and sisters.[1003] Children, spouses and parents are the legal heirs, in that they cannot be disinherited, nor their share designated or reduced by the deceased.[1004] Moreover, non-Muslims and Muslims cannot inherit from one another's estates. The majority of Islamic scholars maintained this rule, although some prominent scholars, including some of the prophet's companions, disagreed with it.[1005] Nevertheless, this disinheritance only applies to the forced heirship rules, because a testator is free to bequeath to a non-Muslim heir a share equivalent to a Muslim's share of the same amount up to one third of the estate.[1006]

Legal heirs shares, a husband will succeed to one-half of his spouse's intestate estate, provided that the deceased was not survived by children or grandchildren, even if they were from an ex-husband; in the latter case, he will receive a quarter.[1007] The wife's share is one eighth if the husband had children, even if they were from a different wife; otherwise, she receives a quarter.[1008] Parents receive one-sixth each where the deceased had children.[1009] The deceased's offspring share the residue in the male-female ratio after the parents' and spouse's shares have been distributed (see Table 5-1 and Table 5-2 below).[1010] However, if the surviving offspring of the deceased are only female, they are treated more generously, in which case two or more daughters share two-thirds of the estate, and if there is only one daughter, she is entitled to one half of the estate (see Table 5-3 and Table 5-4 below).[1011]

[1002] Ibn Othaimeen (n 978), 154; Yassari, 'Intestate Succession in Islamic Countries' (n 228), 424. The term wasiyyah is the Arabic equivalent of will, which means a definite obligation.

[1003] Ibn Rushd (n 266), 411.

[1004] Mohammad Ibn Othaimeen, *Tasheel Al-Faraid (Arabic)* (First, Dar Ibn Aljawzi 2006), 69; Kuwait Ministry of Awqaf and Islamic Affairs, *Encyclopaedia of Islamic Jurisprudence (Arabic)*, vol 3 (Kuwait Ministry of Awqaf and Islamic Affairs, 1983), 46; Yassari, 'Intestate Succession in Islamic Countries' (n 228), 427; Chaudhry (n 973), 529.

[1005] Ibn Rushd (n 266), 427.

[1006] Mohammedi (n 51), 266.

[1007] Ibn Rushd (n 266), 415; Pearl and Menski (n 11), 454.

[1008] Ibn Rushd (n 266), 415; Pearl and Menski (n 11), 454.

[1009] Ibn Rushd (n 266), 415; Pearl and Menski (n 11), 455, 56.

[1010] Ibn Rushd (n 266), 413; Pearl and Menski (n 11), 458.

[1011] Ibn Rushd (n 266), 413; Pearl and Menski (n 11), 458.

Table 5-1 The Legal Heirs' Shares on Death of a Wife:

		36
Husband	1/4	9/36
Mother	1/6	6/36
Father	1/6	6/36
Son	Male/Female Ratio	15/36
Daughter		

Table 5-2 Legal Heirs' Shares on Death of a Husband:

		24
Wife	1/8	3/24
Mother	1/6	4/24
Father	1/6	4/24
Son	Male/Female Ratio	13/24
Daughter		

Table 5-3 Legal Heirs' Shares with One Daughter:

		~~12~~ 13
Husband	1/4	3/~~12~~ 13
Mother	1/6	2/~~12~~ 13
Father	1/6	2/~~12~~ 13
Daughter	1/2	6/~~12~~ 13

Table 5-4 Legal Heirs' Shares with Two+ Daughters:

		~~24~~ 27
Wife	1/8	3/~~24~~ 27
Mother	1/6	4/~~24~~ 27
Father	1/6	4/~~24~~ 27
Two Daughter	2/3	16/~~24~~ 27

Note 1- spouse's and children's shares are as shown in the diagram and remain the same proportion with or without the parents' presence. If no parents survive the parents' share will be added to the residue in favour of the children.

A disagreement between scholars occurs when the deceased is only survived by a spouse and parents with no children. In Qur'anic terms, after deducting the spouse's share, the mother receives one third of the estate, and the residue goes to the father (see

Table 5-6 below). However, the majority of scholars, following Caliph Umar's opinion and most of the prophet's companions, state that after devolving the spouse's share, the mother shall inherit one-third of the remainder, not of the whole estate, because otherwise her share will be more than that of the father, which is contrary to the male-female ratio (see Table 5-5

below).[1012] For them, it is illogical that if the parents are the only survivors, the father would receive twice as much as the mother, and with the surviving spouse it will be quite the opposite.[1013] However, Ibn Abbas, one of the prophet's prominent companions, along with subsequent scholars, argues for Quranic terms, since the Quran gave the mother a fixed share, and the hadith[1014] gave the father the residue: 'the residuary does not have a fixed share along with the sharers, but what he gets can vary, more or less'.[1015] Ibn Qudamah affirmed Ibn Abbas's argument by stating that 'the logic is with him [Ibn Abbas] but for the comrade and subsequent scholars' consensus to the opposite view'.[1016]

Table 5-5 Parents and spouse (The Majority view):

		6
Husband	1/2	3/6
Mother	1/6	1/6
Father	Remainder	2/6

Table 5-6 Parents and spouse (The Quranic term):

		6
Husband	1/2	3/6
Mother	1/3	2/6
Father	Remainder	1/6

Apart from these two cases of parents and spouses, Shariah scholars agree about legal heirs' shares. The entitlement of other relatives depends on whether they are survived by a closer degree to the deceased, because 'heirs closer in degree exclude more distant heirs'.[1017] For instance, the grandchildren become legal heirs to the same share as the children would have received, only in the absence of all the deceased's children.[1018] As a general rule, representation in Shariah succession law is irrelevant, so long as relatives of the same degree are alive to claim.[1019] However, the obligatory bequest (*al-wassiyyah al-wājiba*) could

[1012] Ibn Rushd (n 266), 416; Pearl and Menski (n 11), 457.

[1013] Ibn Rushd (n 266), 417.

[1014] Muhammad Al-Bukhari, *Sahih Al-Bukhari (Arabic)*, vol 8 (Dar Al-taasil 2012), 412, hadith no 6732.

[1015] Ibn Rushd (n 266), 417.

[1016] MA Ibn Qudamah, *Al-Mughani (Arabic)*, vol 8 (Dar Al-Hadith 1996), 383.

[1017] Yassari, 'Compulsory Heirship and Freedom of Testation in Islamic Law' (n 975), 637.

[1018] Ibn Rushd (n 266), 413; Pearl and Menski (n 11), 460.

[1019] Chaudhry (n 973), 527; Yassari, 'Intestate Succession in Islamic Countries' (n 228), 435.

replace the absent representation principle, as applied by many Islamic countries today.[1020] This bequest could assign a share to the grandchildren of the deceased who died before the deceased, limited to one-third of the testator's estate.[1021] However, only the Pakistani Muslim Family Law Ordinance has introduced the representation rule such that the deceased's grandchildren receive a *per stripes* share of what their parents would have received.[1022]

Moreover, the collaterals will be eligible to inherit in the absence of the legal heirs.[1023] The deceased's siblings will be entitled to inherit in the absence of the deceased's male children or grandchildren, however remote (i.e. a son's children or a son of a son's children) and the deceased's ascendant male heirs, such as the father.[1024] For grandparents, only the paternal grandfather will take the father's entitlement to the same allotted share.[1025] Grandmothers, either paternal or maternal, will take the mother's share, and their allotted share is only one-sixth.[1026] Furthermore, the infinite succession rule that is specifically followed by Scots law[1027] also exists in Shariah inheritance law, where distant kindred will be entitled to inherit.[1028] This is unlike England, where the heirs end with half-blood uncles and aunts,[1029] whereas Scots law pursues the right as far as the ancestors of the intestate.[1030]

[1020] Yassari, 'Intestate Succession in Islamic Countries' (n 228), 437; Yasir Billoo, 'Change and Authority in Islamic Law: The Islamic Law of Inheritance in Modern Muslim States Symposium: Law and Religion' (2006) 84 University of Detroit Mercy Law Review 637, 652.

[1021] Muhammad Aljibali, *The Final Bequest: The Islamic Will & Testament* (Alkitaab & Assunnah publishing 1999), 12

[1022] Yassari, 'Intestate Succession in Islamic Countries' (n 228), 437; Billoo (n 1020), 652; ABM Sultan Alam Chowdhury, 'The Problem of Representation in the Muslim Law of Inheritance' (1964) 3 Islamic Studies 375.

[1023] The rules of succession will not be discussed in a comprehensive way given the scope of this research, for more on collaterals shares see following footnotes, and: Hamid Khan, *Islamic Law of Inheritance: A Comparative Study of Recent Reforms in Muslim Countries* (Oxford University Press 2007), 81; Pearl and Menski (n 11), 462.

[1024] Ibn Rushd (n 266), 417; Pearl and Menski (n 11), 462.

[1025] Ibn Rushd (n 266), 420; Pearl and Menski (n 11), 458.

[1026] Ibn Rushd (n 266), 423; Pearl and Menski (n 11), 458.

[1027] Kenneth GC Reid, 'Intestate Succession in Scotland' in Kenneth GC Reid, Marius J de Waal and Reinhard Zimmermann (eds), *Comparative Succession Law* (Oxford University Press 2015), 390.

[1028] Ibn Rushd (n 266), 412; Ibn Othaimeen (n 1004), 73; Yassari, 'Intestate Succession in Islamic Countries' (n 228), 428.

[1029] Administration of Estates Act 1925 ss.46(1).

[1030] Succession (Scotland) Act 1964 s.2.

5.2.3 The Doctrine of Increase (*Awal*) and Return (*Radd*)[1031]

The practical procedure of calculating the shares is called *(ta'asil)* the base or the denominator, where the shares of heirs are transferred to numbers to calculate their exact share. The denominator could be either of (2, 3, 4, 6, 8, 12, 24), which can be decided as illustrated in Table 5-7 and Table 5-8 below.[1032]

Table 5-7 The Denominator:

Share		Share		Base
1/2		1/2		2
1/2	+	1/4	=	4
1/4		1/8		8
1/8		1/2		8

Share		Share		Base
1/3		1/3		3
1/3	+	2/3	=	3
2/3		1/6		6
1/6		1/3		6

Note 2- residue has no denominators and relies on the fixed share to decide the denominators of the case.
Note 3- If denominators of the first or the second table are mixed in one case then we applied the following:

Table 5-8 Mix Denominators:

Share		1/3 OR 2/3 OR 1/6		Base
1/2				6
1/4	+		=	12
1/8				24

For examples:
Table 5-9 A husband, a son, and a daughter:

		4
Husband	1/4	1/4
Son	Male/Female Ratio	2/4
Daughter		1/4

Table 5-10 A husband, a mother, and a grandfather:

		6
Husband	1/2	3/6
Mother	1/3	2/6
Grandfather	1/6	1/6

[1031] This topic was briefly discussed here for its involvement in the legal heirs' shares discussed above. Discussion of the *owal* and *radd* is more complicated than presented in this section, for more on this, see the footnotes in the section.

[1032] *(n 1004), 74.*

Table 5-11 A wife, two daughters, and a father:

		24
Wife	1/8	3/24
Two daughters	2/3	16/24
Father	1/6 + Remainder	5/24

The doctrine of *awal* is the method applied if the shares exceed the estate. In this case, the shares will be proportionally reduced to bring the shares down to the estate amount. For instance, as in Table 5-4 above, the deceased was survived by parents, a wife, and two daughters, where the sum total of their share (1/6, 1/6, 1/8, 2/3 respectively) exceeded the estate. In the first step, the shares must be reduced to a common denominator. According to Table 5-8 above, the common denominator in this case will be 24. The shares will be proportionally reduced as following (4/24 + 4/24 + 3/24 + 16/24 = 27/24 respectively). In the second step, the denominator of 24 will be increased *awal* to equalise the sum of the numerators of 27 to bring the total shares down to the estate amount. The same is also true for Table 5-3 above.[1033]

The doctrine of *radd*, however, is a reverse of the doctrine of *awal.* Instead of exceeding the estate amount, the shares may be left short of the estate amount. In this case, the shares will be proportionally increased to exhaust the estate amount, as illustrated in Table 5-12 below.[1034]

Table 5-12 A mother and a daughter:

		~~6~~ 4
Mother	1/3	2/~~6~~ 1/4
Daughter	1/2	3/~~6~~ 3/4

It should be noted that this rule of *radd* is debatable among Islamic scholars as to whether it applied to spouses share, because for those who disregard spouses in *radd,* blood relatives are prioritised over non-blood relatives in *radd* cases. Moreover, male blood relatives are prioritised over females, so that if the shares do not exhaust the estate, the remainder will go to the nearest blood related male, as illustrated in Table 5-13 below.[1035]

[1033] *(n 1004), 48; Pearl and Menski (n 11), 468; Khan (n 1023), 92.*

[1034] *(n 1004), 49; Pearl and Menski (n 11), 468; Khan (n 1023), 93.*

[1035] *(n 1004), 49, 50.*

Table 5-13 A husband, a daughter, and a father:

		4
Husband	1/4	1/4
Daughter	1/2	2/4
Father	1/6 + Remainder	1/4

The next section highlights some of the conflicts that might arise from applying Shariah succession law in Scotland.

5.3 Shariah succession and Scots law

This section addresses the conflicts that may arise through the application of Shariah succession within Scots law, to assess the applicability of Shariah succession. This assessment also helps to determine the points of conflict that might arise in theory, in order to examine Scottish Muslims' practical options in the following chapters. It may be worth starting with identifying Scots intestacy law before addressing its compatibility with the Shariah rules discussed above.

5.3.1 Scots Intestate Succession

Intestate succession in Scotland is more or less similar to English intestacy in prioritising the spouse.[1036] Countries differ in their methods of devolving the estate. Civil law countries would normally opt for a 'fractional system', whereas common law countries are more likely to choose a 'slab system'.[1037] A fractional system would mean adopting a fixed amount for each of the heirs, such as one third for the spouse and two thirds for the children.[1038] A slab system gives the spouse a 'statutory legacy' which is the first call on the deceased's estate, and 'depending on the size of both legacy and estate, means that there may be little or nothing left for other relatives' such as children.[1039] Scotland has gone further and has a mixture of

[1036] Kenneth GC Reid, 'Mixing without Matching: Fractions, Slabs, and the Succession Rights of the Surviving Spouse and Children' (2020) 24 Edinburgh Law Review 118, 120.

[1037] Kenneth GC Reid, Marius J de Waal and Reinhard Zimmermann, 'Intestate Succession in Historical and Comparative Perspective', *Comparative Succession Law* (Oxford University Press 2015), 497, 98; Reid, 'Mixing without Matching: Fractions, Slabs, and the Succession Rights of the Surviving Spouse and Children' (n 1036), 118.

[1038] Reid, de Waal and Zimmermann (n 1037), 497.

[1039] Reid, de Waal and Zimmermann (n 1037), 498.

the fractional and slab systems.[1040] This is vastly different from Shariah intestate rules and is likely to create difficulty for Scottish Muslims.

The Succession (Scotland) Act 1964, combined with the Succession (Scotland) Act 2016, regulates the current intestate succession rules in Scotland.[1041] Despite many attempts to reform the law over the last thirty years, the 2016 Act only made 'minor technical changes', and 'the substantive law remains as it has been since 1964'.[1042] After paying the deceased's funeral expenses, debts and taxes, there are three stages in terms of distributing the estate: prior rights to the spouse/civil partner ;[1043] legal rights to the spouse/civil partner and the children;[1044] and free estate, which is distributed in the order listed in the 1964 Act.[1045]

The first stage of an intestate estate is dealing with prior rights, under which the widow or widower is entitled to three elements: i) dwellinghouse rights;[1046] ii) plenishings rights;[1047] and iii) financial provision.[1048] In intestacy, a spouse is entitled to a dwellinghouse up to the value of £473,000.[1049] That is to say, if the property is worth this amount or less, then it passes to the spouse.[1050] If it exceeds that amount, the spouse can inherit the property if they are willing to pay the difference;[1051] otherwise, they will be entitled to the monetary value of the property.[1052] If they co-owned the property it might be 'often subject to a survivorship destination', in which case the succession rules are disregarded, because the deceased's share

[1040] Reid, 'Mixing without Matching: Fractions, Slabs, and the Succession Rights of the Surviving Spouse and Children' (n 1036), 119; Dot Reid, 'From the Cradle to the Grave: Politics, Families and Inheritance Law' (2008) 12 Edinburgh Law Review 391, 398.

[1041] Succession (Scotland) Act 1964; Succession (Scotland) Act 2016; Reid, 'Intestate Succession in Scotland' (n 1027), 371.

[1042] Dot Reid, 'Why Is It so Difficult to Reform the Law of Intestate Succession?' (2020) 24 Edinburgh Law Review 111, 111.

[1043] Succession (Scotland) Act 1964 ss 8 and 9.

[1044] Succession (Scotland) Act 1964 ss.3, 5, 6.

[1045] Succession (Scotland) Act 1964 s.2.

[1046] Succession (Scotland) Act 1964 s.8.

[1047] Succession (Scotland) Act 1964 s.8(3).

[1048] Succession (Scotland) Act 1964 s.9(1).

[1049] The Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011 (SSI 2011/436) 1964; the amounts are updated by statutory instrument, see Succession (Scotland) Act 1964 s.9A.

[1050] Succession (Scotland) Act 1964 s.8(1).

[1051] George L Gretton and Andrew J M Steven (n 967), [29.7].

[1052] Succession (Scotland) Act 1964 s.8.

will automatically pass to the surviving co-owner.[1053] Furthermore, the spouse (relict), on top of the dwellinghouse, is entitled to furniture and plenishings up to £29,000.[1054] Moreover, there is a statutory presumption that married couples co-own moveable property as matrimonial property, which means the relict will end up mostly taking all the furniture.[1055] However, these two rules apply only if the relict was ordinarily resident at the property, and will not be in force if, for instance, the property owned by the deceased was let out.[1056] If the deceased had children, the spouse is entitled to the first £50,000 of the remaining monetary value of the estate. [1057] If there are no children, the relict is entitled to the first £89,000. [1058]

The second stage is that in intestacy legal rights take priority after satisfaction of prior rights.[1059] The relict's share is one-third of the moveable estate where the deceased had issue, or one-half if they had no issue.[1060] The children's legal rights (the legitim fund) also amount to one-third of the moveables' value.[1061] In this situation, children seem to be at risk of being left out, considering the relict's prior rights. Therefore, since 2005, 'Scots children have been likely to inherit little or nothing from a [an intestate] married parent'.[1062] This brings the effect of Scots intestate succession in line with English intestacy, where the spouse's statutory legacy is likely to exhaust the entire estate.[1063]

The third stage in intestacy is the free estate, which is whatever remains after distributing the above-mentioned rights. The free estate goes to the next of kin as classified in the 1964 Act in the following order.[1064] The surviving children are entitled to the whole intestate estate. In a case where there are no descendants, the intestate's parents and siblings share the entire intestate estate, receiving a half share and if only one category survives, they are entitled to

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[1053] This is a clause which would be inserted into the conveyance of the property, Reid, 'Intestate Succession in Scotland' (n 1027), 394.

[1054] The Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011 (SSI 2011/436).

[1055] stated by Lord Advocate to the Secretary of State and Lady Tweedsmuir, 27 August 1963 in response to a draft of Submission to Ministers by R E C Johnston, 26 August 1963, see Reid, 'Intestate Succession in Scotland' (n 1027), 392.

[1056] Succession (Scotland) Act 1964 s.8.

[1057] The Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011 (SSI 2011/436).

[1058] The Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011 (SSI 2011/436).

[1059] Reid, 'Intestate Succession in Scotland' (n 1027), 391.

[1060] Family Law (Scotland) Act 2006 s.29.

[1061] George L Gretton and Andrew J M Steven (n 967), [29.21].

[1062] Reid, 'Why Is It so Difficult to Reform the Law of Intestate Succession?' (n 1042), 113.

[1063] Kerridge, Brierley and Parry (n 966), 18; Reid, 'Intestate Succession in Scotland' (n 1027), 392.

[1064] Succession (Scotland) Act 1964 s.2.

the whole estate.[1065] In the absence of children, parent and siblings, the surviving spouse will be entitled to the free estate, which mean they will be entitled to the whole estate. Although there might be no free estate if prior rights exhaust the whole estate; on the other hand, the whole estate might constitute the free estate in the absence of prior rights, i.e. if the deceased had no spouse.[1066] Thus, the absence of the spouse in intestate succession would mean the whole estate goes to the deceased's descendants, followed by parents and siblings.[1067] The next section outlines how these rules conflict with Shariah succession, to ascertain where problems may arise.

5.3.2 Scots Intestacy Law Conflicts with Forced Heirship

If a Scottish Muslim dies without a will, the rules of Scots intestate succession will be applied to the entire estate. This means that to apply Shariah rules within Scots' intestacy, there must be compatibility between the two laws for Shariah intestate rules to take effect. Based on the previous illustration, this option may not be applicable. There are a large number of conflicts that would prevent Shariah intestacy from taking effect.

A) *Nikah* and *Talaq* Impact on Women Inheritance

A potentially significant issue with intestate succession is the failure of marriage and divorce recognition, discussed above.[1068] It is worth mentioning that under Scots law divorce annuls a will.[1069] However, a Muslim couple in a *nikah-only* marriage 'will not be considered 'spouses' for the purposes of [intestate] succession'.[1070] Although this issue could be resolved by means of legal remedies for cohabitants,[1071] the chances of not recognising the deceased's spouse remain significant. In terms of testate, Muslim women may have a slight of a chance with the 1975 Act for a financial provision. This was considered in *Jassal v Shah*[1072] where the couple went into a *nikah-only* marriage, but the deceased husband left his wife out of his final will. The court was satisfied that the claimant and 'the deceased had been living in the

[1065] Succession (Scotland) Act 1964 s.2.

[1066] Reid, 'Intestate Succession in Scotland' (n 1027), 392.

[1067] Succession (Scotland) Act 1964 s.2.

[1068] See section 4.3.1 Formal Validity of Marriages in the Conflict of Laws: Unregistered Nikah Marriages Celebrated in England below.

[1069] Succession (Scotland) Act 2016 s.1.

[1070] O'Sullivan and Jackson (n 459), 29.

[1071] Family Law (Scotland) Act 2006 ss.25-30. See section C) The Rule of Cohabitation in Unregistered Marriages in 4.3.1 above.

[1072] *Jassal v Shah* (n 866).

last two years of his life in the same household as if they had been husband and wife, therefore she was entitled to reasonable financial provision under the 1975 Act. The same issues discussed above may applies to recognition of *talaq*, because if Muslim couples register their marriage and then divorce by *talaq* without following domestic law procedures, they will be considered married for the purposes of intestate succession.[1073] A non-heir would be eligible to inherit in this situation, and a rightful heir in *nikah-only* marriages might be disinherited, which summarises how recognition of the marriage may cause the estate to become partially inoperative.

B) The Impact of Forced Heirship

The male-female ratio in Shariah succession conflicts with every element of Scots intestate succession. There are differences in the identification of legal heirs and their allocation as discussed further below, but the inequality of their shares might be the main conflict that hinders compatibility. As illustrated above, the male-female ratio applies to the shares of parents, children and spouses, all of which receive equal shares in Scots law, which means the two system are incompatible.

Scots intestacy rules also conflict with Shariah in the prioritisation of the spouse and children before the parents. Such a rule results in the omission of parents, whereas Shariah rules treat them as indispensable legal heirs. Moreover, as discussed above, representation is irrelevant in Shariah intestate law, provided that the deceased's other children have survived. This is unlike Scots law, where an infinite representation rule exists if one of the deceased's children predeceases them. However, investigating Scottish Muslims' practice of succession reveals an interesting adoption of representation, which will be discussed further below.[1074]

In addition to the differences in legal heirs and their allocations, a significant conflict relates to prior rights. Shariah succession follows a fractional system, unlike Scots intestacy law, and does not give a spouse the initial slab of the estate. This difference would be a major conflict between the two legal systems. Although Scots law might be an advantage for Muslim spouses, it would disrupt the remaining heirs' allocated shares. For instance, parents would not receive their Shariah forced heirship. Children are also likely to receive a lesser

[1073] Abdal-Haqq, Bewley and Thomson (n 159), 34.

[1074] See section 6.5.1 Cooperation between Mosques and Law Firms to Draft a *Wassiyyah* below.

share than they would in Shariah. And in some cases, the spouse's share could exhaust the whole estate, such as in the case of artificial intestacy[1075]

C) Artificial Intestacy

In Scots law there exists a possibility of applying the intestacy rules even if the deceased left a will. Mixing between the fractional and slab system method adopted by Scots law might lead to greater conflict in practice where treating the 'spouse and children equally in respect of the forced share and grossly unequally in cases of intestacy is a difference beyond rational defence'.[1076] This approach, which is described by K Reid as 'unwise',[1077] can be observed within the concept of artificial intestacy, which follows logically from the 1964 Act.[1078] This situation is possible if a spouse or civil partner is the sole legatee and renounces their legacy thus rendering the estate intestate, which opens up the possibility of claiming their share under the intestacy rules. For instance, in *Kerr, Petitioner*,[1079] a husband died leaving his entire estate to his widow, and his daughter from a previous relationship wished to claim her legitim. The widow renounced her rights under the will, thus creating artificial intestacy. The widow's prior rights then exhausted the whole estate, which left nothing to the unfortunate daughter. Although this method might not serve the widow in a large estate,[1080] the 'unfortunate' result is a consequence of the 1964 Act.[1081]

This could create a conflict with *wassiyyah,* as the effect of this rule on *wassiyyah* cannot be diminished. Given that a *wassiyyah* in Scotland, as explained above,[1082] would consist of voluntary one-third bequests and the obligatory forced heirship division in the remaining two-thirds, a Muslim spouse could be the sole legatee in a *wassiyyah*. This could happen among Muslims, as we have seen in the Greek case of *Molla Sali v Greece.*[1083] Thus, if a Scottish Muslim spouse was the sole legatee and renounced his or her rights under the legacy,

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[1075] Reid, 'Intestate Succession in Scotland' (n 1027), 392.

[1076] Reid, 'Mixing without Matching: Fractions, Slabs, and the Succession Rights of the Surviving Spouse and Children' (n 1036), 119.

[1077] Reid, 'Mixing without Matching: Fractions, Slabs, and the Succession Rights of the Surviving Spouse and Children' (n 1036), 119.

[1078] George L Gretton and Andrew J M Steven (n 967), [29.28].

[1079] *Kerr (Catharine), petitioner* [1968] SLT Sh Ct 61.

[1080] George L Gretton and Andrew J M Steven (n 967), [29.29].

[1081] Reid, 'Mixing without Matching: Fractions, Slabs, and the Succession Rights of the Surviving Spouse and Children' (n 1036), 119.

[1082] See section 5.3.3 Scottish Legal Rights and Testamentary Freedom above.

[1083] *Molla Sali v. Greece* (n 15). See section 3.3.2 Succession: Thrace Minority in Greece above.

they could thereby create an artificial intestacy. This might cause the *wassiyyah* to fall apart, because creating an artificial intestacy could result in exhausting the estate by prior rights, such as in *Kerr, Petitioner*. This means that the Muslim deceased's remaining legal heirs, children, and parents could be left out.

It seems that the chances of applying Shariah rules within Scots intestacy law may be far from achievable on a theoretical level. However, investigating the actual practice of succession among Scottish Muslims may indicates slightly more chances to apply Shariah succession rules within Scots law of intestacy, as examined in chapter 7.[1084]

5.3.3 Scottish Legal Rights and Testamentary Freedom

The principle of freedom of testation means that in theory the testator is free 'to do whatever he likes' with his property.[1085] However, although this definition might be generally accepted in terms of English law,[1086] it is 'subject to certain limitations' in Scots law.[1087] Moreover, in pre-Islamic succession, freedom of testation was adopted, allowing individuals to bequeath 'their property as they pleased'.[1088] However, Shariah law now limits the power of the testator to a maximum of a third of the estate, leaving the remaining two-thirds to the forced heirship rules.[1089] The purpose of this rule as provided by the hadith[1090] is to leave the

[1084] See section 7.2 Alternatives to Islamic Wills below.

[1085] Roger Kerridge, 'Testamentary Freedom in England and Wales' in Miriam Anderson and Esther Arroyo i Amayuelas (eds), *The law of succession: testamentary freedom: European perspectives*, vol 5 (Editorial CSIC-CSIC Press 2011), 131.

[1086] Kerridge (n 1085), 131.

[1087] Eric M Clive, 'Restraints on Testamentary Freedom in Scottish Succession Law' in Miriam Anderson and Esther Arroyo i Amayuelas (eds), *The law of succession: testamentary freedom: European perspectives*, vol 5 (Europa Law Publishing 2011), 243.

[1088] Pearl and Menski (n 11), 448.

[1089] Nadjma Yassari, 'Testamentary Formalities in Islamic Law and Their Reception in the Modern Laws of Islamic Countries' in Kenneth GC Reid, Marius J de Waal and Reinhard Zimmermann (eds), *Comparative Succession Law* (Oxford University Press 2011), 285; This restriction is based on the prophet Hadith: 'bequeath one-third and one-third is much, it is better for you to leave your heir rich than to live them in destitute, begging from others' Al-Bukhari (n 1014) hadith no 5354.

[1090] Narrated the Prophet's comrade Sa'ad ibn Abi Waqqas: I was stricken by an ailment that led me to the verge of death. The Prophet came to pay me a visit. I said, '0 Allah's Apostle! I have so much property and no heir except my single daughter. Shall I give two-thirds of my property in charity?' He said, 'No.' I said, 'Half of it?' He said, 'No.' I said, 'One-third of it?' He said, 'bequeath one-third and one-third is much, it is better for you to leave your heir rich than to live them in destitute, begging from others'. Al-Bukhari (n 1014), Hadith No. 5354.

testator's heirs well provided for after their death.[1091] This section examines whether the application of *wassiyyah* is compatible with the principle of freedom of testation.

Scots succession law is different from English law, discussed below, which requires distinct consideration of testamentary freedom in Scotland in order to ascertain whether Shariah succession could be implemented within the Scottish legal system. Although the testator in theory is free to do whatever they please in their will, there are grounds to challenge such freedom. Full testamentary power, at least in the moveable estate, is 'qualified by the imperatives of family protection', whereby spouses or civil partners and children are entitled to the same fixed share of the deceased's moveable estate as applies in intestate succession of the deceased's moveable estate, known as 'legal rights', irrespective of the will.[1092] This section discusses Scots testate succession, explaining how legal rights operate, identifying the implications of legal rights and other conflicts which might arise in relation to *wassiyyah*, with a discussion of *wassiyyah* rules, where conflicts may arise.

Under Scots succession law, children and spouses or civil partners are entitled to indefeasible common law rights called legal rights.[1093] These provisions are not discretionary and can be claimed without applying to the court,[1094] unlike the discretionary family provision under the 1975 Act in England.[1095] Legal rights operate in both testate and intestate succession.[1096] Legal rights in testate succession involve the relict's right,[1097] and the children's (legitim).[1098] They are a type of forced heirship, which overrides the testamentary provision.[1099] Unlike most other countries, a testator in Scotland has unlimited testamentary freedom over the immoveable estate, but only one half or one-third of the moveable estate.[1100] A spouse or issue are entitled to one half of the moveable estate if only one of those categories survives,

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[1091] Ibn Rushd (n 266), 406; P Stibbard, D Russell and Blake Bromely, 'Understanding the Waqf in the World of the Trust' (2012) 18 Trusts & Trustees 785, 786.

[1092] Kenneth GC Reid, 'Legal Rights in Scotland', *Comparative Succession Law* (Oxford University Press 2020), 418.

[1093] Succession (Scotland) Act 1964 ss.3, 5, 6.

[1094] Succession (Scotland) Act 1964 Ch. 41 s 15(2)(a).

[1095] Inheritance (Provisions for Family and Dependants) Act 1975 s.2.

[1096] Reid, 'Intestate Succession in Scotland' (n 1027), 391. See section 5.3.3 Scottish Legal Rights and Testamentary Freedom above.

[1097] Succession (Scotland) Act 1964 ss.3, 5, 6.

[1098] Succession (Scotland) Act 1964 ss.3, 5, 6.

[1099] Reid, 'Intestate Succession in Scotland' (n 1027), 371.

[1100] Succession (Scotland) Act 1964 s.10(2); Clive (n 1087), 245; Michael Charles Meston, *The Succession (Scotland) Act 1964* (5th edn, W Green/Sweet & Maxwell 2002), 29.

or one-third each if both classes survive the deceased.[1101] Whatever is left, either one third or half of the estate is called the free estate or the dead's part, which goes to the classes of heirs as described by law in intestate succession, or form a part of the testament in testate succession.[1102] This means that there is full testamentary freedom in Scots succession law only on the immoveable estate, plus a third or a half of the moveable estate, which the testator is free to dispose of as he wishes.[1103] Moreover, the descendants of the deceased's children can claim legal rights if any child predeceases: 'such issue shall have the like right to legitim as the child would have had if he had survived the deceased'.[1104]

Furthermore, a beneficiary under Scots succession law is entitled to renounce their right under the will and opt instead for legal rights.[1105] Since spouses and children may also be legatees in the deceased's will, accepting the legacy is to 'approbate the testament', whereas opting for legal rights is to 'reprobate the testament'.[1106] That is to say, spouses and children cannot have both legacy and legal rights and must make an election.[1107] However, the operation of legal rights might be very different in practice than in theory. Although there is no doubt that legal rights constitute a barrier to full testamentary freedom,[1108] they do not operate in practice as a forced heirship provision. Indeed, it appears that they are not 'routinely distributed'.[1109] The executor of the estate is responsible for 'identify[ing] and inform[ing] those entitled to legal rights'.[1110] A discharge of legal rights could take place before or after the testator's death.[1111] A prospective discharge has the effect of considering the granter of the discharge as a dead person, and their share of legal rights would not be

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[1101] Succession (Scotland) Act 1964 Ch. 41 ss 3, 5, 6; Civil Partnership Act 2004 s 131.

[1102] Succession (Scotland) Act 1964 s.1(2), 2; Reid, 'Intestate Succession in Scotland' (n 1027), 374.

[1103] Clive (n 1087), 245.

[1104] Succession (Scotland) Act 1964 s.11(1).

[1105] Succession (Scotland) Act 1964, s.13; Alan R Barr, *Drafting Wills in Scotland* (2nd edn, Tottel 2009), 247.

[1106] James Kessler and William (Legal consultant) Grant, *Drafting Trusts and Will Trusts in Scotland: A Modern Approach* (Second, W Green/ Thomson Reuters 2018), [28.5].

[1107] Reid, 'Legal Rights in Scotland' (n 1092), 433.

[1108] Hannah Roggendorf, 'Indefeasible Family Rights: A Comparative View on the Restrictions of Testamentary Freedom' (2018) 22 Edinburgh Law Review 211, 216.

[1109] Reid, 'From the Cradle to the Grave: Politics, Families and Inheritance Law' (n 1040), 399.

[1110] Kenneth Reid, 'Testamentary Freedom and Family Protection in Scotland' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3274714 <https://papers.ssrn.com/abstract=3274714> accessed 5 March 2020, 20.

[1111] Meston (n 1100), 68; Reid, 'Testamentary Freedom and Family Protection in Scotland' (n 1111), 21.

calculated.[1112] Discharging after death is treated differently, whereby the discharged share would fall into the free estate.[1113] Although legal rights can be claimed by those who are entitled to them, research suggests that few have done so on a routine basis.[1114] Dot Reid assumes that the reason for this is to avoid the risk of 'upsetting the provisions of the deceased's will and causing family disputes at a difficult time'.[1115] Therefore, as Kenneth Reid observes, 'discharges of legitim are normal in cases where the other parent survives', and those children 'are often reluctant to assert their financial interests against those of a parent and have in any case a reasonable expectation of inheriting when the parent eventually dies'.[1116]

5.3.4 Legal Rights Conflict with *Wassiyyah*

Legal rights appear to be the most significant challenge to drafting a *wassiyyah* within Scots law. A potential conflict may arise due to the fact that Shariah succession does not differentiate between moveable and immoveable estates, and the shares of the legal heirs apply in both testate and intestate succession.[1117] Shariah succession has also restricted the testator's wishes to one-third of the estate, and the remaining two-thirds of the estate will be conveyed under the forced heirship rules.[1118] Although these rules seem to some extent in line with the proportion of legal rights in Scots law, the differentiation between the moveable and immoveable in Scots succession, may obscure this coincidence.

Let us assume that a Muslim draft his will in accordance with the formalities set out by Scots testate succession, expressing his wishes to distribute his estate between his heirs (a son and two daughters) in accordance with Shariah forced heirship. That would mean the share of the two daughters combined is equal to their brother's share alone. This rule will be applied to the whole estate (moveable and immoveable property). Usually, it is feasible to decide whether legal rights or a legacy will be worth more, although sometimes a legatee might be

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[1112] Meston (n 1100), 68.

[1113] Meston (n 1100), 68.

[1114] Reid, 'From the Cradle to the Grave: Politics, Families and Inheritance Law' (n 1040), 399.

[1115] Reid, 'From the Cradle to the Grave: Politics, Families and Inheritance Law' (n 1040), 399.

[1116] Reid, 'Testamentary Freedom and Family Protection in Scotland' (n 1111), 21.

[1117] Khan (n 1023), 38.

[1118] Yassari, 'Testamentary Formalities in Islamic Law and Their Reception in the Modern Laws of Islamic Countries' (n 1089), 285; This restriction is based on the prophet Hadith: 'bequeath one-third and one-third is much, it is better for you to leave your heir rich than to live them in destitute, begging from others' Al-Bukhari (n 1014) hadith no 5354.

indecisive.[1119] Although it is not imperative to claim legal rights,[1120] Gretton and Steven argue that female heirs of a Muslim deceased may not give up their legal rights easily.[1121] If the daughters in this example choose to exercise their legal rights rather than accept the legacy, half of the moveable estate would be divided equally between the 3 siblings, and the 2 daughters entitled to a sixth each. However, they would be deprived of their share in the immoveable property by electing for legal rights. Since the immoveable property is likely to be the most valuable part of the estate in most cases, the daughters would benefit less from legal rights than they would by accepting their Shariah shares. Although the *wassiyyah* still might be applied in part, choosing legal rights over a legacy may amount to a failure to execute Shariah inheritance rules as the testator wished.

However, there are some indications that it may not be easy for most Scottish Muslim heirs to challenge the provisions of a *wassiyyah*. For instance, while there may be an academic suggestion that the majority of Scots law firms do not regularly encounter legal rights challenges, a few legal firms in Scotland have come across them infrequently.[1122] Another plausible reason is that Shariah rules of inheritance are interpreted as divine rules laid down by the Quran, so challenging them would mean rejecting the word of the Quran, an action that may not be acceptable for many Muslims. To support this view, the essence of classical Shariah inheritance rules have 'hardly been tackled by any modern [Islamic] jurisdiction', and all the attempted remedies are to redress certain rules that have been causing 'undue hardship', such as the issue of representation.[1123] This suggests that respect for the divine rules of Shariah inheritance exists among Muslims in general. Nevertheless, empirical investigation is required to assess the position of Scottish Muslims in relation to this matter.

A discharge of legal rights could be helpful in securing the *wassiyyah* from any challenge by legal rights. This is because once 'the legacy is accepted, and legal rights are deemed to be discharged, legacies are taken to be in full and final satisfaction of legal rights'.[1124] Whether Scottish Muslim heirs are willing to do so is one reason for conducting empirical research in order to uncover the actual practice of succession among Scottish Muslims, as, unlike

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[1119] *Harvie's Executors v Harvie's Trustees* (1981) S.L.T. (Notes) 126.

[1120] John Kerrigan, *Drafting for Succession* (2nd edn, Thomson/ W Green 2010), 81.

[1121] George Gretton and Andrew Steven, *Property, Trusts and Succession* (3rd edn, Bloomsbury Publishing 2017), 413.

[1122] Reid, 'From the Cradle to the Grave: Politics, Families and Inheritance Law' (n 1040), 399.

[1123] Yassari, 'Intestate Succession in Islamic Countries' (n 228), 434.

[1124] Succession (Scotland) Act 1964 s.13; Reid, 'Testamentary Freedom and Family Protection in Scotland' (n 1111), 21.

English Muslims,[1125] there is a lack of evidence in Scotland. The lack of cases in the Scottish courts prevents conclusive answers to these conflicts. This is the principal reason for conducting empirical research, in which interviews with experts may provide answers.

Therefore, it might be the case at this point, that Muslims who wish to adhere to Shariah succession law are urged to lay out their bequests and the division of forced heirship in a *wassiyyah,*[1126] otherwise Scots intestacy law will be applied to their estate. Despite potential conflicts between *wassiyyah* and legal rights discussed above, it seems that this is the only possible way to apply Shariah succession within Scots law. It is also worth examining freedom of testation in English law to assess the applicability of *wassiyyah* in other parts of the UK.

5.4 Challenge of Testamentary Freedom in English Law

Testamentary freedom has been part of English succession law for four hundred years.[1127] The testator 'could do whatever he liked with his property', which might 'leave his family destitute'.[1128] This individual control of testation came to an end with the enactment of the Inheritance (Family Provision) Act 1938,[1129] which was replaced by the Inheritance (Provision for Family and Dependants) Act 1975,[1130] creating the possibility that certain classes of applicants could apply for a discretionary share of the estate as 'family provision', such as the deceased's spouse and civil partner, or the deceased's children.[1131] These persons must apply within the time limit of six months, which starts once probate or a letter of administration has been issued,[1132] with a number of exceptions.[1133] However, the purpose of this Act is not merely based on the relationship to the deceased, unlike legal rights in Scots

[1125] See section 5.4Challenge of Testamentary Freedom in English Law below.

[1126] Abdal-Haqq, Bewley and Thomson (n 159), 35; Ahsan (n 11), 27; Badawi (n 980), 79.

[1127] Kerridge, Brierley and Parry (n 966), 183.

[1128] Kerridge, Brierley and Parry (n 966), 183.

[1129] Kerridge, Brierley and Parry (n 966), 183.

[1130] Inheritance (Provisions for Family and Dependants) Act 1975 as amended by the Law Reform (Succession) Act 1995, the Civil Partnership Act 2004 and the Inheritance and Trustees' Powers Act 2014.

[1131] Inheritance (Provisions for Family and Dependants) Act 1975 s.1.

[1132] Inheritance (Provisions for Family and Dependants) Act 1975 s.4.

[1133] *McNulty v McNulty* [2002] WTLR 737; *Adams v Schofield* [2004] WTLR 1049; *Stock v Brown* [1994] 1 FLR 840; *Re W* [1995] 2 FCR 689.

law.[1134] It is a discretionary claim that the claimant was excluded or insufficiently provided for.[1135]

The 1975 Act 'does not seem to be as ground-breaking' as it was thought to be,[1136] and the principle of testamentary freedom may not be easy to challenge. However, a recent case, *Ilott v The Blue Cross*,[1137] has 'reasserted the centrality of testamentary freedom in English law'.[1138] This lengthy case enabled the 1975 Act to be 'considered at the highest judicial level' for the first time.[1139] The applicant, who was the only child of the deceased, having been estranged from her mother for 26 years, applied for financial provision as a challenge to her mother's will, which had left her entire estate of £486,000 to charities.[1140] At first instance the judge decided that the deceased's will failed to make financial provision, awarding the daughter £50,000.[1141] The court considered the long estrangement and straitened financial position of the applicant as the dominant factors in allocating reasonable financial provision out of the testator's estate.[1142] However, the applicant appealed against this decision, claiming half or more of the estate. The Court of Appeal reversed the lower court's decision, granting her £143,000 to buy the house she lived in, in addition to an option to receive £20,000.[1143] The will's beneficiary appealed against this decision, and the Supreme Court reversed the Court of Appeal's judgment, reaffirming the district judge's approach.[1144]

This judgment denotes that the 'debate over the proper balance between testamentary freedom and provision for family members will inevitably continue'.[1145] English courts seem to consider both the need and hardship of the claimant as a barrier to these provisions and

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[1134] Succession (Scotland) Act 1964 ss.3, 5, 6; George L Gretton and Andrew J M Steven (n 967), [27.1].

[1135] Inheritance (Provisions for Family and Dependants) Act 1975 s.1; Roggendorf (n 1109), 220; Kerridge, Brierley and Parry (n 966), 189; *In Re Coventry* [1980] Ch 461, 488, 89.

[1136] Juliet Brook, 'Testamentary Freedom–Myth or Reality?' (2018) 82 Conveyancer and Property Lawyer 19, 20.

[1137] *Ilott v The Blue Cross* [2017] UKSC 17.

[1138] Brian Sloan, 'Testamentary Freedom Reaffirmed in The Supreme Court' (2017) 76 The Cambridge Law Journal 499, 500; Brook (n 1137), 22.

[1139] Sloan (n 1139), 499.

[1140] *Ilott v The Blue Cross* [2015] EWCA Civ 797 [2].

[1141] *Ilott v The Blue Cross* (n 1141) [1].

[1142] *Ilott v The Blue Cross* (n 1138) [35].

[1143] *Ilott v The Blue Cross* (n 1141) [62, 63].

[1144] *Ilott v The Blue Cross* (n 1138) [48].

[1145] Sloan (n 1139), 502.

hold that obligations of the deceased toward the claimant must not be considered unless they are immediate to the deceased's death.[1146] This means that 'those towards whom the deceased had financial obligations have strong claims', whereas 'those whose claim is based on no more than a moral obligation have been less likely to be successful'.[1147] Therefore, it can be concluded that the 'testamentary freedom camp are in a stronger position than they were before the Supreme Court's decision',[1148] and that this case also 're-affirmed the core principle of testamentary freedom'.[1149]

In theory, freedom of testation under English law ought to provide a simple way for Muslims to draft their will in accordance with Shariah law.[1150] If the deceased's intentions in a *wassiyyah* are explicit, 'then the will should basically be recognised as valid by English law'.[1151] Indeed, many observers in this field, some using empirical studies, argue that *wassiyyah* is able to provide a legitimate method for Muslims to administer their estate in accordance with Shariah law without contradicting English law.[1152] This was also confirmed by the Law Society of England and Wales when they issued Shariah succession guidance, but had to withdraw it based on public criticism.[1153] In their withdrawal statement, the Law Society precedence had written a rational defence that;[1154]

> We live in a diverse multi-faith, multi-cultural society. The Law Society responded to requests from its members for guidance on how to help clients asking for wills that distribute their assets in accordance with Shariah practice. Our practice note focuses on how to do that, where it is allowed under English law… [English law] will give effect to wishes clearly expressed in a valid will in so far as those wishes are compliant with the law of England. The issue is no more complicated than that.

However, could English law challenge the application of Shariah inheritance provisions in a *wassiyyah*? To date, there is a lack of cases regarding distributing assets under Shariah law

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[1146] Inheritance (Provisions for Family and Dependants) Act 1975 s.3; *Re Jennings* [1994] Ch 286; Roggendorf (n 1109), 220.

[1147] Brook (n 1137), 21.

[1148] Sloan (n 1139), 502.

[1149] Brook (n 1137), 22.

[1150] Pearl and Menski (n 11), 486.

[1151] Poulter, *Asian Traditions and English Law* (n 18), 74.

[1152] Pearl and Menski (n 11), 485; Ahsan (n 11), 27; Poulter, *Asian Traditions and English Law* (n 18), 72; Badawi (n 980), 79; Edge (n 425), 134; Pilgram (n 18), 13.

[1153] 'Society Defends Sharia Wills Practice Note' (n 149).

[1154] 'Society Defends Sharia Wills Practice Note' (n 149).

or challenging a *wassiyyah* by claiming financial provision under the 1975 Act.[1155] This might be because of the Shariah succession protection of legal heirs with the fixed share, in which case a testator cannot disinherit a legal heir in the *wassiyyah*.[1156]

However, we could speculate that there might be other heirs who are eligible to claim financial provision under the 1975 Act, but are not eligible heirs in Shariah succession and therefore excluded from the *wassiyyah*. For instance, a cohabitant, or adopted child has no right in Shariah succession,[1157] unlike English law where they are eligible to apply for a family provision under the 1975 Act.[1158] Moreover, it is debatable in Shariah whether an illegitimate child is eligible to inherit from both parents or only from the mother's estate.[1159] These examples might raise the risk of challenging a *wassiyyah* under English law, although the obligatory bequest in Shariah could include them within a third of the estate.

5.5 Public Policy Challenge and Wassiyyah

In both England and Scotland, legacies may be struck down on the ground of being contrary to public policy.[1160] It is important to understand the reasoning behind this challenge, in order to examine its potential applicability in relation to *wassiyyah*. Public policy will be triggered generally to:[1161]

> Prohibit any testamentary disposition which, though not illegal or immoral (in the sense of contravening any statute or the general law), may prove entirely wasteful of the testator's assets.

[1155] Poulter, *Asian Traditions and English Law* (n 18), 75; Pilgram (n 18), 23.

[1156] Ibn Rushd (n 266), 405; Yassari, 'Testamentary Formalities in Islamic Law and Their Reception in the Modern Laws of Islamic Countries' (n 1089), 285; Pearl and Menski (n 11), 449.

[1157] Kuwait Ministry of Awqaf and Islamic Affairs, *Encyclopaedia of Islamic Jurisprudence (Arabic)*, vol 10 (Kuwait Ministry of Awqaf and Islamic Affairs, 1987), 121; Yassari, 'Intestate Succession in Islamic Countries' (n 228), 424.

[1158] Inheritance (Provisions for Family and Dependants) Act 1975 s.1; Kerridge, Brierley and Parry (n 966), 207, 209.

[1159] *Encyclopaedia of Islamic Jurisprudence (Arabic)* (n 1004), 70, 71; Khan (n 1023), 51; Yassari, 'Intestate Succession in Islamic Countries' (n 228), 424.

[1160] Clive (n 1087), 256; Hector L MacQueen and others, *Gloag and Henderson: The Law of Scotland* (Fourteenth / general, Hector MacQueen, Lord Eassie, W Green 2017) s39.36; Kerridge, Brierley and Parry (n 966), 341.

[1161] Mark Pawlowski, 'Testamentary Trusts and Capricious Testators' (2020) 26 Trusts & Trustees 222, 225.

An example of an English case striking down a testamentary disposition on the basis of public policy is *Re Johnson*.[1162] The testator's disposition to his daughter in a protective trust ought to be accumulated only if her husband died or she separated from him.[1163] This was held as a void disposition because it was contrary to public policy, 'as contrary to good morals by tending to disrupt a marriage'.[1164]

There have been a number of cases raised in the Scottish courts challenging wills on the ground of public policy,[1165] for instance, the case of *M'Caig v The University of Glasgow,*[1166] concerning a testator who made a testament to build 'artistic towers' that resembled the testator, his parents and siblings.[1167] This testament was struck down on grounds of public policy because it benefitted no one, and lacked purpose.[1168] These cases 'reveal [that it] is essentially an exclusionary policy that rejects a testamentary gift which is manifestly wasteful of resources judged against the court's ostensibly objective standard of what is unacceptable'.[1169] Having said that, it seems that only 'the most outrageous cases' are condemned.[1170] Therefore, as Clive argues, public policy may not be 'a significant restriction on testamentary freedom', because 'this rather vague and general rule can be difficult to apply'.[1171]

Regarding English courts, Poulter believes that there is a 'very remote risk' that an English court in an inheritance dispute might reject giving effect to certain testamentary provisions on the grounds of public policy.[1172] That includes the male-female ratio, and excluding non-Muslim heirs from inheritance.[1173] That might be why he alleges that Muslims are

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[1162] *Re Johnson's Will Trusts* [1967] Ch 387.

[1163] *Re Johnson's Will Trusts* (n 1163), 389.

[1164] *Re Johnson's Will Trusts* (n 1163), 395.

[1165] *M'Caig v University of Glasgow and others* [1907] SC 231; *M'Caig's Trustees v Magistrates of Oban* [1915] 1 SLT 152; *Aitken's Trs v Aitken* [1927] SC 374; *Mackintosh's Judicial Factor v Lord Advocate* [1935] SC 406; *Lindsay's Executor v Forsyth* [1940] SC 568; *Sutherland's Tr v Verschoyle* [1968] SLT 43.

[1166] *M'Caig v University of Glasgow and others* (n 1166).

[1167] *M'Caig v University of Glasgow and others* (n 1166).

[1168] *M'Caig v University of Glasgow and others* (n 1166), 242; See also: *M'Caig's Trustees v Magistrates of Oban* (n 1166); And *Aitken's Trs v Aitken* (n 1166).

[1169] Pawlowski (n 1162), 223.

[1170] Clive (n 1087), 256.

[1171] Clive (n 1087), 256.

[1172] Poulter, *Asian Traditions and English Law* (n 18), 75.

[1173] Poulter, *Asian Traditions and English Law* (n 18), 75.

deliberately avoiding the English courts in inheritance disputes, due to potential rejection on the basis of public policy.[1174] Poulter's approach lacks certainty and concrete evidence, and it is very difficult to speculate about an English court's approach to Shariah inheritance rules. As discussed above, English courts have generally upheld the centrality of testamentary freedom,[1175] by respecting the testator's wishes,[1176] and gone to great lengths to examine the applicants' needs and hardship, in order to provide them with limited financial provision.[1177]

Moreover, Edge rejects Poulter's speculations, believing that an English court is less likely to decide against Shariah inheritance law constituted in a valid will.[1178] He firmly believes that the interference of English courts to protect public policy is less likely to happen because English law 'accepts that a testator has complete freedom to prefer one heir over another, or even validly leave the whole of their estate to a cat's home to the exclusion of all the heirs'. If this were acceptable in the eyes of English law then 'it is difficult to see why an English court should intervene as a matter of public policy in the case of a so-called Islamic will'.[1179] Despite the remote potential challenge of public policy, it seems that Shariah succession law could feasibly be implemented within English law, provided that Shariah rules are demonstrated in a valid will.

5.6 Conclusion

As we have observed in this chapter, the chances of applying Shariah forced heirship within Scots intestate, may not be achievable. For instance, the impact of artificial intestacy and the recognition of informal marriages and divorces are significant. Artificial intestacy and prior rights might result in exhausting the whole estate in favour of the spouse, which leave nothing to the remaining legal heirs. Also, parents are not eligible heirs with the presence of spouse and children in Scots intestate unlike Shariah forced heirship. Moreover, representation is irrelevant in Shariah succession, provided that the deceased's other children have survived. This is unlike Scots intestate, where the infinite representation rule takes place if one of the deceased's children are predeceased. Therefore, it could be argued that

[1174] Poulter, *Asian Traditions and English Law* (n 18), 75.

[1175] Sloan (n 1139), 500; Brook (n 1137), 22.

[1176] *Ilott v The Blue Cross* (n 1138) [46]; Sloan (n 1139), 500.

[1177] Inheritance (Provisions for Family and Dependants) Act 1975 s3.

[1178] Edge (n 425), 134.

[1179] Edge (n 425), 134.

there are immense differences between Scots and Shariah succession in intestacy law, which would prevent a complete implementation of Shariah succession within Scots law.

The application of Shariah succession law could be achieved only in testate succession. In England, accommodating Shariah succession rules through a testament seems feasible due to the adoption of broad testamentary freedom by English law. Moreover, although there is no case law to determine such an issue,[1180] the chances of challenging a will are highly unlikely, because testamentary freedom in English law 'enables a testator to disinherit any of his heirs or alternatively to prefer any one of them at the expense of the others'.[1181] However, in Scots testacy law, the situation is different from English law, due to more limited testamentary freedom. Legal rights reduce the chances of applying Shariah succession in a Scottish will. In spite of a possible solution by means of discharge of legal rights prior death, the application of legal rights still makes it difficult to predict whether Shariah succession rules could be implemented in a will. Moreover, the public policy question, particularly concerning gender inequality. Although it has not been tested by Scottish courts, or indeed in English courts, public policy may not be a real threat on testamentary freedom.

However, the lack of case law precludes definitive answers to these conflicts. Therefore, it was necessary to use a different method in an attempt to resolve this issue, by conducting expert interviews with solicitors offering Islamic services in Scotland, and scholars of Shariah law who provide the Muslim community with guidance on religious matters. Those types of experts are the most significant resource in this particular field. Shariah law experts or Imams provide guidance to Muslims on Shariah succession. On the other hand, legal advisors advise them on how it should be implemented within the law and how to keep these rules in line with domestic law. That is why the empirical interviews with experts was conducted in order to come closer to the actual practice of Shariah succession in Scotland. This allowed for examining the possibilities of implementing *wassiyyah* within a Scottish will model, similar to an English will, and to what extent obstacles, such as legal rights may disrupt *wassiyyah*. It also provides information on whether Shariah succession could be applied within intestacy law, or whether private international law rules are popularly used as a method of applying Shariah succession.

[1180] Poulter, *Asian Traditions and English Law* (n 18), 75; Pilgram (n 18), 23. Poulter confirmation up to 1990, a recent confirmation by Pilgram confirming that up to 2017 no cases concerning Sharia inheritance have been raised before an English court.

[1181] Edge (n 425), 134.

Chapter 6 The Practice of Shariah Succession Law within Scots Law

6.1 Introduction

This study has assessed the level of tolerance offered to Shariah law, and how it affects Muslims living in Europe, using Scotland as an example in order to provide a broader picture of the accommodation of Shariah law within Europe. It has considered the different practices of Shariah family rules, through domestic laws and private international law, to assess the legal response to family law cases and, by analogy, the implications for succession law. Primary and secondary sources have been examined in relation to the Shariah family law issues discussed so far, which have allowed for a doctrinal analysis of Islamic marriage, divorce, and most aspects of succession. However, the practice and lived experience of Shariah succession in Scotland has been difficult to assess, due to the almost complete lack of secondary literature, empirical evidence and case law. This gap in knowledge has prompted me to adopt different methods in an attempt to explore the practice of succession amongst Scottish Muslims, in order to gain a better insight into whether the incompatibilities identified in chapter 5 may present problems in practice.

Having examined in the previous chapter the potential conflicts that might arise from applying Shariah succession within Scots law, this chapter and the following chapter focus on the practice of Shariah succession among Muslims in Scotland. This is based on empirical data collected by means of interviews with Shariah succession experts in Scotland in an attempt to clarify these conflicts. Potential conflicts are mostly expected in relation to the male-female ratio principle in Shariah succession and legal rights claims in Scotland; whether women heirs, for instance, would benefit more from accepting the legacy with the ratio principle applied or might opt for legal rights. Answering this question would help to suggest that *wassiyyah* may apply to Scots law, similar to its applicability in English law.[1182] Another question is related to the inapplicability of the ratio principle with Scottish intestacy rules. As identified in the previous chapter,[1183] equal shares among siblings in Scots intestacy means the ratio principle is not applicable. These interviews attempt to clarify whether the ratio principle in Scottish Muslim practices may create issues with Scots intestacy law, as identified in theory.

Moreover, due to the lack of background literature on this topic, a general issue ought to be explored which is related to revealing the actual practice of succession among Scottish

[1182] See section 5.4 Challenge of Testamentary Freedom in English Law above.

[1183] See section 5.3.2 Scots Intestacy Law Conflicts with Forced Heirship above.

Muslims in general. This involves the question about the attitudes of Scottish Muslims towards Shariah succession, how they apply it, and whether there are legal services in Scotland to meet Muslims' needs concerning succession. Exploring the practice of succession among Scottish Muslims may also indicate other interesting outcomes, such as the use of the representation principle among Scottish Muslims, which might conflict with Shariah succession rules. It is worth restating that the field of inquiry in this research focuses on Muslims living in Scotland who may still be connected to Shariah law in regard to succession, and who want to make sure that Shariah laws are followed. The results of this thesis are pertinent to that group and do not represent the opinions of all Muslim communities in the UK. In other words, no attempt is made to generalise the results of the interviews, and I am conscious that not all Muslims in Glasgow will be aware of or want to follow the Shariah laws. Despite the limitations of the interviews conducted, because of the lack of additional sources, the experts I spoke to did offer some insights into the practice of succession, and were useful in guiding the investigation into alternative legal options.

Moreover, drawing on chapter 3, the operation of Shariah councils in the UK might raise a concern about discrimination against women in inheritance cases. The existing literature contains very limited information on the operation of these councils in Scotland. Therefore, it was important to examine them in Scotland and to explore whether councils get involved in succession disputes, and therefore whether they discriminate against women. This issue is discussed in detail in the next chapter. The first section outlines the process of data collection, the methodology used in this study, and its challenges and limitations. The second section will report the evidence obtained from interviews with experts in Scotland. The third section begins to highlight themes that emerged from the interviews, particularly focusing on Islamic wills among Scottish Muslims. The final section reveals another theme that emerged from the interviews concerning the applicability of Islamic wills with Scots law.

6.2 Methodology: Qualitative Approach

This section explains the process of the qualitative method used in this chapter. It considers the purpose of choosing this approach, the process of data collection and analysis, and ethical considerations. The qualitative approach in the legal field, as Bradney observes, 'answers questions about law that cannot be answered in any other way'.[1184] Ignoring such an approach

[1184] Anthony Bradney, 'The Place of Empirical Legal Research in the Law School Curriculum' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010), 1033.

means ignoring something that 'can be said about law and thereby decrease our potential knowledge of law'.[1185] As MacLean observes: 'recent debates about the role of religious systems of law in secular states, for example, Shariah law, are in urgent need of empirical background information'.[1186] These purposes highlight the importance of empirical research in gaining tangible insights into the background information. Moreover, there is an almost complete lack of data in the literature on the Muslim practice of succession in Scotland. Therefore, an empirical approach was necessary, in an attempt to uncover some of the actual practices in the Muslim world in Scotland regarding succession, which would help to examine the theoretical research questions identified above.

Furthermore, qualitative research is best suited to address the research issues under examination, as, described by Webley, qualitative research 'attempts to capture and categorize social phenomena and their meanings'.[1187] This approach is in line with the purpose of this research, which is to explore the underlying practice of succession among Scottish Muslims. Moreover, the interpretive approach, which is mostly linked with the qualitative approach, is compatible with expert interviews, particularly to provide 'understanding and revealing the layers of social meaning and context that underpin social behaviour and practices'.[1188] This approach was employed to extract interviewees' meanings, whether the meaning is 'attach(ed) to their own actions or the meaning they attach to other people's actions'.[1189] As Lofland argues:[1190]

> The role of a qualitative researcher is not to interject one's own view but instead to describe accurately another's experience so as to elicit what the research participant believes or understands, and to provide quotes as evidence, rather than to judge through one's own lens what that person must think or feel.

All things considered, the qualitative approach is best suited to focus on expert views on succession practice among Scottish Muslims, to extract their own experiences of practising Shariah succession, and the experiences of those Muslims who approach these experts for guidance.

[1185] Bradney (n 1185), 1033.

[1186] MacLean (n 10), 303.

[1187] Webley (n 48), 928.

[1188] Webley (n 48), 931.

[1189] Max Weber, *The Methodology of the Social Sciences* (Free Press 1949).

[1190] Lofland, J. (1971). Analyzing Social Settings, Belmont, CA: Wadsworth, in Webley (n 48), 931.

I should note that there might be some identified conflicts in chapter 5 that were not explored in the empirical approach because of the limited scope of this research, which did not include interviews with Muslim families in Scotland. One of the main reasons that the empirical interviews focus on experts is because this is the first exploration of the actual practice of succession among Scottish Muslims. By focusing on the views of experts, my aim was to present a general insight into the actual practice of succession among Scottish Muslims. These general insights will add to the background information on this topic, as they are obtained from experts who tend to deal with Muslims' inquiries about succession, I did not target Muslim families or individuals, because they may only share their own experiences in managing their assets, whereas Imams and solicitors are likely to have a broader picture.

6.2.1 Recruitment, Challenges and Limitations

This study, therefore, relied on qualitative interviews with expert figures in the Muslim community, mainly in Glasgow, to explore the actual practice of Shariah succession among Scottish Muslims. This study involved interviews with three Imams from Glasgow and Edinburgh, and two solicitors based in Glasgow who specialise in advising Muslim clients. Participation in these interviews was limited to those who are experts in succession matters, including solicitors, Imams (who are in fact Shariah scholars and experts), for their wide contacts within the community. I interviewed experts in the field to assess the extent to which they are consulted by Muslim families about succession issues. As stated above, the limited scope of a PhD thesis and the fact that this study would be the first examination of its kind contributed to the limited sample numbers. However, the qualitative approach focuses on a limited number of sources, 'which are considered to be data-rich and thus worthy of study, and to examine them in-depth'.[1191] I selected those participants on that basis.

Since my study is focused on Scotland, where a very limited number of solicitors promote will-writing for Muslims in Scotland and have been approached by Muslims from across Scotland, I started by searching online through law firm websites in Scotland and across the UK, and identified one law firm that promotes writing Islamic wills for Scottish Muslims. I contacted the law firm, explained my research, and a solicitor agreed to participate in this study. Then I expanded the recruitment process by searching online, using a snowball sampling technique, by asking the interviewees if they knew and would agree to guide me to other solicitors. One of the interviewed Imams agreed to guide me to a different solicitor

[1191] Webley (n 48), 934.

who promotes writing Islamic wills, and she also agreed to participate in this study. I also asked both solicitors if they were able to identify others, but the answers of both of them was negative. Two specialist solicitors were therefore interviewed.

In order to recruit Imams, I focussed on central mosques, particularly in Glasgow and Edinburgh, as the vast majority of Muslims in Scotland are settled in these two cities.[1192] Although central mosques are usually diverse enough to accommodate Muslims of all backgrounds, I also targeted other mosques which tend to be in the heart of a specific community, such as the Pakistani community and the Arab community. I approached these mosques and had a conversation with the leading Imam(s). I contacted five Imams and managed to interview three of them. One Imam, whom I already know, and had discussed general matters with, did not agree to take part in this study. I noted some hesitation when I asked him if he would participate, because he thought it was for legal purposes rather than merely religious purposes. Another Imam guided me to a mosque that might be helpful to this study. When I contacted the mosque and asked them if I could interview the Imam, I could not proceed, because they advised me that there might be language difficulties. It is worth noting that two of the three Imams I interviewed are of a Pakistani background. The bias toward this community is justified by the fact that almost 60% of the Muslim population in Scotland are of Pakistani descent.[1193] I was able to interview three Imams, who are based in the largest mosques, and have experience of up to twenty years in their positions.

While I discussed the limitations briefly with regard to recruitment in chapter 1 above,[1194] it is helpful to restate the considerable difficulties encountered because the timescale of this thesis coincided with the Covid-19 pandemic. Research has shown that the application of Shariah family law might be desirable among some members of the Muslim minority populations.[1195] However, it is difficult to predict how many people are potentially affected by this issue, given the fact that the Muslim community in Scotland is about 2% of the wider population and very little is known about their attitudes. I anticipated that expert participants involved in providing succession services might be very limited. As I explained above, I could not find more than two solicitors who provide Shariah succession services in Scotland. This might be related to the fact that writing a will is not popular among the wider Scottish

[1192] Elshayyal (n 9), 16; Bonino (n 80), 10.

[1193] Elshayyal (n 9), 15.

[1194] See section 1.5.2 Qualitative Approach above.

[1195] Menski (n 1), 144. See section 2.4.3 Dual Jurisprudence and Shariah Family Law in the UK: Postcolonial Effect above.

population, with over 60% without a will in the general Scottish population.[1196] Moreover, two of the participant Imams informed me of a person who started visiting mosques in Scotland a few years ago offering help to arrange for writing Islamic wills. He then gave up these visits because of the lack of interest in Muslim people to deal with succession. Imam C also had the same experience when he started offering a free drafting service for Islamic wills as discussed below. Therefore, it seemed to me most fruitful to interview experts likely to be advising the Muslim community on asset arrangements.

As I explained above,[1197] individual interviews were excluded because approaching them was not feasible for many reasons. The breakout of the pandemic (COVID-19) and the national lockdown with restrictions on transport across Scotland were challenging obstacles to recruiting individuals. The limitation of the scope of the research was also a factor because interviewing public might produce an overwhelming data to deal with, particularly with word limitation of the thesis. Therefore, it was not my intention to interview members of the public within the limited scope of a doctrinally-focused thesis. My intention focussed on interviewing those coming into contact with the public by providing advice in order to gain a sense of whether it was a frequent issue they encountered and what kind of legal or religious advice they might be given. It was difficult to see how else this information could be elicited other than by interviewing experts likely to be advising Muslim families i.e. Muslim Imams, scholars and solicitors with some experience in Shariah law, or representatives of Shariah councils in Scotland.

This empirical research did not also include interviews with those more directly representative of the wide range of intergenerational Muslims and Muslim communities. In addition to the reasons identified above with relation to individual interviews, the research focus is to legally examine the compatibility of Shariah succession law with Scots law. This could be achieved by recruiting legal experts who provide legal advice on succession matters. Since the focus of this thesis is on Shariah succession law, and on those members of the Muslim community who are concerned with applying those rules, I concluded that they may seek advice from their religious leaders. I concluded that Muslims Imams with experience of Shariah law may be more likely to get involved in succession issues either in formal or informal ways. Solicitor do get in touch with Imams to guide them through drafting

[1196] Scottish Consumer Council (n 46), 6.

[1197] See section 1.5.2 Qualitative Approach above.

Islamic will as we shall see later in this chapter.[1198] that is why my focus was to recruit solicitors and Imams in attempt to assess the issue of compatibility where those two categories are most likely to be approached by Muslims, either male or female, for guidance on succession. Therefore, although approaching members of the Muslim community directly, including women's groups, would be a rich source of information about their attitudes to succession, this was not the focus of the thesis. In the circumstances of the COVID-19 pandemic this would have become an extremely difficult task to carry out. In addition, within the limited scope of a thesis it would likely have provided an excessive amount of data to manage with lack of time and thesis word limitations. Moreover, it is acknowledged that there may be gender issues involved in terms of the desire of applying Shariah succession,[1199] however, my concern was not principally with public attitudes or gender differences. My concern was based on the fact that there are undoubtedly some Muslims in Scotland who do want to comply with Shariah law and this thesis may contribute to helping them find solutions in order to do so. Therefore, I did not intend to target specific gender of male or female, where my focus was on those experts who are most likely to have experience in advising both Muslim men and Muslim women on assets distributions.

All the reasons identified above obstacles widening the requirement to include those representatives of Muslims community or individual with personal experiences. Therefore, it is important to say again that this research may not provide a comprehensive picture of succession practice among Muslims in Scotland. Nor it is representative of all Muslims in Scotland. The main object of concern is Muslims in the UK, who may still be subject to Shariah law with relation to succession, and who wish to ensure that Shariah regulations are adhered to. The findings of this thesis are relevant to that group, but they may not accurately reflect the views of all Muslim communities in the UK. The results of the interviews are not intended to be of general application, and I am aware that not all Muslims in Scotland will be familiar with or desire to abide by the Shariah regulations. However, despite this limitation, these interviews are still valuable in that they are the first attempt to elicit information and gain insights from experts who have engaged with the Muslim community in Scotland regarding succession matters. It provides us with data that cannot currently be

[1198] See section 6.5.1 Cooperation between Mosques and Law Firms to Draft a *Wassiyyah* below.

[1199] See subsection A) Female Shares of Assets Between Testate and Intestacy Law in section 7.2.1 below.

found in the literature, thus adding to our knowledge of the practice of succession among Scottish Muslims.

6.2.2 Qualitative Interviews

For the purpose of this study, I managed to interview five participants in total, three Imams and two solicitors over a period of three months, between March to May 2021. Each interview lasted between 30 to 45 minutes, and although most of them showed a willingness for follow-up interviews, it was not necessary to pursue further information. All interviews were conducted in English except for one Imam, where we conducted the interview in Arabic. The interviews aimed to investigate how Muslims manage their succession distribution or disputes in Scotland, and whether any conflicts with Scots law might prevent them from applying Shariah succession.

I adopted semi-structured interviews to keep the interview open to, for example, the emergence of unexpected information. It has been said that 'good qualitative research requires the use of a semi-structured interview'.[1200] Although the questions were structured before the interviews, there was also flexibility in terms of modifying their order or changes in some questions that might be irrelevant to some participants. For instance, some questions were relevant to Imams, but not solicitors, and vice versa. Questions were prepared for Imams and solicitors to guide the interview, but there was openness for further questions to be asked. The interviews focussed on identifying the operation of Shariah councils in Scotland, to ascertain whether there was a link with Shariah succession practice. They also covered measuring the popularity of writing Islamic wills or the frequency of intestate estates among Scottish Muslims. Ultimately, and most importantly, they investigated the applicability and implementation of Shariah succession with Scots law. These questions were designed to help answer questions identified in the previous chapter surrounding the practice of Shariah succession among Muslims and to measure its applicability within Scots law. The requirement process and limitations were discussed in chapter 1 above.[1201]

[1200] Michael McConville, Wing Hong Chui, and ProQuest (Firm), *Research Methods for Law* (Edinburgh University Press 2007), 74.

[1201] See section 1.5.2 Qualitative Approach above.

A) Ethical Considerations

This study was in line with the University of Glasgow Ethical guidelines, where I obtained ethical approval to conduct interviews. The relevant participants were either solicitors or Imams, who are experts in Shariah. Given the subject of my study, and the method followed, I had to consider whether potential distress might be caused to expert participants, though I believed the risk was extremely low. However, I was careful to avoid distress by minimising conversations where any conflict could arise or changing the subject if that might mitigate these risks. I was even willing to terminate the interview if required to avoid such distress. Moreover, the interview questions were objective, which helped to avoid any disruptions. Although this research concerns an ethnic minority, it does not touch on any sensitive matters, thus keeping ethical risks at a minimum. Overall, I was careful to avoid any risks, and the fact that I am a Muslim myself helped mitigate any potential ethical risks, as I am aware of the wider community's reactions toward Islamic practices.

In line with the University of Glasgow's ethical guidelines, I provided those who agreed to be interviewed with a consent form, a participant information sheet, and a privacy notice. I ensured that all participants were provided with a participant information sheet illustrating why the research was being done and what it would involve. I also ensured that all participants provided their consent in writing before conducting the interview. This consent confirms that they had read and understood the participant information sheet, their participation was voluntary, they agreed to be audio-recorded, and acknowledged that participants would be referred to by a pseudonym. They were also provided with a Privacy Notice, explaining the legal basis for processing their data, the security measures taken to protect their data, and all their Data Protection rights. Collecting data involved giving the interviewees a pseudonymous identity, which keeps the risk of identifying the interviewee to a minimum. To avoid the identification of any individual, I referred to the participants with reference to their position. Moreover, in order to navigate easily between participants and avoid confusion in presenting the findings, I used alphabetical letters to refer to each participant based on the order of the interview, Imam A, Solicitor B, Imam C, Imam D, Solicitor E. This ensures avoidance of identifying any individual, because their job titles identify them neither directly nor indirectly. It also helps the reader to understand the context when knowing where such information comes from.

B) Data Analysis

A qualitative approach also allowed me to approach in-depth analysis through adopting grounded theory. Grounded theory was introduced and developed by Barney Glaser and Anselm Strauss in 1967.[1202] This theory, which is the most popular method used in the qualitative method, allowed me 'to seek an understanding of an area, by developing and refining a theory as more is learned about the area'.[1203] To elaborate, in order to examine the practice of Shariah succession law in Scotland, I should 'examine all possible theoretical explanations' from the emergent empirical findings.[1204] In terms of processing the data for analysis, I did not use analysis software because of the limited number of samples. I started by transcribing the interview audio recordings. I translated the transcription of one of the interviews because it was conducted in Arabic. I started transcribing by applying process coding by conceptualising basic codes from the data. The second step of coding is categorising these codes as a 'best attempt to cluster the most seemingly alike things into the most seemingly appropriate groups'.[1205] This did not raise any difficulty because I had already identified a number of research conflicts which helped me to predetermine certain questions to guide the interviews. I managed to group the codes from all the interviews into categories. These categories led to the third stage of grounded theory analysis, which is drawing a conclusion based on these abstract categories.

6.3 Report of Empirical Outcome

This section presents the results of the interviews conducted with Imams and solicitors in Scotland about Shariah succession. The Imams in the context of this chapter refer to individual Imams who receive inquiries about writing a *wassiyyah,* because they are experts in Shariah law and normally get approached by Scottish Muslims for general Shariah law enquiries, not because they are part of Shariah councils. The headings identified in this section are the main themes that will be discussed further in later chapters. I should note that

[1202] B Glaser and A Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research. EE. UU* (Aldine 1967).

[1203] Webley (n 48), 944.

[1204] Antony Bryant, 'The Grounded Theory Method' in Patricia Leavy (ed), *The Oxford Handbook of Qualitative Research* (Oxford University Press, Incorporated 2014), 125.

[1205] Johnny Saldaña, 'Coding and Analysis Strategies' in Patricia Leavy (ed), *The Oxford Handbook of Qualitative Research* (Oxford University Press, Incorporated 2014), 587.

all the quotations of the interviewees below are presented verbatim, even where their English is not perfect.

6.3.1 Attitudes to Islamic Will-Writing in Scotland

In the interviews, I asked interviewees to describe their experience of will-writing practice among Muslim families. It worth noting that it is understood that Muslims in the UK are very diverse in terms of, for instance, ethnically, geographically, demographically, and that may impact on their attitude toward Shariah practice, particularly if they follow different schools of thought. However, my research focus is on Muslim practices to benefit those who want to apply Shariah succession within Scots law by examining the main concepts of Shariah succession rules that may be in conflict with Scots law. From solicitors' perspectives, will-writing is not that popular among Muslims in Scotland. Solicitor B believed that one of the reasons associated with a lack of Islamic wills could be the misconception of the concept of domicile, where some people may think that they cannot write an Islamic will while they are domiciled in Scotland. Moreover, solicitors B and E both took the view that there is also a misconception related to wealth, whereby people may think that 'you only need a will if you are wealthy'. This may also be true generally as a perception of inheritance, not just for Muslims.

Imam C, on the perception of *wassiyyah* among Scottish Muslims, states:

> One of the key services that we provide is drafting a free Islamic will. I think, generally, there is not as much concern among Muslims to write a will. We do get requests, they are not dozens, but they are quite a handful.

Imam C took the view that this issue is not just about Muslims, but the lack of writing wills across other communities is associated with the same reason:

> This is an issue that prevents other communities from talking about having a will or making a funeral arrangement, nobody likes to think about death, talk about death, it is not a popular subject.

Therefore, when the subject of writing a will arises, 'people do not really think it applies to them, they think it applies to other people'. Moreover, Imam D observed that writing a will became more popular among the elderly and people with terminal illnesses. Other age groups appear to inquire about writing a will, but the majority of actual will-writing can be found in these two groups. Both Imams C and D think that this could be due to a lack of knowledge of religion or 'the concept of life' among Muslim youth (Imam D's words):

> I think it is the obligation as a Muslim to understand the element of life because I do not think generally that the majority of the Muslims that live in Scotland have this perception of the fact that life can end for any individual at any moment, and the preparation for the hereafter.

A) Commitment to Shariah in Will-Writing

Imam D stressed that '100% of the cases we have had [inquiries about succession] are people trying to please God, rather than an individual or personal desire'. Imam A also believed that their approach for help, raising concerns and seeking guidance on Shariah succession, are attitudes that denote a commitment to Shariah. Moreover, this commitment to pleasing God in other aspects through succession was also observed by participants in this study. An example of this was given by Imam A, that concern over children's welfare and upbringing urges Muslims to write an Islamic will, specifying the guardians of their children to ensure their children are brought up following their beliefs.

Solicitor E also believed that Scottish Muslims' commitment to Shariah law 'is obviously becoming more and more important to them'. It encourages them to try and 'marry both together' i.e. to write an Islamic will that complies with Scots law.

There does not appear to be much difference between those Muslims and other Scottish adults in relation to will-writing. In both groups, the evidence is that older people are more likely to do so. In terms of this study and the application of Shariah law, it was interesting to note the Imam's perception of perhaps less interest in religion. However, this would not necessarily be reflected in a lower incidence of applying Shariah succession, because this subject appears to be less popular among Scottish people in general.

B) Change in Awareness of Will-Writing

Imams C and D revealed the efforts that have been carried out by Muslim leaders in Scotland to raise awareness of an Islamic will so that Muslims would 'take this issue seriously'. Because of these efforts, as Imam C put it, 'a gradual awakening is happening'. Imam C continued 'the change is happening, it is gradual, it is quite slow, but definitely the subject gets talked about'. Imam C also noted that this gradual awareness may also have been affected by the misconception of the impact of inheritance tax, which encourages people to take 'a step to go to someone to have their will drafted':

> Generally, there is a concern that if there is no will, that means there is a huge tax bill… people thought that happens if someone passed away without leaving

> a will, does not matter whether their estate is worth a hundred thousand or worth a million, they thought that 40% of it will be taken away by the taxman, which is not true.

The interview with solicitor E confirms this misunderstanding, whereby she believed that 'inheritance tax is quite a driver', and 'Muslims are very canny when it comes to tax, and they are aware of tax much more than other communities'. However, she thought that inheritance tax might not be a pressing concern, because 'you've got your inheritance tax threshold, but you have then got an additional threshold for your house'. This threshold, which was increased recently 'does not tend to kick in for ordinary people anymore'. She might be reflecting on the spousal exception here.

Solicitor E also observed that the popularity of writing Islamic wills in Scotland 'is now ever increasing'. She noted that the situation had changed from 5 years ago when *wassiyyah* was less popular among Muslims. She also observed that the younger generation often approaches the matter both for themselves and their parents. Solicitor E suggested that the reason for the popularity of *wassiyyah* among the younger generation could be that they 'are now more knowledgeable in terms of what difficulty can arise here in Scotland'. Moreover, she noted that 'COVID has been a huge accelerant of wills, a lot of people have become very conscious of their own mortality with COVID and that triggered wills'. She also observed that once a family member has made their will, 'then the wider family will do their wills as well'.

Solicitor E believed it is 'now becoming much more well-known' that it is easier to deal with the estate if the deceased leaves a will. What triggers this from her perspective is the situation where somebody has died intestate, and the family has faced problems in dealing with the estate that they would not encounter if there was a will. She always would seize this chance to encourage executors and families to have their own will written, in order to avoid such conflicts. This practice is also considered by solicitor B whenever she noticed some hesitation among clients over whether they need an Islamic will, by explaining to the clients the legal consequences of not having an Islamic will, so the clients:

> Will be made aware that if you do not create a will this is what is going to happen; they are not going to follow it Islamically, they are going to follow it in the place where you are domiciled. So, your domicile is here, you are residing here, your estate is here, this is how it will be distributed in accordance with succession law in Scotland.

It seems that the practice may be changing and the awareness of the importance of will-writing has been getting more attention. COVID-19 might make people think of the afterlife or the welfare of their families.

6.3.2 Compliance with Scot Law

Solicitors approached by Muslim clients, as discussed by solicitor B, firstly need to ensure that the testator has the capacity, and therefore is able 'to take the interview on their own' in which 'instructions are only provided from that person who is creating that will'. This verification allows solicitors to move forward with working 'the calculation of their assets', to 'ensure that matters do not contradict Scots law', and to 'formally prepare a will'.

Some law firms in Scotland may have liaisons with Islamic institutions, though this varies in the level of their cooperation. Imam D does not generally refer to a law firm, unless the inquirer asks them for advice on that matter because normally the inquirer:

> Will have a person, a lawyer or people who deal with inheritance law that they can go back to when it comes to the splitting of the inheritance and what the figures would be.

However, once this inquirer asks for a solicitor, then they will be guided to one of the 'Muslim firms because they would understand this element far better and greater than a firm that does not apply itself to Muslim ideology generally'. However, there is an intriguing example of cooperation between Imam C and solicitor E to help Muslims draft their *wassiyyah*. Their communication with any clients started through an application that their clients filled in on the *Almasjid* website.[1206] The website is run by the mosque, and once the application is made it gets passed to the solicitor. Although the mosque is already cooperating with one law firm, they are open to cooperation with 'any solicitor who is prepared to learn about Islamic wills'. In their first year of operation, they received about thirty applications, twenty of which were completed. Moreover, as a part of this partnership, they have held webinars where each participant (Imam and a solicitor) talks about their principles to understand the applicability of *wassiyyah* with Scots law (Imam C):

> And our understanding is the principles are almost identical, they match … and so far, she [the solicitor] has successfully incorporated everything into the

[1206] Interview with Imam C (April 2021), https://almasjid.co.uk/will-preparation/; Free preparation of wills; Supervised by an Islamic Scholar (Aalim) & prepared by an approved law firm based in Scotland.

> Scottish structure, and she has prepared a will which meets both sides, Islamic and Scottish.

Imam C also reflected on some of his own experiences in drafting an Islamic will through this service:

> I have my own personal will prepared which meets both standards. We did come across something which was an obstacle, we managed to find our way around things. The other people that I have spoken to who we helped prepare their wills, they did not report back any tension where they could not do things.

Solicitor E confirmed that after the webinar she received inquiries from clients across Scotland. Some English clients have also approached her, but Scottish wills would only be helpful for them if they have assets in Scotland; otherwise, they will be advised to seek an English solicitor. This limitation also applies if the clients have assets abroad, as solicitors B and E noted. Not all law firms will have the resources to manage assets located outwith Scotland, in which case clients may need to contact a solicitor in that jurisdiction to prepare a will.

A) Wassiyyah in a Scottish Will

To implement a *wassiyyah* in a Scottish will, solicitor E believes that an 'Islamic will is feasibly applied with Scots law'. From her perspective, the only difference between a *wassiyyah* in a Scottish model will and a Scottish will is the section 'that does the actual division' per Shariah succession rules:

> In a layout, it is a Scottish will, the actual division is divided and calculated by the Imam and takes account of Islamic will… So, it is not actually me who is deciding the Islamic division, it is the Imam. And in fact, in our letter of engagement that's exactly what it says.

Solicitor E reflected on some difficulties she came across frequently, until the matter was finally settled by Imam C. This difficulty was not related to the male-female ratio, nor to the fact that the testator is free to bequeath one-third of his estate to whom they may wish, because 'that was the easy bit'. The issue was related to the destination-over, which is a clause in a will that states to whom certain property is to be transmitted if the first intended recipient pre-deceases. The destination-over and the principle of representation conflict with *wassiyyah,* because in a Scottish will the testator will decide the destination-over. In an Islamic will, however, the shares to the heirs are fixed, and cannot be decided by the

testator.[1207] So, the solicitor here will inform the Imam of the testator's children and grandchildren, and the Imam will provide the solicitor with the division of the estate concerning the destination-over.

B) Legal Rights

It was interesting to note that both the Imams and solicitors interviewed observed that the determination to apply Shariah succession is not hindered by gender concerns. To elaborate, concerns about the male-female ratio and legal rights do not deter Muslims from following Shariah succession rules. Solicitor B observed:

> [Muslim clients] just want to ensure they are following what they should be in their religion. That is what they told me, they are not bothered by who gets what, as long as they … follow the right way they should.

Given that Shariah inheritance rules give a female half as much as a male, Imam D believed that this may not be a real concern among Muslims, and that legal rights or any other challenge are unlikely to emerge from Muslims, because 'the ones who ask are individuals who are dedicated to their religion, and they are submitted to the [Shariah] laws which are divine'. Imam D added that even those who may be sceptical about the fixed heirship division would understand the implication once 'the logical aspect of it is understood and explained'.

The Imams' speculation seems to be in line with solicitors' observation of the lack of legal rights challenges. Although these might be quite significant findings, the interviewed experts' clients are Muslims who approach them for Islamic services. This means that we may assume that those who do not appreciate the Shariah method of fixed heirship may not seek experts in Shariah. They would, instead, go to a normal solicitor to draft a Scottish will.

However, solicitors B and E tend to raise the issue of legal rights at the initial stage when meeting clients who are interested in drafting their will. Solicitor E reflects on a legal rights claim:

> Legal rights are a debt against the estate, so if I was making a will and I decided that my husband and my two children were to get nothing, I am perfectly good to write a will leaving everything I have to the dog and cat

[1207] See section 5.2.2 The Definition of Heirs above.

> home. However, your husband and your children do have legal rights claims on your moveable estate.

Solicitor B would ensure clients were aware of legal rights as 'challenges can happen from the beneficiary' and 'that might change the way they want the will'. Moreover, she advised clients that their children should be aware of the division, which might reduce the risk of challenges. However, the risk of challenge might increase from Solicitor's B point of view if 'you are following something so fixed', such ass Shariah succession rules, particularly the male-female ratio. However, solicitor E suggested quite the opposite: 'Islamic wills are properly more compliant or more in keeping with legal rights' because excluding spouses and children from the will in Shariah law is not permitted:

> The Islamic division takes account of all children and all spouses. A legal rights claim is unlikely to come into play, [though] still hovering there, but Islamically you are taking into account, and your estate is already dealing with legal rights.

Furthermore, solicitors B and E both warn against the exclusion of children from the will, although it is not common in an Islamic will. Solicitor B observed that Muslim testators are mostly aware of the Shariah fixed share when they are approached to draft the *wassiyyah*. Solicitor E's observation may also suggest their previous knowledge of legal rights, but she believed this knowledge usually emerged 'because there has been an issue in the family'. To elaborate on this statement, Solicitor B observed that the lack of a legal rights challenge might be because 'most of the time, clients have discussed with their family how they want to distribute it', and some may 'have got an agreement' about the distribution.

Even the discharge of legal rights seems to be less effective among Muslims. What makes it more difficult for the testator is that, as solicitor B puts it:

> Nobody can answer on the beneficiaries' [behalf] whether they would agree or not to [discharge] their legal right, that is something that cannot be answered, it only depends on the beneficiaries.

However, none of the interviewees had experienced any challenges concerning legal rights. Solicitor B insisted on that statement, despite having experience with some beneficiaries who were not keen on literally following the Islamic will. From her point of view, there are other 'strong points' to challenge a will, such as 'whether it has been done under pressure, or whether there is no validity of that will, or they did not have the capacity to do so'.

All in all, the website seems to be an important connection between Muslim clients who wish to apply Shariah and solicitors that cooperate with Imams in drafting Islamic wills. Although there exists a perception that there can be compliance about legal rights, it is interesting that none of the interviewees had experienced any such challenge. What was striking to me is that Imams seem to advise the solicitor on representation, which is in conflict with Shariah rules, as discussed below.

6.3.3 Alternatives to Islamic Wills

Solicitor B, who deals with Islamic wills in Scotland, observed that some clients approach them for guidance on asset arrangements under Shariah, but do not proceed, because 'sometimes, an Islamic will does not affect their assets, so … they might go with a normal will'. An example of these cases is when 'somebody might have a house and they want it specifically to go to a family member who is taking care of them'. These clients may not want to follow Shariah succession rules 'because they might have an asset that they do not want to pass to other people'. Another example illustrated by Solicitor B is where someone wants their assets to be divided in a way that does not coincide with the Shariah forced heirship rules, such as:

> If they have a house and three young children, you are not going to have fixed inheritance, where the only assets they have got is the house, to be divided between the children and the husband, which makes them homeless.

In this example, they normally decide that 'everything passes to the husband, or everything passes to the wife and then to the children'. This might mean that Scots law could in fact be more useful to them than the Shariah rules.

Furthermore, both Solicitors B and E suggested that a deed of variation could be effective for applying Shariah inheritance rules on an intestate estate in Scotland. Based on Solicitor E's observation, agreement to a deed of variation 'happened normally' among the heirs, and she has experienced a Muslim executory in which the heirs agreed to create a deed of variation under Shariah inheritance rules. However, she stressed some obstacles in obtaining the agreement of all the heirs, particularly female heirs:

> You could have a female who is going to sign away possibly half or a third of what she due to get from her parents to her brothers. You are relying on that individual. If their faith maybe is not as strong as other people's faith, they want maybe to stick with Scots law division as opposed to Shariah law

> division. And if one said no, then that cannot happen, and it needs to be divided by Scots law.

Imam C, having reflected on his own experience in distributing his assets in his will, said:

> Personally, my life is very simple, I do not have estates lying everywhere in the world, not even different markets, nor do I have huge investments. The simple estate that I have, we had no issue working it out who should get what.

A) Scottish Imams and Succession Inquiries

From my interviews it is clear that Imams in Scotland do get approached by Muslims inquiring about succession. Imam D regarded the inquiries about will-writing as seeking 'instruction on two grounds: how should I write my will down; others want to know in-depth what each person will get within the family'. The first type of inquiry is easy to deal with, but the other type may not be feasible, due to the possibility that the testator may not die before the beneficiaries or the heirs. However, Imams generally resolve these inquiries by providing them with the information they need, which normally involves the fixed heirship division, and advising them to 'write their will down and then … to have those documents approved and kept with a solicitor who deals with inheritance law'. It appears that there might be a general wariness among Imams to provide legal services.

Imams also seem to deal with many cases of intestacy, as Imam D puts it:

> Yes, I think a lot of the cases [are] like that, because the majority of the Muslims do not pay attention to the element of making a will on a regular basis. So, when sudden death occurs within a family, then the issue of splitting inheritance is a common question, and how it would be split.

Sometimes the inquirer about intestacy may specify a sum and ask for more details in dividing this amount among the heirs under Shariah inheritance, as explained by Imam D:

> We just go as far as giving the information. We do not go into actually distributing or going into the personal element of it from the family side of things. There is an obligation left upon the family itself. And we do not force either, so we cannot push anybody in a particular direction, but yes, if somebody is willing and wanting and need direction and guidance, we will be there for them.

Imam C confirms this approach when they get approached by Muslims asking for guidance in case of intestacy:

> Definitely, definitely, that as an Imam, this is your duty, you do tell them who is supposed to get what, but then you leave it to themselves to go on to speak to a lawyer and get it agreed, get something approved or executed in accordance to that.

Moreover, even though when an issue occurs between two parties, 'both parties would [mutually agree] to the fact that we would like to take it to an Imam of a masjid',[1208] the Imams' decisions in these disputes 'are not obligatory'.[1209] Moreover, Imam D illustrates their limitation in solving the succession disputes discussed above:

> They ask for the rulings and we gave them a ruling, then, of course, we try to help influence them to do the right thing, but … we can only do just about that, there is no force in all of this. We cannot do much else than that. And, thanks to God, I think, in that particular case, they did come to an agreement to leave the mother alone.

Furthermore, Imam D revealed that it is uncertain whether Scottish Muslims would seek a solicitor's advice 'when it comes to splitting inheritance Islamically'. The solicitors' perspective may agree with the Imams' perspective on the popularity of Muslims' intestate estate internal arrangements. Solicitor B did not experience inquiries regarding intestacy with Muslims, which led her to speculate that people might 'do it internally by themselves particularly if they do not need a confirmation, because if you do not need a confirmation then you do not need to go to a solicitor'.[1210]

Moreover, Solicitor E asserts the tendency of Scottish Muslims 'to do their own executory'. She reflects on her experiences in dealing with Muslim estates:

> What you tend to find is that Muslims just will not deal with their own executries, they just leave things for years sometimes, and it is only when they run into difficulty… Muslims tend not to come right at the beginning, it is only when there is an issue

An example of this issue is when she was approached by a client where the title deed of the house was still in their late mother's name, despite her being deceased for many years, and

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[1208] Interview with Imam D (April 2021).

[1209] Interview with Imam A (March 2021).

[1210] Interview with Solicitor E (May 2021)'Confirmation is a legal document from the court giving the executor(s) authority to uplift any money or other property belonging to a deceased person from the holder (such as the bank), and to administer and distribute it according to law'. For more, see: https://www.scotcourts.gov.uk/taking-action/dealing-with-a-deceased's-estate-in-scotland.

they only approached her because they were required to present the title deed to gain some services for the house.

B) The Role of Shariah Councils in Scotland

In the past few years, several Imams across Scotland have confirmed that there used to be a Shariah council in Scotland until 2015.[1211] According to Imam C, this council operated 'for about nine years before its services were withheld and stopped'. He stressed that 'there is a definite need for it but there is a lack of leadership' that hindered Shariah council continuation within Scotland. Imam D believes the absence of Shariah councils in Scotland is due to the instability of some Islamic institutions there:

> Because the Islamic council is not made within one particular mosque or with one Imam, it cannot be done like that. If you want to do collective joint work, then that means taking on board so many other institutions within Scotland. So, for us to do that, that means the fact that we work with individuals that are consistent. But the problem with mosques, being very frank about it, is that Imams [have a lack of knowledge] with regards to the running of the masjid and management. And there will be trustees and committee members who are possibly not Islamically motivated, hence more difficulty. So, you have these complications.

Imam D also believed that some Muslims have a religious attachment to the mosques, and that they will be the only option for any matters they come across because, from his point of view, there is a lack of knowledge of the law and how to seek support from legal authorities, particularly among elderly Muslims. However, Imam D confirmed that there have been ongoing accelerated efforts in the past five years to bring back a Shariah council in Scotland, 'so that we could relate to that council with regards to Muslim matters'.

Since the Scottish Shariah council ceased its services, Imam C believes that Muslims have been left with the only option of seeking services from Shariah councils in England. Imams C and D revealed that in Scotland there are representatives of two major Shariah councils in England: The Islamic Shariah Council in Leyton (ISC) and the Birmingham Shariah Council (BSC). According to an interview with Imam C, they have a representative in both Glasgow and Edinburgh. Representation mainly takes place by means of personal interviews on behalf of the ISC:

[1211] Interview with Imam C (n 1207); Interview with Imam D (n 1209).

> So, if anybody from Scotland applies to the London Shariah council when it comes to a personal interview, they will ask him to be interviewed by an *Aalim* [scholar] who may be in Glasgow or maybe in Edinburgh. So, they have their representation in Scotland, but officially Shariah councils operate from England.

Furthermore, Imam D, the leading Imam in one of the Glasgow mosques, stated that BSC services - another major Shariah council - also extend to Scotland, where they have a representative in his mosque. He revealed that this is the case even though there is no Shariah council in Scotland anymore, which may cause a lack of access for some Muslims who require these services:

> The thing is that we have a slightly different approach [than Shariah council] because we are individuals but part of a greater organisation … that has a judiciary board of its own and has a number of branches beneath them, so when it comes to our issues like that, we would most probably go back to the Shariah council to seek any advice as needed. Yes, I would consider that we are, yes, a branch of [BSC], because [BSC] is the central [council] and we are an affiliate of that central.

Moreover, Imam D believes that representation would possibly have been different with the operation of the Shariah council in Scotland:

> But in particular in Glasgow, because there is no element of centralisation that we can go back to for the purpose of Islamic law and stuff, so we tend to take guidance from those who are above us in position in headquarters.

However, representation is not as straightforward as it sounds. For instance, an issue is likely to arise when consulting BSC:

> 'The issue with that is because they are based in England and all the English laws may not coincide with Scots laws. And maybe differences and so forth. Sometimes that does not really help. But there is always guidance we will take from them.'

Furthermore, Imam D, discussing how they process Muslim inquiries, states that common inquiries, where individual Muslims inquire about Shariah worship, might be dealt with by an Imam 'single-handedly', 'because most of the Muslims tend to go through that situation, hence that is a common question'. However, the situation could become more complicated when it comes to inquiries related to family law issues or personal transactions that involve disputes:

> We will definitely take another position, and that is the fact that there will be a collective decision done in that… For example, if it be a matter of money, we would not make a decision on that single-handedly, especially if the issues became more complicated in that sense.

An explanation of the process of addressing Muslim disputes by Imam D, a representative of BSC in Scotland:

> So, you have got two parties conflicted over a particular matter, then those parties would come to one individual [Imam]. That one individual will not take the matter on his own shoulder completely, but rather he would have other multiple institutions as well as individuals to partake in that decision to guide them. If it came to myself, then the whole matter would be taken down, a minute would be made, and then those particular matters would be discussed with the immediate Imam, who is assumed to be the next person in line. And then once that is taken, if the matter is solvable, then it will be done; if not, and it is complicated then on taking the ruling Islamically, all to become complicated in dealing with it, because of the nature of people's attitudes and so forth, then other institutions would be required to help and guide.

Furthermore, seeking the guidance of a BSC representative is not confined to BSC, but it extends also to Islamic scholars in Islamic countries such as Saudi Arabian scholars:

> But what I meant was the fact that there needs to be an external party to resolve a matter between two parties. So, concerning that, we have the majority of our scholars that partake in our decision-making from Riyadh. Scholars in Riyadh would be consulted without mentioning names.

On the type of disputes that they may receive, Imam D believes that *talaq* issues 'are at the height of major problems' of Scottish Muslim disputes. *Talaq* cases among Scottish Muslims could be dealt with immediately by the Scottish representative without further help from external parties:

> So, whatever issue that there is with regards to the matters of Scotland that they [BSC] would receive, they would possibly hand them over to us. For us to look into them. So, what happens to a lot of cases that do come, the cases are given to myself, I would initially meet both parties, then again, the whole concept of bringing two elders from the parties to come forward to understand each other, their mentalities, attitudes, to see where this is going to go. Then, possibly, relating to the husband and wife, and trying to resolve the issue between them. First, on a separate occasion, then together. And eventually, we get success, I would say most of the time it is a success.

However, while that success seems to be true mostly in reconciliation sessions, once it becomes more complicated than that, then they may require external help:

> But there are a small number that are persistent in their decision. So, there is a whole process in that also, but within that, yes, if it became more complicated, the issue will be sent off to the Shariah council in Birmingham… They get to be sent back to them to rule, for example, on issues of *khula* and stuff like that, they get sent back. But most of the time, 80% we solved them, whether if it is a divorce or not.'

Therefore, on the question of whether Scottish representatives who seem to offer Shariah council services could be considered as a Shariah council, Imam C and D seem to disagree with that approach, on the basis that (Imam C's words):

> Because decisions ultimately are made by the judges or *ulama* in England, the local [Imam] is just a representative who is collecting the view of the parties involved. So, if anybody wants to make a testimony or something, the local representatives on the behalf of the *ulama* or judges in London, they will take that, but they will not be able to make a judgment or make a decision.

Imam C explained the process of responding to Muslims' inquiries about succession:

> People normally, when it comes to advice on such matters, they would go on to speak to an Imam. So, the Imam would offer that advice himself, or would ask them to pass such a client to a senior Imam, to a more experienced person. But I do not think they would show that to Shariah councils.

Imam C also seems more certain that Scottish representatives of Shariah councils do not offer such services:

> To the best of my knowledge, I have never heard anybody talking about *mirath* [inheritance], about succession, when it comes to Shariah councils, the two concepts I have never heard together or never experienced them coexist.

However, he did not rule out the possibility that Shariah councils may offer such services to their clients upon request:

> So, normally Shariah councils are not meant to deal with succession law. If somebody asks … for such advice… I am sure they will offer that service. But. This is not what the Shariah council promoted as their business, [nor] as the services that they exclusively offered.

For example, the BSC representatives in Glasgow have dealt with an inheritance case where immediately after the husband died, his wife distributed his wealth among the eligible heirs internally, under Shariah inheritance. However, the deceased's children insisted there were motives of 'greed' in selling their father's house and distributing the money among the heirs,

even though their mother was living in that house.[1212] Imam D stressed that: 'We did not see any justification on that [the children's attempt], the mother has the right to the house under Shariah, and it was not up for inheritance'. Imam D reflects on the consultation they sought for this case:

> We, of course, consulted institutions outside of Scotland as well as the centre itself [BSC] and understood the fact that elements of the house are not to be distributed if the mother stays on, that is her house, and she is living there, and not to be distributed.

6.4 Discussion of Empirical Findings

In this section I begin to discuss and analyse the empirical evidence reported above and my observations of that process. This section examines the popularity of writing an Islamic will among Muslims in Scotland. It helps us to understand whether Shariah succession is well perceived among Muslims and the reasons associated with it. This section attempts to answer the general question about the application of Shariah succession in Scotland raised at the start of this chapter. Investigating how Shariah succession is received among Scottish Muslims and the motivation behind it is important to understand how they apply Shariah within Scots law, as discussed in the following section. However, I should clarify that the study's focus is on Muslims in Scotland who may still be concerned about Shariah law. The findings of this thesis apply to that particular population and do not reflect the views of all Muslim communities in the UK.

6.4.1 The Perception of *Wassiyyah* among Scottish Muslims

This section starts discussing these results by examining the perception of Islamic wills by Scottish Muslims. Generally, Imams and solicitors agreed that *wassiyyah* is a concern among some Scottish Muslims, although not very common among them. The local mosque of Imam C started offering a free Islamic will service quite recently but applications remain very low. However, this might be a common factor among Scottish people in general and not confined to Muslims. Will-making succession appears to be unpopular across all communities, with over 60% without a will in Scotland.[1213] A few reasons were offered by interviewees that could be associated with this issue. The first is that the topic is related to death. This reason makes sense with what Imam D suggested that inquiries about writing Islamic wills are more

[1212] Interview with Imam D (n 1209).

[1213] Scottish Consumer Council (n 46), 6.

popular among the elderly or those with terminal illnesses i.e. those approaching the end of life. The popularity of writing a will among the elderly is also common among Scottish people in general, with nearly 70% of those who had a will aged 65 and over.[1214] For Muslims, however, the lack of engagement with preparation for death could be the principal reason for their lack of writing wills. That is the perception of Islamic wills among Scottish Muslims in the view of Imams.

However, although the popularity question was perceived similarly between Imams and solicitors, each of them may link the lack of writing wills to different reasons. The misconception of domicile, suggested by solicitors, whereby some people may not consider an Islamic will because they think it conflicts with their living in Scotland, is an interesting point, where one of the aims, discussed in this study, is to clarify the application of Shariah succession within private international law. It is true if someone's domicile is Scotland, they are bound by Scots law, but the acquisition of a domicile of choice is not as straightforward as this statement may suggest. Some people may be able to retain their domicile of origin despite living in Scotland, as discussed further below.[1215] However, efforts are being carried out by Muslim leaders and solicitors in Scotland to raise awareness of the need for writing Islamic wills.

6.4.2 Motivations for Shariah Succession

There are a number of observed motives that might encourage some Scottish Muslims to draft their wills. Solicitor E observed that the impact of COVID may have accelerated will-writing generally, since it has made people more conscious of their own mortality, including Muslims, and triggered them to write their wills. It was also observed that the younger generation sometimes consider drafting a *wassiyyah* for themselves and their parents. This is distinct from what Imam D observes above regarding their popularity with the elderly. While the rise of awareness among the younger generation to draft a will might be an impact of COVID, it might also be the result of the difficulties that may arise if someone died intestate, according to solicitor E. For example, a certificate of confirmation is required to deal with some parts of the estate, such as a house or bank accounts, where there is a process to obtain this certificate, and 'if you do not have a will, that process is longer and much more expensive'.

[1214] Scottish Consumer Council (n 46), 6.

[1215] See section 6.5.2 Male-Female Ratio and Legal Rights Challenge below.

Furthermore, inheritance tax could be a motive for some Muslims to consider writing their will, given that both an Imam and a solicitor observed the same point each from their own perspectives. However, this might be a misconception, because in most cases ordinary people's estates will not exceed the inheritance tax threshold. For example, in the latest figures for the tax year 2018 to 2019, less than 4% of estates across the UK resulted in inheritance tax charges.[1216] However, for those who might be affected by inheritance tax, the solicitor would advise them to 'mitigate their liabilities' by gifting or transferring properties to their children, to push back the inheritance tax threshold.

Commitment to Shariah law appears to be a key element that prompts a significant number of Scottish Muslims to follow Shariah succession rules. This was observed clearly by all interviewees, from both Imams' and solicitors' perspectives. Scottish Muslims who were encountered by the participants had a commitment to please God, which was a priority over any personal gain. They also demonstrate commitment to Shariah law by ensuring that their children are brought up with their beliefs. Moreover, the gender concerns in the male-female ratio seem to be less important in their decision to choose Shariah succession over Scots succession, as further discussed below.[1217]

There might be a different motivation between Muslim testators living in Muslim and non-Muslim countries. Dying intestate in a non-Muslim country would have far greater implications than in a Muslim country. As explained above,[1218] estate divisions in Shariah succession are the same in both testate and intestate succession. To keep it simple, the only difference is that dying testate will reduce the heirs' access to the estate by a third, because Muslims have the right to bequeath no more than one-third of their estate. This third is normally bequeathed to charity or non-heirs such as relatives. The remaining two-thirds will be distributed under the forced heirship rules, with or without a will. Therefore, the motive in a Muslim country could be merely related to a religious commitment to please God by writing a will to bequeath the one third. However, when it comes to living in a non-Muslim country, the motivations may be different, in which circumstances one may urge Muslims who want to follow Shariah to have their will drafted to, for instance, ensure that estate

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[1216] 'Inheritance Tax Statistics: Commentary' (*GOV.UK*) <https://www.gov.uk/government/statistics/inheritance-tax-statistics-commentary/inheritance-tax-statistics-commentary> accessed 16 May 2022.

[1217] See section 6.5.2 Male-Female Ratio and Legal Rights Challenge below.

[1218] See section 5.2 Shariah Succession Rules above.

distribution is in line with Shariah succession, by including the forced heirship division into the will. Otherwise, Scots intestacy law will be applied to their estate.

Although drafting a will may not be popular among them, these possible motivations suggest that Scottish Muslims who want to apply Shariah to their estate would gain more benefits with *wassiyyah* than dying intestate. However, this might be unattractive to some Muslims, particularly when it comes to meeting their interests as discussed in the following chapter, where Muslim may opt for alternative ways than Islamic wills to arrange their assets.[1219] Having examined the attitudes of those Muslims who want to apply Shariah succession within Scots law, the next section turns to an important element of the study, which is the question of compatibility between *wassiyyah* and Scots law and the process of drafting a *wassiyyah* within the Scots law framework.

6.5 Islamic Wills and Compliance with Scots Law

The interviews conducted revealed that drafting an Islamic will within Scots law may affect a significant number of Muslims in Scotland, although only some of them may proceed with it. This may not be as straightforward as it seems to be, and some complications and risks need to be taken into account when drafting an Islamic will. In addition, they may be faced with the risk of challenge to the *wassiyyah* by legal rights. This section will examine these issues to come closer to the applicability of *wassiyyah* within Scots law and how Muslims manage their way through Scots law.

6.5.1 Cooperation between Mosques and Law Firms to Draft a *Wassiyyah*

The interviews found that Scottish Muslims with interest in applying Shariah sometimes seek Imams' help with inquiries about drafting a *wassiyyah*. However, it appears that Imams would 'just go as far as giving the information', and the remaining part of preparing the will is referred to the legal professional to complete. Moreover, an intriguing suggestion revealed by Imam C is the creation of a webinar where they will have experts from Shariah law and Scots law, and 'the idea they talk about the principles of Islamic wills, and the principles from Scottish perspective' to show that an Islamic will can be applicable with Scots law. That is the level at which Imams in Scotland would participate in the will-making, which

[1219] See section 7.2 Alternatives to Islamic Wills below.

means that there is a limitation in how far they can proceed with resolving Muslim inquiries regarding drafting a *wassiyyah*.

In terms of legal services, few solicitors offer to prepare a *wassiyyah* in Scotland. Solicitor B offers such services, as she has knowledge of succession in both Scots and Shariah law. However, the other solicitor, Solicitor E, offered a more cooperative example of a liaison between her and Imam C to draft a *wassiyyah* for Muslim clients. Clients normally approach the solicitor directly or through the Imam. The solicitor will then lay down an Islamic will with the Imam's help regarding the Shariah division of the estate. However, they received few applications over two years of their operation, which seems quite insignificant for eighty thousand Muslims living in Scotland, with more than half of them based in Glasgow.

Solicitor E only experienced difficulty with issues related to destination-overs. The destination-over and the principle of representation conflict with *wassiyyah* because in a Scottish will the testator will decide the destination-over. In an Islamic will, however, the shares to the heirs are fixed, and cannot be decided by the testator.[1220] So, in practice the solicitor will inform the Imam of the testator's children and grandchildren, and the Imam will provide them with the division of the estate concerning the destination-over. Therefore, the issue here is not about incompatibility with Scots law, but rather with working out the calculation of destination-over. However, this may conflict with Shariah law, which provides that representation is irrelevant in Shariah succession, provided that the deceased's other children survived.[1221] In modern Islamic countries, only Pakistani Muslim Family Law Ordinance has introduced the representation rule to benefit the deceased's grandchildren to receive a per stripes share of what their parents would have received.[1222] This may influence some Muslims in Scotland, because most of them are of a Pakistani background.[1223] It may also be an adjustment that Muslims in non-Muslim countries may have to adapt to meet their interests.[1224]

[1220] See section 5.2.2 The Definition of Heirs above.

[1221] See section 5.2.2 The Definition of Heirs above.

[1222] Yassari, 'Intestate Succession in Islamic Countries' (n 228), 437; Billoo (n 1020), 652; Sultan Alam Chowdhury (n 1022).

[1223] Elshayyal (n 9), 15.

[1224] See section 7.3.1 The Involvement of Necessity, (*Darura)* below.

This principle was discussed in the previous chapter,[1225] but is worth discussing again to clarify how the adoption of representation by some Scottish Muslims might meet the requirements of Shariah succession. Generally, representation in Shariah succession law is irrelevant, so long as relatives of the same degree are alive to claim.[1226] However, the obligatory bequest could replace the representation principle.[1227] This bequest could assign a share to the grandchildren of the deceased's child if they died before the deceased, limited to one-third of the testator's estate.[1228] The only difference between this approach and the principle of representation is that the latter assumes the predecease of some heirs at the time of writing the will, whereas the obligatory bequest could not be added to the will unless the heir predeceased the testator. We could say that both approaches have the same aims, and obligatory bequests could replace the destination-over if the testator was able to keep their will up to date. However, this may not always be true, considering that the obligatory bequest must not exceed one-third of the estate, unless permitted by the heirs. It may be worth pointing out that in the same way that people are reluctant to make wills, we have no evidence that there is any widespread practice of updating them, which would require a very well-informed testator to do.

Another mosque provided another example of a form of cooperation with solicitors, though with less correspondence than the previous example. Because this mosque appears to treat succession like any other inquiries that require legal action, they would refer to any solicitor that will be eligible to handle their case, and there is no direct cooperation like the cooperation between Imam C and Solicitor E. Although this may resolve Muslims' succession inquiries, it is certainly not as practical as the previous example. In the former example, Muslims may not need to approach an Imam, because the solicitor is already in liaison with an Imam, and aware of how to proceed with drafting a *wassiyyah*.

The forms of cooperation discussed above are promising approaches, I believe, for many reasons. They reveal that there are legal services in Scotland to provide for Scottish Muslims in managing their assets. This result may not be present elsewhere, where data about these services are very limited. Legal services may promote integrating the Muslim community in Scotland with domestic law in a way that satisfies their belief in Shariah law and complies

[1225] See section 5.2.2 The Definition of Heirs above.

[1226] Chaudhry (n 973), 527; Yassari, 'Intestate Succession in Islamic Countries' (n 228), 435.

[1227] Yassari, 'Intestate Succession in Islamic Countries' (n 228), 436.

[1228] Muhammad Aljibali, *The Final Bequest: The Islamic Will & Testament* (Alkitaab & Assunnah publishing 1999), 12

with Scots law. This may be linked to British Muslims' practice of hybrid rules in a combination of domestic law and Shariah law, in which Muslims may have to both marry twice and divorce twice to satisfy English or Scots law and simultaneously adhere to Shariah law,[1229] which also includes drafting their Islamic wills within the domestic law framework.[1230] This study reveal that Scottish Muslims are also engaging with domestic law to draft their *wassiyyah.* This shows how Scottish Muslim testators attempt to apply Shariah succession to their estate, and how their commitment to Shariah encourages them to blend Shariah with Scots law to ensure that their *wassiyyah* is valid under domestic law too.

Moreover, these legal services constitute a chance to raise awareness among the Muslim community of the importance of writing a will. Also, they provide the possibility of increasing Muslims' knowledge of the applicability of *wassiyyah* within the Scots law framework, by guiding them through formal means to draft their *wassiyyah.* This is crucial because, as we have observed above, some Muslims may have misconceptions when it comes to drafting an Islamic will in Scotland.[1231] However, drafting a *wassiyyah* could be challenged under Scots succession law principles.

6.5.2 Male-Female Ratio and Legal Rights Challenge

This section will examine the severity of the impact of legal rights claims on *wassiyyah,* based on empirical interviews with Shariah experts in Scotland. As we have discussed in a previous chapter, testamentary freedom in Scotland is not as absolute as in England. Scots succession law imposes legal rights as a restriction on testamentary freedom, whereby certain heirs have the right to challenge the deceased's will for fairer treatment on the moveable estate.[1232] This section addresses the impact of the male-female ratio on legal rights claims to clarify whether this element means that Muslims in Scotland would not be able to draft a *wassiyyah* as freely as Muslims in England.

From the Imams' perspective, legal rights claims may not be a concern among Muslims who want to apply Shariah to their assets, because it is not logical that they would approach Imams and raise concerns if they were not devoted to Shariah. Therefore, their commitment to the authority of God and the logical aspect of the ratio may persuade Muslims to accept

[1229] Pearl and Menski (n 11), 77.

[1230] Abdal-Haqq, Bewley and Thomson (n 159).

[1231] See section 6.4.1 The Perception of *Wassiyyah* among Scottish Muslims above.

[1232] See section 5.3.3 Scottish Legal Rights and Testamentary Freedom above.

it, and not proceed with a legal rights challenge. The religious aspect of the male-female ratio, as discussed previously,[1233] can be justified by 'the greater economic burden of males in society and under the law, in that they have to provide for the dower (*mahr*) and maintain women financially'.[1234] This may depend on who is approaching the Imam, as if it is the testator, there is no guarantee that their children or spouse would not make a legal rights claim.

Furthermore, from the solicitors' perspective, they insisted that they have not experienced any challenge of legal rights in relation to Scottish Muslim wills. Solicitors inform their clients of legal rights challenges and advise them to inform their children of their intention to apply the Shariah division to the estate. This may help to reduce the risk of legal rights challenges. However, most of the Muslim testators are already aware of the Shariah fixed share when they decide to draft the *wassiyyah*. Based on this, we can assume that they are also aware that these fixed shares may cause a reaction from their beneficiary, particularly with a potential legal rights claim.

This may prompt Muslim testators, as solicitors observed, to liaise with their families before drafting a *wassiyyah*. It could be useful to liaise with your family regarding the arrangement of the distribution of your wealth in order to prevent any challenges or issues within the family regarding the inheritance. However, there may not be an assurance that they would take this agreement seriously, given that the circumstances of beneficiaries' lives may change from the date of agreement to the time of distribution. Another potential reason for the lack of legal rights challenge observed by solicitors is that although they might still warn against the exclusion of children, Shariah's division of the estate complies with the underlying principle of legal rights, because it does not exclude spouses or children.

This confidence from solicitors and Imams in the lack of legal rights challenges to Islamic wills may not be unexpected. Indeed, it may be in line with a previous academic suggestion that the majority of Scots law firms do not regularly encounter legal rights challenges, and only a few legal firms in Scotland have come across them, infrequently.[1235] However, this does not mean Muslims do not expect this challenge to be raised, which is why some Muslims take it into account when writing a *wassiyyah,* to avoid legal rights encounters.

[1233] See section 5.2.1 Male-Female Ratio above.

[1234] Yassari, 'Intestate Succession in Islamic Countries' (n 228), 424.

[1235] Reid, 'From the Cradle to the Grave: Politics, Families and Inheritance Law' (n 1040), 399.

Moreover, even the discharge of legal rights seems to be less effective in practice among Scottish Muslims. This element, which was covered in detail in the previous chapter,[1236] may be effective in securing the *wassiyyah* from any challenge by a legal rights claim.

It is important to address the discussion in the previous chapter regarding the consequences of choosing legal rights over a legacy,[1237] and to the question raised at the start of this chapter about the conflicts of the male-female ratio principle with legal rights claim. Prior to conducting interviews, I took the view that a legal rights challenge would most likely be raised by female heirs because of the ratio principle. However, no evidence emerged from the interviews indicating that this was the case. All the observed reasons above might be a reason for the lack of challenge of legal rights. What could also be a reason is that although opting for legal rights would guarantee an equal share among the children in half or a third of the estate, it only applies to the moveable estate in Scots law, and they would be deprived of their share in the immoveable property. It is likely that the immoveable property is the most valuable part of the estate in most cases, which means the daughters would benefit less from legal rights than they would by accepting their Shariah shares. However, while this is the position of the ratio principle in the testate estate, the ratio principle with intestacy law will be discussed in the following chapter.[1238]

Based on what we have observed and examined, there may not be a definite answer to determine whether a *wassiyyah* may proceed without a challenge. It may also be true to say that the likelihood of a *wassiyyah* challenge within Scots law is minimal. My conclusion on this issue is that legal rights claims may not be a pressing concern with drafting a *wassiyyah,* as I had previously suggested from a theoretical perspective. Based on the empirical interviews, I am now of the view that *wassiyyah* can be effective within Scots law, and that legal rights claims are highly unlikely. Therefore, the male-female ratio appeared not to be a pressing concern among Muslim females to receive an equal share to males. Whether it is the religious commitment or the logical element of the financial burden on the male that persuades women, as Imams may think, or the liaison within the family, as solicitors suggested, the empirical interviews indicated a lack of difficulty based on the ratio principle among Scottish Muslims.

[1236] See section 5.3.4 Legal Rights Conflict with *Wassiyyah* above.

[1237] See section 5.3.4 Legal Rights Conflict with *Wassiyyah* above.

[1238] See section A) Female Shares of Assets Between Testate and Intestacy Law in 7.2.1 below.

However, I would argue that the real concern is not related to whether the *wassiyyah* can go without a challenge, because practice may suggest that legal rights might not be a pressing concern when drafting a will. Rather, the more pressing concern in drafting a *wassiyyah* might be the factors that may deter Muslims from drafting a *wassiyyah* in the first place. The type of assets that a testator may leave has proven to play a greater role in deciding whether or not to write a *wassiyyah*, whereby some Muslims might think of alternative means of distributing their estate. This involves opting for a normal Scottish will instead of following Shariah forced heirship rules, because forced heirship rules may not be as helpful in certain cases as much as Scots law would be. Indeed, these results may indicate some practice of succession among Muslims, although they are not representative of all Muslims in Scotland, or in the UK. These aspects will be further discussed in the next chapter, examining alternative means for Muslims in dealing with succession besides drafting a *wassiyyah* within the Scottish will framework covered in this chapter.

6.6 Conclusion

The empirical work discussed above throws light on the position of Shariah succession practice among some Scottish Muslims who have an interest in applying Shariah succession to their assets by conducting interviews with expert figures in Scotland who tend to handle Muslim estates. What the interviews indicate regarding the perception of an Islamic will in Scotland may not be an unpredicted outcome, because wills may be unpopular across all communities. However, the study reveals that there might be a rise in awareness among Muslims over the importance of a will. This could be due to the efforts in increasing awareness by Imams and solicitors, but also might be an impact of COVID-19, which has made people think more about their own mortality. Moreover, Scottish Muslim commitment to Shariah law may be a key motivation in writing Islamic wills.

Implementing Shariah inheritance rules in a Scottish will may create an unforeseen outcome that has not been identified elsewhere in the literature. It shows how some of these potential encounters may not be in complete conflict in actual practice, as they may initially seem in theory. All the interviewees seem more confident of the feasibility of creating an Islamic will in line with Scots law, despite the potential disruption of legal rights. In fact, legal rights seem to be less obstructive to the will. The fact that children and spouses cannot be disinherited in an Islamic will may give the will a strong position against a legal rights claim. This would mean the male-female ratio may not be an issue in a Scottish Muslim estate. Commitment to Shariah and the religious aspect of the financial burden on males or liaison

with family, all these observed reasons may account for the lack of difficulty encountered by the ratio principle. It seems that *wassiyyah* could be applied to the Scottish will framework, despite the limitation on testamentary freedom.

In addition, this study indicates that Shariah inheritance division in a Scottish will may include a destination-over, despite the contradiction with Shariah inheritance. This practice could be influenced by Pakistani law. It could also be a necessary adjustment that Muslims living in non-Muslim countries like Scotland, for instance, had to adapt to this element to meet their interests. This will be explored further in the following chapter.[1239]

Furthermore, this study indicates that there are legal services for Scottish Muslims, although they may be very limited. Imams and solicitors could each have a different position in this, though integrated into a collective role. We have seen some examples of cooperation between an Imam and a solicitor to help Scottish Muslims draft their wills under Shariah rules. However, another version of this is what solicitor B offers, where she would deal with both Shariah and Scottish law in order to draft an Islamic will. It could also be a case of the Imam providing information about Shariah inheritance and leaving the inquirer to decide how to proceed with it. These approaches seem to guide Muslims in a just direction to comply with Shariah law and domestic law. Scottish Muslims, and perhaps all Muslims in the UK, may need this type of assistance so that their concerns about Shariah succession could, to a large extent, be implemented within domestic law. Moreover, none of the participants I interviewed have experienced any challenges to the will either throughout the processes or after the execution of the will.

The empirical interviews also suggest that not all Muslims in Scotland are following Shariah, resulting in a situation where some Muslims may opt for other methods when it comes to administrating succession. Intestate succession may be significantly more popular than testate succession among Scottish Muslims. The interviews also suggest that Muslims do approach Shariah councils' imams in Scotland to inquire about succession. The next chapter will be dedicated to examining what Scottish Muslims practice as alternatives to drafting a *wassiyyah*, and why they chose these practices over *wassiyyah*. It will also examine access to Shariah councils, to assess Shariah councils' involvement in succession distribution and

[1239] See section 7.3.1 The Involvement of Necessity, (*Darura)* below.

disputes. It will additionally assess the different roles of Imams as part of Shariah councils, and as individual Imams who respond to day-to-day Muslim inquiries.

Chapter 7 Other Options for Succession Practices of Scottish Muslims

7.1 Introduction

As we have seen in the previous chapter, Shariah inheritance rules within a Scottish will could be accommodated despite possible conflicts with legal rights. However, this practice may not be the only practice that Scottish Muslims could adopt to arrange their estate. Having illustrated the position of *wassiyyah* within the Scottish will framework in the previous chapters, this chapter uses information suggested in the interviews undertaken to assess alternative means by which some Muslim families may practice succession in accordance with their wishes. The empirical interviews with experts contain some suggestions that might persuade Muslims to avoid drafting a *wassiyyah* to protect their interests, which might also be impacted by the male-female ratio. Muslims living in non-Muslim countries may have to adjust certain practices of Shariah to maintain those interests.

The first section discusses what this study reveals as possible alternative practices for succession among Scottish Muslims. The second section explains the recognition of Shariah succession law in PIL, and discusses whether there is a way to accommodate Shariah succession rules. As revealed in the previous chapter, there might be a misconception among Scottish Muslims related to domicile, therefore it might be interesting to explore the potential application of Shariah succession through PIL as an alternative method. The last section assesses the practices of Shariah succession in Scotland from the perspective of Shariah law, and whether these practices conflict with Western principles of human rights.

7.2 Alternatives to Islamic Wills

Some Muslims may not be as devoted to Shariah law as others and could be flexible toward some elements of Shariah succession. Other Muslims may want to follow Shariah, but may be in a situation, for instance, where they must adopt an alternative approach to Shariah fixed heirship rules in order to protect their children's interests. Solicitor B observed that Muslims sometimes strictly follow Shariah in relation to their wills, but sometimes vary it if they disagree with family members about a certain division of the estate, for instance one that does not comply with the forced heirship rules. Solicitor B would advise clients that this is not an Islamic will should the client wish to proceed with it. Investigating these aspects may indicate the alternatives to *wassiyyah* as aspects of Muslims' practice of succession in Scotland, and the reason for their adoption. The first part of this section focuses on the impact of asset types that have emerged from the empirical interviews and the way in which this influences how Muslims draft their wills to ensure their interests are met.

7.2.1 Scottish Wills

I should mention at the beginning, as discussed above,[1240] legal heirs in Shariah include parents as indispensable legal heirs, unlike Scottish intestacy law where legal heirs are the spouse and children, i.e. nuclear family. The term 'family' in this section will be used to mean the nuclear family, where the testator's concerns are only about their spouse and children.

The type of assets that a person leaves, and the possible ways of dividing them, may play a significant role in the abandonment of Shariah forced heirship rules among Scottish Muslims. That was observed by solicitor B, who noted that some clients do not proceed with *wassiyyah* because Shariah inheritance rules may not help with the assets they may leave.[1241] The typical example in general succession law might be if someone's most valuable asset is their home, and the best interests of his family are served by protecting this property from being distributed among the heirs. She observed, in a case of a deceased who left a house to their spouse and three children, that they decided that everything should pass to the spouse and then to the children, contrary to Shariah rules. The fact that they are Muslims does not mean that they may strictly follow Shariah rules if the forced heirship rules contradict their preferred distribution of assets. Therefore, abandoning Shariah inheritance might be because the testator believes, particularly with a small estate, that his family will be better off with passing everything to the living spouse, instead of dividing the assets among the heirs in accordance with Shariah rules which would result, in theory, in selling the property.

This approach, which is popular among Scottish people, is a discharge of legitim.[1242] This can be contradicted if the children disagree and go onto claim their rights, which cannot be waived. Regarding whether this action may contradict with Shariah law rules, clearly, it will depend on the heirs agreeing to share some of the deceased's assets. However, to take solicitor B's example where the deceased left a house to a husband and three children, it may be true that the only way to distribute the house amongst the heirs, if it is not possible to divide it, is to sell it. However, the approach of leaving everything to the husband or the wife may still be applied in a Muslim country, where the surviving spouse could be a guardian of

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[1240] See section 5.2.2 The Definition of Heirs above.

[1241] The empirical data discussed in this section are reported in section 6.3.3 Alternatives to Islamic Wills above.

[1242] George L Gretton and Andrew J M Steven (n 967), [27.11]; Reid, 'Legal Rights in Scotland' (n 1092), 433.

the children and their inheritance, at least until the children reach the age of puberty. However, the approach of leaving everything to the spouse might be only adopted by Muslims living in non-Muslim countries like Scotland. Having said that, they might have done so to protect their interest or their children's welfare, which is an act that could be endorsed by Shariah, as discussed further below.[1243]

A) Female Shares of Assets Between Testate and Intestacy Law

However, the beneficiaries may also wish to abandon Shariah rules, particularly with a large estate, where the male-female ratio may not satisfy prospective female heirs. That would mean abandoning Shariah rules, because women's inheritance rights are greater under English/Scots intestacy law than under Shariah forced heirship rules.[1244] In England, Badawi has provided evidence of cooperation between solicitors and Imams to draft Islamic wills, and this experience suggests that Muslim women might prefer the English law of intestacy over Shariah succession law:[1245]

> At the time we negotiated with a lawyer who agreed to do this for the sum of £7 and we agreed that we would pay for the first 100 applicants to encourage Muslims to come forward. Only seventeen did so and at the time I received a delegation of Muslim women who said, 'We don't want it, because it militates against our interests. We are better off under English intestacy law.

This is a fact which could also apply to Muslim women in Scotland, where their shares under Scots intestacy law could be higher than a Shariah inheritance. The male-female ratio question raised above[1246] might be an issue with Scottish Muslims, though the evidence presented in this study did not identify a single issue related to it. The smaller population of Scottish Muslims compared to English Muslims and the limited number of interviews conducted make it difficult to extrapolate such issues. However, based on the observation that some Muslims enquire about Shariah succession and then pull out because it contradicts their interests, we could speculate that the ratio issue might arise among Scottish Muslims particularly with a larger estate. Scottish Muslim women could also be better off under Scottish intestacy law.[1247] Some spouses might be reluctant to give up prior and legal rights

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[1243] See section 7.3.1 The Involvement of Necessity, (*Darura)* below.

[1244] Maria Reiss, 'The Materialization of Legal Pluralism in Britain: Why Shari'a Council Decisions Should Be Non-Binding Note' (2009) 26 Arizona Journal of International and Comparative Law 739, 747.

[1245] Badawi (n 980), 79, 80.

[1246] See section 6.5.2 Male-Female Ratio and Legal Rights Challenge above.

[1247] See section 5.3.1 Scots Intestate Succession above.

in intestacy for Shariah's forced heirship rules. However, the situation could not be the same if there is a will, where Muslim females might not always be better off with legal rights in a testate estate as they would be with intestacy law, particularly if the most valuable part of the estate are the immoveable assets, as discussed above.[1248]

Moreover, Muslim females may feel that they are being side-lined by their brothers' greed. For example, this occurred in the English case of *Ghafoor v Cliff,*[1249] where the deceased left a will in England, appointing his four children, three sons and a daughter, as executors, then had a dispute over the arrangement of the 'sizeable estate with assets in England and Wales, Jersey and Pakistan'. The daughter felt that her brothers 'were taking steps to exclude her from her share of the assets under the will' because they sought a succession certificate from a Pakistani court, without raising the fact that the deceased had left a will. In such a situation, Pakistani law will apply the Shariah fixed inheritance. This case shows why some British Muslim females may oppose Shariah forced heirship, due to the reduced shares they may receive, particularly with a large estate.

B) The Impact of The Size of The Estate

It may also be true that having insignificant assets would imperil a smooth division amongst the heirs. This might be indicated when Imam C reflected on his experience of writing his own will. He seemed confident that he did not have an issue arranging for his assets because he did not have significant assets or 'huge investments'. Therefore, his children may not have disputes about who should get what, due to the limited assets their parents may leave. Moreover, the male-female ratio may be less likely to be triggered here, as a result of the arrangement between the family. Returning to our discussion about liaison with the family and how it may contribute to avoiding a legal rights challenge,[1250] it seems that this arrangement might be easier with an insignificant estate than with a large estate.

The type of assets seems to be a significant element in deciding between following Shariah rules or Scots law. I think that the assets type that a testator may leave may be a substantial reason for the unpopularity of *wassiyyah*. Some Scottish Muslim testators might find it unnecessary to draft a *wassiyyah* because they have few assets, and it may not benefit their spouses and children if they were distributed according to Shariah succession rules.

[1248] See section 6.5.2 Male-Female Ratio and Legal Rights Challenge above.

[1249] *Ghafoor v Cliff* [2006] EWHC 825 Ch.

[1250] See section 6.5.2 Male-Female Ratio and Legal Rights Challenge above.

Similarly, the presence of significant assets may also deter Muslims from drafting a *wassiyyah* because, for instance, females may not be in favour of the male-female ratio with a substantial estate. Moreover, this element could also be more threatening to *wassiyyah* than the possibility of a legal rights claim. To elaborate, a legal rights claim is dependent on the beneficiaries, if they were left out of the will. As we have observed above,[1251] legal rights claims might be less likely to interfere with Shariah forced heirship because it does not disinherit spouses and children. Also, they can be avoided by reaching agreement with family members before drafting the *wassiyyah*, which seems to be effective. However, the assets type may concern most of the Scottish Muslims giving that significant Scottish Muslims do own a property[1252] and it could be the only viable assets they may leave.

7.2.2 Deed of Variation and Shariah Succession

For many years it has been possible for beneficiaries to enter into an agreement that alters the distribution of the deceased regardless of the existence of a will.[1253] Their validity was recognised in statuary in the Inheritance Tax Act 1984, which has force across all UK legal systems.[1254] This change is known as a Deed of Variation, or a Deed of Family Arrangement, or as the Capital Taxes Office calls it instruments of variation.[1255] These descriptions could be 'slightly misleading' because 'the facility to enter into a deed of variation' is not limited to the testate estate, where 'a deed of variation can also be entered into in relation to an intestate estate'.[1256] Certain conditions must be met to make this document legally binding: it must be made in writing within two years of the deceased's death; and it also needs the consent of all beneficiaries involved to adjust their shares.[1257]

This is an intriguing approach, which was suggested by both interviewed solicitors as a method for Muslims to apply Shariah rules.[1258] However, taking a step back, the deed of

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[1251] See section 6.5.2 Male-Female Ratio and Legal Rights Challenge above.

[1252] Elshayyal (n 9), 38. See section 7.2.4 Potential Application of Shariah Succession Through Conflict of Laws Rules below.

[1253] *Gray v Gray's Trustees* [1877] 4 R 378; Kerrigan (n 1121), 238.

[1254] Inheritance Tax Act 1984, s.142; See also: Taxation of Chargeable Gains Act 1992 s.62(6).

[1255] Kerrigan (n 1121), 238; Inheritance Tax Act 1984, s.142.

[1256] Kerrigan (n 1121), 239.

[1257] Inheritance Tax Act 1984, s.142.

[1258] The empirical data discussed in this section are reported in section 6.3.3 Alternatives to Islamic Wills above.

variation is discussed in the literature as a way of arranging the deceased's estate.[1259] Kerrigan notes many purposes where the deed of variation can be useful.[1260] Although the 'principal justification' and 'the most common usage' of a deed of variation is inheritance tax mitigation, it could be useful if the wills are not up to date, or 'to direct a greater share of the deceased's estate to more needy beneficiaries'.[1261] In other words, the purpose of this agreement is to 'allow adult beneficiaries under a will or intestacy to agree to rearrange their inheritance' to 'save inheritance tax or to achieve a more suitable distribution of the inheritance'.[1262]

Furthermore, although the 1984 Act did not address whether foreign assets could be included in this variation, 'there appears to be no reason why a variation cannot apply to assets outside the UK'.[1263] This is because the 1984 Act 'makes it clear that the section applies to excluded property, the most common type of which is foreign property owned by a non-UK domiciliary'.[1264] Although this document could resolve some complications about assets located outwith the UK,[1265] there may be added complications caused by the deed of variation. For instance, if the variation is not recognised by a foreign system with different distribution rules, and a claim is made under that system by someone not entitled to benefit under Scots succession law. Parents, for example, are not entitled under Scots succession law to inherit if children and spouse survived the deceased, as they would under a foreign state applying Shariah law.

However, Barr has suggested that Muslim beneficiaries can 'come to an informal arrangement, once the bequests and shares are known, and a deed of variation could be entered into'.[1266] This option could be used for a testate estate, if, for instance, a beneficiary

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[1259] Barr (n 1106); Kerrigan (n 1121); Lucy Warwick-Ching, 'Should I Use a Deed of Variation to Direct Assets to My Children?' [2015] FT.com <https://www.ft.com/content/73c4f8d4-f7c6-11e4-9beb-00144feab7de> accessed 15 June 2021; 'Can a Deed of Variation Apply to European Assets?' (*LexisNexis*) <https://www.lexisnexis.com/uk/lexispsl/willsandprobate/document/410976/8TXD-MH92-D6MY-P4T5-00000-00?utm_source=psl_da_mkt&utm_medium=referral&utm_campaign=can-a-deed-of-variation-apply-to-european-assets?> accessed 15 June 2021.

[1260] Kerrigan (n 1121), 239.

[1261] *Gray v Gray's Trustees* (n 1254); Kerrigan (n 1121), 239.

[1262] Warwick-Ching (n 1260).

[1263] 'Can a Deed of Variation Apply to European Assets?' (n 1260).

[1264] Inheritance Tax Act 1984, s.142(5); 'Can a Deed of Variation Apply to European Assets?' (n 1260).

[1265] Kerrigan (n 1121), 238-247; Barr (n 1106), 456.

[1266] Barr (n 1106), 456.

of a Muslim will adopts legal rights over the legacy, but the remaining heirs accepted the legacy, then a deed of variation might be helpful to amend the effect of the will and allow the beneficiaries to enter into an arrangement that best suits everyone's interests. It could also be effective for Muslims who wish the distribution of an intestate estate to be in line with Shariah inheritance rules instead of Scots law.

Moreover, both Solicitors B and E viewed the deed of variation as a useful mechanism for Scottish Muslims, particularly on an intestate estate arrangement. A deed of variation could also resolve conflicts between Scots and Shariah intestacy laws. This will not only alter the allocated share to be in line with Shariah inheritance rules, but will also affect the legal heirs. As I identified in chapter 5,[1267] Scots intestate succession prioritises the spouse and children before the parents. Such a rule means that parents would not be heirs if children or a spouse survives them, whereas Shariah intestate succession treats them equally, with the spouse and the children as indispensable legal heirs. The deed of variation would guarantee this adjustment to include the parents in the list of the heirs.

However, in terms of the likelihood of applying the deed of variation in the succession context, all beneficiaries must agree for the deed of variation to take effect. This might be an issue for some Muslims as suggested by solicitor E, that some Muslim females may not be willing to accept the male-female ratio over equal shares in Scots intestacy law. Nevertheless, the solicitors declared that they offer this agreement to their clients and observed that the deed of variation happens normally among Muslim heirs. Therefore, it could be concluded that the deed of variation could be effective, theoretically and practically, for Scottish Muslims to apply Shariah rules if the conditions identified above are met.

7.2.3 Intestacy Law and Informal Distribution

This section discusses intestate succession among Scottish Muslims. In chapter 6,[1268] we partially discussed testate succession in revealing the cooperation between Imams and solicitors to draft a *wassiyyah* that meets Shariah and Scots law standards. This section, however, expands the discussion of the role of Imams to involve intestate succession. The first part reveals how Imams may respond to intestate succession inquiries individually, because they are experts in Shariah law, and normally get approached by Muslims for general Shariah law enquiries, not because they are part of Shariah councils. The second part

[1267] See section 5.3.1 Scots Intestate Succession above.

[1268] See section 6.5.1 Cooperation between Mosques and Law Firms to Draft a *Wassiyyah* above.

examines the limited involvement of Shariah Councils in intestate succession inquiries to assess any conflicts with Scots intestacy law.

A) Scottish Imams' Involvement in Intestate Succession

As we observed earlier, as making a will is not a common practice, a significant number of Muslims die intestate. Imams revealed that inquiries related to intestate are significant among Scottish Muslims.[1269] Resolving such inquiries, from Imams' perspectives, does not go beyond stating the figures or the fractions that each heir will get under Shariah law. This seems comparable to their response to inquiries about drafting a *wassiyyah*, discussed above.[1270] The only difference for Imams might be to ensure whether the testator bequeathed one-third of the estate which means the forced heirship rules applied to the remaining two-thirds. However, this question might also be raised in an intestate estate, whether the heirs would leave up to one-third of the estate to the charity or to non-heirs' relatives as goodwill on behalf of the deceased. Therefore, the Imams' process of answering inquiries about succession might not differ between testate and intestate estates.

For the inquirer, the significant difference would be that the testator would seek legal advice to include the divisions in his will, whereas in intestacy law they might do the distribution on their own. This was indicated by Imam D and observed by solicitors B and E above. This means Scottish Muslims would either seek the Imams' advice on how to distribute their assets in accordance with Shariah, or they might find out on their own by searching online, for instance. This is a significant finding that highlights the fact that Imams are regularly telling people how to distribute an intestate estate, according to Shariah's forced heirship rules. This will be directly in conflict with the rules of intestate succession in Scotland, where the vast majority of the intestate estate will go to the spouse.[1271] The male-female ratio is also in conflict with equal shares among the siblings in Scots intestacy law. Female heirs might prefer to receive an equal share rather than half a share to their male siblings in the male-female ratio. Given that almost two-thirds of Scottish people die without a will,[1272] if we can assume the same proportion for the Muslim population, then we may say that the

[1269] The empirical data discussed in this section are reported in section 6.3.3 Alternatives to Islamic Wills above.

[1270] See section 6.5.1 Cooperation between Mosques and Law Firms to Draft a *Wassiyyah* above.

[1271] See section 5.3.1 Scots Intestate Succession above.

[1272] Scottish Consumer Council (n 46).

majority of Muslims do not leave a will, which increases the possibilities of dividing the intestate estate according to Shariah.

Moreover, it was suggested by solicitors that the confirmation might be associated with the lack of interaction with legal services in an intestate estate discussed above. While that might be true for a small estate where there may not be a need for confirmation if the estate value does not exceed £5,000,[1273] Imam D reflects on the impact of inheritance tax on a large property, where families may not have a choice in distributing the estate internally. This could indeed be an obstacle against informal distributions of an intestate estate. Although it might be unfair to assume that all Muslims would follow Shariah in an intestate estate, both Imams and solicitors indicated that it may be likely that a considerable number of Muslims would follow Shariah intestacy law over Scots intestacy law. The motivation could be linked back to the commitment to Shariah law discussed above.[1274]

The outcome of the interviews suggests that Imams get involved in Shariah succession inquiries whether they are related to drafting a *wassiyyah* or intestate succession. The former, as established in the previous chapter, may take place within the Scottish will framework. The latter, however, may constitute some conflict with Scots intestacy law. Although this could be formalised through a deed of variation, as discussed above, I think the Imams' justification for providing this information is a matter of religious duty to tell Muslim inquirers how Shariah succession works. They maintain that they do not force Muslims to distribute their assets accordingly, nor do they get involved in their actual distribution. This represents a way for Muslims to deal with their estates without involving Scots law. However, it may be difficult for Muslim families to avoid formal distribution for the purpose of confirmation or inheritance taxes, as we have seen from the examples above.

B) Shariah Councils Involvement in Intestate Succession

Shariah councils in the UK provide a prominent approach, sometimes alternative to domestic laws, for Muslims to apply Shariah family law. Shariah council disputes primarily concern Muslim women who desire to obtain a divorce, with the striking outcome that over 90% of councils' work involves such cases.[1275] However, these councils decisions have no legal

[1273] Interview with Solicitor E (n 1211); see also: https://www.scotcourts.gov.uk/taking-action/dealing-with-a-deceased's-estate-in-scotland.

[1274] See section 6.4.2 Motivations for Shariah Succession above.

[1275] 'The Independent Review into the Application of Sharia Law in England and Wales' (n 172), 5; Ali (n 11), 130; Uddin (n 174), 123.

authority in the eyes of English law, with the result that English domestic law will prevail.[1276] Although there is a lack of evidence of English Shariah councils' involvement in administrating succession under Shariah inheritance law, empirical interviews held in Scotland suggest that Scottish Shariah councils may get moderately involved in succession if they receive inquiries as to the distribution of the estate. Shariah council is a significant element of Shariah family law application in the UK. However, due to the limited involvement of these councils in succession, the discussion will be reduced to focus on their relevance within the research scope.

An interview with Imam D suggested that Muslims tend to approach Imams for inquiries related to one of two issues. They might have inquiries about (*ibadat),* which are acts of ritual worship including praying and fasting, etc. They also may raise questions related to (*muamalat),* which involves personal transactions, such as sales and sureties, and family law, such as marriage, divorce, inheritance, etc.[1277] Imams appear to have no issue in dealing with inquiries about *ibadat* 'single-handedly', as an individual Imam.

With that being said, this process is not a unique method of dealing with Muslim issues. To elaborate, these two categories, *ibadat* and *muamalat,* mark the classical pillars of Shariah law jurisprudence (*Fiqh*).[1278] This situation is consistent in all Muslim communities across the world, including Shariah councils in England.[1279] The *ibadat* branch is the relation between Muslims and God in performing worship, and does not involve another person. Inquires related to it would be left to a religious scholar to explain the matters by issuing a *fatwa*[1280] based on the inquiry, whereas *muamalat* disputes would normally require legal proceedings in Muslim countries. Therefore, the requirement for a collective decision on these matters may comply with Shariah's requirements. These requirements cannot be formally met in Scotland because there is no recognition of Shariah in Scottish courts. That

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[1276] 'The Independent Review into the Application of Sharia Law in England and Wales' (n 172), 10.

[1277] Kuwait Ministry of Awqaf and Islamic Affairs, *Encyclopaedia of Islamic Jurisprudence (Arabic)* (Kuwait Ministry of Awqaf and Islamic Affairs, 1983) vol 1/45, 48; Wahbah Al-Zuhaili, *Al-Fiqh Al-Islâmî Wa Adillatuhu (Al-Ahwâl Al-Syakhshiyyah) (Arabic)* (4th edn, Dar Al-Fiker 2007) vol 1/10, 231.

[1278] *Encyclopaedia of Islamic Jurisprudence (Arabic)* (n 1278) vol 1/45, 48; Al-Zuhaili (n 1278) vol 1/10, 231.

[1279] Bowen, *On British Islam: Religion, Law, and Everyday Practice in Shariʿa Councils* (n 127), 56.

[1280] *Fatwa* is a ruling or interpretation on a point of Islamic law given by a scholar who is a qualified expert in Shariah law.

could justify the fact that these decisions are made by what might be considered as an alternative to an "Islamic court" here in Scotland and across the UK, a Shariah council.

Although these Imams represent Shariah councils, they insisted that Shariah councils in Scotland do not get involved in succession inquiries. This is consistent with what the literature suggests that the question of Shariah succession has always been rejected by English Shariah councils as being one of their promoted services.[1281] It could be because their decisions on assets arrangement could be challenged by the court once one of the parties raise a claim, unlike granting a *talaq*.[1282] Scottish Shariah council may treat succession normally in the same way as *ibadat* inquiries, as demonstrated by Imam D, to be dealt with by an individual Imam who might consult a senior Imam on the matter. There may be little chance here to examine whether Shariah councils or their representatives would deal with the entire asset distribution. The next section examines whether private international law would provide plausible access for Scottish Muslims to have Shariah succession law govern their estate directly.

7.2.4 Potential Application of Shariah Succession Through Conflict of Laws Rules

This section assesses the possible implementation of Shariah succession within PIL succession rules in England and Scotland. This section aims to elaborate on the extent by which PIL rules be applicable to Scottish Muslims from Muslim countries in administrating their assets in accordance with their domicile of origin, and assess whether PIL could be used as an alternative for Muslims to arrange for succession. As explained above, the English and Scottish choice of law rules in succession refer to the domiciliary law for moveable property, but for immoveables it refers to the law wherever this property is located.[1283] That means Shariah succession rules may govern the distribution of the deceased's estate via PIL rules if (a) the deceased dies domiciled in a state that is governed by Shariah law or (b) leaves immoveable property in that state.

It is true that English and Scottish courts would apply their rules of succession if a deceased Muslim had died domiciled in England or Scotland. In a Muslim case of *Holliday v Musa,*[1284]

[1281] Bowen, *Blaming Islam* (n 62), 82; 'The Independent Review into the Application of Sharia Law in England and Wales' (n 172), 13.

[1282] Bowen, *Blaming Islam* (n 62), 82.

[1283] Wills Act 1963 s.1, s.2(1)(c); Briggs (n 662), 788; Crawford and Carruthers (n 652), 689.

[1284] *Holliday v Musa* [2010] EWCA Civ 335.

the deceased's second wife applied for financial provision under the Inheritance (Provision for Family and Dependants) Act 1975 s.2. which was opposed by his late wife's children. The Court of Appeal upheld the granting to a wife of financial provision under the 1975 Act because her husband, who had died in Cyprus and was brought to England for burial, established a clear domicile of choice in England.[1285] He also continued to live in England after the death of his first wife, remarried and had a son, which also indicated his intention to end his days in England.[1286]

Furthermore, regardless of the deceased's domicile, English and Scottish courts would apply Shariah inheritance rules if there was an immoveable property in a Shariah law state and English or Scottish courts were to take jurisdiction. In these cases where English or Scottish courts apply foreign law, such as Shariah law, the court will not object to any of the rulings of the foreign law. The quote of *Re Maldonado*[1287] demonstrated the full recognition of foreign law in succession cases:[1288]

> '… in accepting the foreign State's law of succession, English law recognizes the foreign State as being the arbiter of what the succession is to be. The foreign State could, for instance, enact that older relatives should be preferred to younger, or that male relatives should be preferred to female, or vice versa, or even that fair-haired relatives should be preferred to dark-haired; and to such distinctions, unreasonable as they might seem, English law would, as I understand the matter, have no objection.'

However, 'the only matter … which remains for consideration is whether or not there is anything either contrary to public policy or so repugnant to English law'.[1289] In such a case, public policy will 'prevent such a right acquired under a law of a foreign country from being enforced in the English courts'.[1290] Male-female ratios may not be a concern here, since the court unambiguously declared that it does not take issue with any prejudiced perveance,[1291] and there is no reason to link it with public policy concerns. However, this is a pre-Human Rights Act case, and it would be fair to say that there might be some circumstances in which the court would intervene. Poulter also argues that 'English law is sometimes unwilling to

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[1285] *Holliday v. Musa* (n 1285) [20, 74].

[1286] *Holliday v. Musa* (n 1285) [20, 74].

[1287] *Re Maldonado* [1954] P 223 CA, 248.

[1288] *Re Maldonado* (n 1288), 248.

[1289] *Re Maldonado* (n 1288), 231, 32.

[1290] *Re Maldonado* (n 1288), 231, 32.

[1291] *Re Maldonado* (n 1288), 248.

recognise and enforce rules of a foreign legal system which are felt to be discriminatory'.[1292] There is a lack of cases of Shariah succession, which makes it difficult to assess whether the court is willing to intervene in discriminatory practice, particularly after the enactment of the Human Rights Act 1998.

It is also true to say that English and Scottish courts would apply the rules of Shariah succession law to the deceased's estate if the court established that the deceased was domiciled in a country where Shariah law governs the inheritance. This issue has arisen in the English case of *Al-Bassam v Al-Bassam,*[1293] where the deceased's half-brother challenged the validity of the will that had been allegedly drafted by his Saudi brother, leaving the whole estate to his non-Muslim English wife. The question of domicile of the testator at the time of his death was an obstacle to the court in deciding on the material validity of the will.[1294] Although the applicant withdrew her application, the court stated that if the testator had died domiciled in Saudi Arabia, then the English court itself would apply Shariah law provision to the validity of the will, and there would be no need to seek a judgment from the Saudi courts.[1295] This would mean that the English court will apply Shariah rules with regard to the restriction of the wife's share in the will to one-third of the estate, and the remaining two-thirds to his brother as the sole heir, under Shariah's forced heirship rules. The wife would not be entitled to her share in the forced heirship because of different in religion but only entitled to legacy in a will up to one-third.[1296] This might mean definite access to Shariah law in English and Scottish courts.

However, in case of the deceased's domicile being England, then English law would govern the material validity of the will, which means the claimant would be entitled to the world-wide movable estate, even though the defendant would still be able to obtain a Saudi judgment regarding moveable property located in its jurisdiction. However, the deceased's brother was restrained by an anti-suit injunction, preventing him from proceeding as he had commenced in a Saudi Court to establish his right as the sole heir to the deceased, at least until the question of the domicile had been determined. If he had sought a Saudi court judgment, then the English court would have been 'faced with the fact that a foreign Court

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[1292] Poulter, *Asian Traditions and English Law* (n 18), 75.

[1293] *Al-Bassam v. Al-Bassam* (n 124).

[1294] *Al-Bassam v. Al-Bassam* (n 124) [23].

[1295] *Al-Bassam v. Al-Bassam* (n 124) [33, 11].

[1296] See section 5.2.2 The Definition of Heirs above.

had decreed a different result in relation to movables within its jurisdiction'.[1297] The effect of this, as discussed above, is that an English court 'would recognise that judgment in working out the consequences of its own ruling'.[1298] However, an English court 'will still apply its choice of law rules until it faced with the foreign Court Judgment'.[1299] This case, which concerns a Muslim living in the UK with assets lying in the UK and in Saudi Arabia, may show how it might affect Shariah inheritance rules applied in an English or Scottish court.

With all these rules and circumstances illustrated,[1300] would it be possible for a Scottish Muslim, who wanted to prove that their deceased parent (of dual residence/nationality) did not acquire their domicile of choice in Scotland, despite the fact they had died in Scotland, in order to apply Shariah succession to the deceased's estate? Although it would be plausible to argue for this, as we have seen, whether this could be established is not a clear-cut case. There is a long list of factors that might be considered, and the court would assess every case based on its own facts. Even the religious aspects, which are very relevant to this research focus, have seemed to be decisive in certain cases and disregarded in other cases. However, it would also be far from true to say that there are no chances of applying Shariah succession rules to Scottish Muslims' estates. I think that the chances of indirect application of Shariah succession through PIL might be minimal, though not entirely impossible.

What we can learn from the above case law is that, in *Musa*, the court assessed the deceased's life, which was divided between England and Cyprus, and relied on a number of indications, including the building of a mausoleum and starting a new family in England, to outweigh his declaration to retire in Cyprus. His declaration seemed to the court to be a 'vague intuition' that had disappeared by the time of his death. On the other hand, the court decision in *Qureshi* shows that their place of residence might not be relevant if the court were convinced of the subject's intentions, based on the circumstances of his life.[1301] Although I believe that this is a very delicate situation, because all these factors will be fact-sensitive issues and the chances of persuading the court are unpredictable, PIL rules may, within

[1297] *Al-Bassam v. Al-Bassam* (n 124) [26], although judgments granted in violation of an anti-suit injunction tend not to be enforced here as a matter of public policy, see; *Philip Alexander Securities & Futures Ltd v Bamberger* [1996] 7 WLUK 237.

[1298] *Al-Bassam v. Al-Bassam* (n 124) [26].

[1299] *Al-Bassam v. Al-Bassam* (n 124) [26].

[1300] This fall from the discussion at section 4.2.2 Domicile of Choice above.

[1301] *Qureshi v Qureshi* (n 124), 193.

limits, provide access for Shariah succession law, equal to any foreign law, to be applied in English and Scottish courts.

For direct application, perhaps expressing wishes in a will that one's succession be governed by the law of their home state instead of Scots law might be a strong factor in demonstrating that no Scottish domicile had been acquired. *Re Khan's Settlement*,[1302] might be helpful to consider here, showing the force that the testator's wishes have been given. In this case, a testator created a protective trust for himself during his life, so that, after his death, the trustees should hold the trust fund to be distributed to legal heirs that he appointed in a will in accordance with Shariah law. In this will, he bequeathed a number of legacies to some of the legal heirs that exceeded the amount of his free estate. The Court held that the estate was one mass, conceding that the testator intended to count his settled fund and his free estate as one fund. Therefore, since the testator made wishes that his domiciliary law – Shariah law – should govern his estate, the English court held that the legatees could not receive the legacies without the consent of the remaining legal heirs. This decision was made within the rules of Shariah because he bequeathed certain assets to certain legal heirs, an action that cannot be procced in Shariah succession without the consent of the remaining heirs.

The situation discussed above might occur when a Muslim dies intestate in the UK, and 'sufficient evidence establishes that the deceased wished for such a distribution'.[1303] Thompson believes that in such a case, 'civil judicial bodies should consider the devolution of estates according to Islamic law'.[1304] Though, this might be treated exactly the same as a declaration of domicile. However, as we learned from the discussion above, it might be difficult to assume that such a factor will be a determining factor to the courts, because they regard it holistically, and subjective factors might be outweighed by other factors. What might be helpful to learn from *Re Khan's Settlement* is that if a person made such wishes in a will, English and Scottish courts will apply Shariah law rules to his estate, if those rules are validly incorporated and are not contrary to mandatory rules of the applicable succession law.

However, this may not be effective for Scottish Muslims who reside in and live there permanently, or those who are originally Scottish and have no connection with any other

[1302] *In Re Khan's Settlement* [1966] Ch 567.

[1303] Thompson (n 989), 71.

[1304] Thompson (n 989), 71.

country. Their only chance with PIL is if they have immoveables that are situated in a country governed by Shariah law. Otherwise, the courts adhere to domestic law, and in order to make their wishes in line with Shariah succession law, they may need to do it within the Scots law framework discussed above. However, this discussion shows that the misconception of domicile among some Muslims, which was indicated in the interviews,[1305] may be inaccurate. This is because simply living in Scotland does not determine your choice of domicile where certain factors might indicate otherwise. Although these chances are minimal, it may be worth knowing that there is a chance, after all, to apply Shariah succession to a Muslim estate where the deceased retains their domicile of origin despite living in Scotland.

However, it might also be fair to ask whether Muslim families who reside in Scotland for a long time, who might have settled in this country and purchased immoveable properties in Scotland have acquired a domicile of choice here. This might be true particularly for second and third generation Scottish Muslims, given that nearly half of Scottish Muslims, at least until 2011, were born in the UK.[1306] Statistics also suggest that just over half of Scottish Muslims are homeowners.[1307] With that said, these properties may be more likely to be the most valuable element in the estate, as for most Scottish people. Another relevant question is how likely it is that Scottish Muslims may own property both in Scotland and in their country of origin e.g., Pakistan. Case law suggests that a number of Muslims in the UK might leave assets in their countries of origin, which might raise the prospect of this question in the affirmative, although this might vary from generation to generation.[1308]

7.3 Assessment of Shariah Succession

Having examined a variety of practices of succession among Scottish Muslims, this section discusses the propriety of adopting one of the above alternatives – one from the standpoint of Shariah law, the other from the standpoint of western human rights law. They evaluate the validity of these alternatives from differing normative standpoints. The first part of the section examines the applicability of these practices with Shariah rules, and how Muslims who opt out of *wassiyyah* may not have conflicted with Shariah rules. The second part of the

[1305] See section 6.4.1 The Perception of *Wassiyyah* among Scottish Muslims above.

[1306] Elshayyal (n 9), 14.

[1307] Elshayyal (n 9), 38.

[1308] *Al-Bassam v. Al-Bassam* (n 124); *Ghafoor v. Cliff* (n 1250); *Al-Midani v Al-Midani* [1999] CLC 904.

section examines how these practices, particularly applying Shariah succession by individual Imams, are received within the concept of human rights principles.

7.3.1 The Involvement of Necessity, (*Darura)*

These alternatives, including simply leaving the matter to Scots law, may be justified by the doctrine of necessity in Shariah law. As suggested in the discussion above, some Scottish Muslims may not always opt for drafting *wassiyyah* or applying Shariah rules in intestacy. They may find themselves in a situation that requires them to consider their interests where Shariah rules may not be applicable. This section examines this dilemma from the viewpoint of Shariah law, based on examples collated from the interviews.

This dilemma would be assessed in Islamic law jurisprudence under the mechanism of necessity – *darura* – and individual or public interest and welfare – *maslaha* – which involves, for instance, protecting one's religion, essence and mentality.[1309] The mechanism of *darura* in Shariah law, which evolved from the *Quran* and the *Sunnah* texts, is a very wide principle that was developed where, in circumstances of *darura*, Muslims should form 'their normative statements' on the basis that they might contradict the overall objectives of Shariah's revelations, *(maqasid Al-Shariah)*.[1310] To elaborate, although certain actions might be prohibited by Shariah law, in circumstances of *darura*, compliance with Shariah rules might contradict an individual's interests, their *maslaha*. For instance, a Muslim might be challenged to comply with Shariah rules due to the dire constraints of their surrounding circumstances, such as eating pork rather than starving to death.[1311] Therefore, even if eating pork is prohibited in Shariah, protecting oneself prevails over the prohibition, due to the necessity surrounding these circumstances.

Furthermore, in connection with the context of *darura*, and Muslims living in non-Muslim countries, there has been development in the area of Shariah law jurisprudence (*Fiqh*). It is a new interpretation of *Fiqh* called *minority Fiqh* or *Fiqh Al-aqalliyyat*, developed by the European Council for Fatwa and Research (ECFR).[1312] Following the vast increase of

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[1309] Mustafa Ahmad al-Zarqa, *Al-Madkhal Al-Fiqhi Al-Amm (Arabic)* (2nd edn, Dar al-Qalam 2004), 102.

[1310] Bowen, *On British Islam: Religion, Law, and Everyday Practice in Shariʿa Councils* (n 127), 118.

[1311] Bernard Lewis, 'Legal and Historical Reflections on the Position of Muslim Populations under Non-Muslim Rule' (1992) 13 Institute of Muslim Minority Affairs Journal 1, 3.

[1312] Bowen, *On British Islam: Religion, Law, and Everyday Practice in Shariʿa Councils* (n 127), 122.

Muslims in the West, Alwani, one of the scholars who introduced this notion, has outlined a set of Shariah principles that aim to mitigate Shariah rules in special circumstances, particularly those of Muslims living in non-Muslim states.[1313] These principles propose a new division of Islamic *Fiqh,* called *minority Fiqh*. He has ambitiously argued that this notion aims to develop a 'fresh juristic vision' derived from the principles of the *Quran* and the *Sunnah*.[1314] He alleged that the current unique situation of Muslim minorities requires a new interpretation (*ijtihad)* technique, one that is compatible with modern developments in knowledge, science and means of learning.[1315] By this argument, Alwani proposed 'restoring the role of Shariah in modern life', alleging that the tradition of *Fiqh* did not provide a precise classification of Shariah sources in which 'the thinking of Muslim jurists with respect to the geopolitical world map of the time was influenced by contemporaneous historic convention'.[1316]

In relation to *darura* and *minority Fiqh,* there are a few examples that have emerged from succession practices among Scottish Muslims observed from the interviews, that might be applicable within this context. The first example is related to the application of destination-over in a *wassiyyah* among Scottish Muslims and its inapplicability with Shariah succession, as discussed above.[1317] Representation is irrelevant in Shariah succession provided that the deceased's other children have survived. The *darura* concept may be relevant here, considering the different lifestyles between the UK and Muslim countries. Muslims here may pay extra care and consideration to the welfare of their children or grandchildren, as Imam A suggested.[1318] That would encourage them to adapt to certain rules that could be fitted with their *maslaha*, such as destination-over or representation.

A second example is related to the succession disputes discussed above and its connection to the concept of *darura*.[1319] To discuss this example further, let us assume that a house was solely owned by their father, and the mother is an heir to the house as much as the children, in which they may have the right to claim their share of the house. Based on the Hadith:

[1313] Taha Jabir Al-Alwani, *Towards a Fiqh for Minorities: Some Basic Reflections*, vol 10 (International Institute of Islamic Thought (IIIT) 2003).

[1314] Al-Alwani (n 1314), 7.

[1315] Al-Alwani (n 1314), 12.

[1316] Al-Alwani (n 1314), 8, 9.

[1317] See section 6.5.1 Cooperation between Mosques and Law Firms to Draft a *Wassiyyah* above

[1318] See section 6.3.1 Attitudes to Islamic Will-Writing in Scotland above.

[1319] See section B) The Role of Shariah Councils in Scotland in 6.3.3 above.

'There should be neither harming nor reciprocating harm', and a significant number of scholars believe that an asset that is shared among heirs or partners should not be divided if this division will cause harm to any of them.[1320] The harm here could be identified as by dividing the asset, one or some of the partners lose their benefit from it, which means they will not benefit from their share after the division, as they had before.[1321] Therefore, I assume the Imams who resolved this dispute might have taken this into account when they decided that the mother should keep the house to protect her *maslaha*. A third example would be related to the testator's wishes to keep their family well-provided for, and *wassiyyah* may not be useful enough to accommodate this. Therefore, we may say that to protect the *maslaha* of his children, he avoids dividing, for instance, the only asset he got under forced heirship rules.

Based on these examples, it may be observed that Muslims living in non-Muslim countries may face difficulties that require adjustment. This could be to protect their *maslaha,* such as in the cases with the examples above. The adjustment could also be related to complying with domestic law, such as forming *wassiyyah* with the element of destination-over. However, all these adjustments, I believe, could be applicable to the conception of *darura*. This could mean that there is no need for a new *ijtihad* technique, as Alwani claimed, because the *darura* context justifies these adjustments. It may be possible to help Muslims living in non-Muslim countries to raise their awareness and enhance their knowledge of what Shariah incorporates, because there might be a lack of knowledge of this particular aspect.[1322] Hopefully, this study would add to the knowledge of Muslims from this aspect. Shariah law accommodates adjustments of certain practices in a situation of *darura* to protect Muslims' *maslaha.*

7.3.2 Discriminatory Practices and Human Rights

As mentioned in chapter 3 above, there have been allegations raised, for instance, by the Assembly of the Council of Europe, that 'the rulings of the Shariah councils clearly discriminate against women in divorce and inheritance cases'.[1323] Although Shariah councils'

[1320] Ibn Othaimeen (n 978) vol 15/15, 369.

[1321] Ibn Othaimeen (n 978) vol 15/15, 370.

[1322] Adis Duderija and Halim Rane, 'Minority Fiqh (Fiqh al-Aqalliyyat)' in Adis Duderija and Halim Rane (eds), *Islam and Muslims in the West: Major Issues and Debates* (Springer International Publishing 2019).

[1323] Parliamentary assembly of the Council of Europe, 'Sharia, the Cairo Declaration and the European Convention on Human Rights' (n 651).

discrimination against women in talaq cases might be justified,[1324] the latter claim lacks justification. For succession, there is no evidence as to whether Shariah councils in England are involved in distributing the assets under Shariah inheritance law. Indeed, as both the independent review and Bowen observed, although the council's members might provide advice regarding general matters of Islamic law, they do not pronounce on asset distribution.[1325] Moreover, this research may indicate the limited involvement of Scottish Shariah councils and Imams in succession inquiries.

However, the fact that there is no enforcement nor legitimacy to Shariah councils and Imam's judgements regarding succession means that women would not be discriminated against their will.[1326] To elaborate, if the case is related to applying the male-female ratio in an Islamic will, then Muslim females will have access to legal rights, similar to any other Scottish women who were either disinherited or were not satisfied with their share and think they would be better off with legal rights than the legacy. However, we may assume that societal pressure might affect women's decision in opting for legal rights. Interviews with Muslim women in the UK in family law related cases suggest that such pressure does occur in obtaining *talaq*, despite having a civil divorce.[1327] Given that this amounts to a family law issue similar to succession, we may, therefore, assume that such pressure could happen among Muslim families to persuade females from accessing legal rights.

However, it may also be justified to say that English and Scottish freedom of testation allows for actions that might be more discriminatory than the male-female ratio in Shariah law. Freedom of testation allows full disinheritance of heirs, either male or female, in favour of a cat or a dog, or charities, where women could end up with nothing,[1328] subject to legal rights in Scotland, which are rarely claimed, and the 1975 Act provision in England, which must prove need and hardship, as discussed above.[1329] This is unlike Shariah's forced heirship,

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[1324] 'The Independent Review into the Application of Sharia Law in England and Wales' (n 172), 5.

[1325] Bowen, *Blaming Islam* (n 62), 82; 'The Independent Review into the Application of Sharia Law in England and Wales' (n 172), 13.

[1326] See section A) Scottish Imams and Succession Inquiries in 6.3.3 above.

[1327] Ali (n 11), 133; Bano, 'Complexity, Difference and Muslim Personal Law': Rethinking the Relationship between Shariah Councils and South Asian Muslim Women in Britain' (n 11), 163; 'The Independent Review into the Application of Sharia Law in England and Wales' (n 172), 12, 13.

[1328] See section 5.4 Challenge of Testamentary Freedom in English Law above.

[1329] See section 5.4 Challenge of Testamentary Freedom in English Law and section 5.3.3 Scottish Legal Rights and Testamentary Freedom above.

which maintains an automatic fixed share for women, that is applied in both testate and intestate succession, and cannot be reversed.

The issue of discrimination may become clearer in intestacy law, where English and Scots intestacy law provide for the spouses far more than Shariah does, and equalise the children's shares, regardless of their gender. Although this could be justified by the burden on males to provide for the family, there is no recognition of Shariah rules with intestacy law, where women, in case of internal distribution of the assets, could seek legal advice to maintain their rightful share assigned by Scots intestacy law. This means that Scottish Muslim females, who have access to legal rights in testate and could maintain their rightful share in intestate, may not be denied their rights assigned by Scots law. Therefore, it may seem unreasonable to designate the practice of applying Shariah forced heirship rules in this context as being discriminatory against women, because Islamic wills are applied within the framework of Scots law, and Scots intestacy law will overrule informal distribution of assets in accordance with Shariah.

Additionally, as discussed above in chapter 3, human rights may often be interpreted as universal and inalienable, and to be applied regardless of political or cultural orientations.[1330] This has led to the rejection by many non-Western societies of basic international declarations on human rights, because of their domination by Western notions of rights in international law.[1331] This could mean that in succession the human rights scale that judges Muslim practices in the West is not comprehensive enough to include all beliefs, not to mention the fact that there may be a bias in human rights rules rooted in Christianity, which would mean discrimination against other religions and cultures. Therefore, it may be fair to say that it is unreasonable to judge the male-female ratio as discriminatory based on a scale influenced by one religion or one culture, and that it may not be universally applicable. This is because discrimination in the male-female ratio is every often judged based on the principle of equality, without understanding the logical element within the wider context of family law, as discussed above.[1332]

[1330] Petty (n 448), 816.

[1331] Witte (n 474), 12, 13.

[1332] See section 5.2.1 Male-Female Ratio above.

7.4 Conclusion

The empirical work discussed in this chapter revealed alternative practices of succession among Scottish Muslims. The interviews indicate that the type of asset, such as a family home, might be an obstacle against having an Islamic will. This disruption could come from the testator, whether for positive or negative intentions. For the former, testators may not wish to distribute their estate within Shariah law, because it may affect the wellbeing of their children, such as keeping the house. It could be also for negative reasons, i.e., evasion, if they do not want someone, a legal heir in Shariah inheritance, to inherit their estate. Additionally, the beneficiaries may interfere with opting for an Islamic will, particularly if there are significant assets as is the case where females may not favour the male-female ratio with a substantial estate. However, practices that may appear to conflict with Shariah could be triggered by the concept of *darura*, where Muslims living in non-Muslim countries may have to adapt to certain practices that may contradict Shariah, in order to avoid losing interests, that might not occur in a Muslim country.

However, if there is a will, Muslim females might not always be better off with Scots law than with Shariah intestacy law, particularly if the most valuable part of the estate is the immoveable assets. This is because if the testator left his assets to be distributed among his children under Shariah's forced heirship rules, and his daughters chose to waive their legacy and claim legal rights, they would only inherit an equal share to their brothers in the moveable assets, and lose their right to the immoveable assets.

Another intriguing result is the contribution of the deed of variation to Shariah inheritance application in a Muslim estate. This agreement could be more effective for Muslims in intestacy law, where if the heirs all agreed to enter the deed of variation, they could opt for distribution in a fashion in line with Shariah intestacy law, instead of Scots intestacy law. An interesting finding is that although Imams' advice in intestacy does not go beyond stating to the inquirers the figures or fractions that each heir will get under Shariah law, they are telling people how to distribute an intestate estate, according to Shariah law. This will be directly in conflict with the rules of intestate succession in Scotland, where the vast majority of the intestate estate will go to the spouse. If we can assume that the majority of Muslims do not leave a will, then this increases the possibilities of dividing the intestate estate according to Shariah.

Furthermore, private international law may provide limited access for some Muslims to apply Shariah law, although this may not be feasible. The question of domicile associated with the scission principle is central to designating the law which governs the distribution of an estate. Several factors may preclude the retention of the domicile of choice over the domicile of origin for many Scottish Muslims. Retaining the domicile of origin for a Scottish Muslim who has an Islamic country's background may allow them to administrate their assets in accordance with the law of the Islamic country, whether they have an intestate or testate estate.

There may be issues of discrimination through these different practices of Muslims related to the male-female ratio. However, since there is no enforcement in Imams' judgments, nor do they handle the estates' distribution, both claims could be rebuttable, on the basis that Imams' verdicts have no legitimacy, and therefore cannot be enforced. Needless to say, Islamic wills that include the division of the male-female ratio could be feasibly applied within the freedom of testation principle. Classifying Islamic wills in this context as discriminatory will necessarily mean that the freedom of testation principle is discriminatory law, which allows far more radical discrimination than the male-female ratio.

Ultimately, this is what the qualitative interviews revealed, and I am not hesitant to say that this practice happens among Muslims in Scotland. This study explores various methods that Muslims may adopt in arranging their assets. The interviewees were chosen very carefully, based on their experiences in dealing with Muslim estates in Scotland. However, the question remains whether these practices are dominant among Muslims, or whether perhaps other forms of practice may be still unveiled. More research needs to be done to affirm the outcome of this research or indeed add to it, to enhance our knowledge of the practices of succession among Muslims in Scotland.

Chapter 8 Conclusion

8.1 Summary of the Research

Shariah law is 'here to stay',[1333] and the debate about the applicability and accommodation of Shariah family practices in the UK remains firm. Assessing the place of Shariah succession within Scots law and determining whether Shariah succession laws are appropriate within the context of Scots succession law is the primary aim of this thesis. To achieve this aim, the research engaged with a combination of doctrinal analytical and empirical observation in examining the research issues. The inclusion of English law is intended to offer a contextual backdrop for the study's main subject, which is Scots law, where this study has put forward the argument that for Muslims in England, the principle of freedom of testation allows for distributing a Muslim estate under Shariah rules in an English will. For Scotland, despite the limitations on testamentary freedom, the empirical interviews confirm that there are concerns regarding the applicability of Shariah succession within Scots law that may allow indications that Muslims in Scotland could also implement Shariah forced heirship rules in a Scottish will.

However, there may still be some circumstances that affect an Islamic will in a Scots framework. Some of these circumstances are associated with the limitation on freedom of testation, namely the heirs' right to claim their legal rights instead of the legacy, which conflicts with Shariah forced heirship rules. Other circumstances may be accountable to the testator's wishes to keep his family provided for, and the only way to fulfil this is to follow Scots law instead of Shariah. However, the flexibility in testate succession does not apply to intestacy law in either England or Scotland. Shariah succession rules are not compatible with the rules of intestate succession in either Scotland or England, and the only way to make them work is through the consent of all the beneficiaries to distribute the intestate estate of the deceased's estate in accordance with Shariah rules. Ultimately, the common practices of Scottish Muslims observed in legal fields suggest that an Islamic will works with a Scottish will, which means that Muslim heirs could maintain the rights assigned by Shariah succession law to their estate.

As suggested earlier in this study, the discussion of multiculturalism in chapter 2 was as essential background for understanding discussion of the presence of Muslims in Europe. Although the main objective of this research was to evaluate the legal conformity between

[1333] Nicholas Phillips, 'Equality before the Law' (2008) 3 Speech by Lord Nicholas Phillips, Lord Chief Justice, East London Muslim Centre cited in; Bowen, 'How Could English Courts Recognize Shariah' (n 140).

Scots law and Shariah succession law, it raises wider issues that require locating the objects of this study within a broader context. As we have seen, multiculturalism and colonial aspects are argued to influence Muslims' attitude in practising Shariah in Europe, particularly the UK.[1334] Given that immigrants to the UK were mostly colonial subjects, the UK policy post-colonialism was influenced by their policy during the colonisation era.[1335] This was clear in the case of Muslims in England in continuing to manage their personal matters under Shariah law as they used to do during colonialism, as many empirical studies have observed these practices among Muslims in England. [1336] This theoretical debate helped us to determine that Shariah law can be tolerated and accommodated within the UK multiculturalist approach, unlike other countries that have adopted the assimilationist approach in dealing with minorities. This set the scene for the rest of the thesis, concerning the accommodation of Shariah family law in the UK, and its main object of considering attitudes to Shariah law in Scotland.

Furthermore, toleration of Shariah law in Europe was also assessed through the ECHR in chapter 3, which is the major influence on religious freedom in Europe. This thesis argues that there is inflexibility in restricting Shariah, which may be because of bias toward Christianity, that has shaped the design of modern religion, and has separated religion from the public sphere.[1337] Human rights principles are also impacted by separating the internal and external aspects of religion. This separation may be biased towards certain forms of religion[1338], which means that ECtHR cases concerning European Muslims' claims within the public order sphere 'remain blind to this normative disposition of secular-liberal law to majority culture'.[1339] This bias may have contributed to European countries' latitude in imposing further restrictions on religious practices outside of Christianity. For instance, the ECtHR differentiates between wearing a headscarf in a classroom[1340] and displaying a crucifix in a classroom[1341] because the former does not signify tradition in the manner that

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[1334] Se section 2.4.3 Dual Jurisprudence and Shariah Family Law in the UK: Postcolonial Effect above.

[1335] See section 2.4.3 Dual Jurisprudence and Shariah Family Law in the UK: Postcolonial Effect above.

[1336] See section 5.4 Challenge of Testamentary Freedom in English Law above.

[1337] See section 3.2.1Christianity and Privatising Religion above.

[1338] Evans, 'Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions' (n 469), 313.

[1339] Mahmood (n 470), 859, 860. cf

[1340] *Dahlab v. Switzerland* (n 571).

[1341] *Lautsi v. Italy* (n 577).

the latter does. This bias might suggest a lack of acknowledgement of any religious external manifestations that do not reveal a European identity. However, the ECtHR, in *Molla Sali*, implicitly endorsed a state recognition of Shariah law status to serve a minority.[1342] This is because it acknowledges the parties' voluntary opt-out if they agree to adjudicate their disputes under Shariah rules.[1343] After all, women have a choice to opt for civil jurisdiction instead of Shariah law. This may suggest that Shariah succession rules could be accommodated within the ECHR framework with the voluntary opt-out.[1344]

Chapter 4 assessed the recognition of Shariah marriage and divorce in England and Scotland, because of their fundamental connection with succession. It evaluated the application of Shariah law by an English or Scottish court, either when such courts applied their own domestic laws, or where a conflict of laws rules designated a certain foreign law as applicable. Even while this study is primarily focused on Scotland, the English law literature is considered here, because the majority of Muslims in the UK reside there, and this subject matter has attracted much more consideration than in the Scottish context. It is helpful to consider how English courts and commentators have approached the topic in order to set the stage for other parts of the UK. It is crucial to remember that Scotland has its own regulations, and laws that are mostly different from English law in the areas of property, family, and succession. Most of the case law involves marriage and divorce, and there is a lack of case law concerning Shariah succession law.

This chapter illustrated that under the conflict of laws rules, Shariah legal systems may govern how the deceased's estate is distributed under PIL rules if they were specified as applicable, as would be the case if the deceased leaves movable property in a state that is governed by Shariah law. This might mean that conflict of laws rules are not hostile to Shariah law. However, *Nikah-only* marriages celebrated in the UK are classified by English courts as non-qualifying ceremonies, and therefore fail to be recognised. This impacts Muslim access to the courts, particularly women, as this rejection prevents spouses from granting a divorce decree, financial relief, and right to succession.[1345] Moreover, the provisions of foreign divorce recognition make it difficult to recognise a bare *talaq* for a British citizen. Indeed, a bare *talaq* pronounced by a Muslim in the UK will not be

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[1342] *Molla Sali v. Greece* (n 15), [155]; Kalampakou (n 622), 262; Topidi (n 633), 42; Iakovidis and McDonough (n 637), 445.

[1343] *Molla Sali v. Greece* (n 15), [157].

[1344] See section 3.3.2 Succession: Thrace Minority in Greece above.

[1345] See section 4.3.3 The Implications of *Nikah* and Polygamous Marriages on Succession above.

recognised in the English or Scottish courts, unlike a *talaq* processed formally in a foreign country where the *talaq* occurred, such as in Pakistan, Lebanon, and Saudi Arabia. These difficulties in recognising a *talaq* may impact Muslims' right to succession.[1346] A couple in *Nikah-only* marriages will not be granted a divorce, nor they would receive recognition if they obtained a foreign divorce, which also impacts their access to succession rights. Moreover, failure to recognise a *talaq* - whether pronounced in the UK or abroad - may create issues for a Muslim woman, because she will still be divorced in Shariah law. This means that she is not entitled to inherit under Shariah, and English and Scottish courts may not protect her rights, because of a lack of authority caused by the domicile of the deceased.

Chapter 5 assessed, in theory, the conflicts when applying Shariah succession rules within Scots law. Scots intestacy law rules and Shariah forced heirship appear to be far from compatible.[1347] For instance, parents have forced heirship rights in Shariah succession in line with their spouse and children, unlike Scots intestate law, where the presence of a spouse and children excludes the parents. Moreover, one must consider that the impact of artificial intestacy and prior rights could result in the spouse exhausting the estate,[1348] which would deprive other eligible heirs of receiving their fixed shares. Therefore, it could be argued that this theoretical examination may suggest that the application of Shariah forced heirship within Scots intestacy law is not possible, due to their lack of compatibility. Furthermore, although legal rights in Scotland appear to be a potential obstacle against drafting *wassiyyah*, the application of Shariah succession rules may still be achievable within Scots testate succession.[1349] The application of a *wassiyyah* within English law is more easily achievable in England than in Scotland, because English law has adopted a broader principle of freedom of testation than that of Scots law. However, although there is a lack of cases to determine potential challenges against Islamic wills, it seems that Muslims in England have been drafting *wassiyyah* within the framework of English wills for decades now. The difficulty of challenging testamentary freedom if the heirs were reasonably provided for may determine the compatibility of Islamic wills within the context of an English will.

In Scotland, however, there is, in addition to a lack of case law, a lack of literature on Scottish Muslims' practice of succession. That factor urged me to employ an empirical method in an

[1346] See section 4.4.2 The Implications of *Talaq* on Succession above.

[1347] See section 5.3.2 Scots Intestacy Law Conflicts with Forced Heirship above.

[1348] See section C) Artificial Intestacy in 5.3.2 above.

[1349] See section 5.3.3 Scottish Legal Rights and Testamentary Freedom above.

attempt to come closer to the actual practice of succession among Scottish Muslims. I conducted interviews with experts in Scotland, who have experience in dealing with Shariah succession with Scottish Muslims. Chapters 6 and 7 draws on the conflicts identified in chapter 5 to assess their compatibility in the actual practice of Shariah succession among Muslims in Scotland, based on empirical data.

Chapter 6 revealed the outcome of the interviews, which indicate that drafting a *wassiyyah* among Scottish Muslims may not be a common issue, despite efforts to raise awareness of the importance of leaving a will.[1350] However, what was interesting is that creating a *wassiyyah* in Scots law may not cause any conflicts, despite the potential disruption of legal rights in theory. The experts interviewed appear to be confident that legal rights are less likely to interrupt a *wassiyyah* that is written within the framework of a Scottish will.[1351] From a legal point of view, this could be related to the fact that children and spouses have forced heirship rights under Shariah succession and therefore cannot be disinherited, which give the will a strong position against the legal rights claim. However, from a religious point of view, Scottish Muslims' commitment to Shariah law may prevent them from challenging an Islamic will. Moreover, Imams and solicitors in Scotland may cooperate in drafting an Islamic will within the Scottish will framework. The solicitor will deal with laying out the testator's wishes in the form of a Scottish will, and the Imam will provide the solicitor with the forced heirship division to include in the will. It is worth noting that none of the experts have experienced any challenges to the Islamic will drafted within the Scottish will framework, either throughout the process or after the execution of the will. These approaches seem to guide Muslims in a just direction to comply with Shariah law and domestic law, therefore integrating within the dominant culture discussed in chapter 2 and 3. Scottish Muslims, and perhaps all Muslims in the UK, may need this kind of information that their concerns about Shariah succession could, to a large extent, be implemented within domestic law.

Furthermore, the outcome of the interviews also indicates that Muslims in Scotland may not always opt for *wassiyyah* when it comes to administering succession. Chapter 7 draws on the outcome of the empirical work by exploring how the type and the size of the estate, and the male-female ratio each may impact on abandoning *wassiyyah*.[1352] However, it might be

[1350] See section 6.3 Report of Empirical Outcome above.

[1351] See section 6.5 Islamic Wills and Compliance with Scots Law above.

[1352] See section 7.2 Alternatives to Islamic Wills below.

fair to say that some of these practices, which appear to be in conflict with Shariah, could be justified by the concept of *darura*, particularly for Muslims living in non-Muslim countries.[1353] Moreover, what might be an interesting outcome is that dying intestate might be significantly more popular than dying testate among Scottish Muslims. Based on the indication that a large number of Muslims die intestate, this would mean that a significant number of those Muslims may opt for informal distribution of an estate under the Shariah forced heirship rules.[1354] Most of the interviewed experts speculated that this might be the case. Imams may also provide information about Shariah inheritance to Scottish Muslims in an intestate estate, which may result in a direct conflict with Scots intestacy law. The compatibility with Shariah succession can be achieved through a testate estate as explained above,[1355] whereas the interviews affirmed the theoretical assessment in chapter 5[1356] that applying Shariah rules is far less likely to happen with an intestate estate. However, what might be helpful in this case is the role of a deed of variation to formalise the application of Shariah succession in an intestate estate to comply with Scots law.

The interviews also indicate the limited involvement of Scottish Shariah councils in succession, although they mainly deal with *talaq* cases, similar to English Shariah councils. However, if Scottish councils were approached by Muslims with inquiries or disputes about succession, they would not hesitate to provide them with the relevant information, because it is their duty to do so. Moreover, the theoretical examination of PIL may suggest that Shariah succession has limited access through PIL, and may be difficult to rely on.[1357] It may not be a practical method for the majority of Scottish Muslims, who consider Scotland as their domicile and have no acquisition of property abroad. Therefore, it seems that the chances of engaging with PIL for succession are minimal. Furthermore, the male-female ratio in Shariah succession might be regarded as discriminatory practice. Understanding this element requires a comprehensive view of the wider context of Shariah family law and succession law.[1358] This could be justified by the fact that males in Shariah family law have a burden to provide for their family, unlike females. However, for British Muslim women, they could challenge the *wassiyyah* through the 1975 Act in England or opt for legal rights

[1353] See section 7.3.1 The Involvement of Necessity, (*Darura)* above.

[1354] See section 7.2.3 Intestacy Law and Informal Distribution above.

[1355] See section 6.5 Islamic Wills and Compliance with Scots Law above.

[1356] See section 5.3.2 Scots Intestacy Law Conflicts with Forced Heirship above.

[1357] See section 7.2.4 Potential Application of Shariah Succession Through Conflict of Laws Rules above.

[1358] See section 5.2.1 Male-Female Ratio above.

in Scotland. Even in case of an informal distribution, they could raise a claim before the court. It is argued that Shariah forced heirship rules in this context may not be completely discriminatory against women, particularly Islamic wills that are applied within the framework of English and Scots law.

8.2 Reflection on the Research

Since Muslims in the UK have found a way to practice Shariah family law in Islamic marriage, divorce, and succession arrangements, through hybrid rules, this thesis argues that the hybrid rules adopted by Muslims in Scotland, together with England, have encouraged them to integrate with mainstream culture. One reason is because Muslims in Scotland may integrate with the state law in writing their wills in a way that satisfies both Scots and Shariah law. This may support Kymlicka's view that integration into the dominant culture does not mean complete assimilation.[1359] It could also be noted that this is in accord with the Council of Europe's approach to interculturalism that promotes integration.[1360] Although Muslims may have had to adapt to these practices due to the lack of recognition of their religious practices, it may nevertheless serve their needs.

However, there might be some difficulties caused by Muslims, both men and women, because of their reluctance to engage with domestic law, such as avoiding registering their marriage. This stance may be associated with avoiding the engagement of English or Scottish courts in the matter of family assets and succession.[1361] Although this might be true for some Muslims, many Muslims in England and Scotland, as we have examined in chapter 4, have brought their family issues before the courts. Regarding succession, it is true that there is a lack of case law in English and Scottish courts, but many observers in this field, some using empirical studies, argue that Muslims in England are engaging with English law to administer their estate under Shariah law without any conflict with English law.[1362] Regarding Scotland, this thesis argues that, based on empirical interviews, Muslims in Scotland are also engaging with Scots law to administer their estate under Shariah law,

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[1359] Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (n 184), 78. See section 2.2.1 Will Kymlicka: National Minorites vs Ethnic Minorites above.

[1360] Council of Europe, 'Living Together as Equals in Dignity: White Paper on Intercultural Dialogue': (n 394), 19. See section 2.5.3 'Interculturalism' or 'Civic Integration': A New Approach? Above.

[1361] Grillo (n 737), 292. See section 4.3.3 The Implications of *Nikah* and Polygamous Marriages on Succession above.

[1362] Pearl and Menski (n 11), 485; Ahsan (n 11), 27; Poulter, *Asian Traditions and English Law* (n 18), 72; Badawi (n 980), 79; Edge (n 425), 134; Pilgram (n 18), 13.

despite some obstacles that may occur at the time of executing the will. This means that Muslims in England and Scotland are engaging with the domestic law that is accommodating to Shariah succession.

Moreover, Thrace's situation may have been similar to the situation in the UK with regard to Muslims' adoption of hybrid rules.[1363] These approaches do not satisfy the Assembly, due to their concerns about discrimination against women, particularly in inheritance cases.[1364] However, as this thesis establishes above, testamentary freedom in English and Scots succession law can encompass Shariah inheritance rules.[1365] Conflict of laws rules are also not in opposition to Shariah succession rules, where they may govern assets distribution if designated by English or Scottish courts, as applicable. In addition, Muslim women are not obliged to follow Shariah succession. Scottish Muslim women could opt for legal rights in a testate estate and to their assigned rights under Scots intestacy law. This is also in line with the recent judgment of the ECHR in *Molla Sali*, where the Strasbourg court acknowledges the parties' voluntary opt-out if they agreed to adjudicate their disputes under Shariah rules.[1366] Moreover, this thesis argues that English freedom of testation may in fact create a more discriminatory approach than the Shariah male-female ratio. Women in English law could be disinherited, unlike Shariah where women's shares are guaranteed under the forced heirship rules, and they cannot therefore be disinherited. The Scots law approach to freedom of testation is less discriminatory than English law, providing a legal rights claim of the moveable properties regardless of the will. Nevertheless, women in in Scotland could still be disinherited of their rightful shares in immoveable property. [1367]

8.3 Contribution and Further Research

This research aimed to uncover the practice of Shariah succession among Scottish Muslims in order to assess its compatibility with Scots law. The significance of this study is in providing greater insight into the problems encountered in any attempt to apply the rules of Shariah succession law in Scotland. This allowed me to examine the compatibility issues of succession between Shariah law and Scots law in detail for the first time and identify points

[1363] See section 3.3.2 Succession: Thrace Minority in Greece above.

[1364] Parliamentary assembly of the Council of Europe, 'Sharia, the Cairo Declaration and the European Convention on Human Rights' (n 651).

[1365] See section 5.4 Challenge of Testamentary Freedom in English Law above.

[1366] *Molla Sali v. Greece* (n 15), [157].

[1367] See section 7.3.2 Discriminatory Practices and Human Rights above.

of conflict. We learned that it is difficult to apply Shariah forced heirship rules within Scots intestate succession, while Scots testate succession may allow for the adoption of Shariah succession rules, despite a legal rights potential challenge. This is an important finding because, as stated above, most of the literature in this context concerns English law, which is different from Scots law, because English law has adopted a broader principle of freedom of testation than that of Scots law. Moreover, another significant perspective is raised in providing doctrinal insights from conflicts of laws as potential solutions for applying Shariah succession. The theoretical analysis of conflict of laws indicate that it provides a legal route for Muslims to apply Shariah succession rules where Shariah succession rules may govern distribution of the assets if designated by an English or Scottish court as applicable. This indicates that PIL rules may provide limited access for some Muslims to apply Shariah succession. However, for the vast majority of Scottish Muslims, who regard Scotland as their country of residence and do not own any property abroad, it might not be a viable approach.

Another significant implication is where the empirical work revealed some insights about practices of succession among Scottish Muslims. The importance of this limited empirical work is to present information gained through conducting interviews with a number of religious figures and legal experts in succession who have dealt with counselling Muslims who seek to consider Shariah succession law. Because the practice of succession is not discussed anywhere else in the literature, this approach was required. The applicability of the Shariah norms in both testate and intestate succession is evaluated in interviews with specialists in Shariah and Scots succession laws. No attempt is made to generalise the results of the interviews, and I am conscious that not all Muslims in Scotland will be aware of nor want to follow the Shariah laws. Nevertheless, the limited interviews did offer some insights in the absence of other sources and helped motivate exploration. This is the first study of its kind into the rules of Shariah succession within the Scottish context. It is also the first time that anyone has established some actual practice of succession among Scottish Muslims. With regard to the applicability of Shariah succession within Scots law, the outcome of the interviews indicates that Scottish Muslims drafting a *wassiyyah* within a Scottish will could be as effective as drafting a *wassiyyah* within an English will. The speculation that legal rights would interfere with a *wassiyyah* might not be a serious one in practice. These results indicate that Shariah forced heirship rules could be applied in a Scottish will with no significant risk of interference by legal rights. In addition, it may add to our knowledge about the operation of Shariah councils in Scotland. It has indicated that there are a number of representatives of English Shariah councils in Scotland. Their presence could be a result of the closing of Scottish Shariah councils in 2015, after 9 years of operation. Scottish Muslims

have been approaching Scottish representatives for *talaq*, similar to English Muslims, which may indicate the popularity of *nikah-only* among Scottish Muslims.

Furthermore, a significant area importance of this study is in outlining potential legal routes to minimise the points of incompatibility. Based on these results, I would say that Muslims who want to write their *wassiyyah* are advised to obtain a discharge of legal rights to guarantee that their *wassiyyah* will proceed without a challenge. Interviewed solicitors suggested that some Muslims already liaise with their family before drafting their *wassiyyah*, so a discharge might be a further step that they could discuss with their solicitor to avoid disturbance to the *wassiyyah*. Muslims could also benefit from the deed of variation to lay down Shariah forced heirship rules if the deceased died intestate, subject to certain conditions that must be met. Ultimately, this is what this study uncovered, and I believe that these observed practices happen regularly among some Muslims in Scotland. However, the question remains whether these practices are dominant among Muslims, or whether perhaps other forms of practice may be still unveiled. More research needs to be done to affirm the outcome of this research or indeed add to it, in order to enhance our knowledge of the practices of succession among Muslims in Scotland.

Legislations

Administration of Estates Act 1925

Civil Partnership Act 2004

Domicile and Matrimonial Proceedings Act 1973 c. 45

Family Law Act 1986

Family Law (Scotland) Act 2006

Immigration Act 1988

Immigration Act 2014

Inheritance (Provisions for Family and Dependants) Act 1975

Inheritance Tax Act 1984

Law No. 2004-228 Of March 15, 2004

Marriage Act 1949

Marriage and Civil Partnership (Scotland) Act 2014

Marriage (Scotland) Act 1977

Matrimonial Causes Act 1973

Matrimonial Proceedings (Polygamous Marriages) Act 1972

Offences Against the Person Act 1861

Race Relations Act 1976 (The Act was repealed by the Equality Act 2010)

Succession (Scotland) Act 1964

Succession (Scotland) Act 1964 Ch. 41

Succession (Scotland) Act 2016

Taxation of Chargeable Gains Act 1992

The Prior Rights of Surviving Spouse and Civil Partner (Scotland) Order 2011 (SSI 2011/436)

Wills Act 1963

Cases

United Kingdom Cases:

Adams v Schofield [2004] WTLR 1049

Ahmed v Ahmed [2006] SLT 135

AI v MT [2013] EWHC 100 Fam

Aitken's Trs v Aitken [1927] SC 374

Akhter v Khan [2018] EWFC 54

Al-Bassam v Al-Bassam [2004] EWCA Civ 857

Ali v Ali [1968] P 564

Al-Midani v Al-Midani [1999] CLC 904

A-M v A-M [2001] Divorce Jurisd Validity Marriage 2 FLR 6

Attorney General v Akhter [2020] EWCA Civ 122

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Baindail v Baindail [1946] 122 CA

Bamgbose v Daniel [1955] AC 107 PC

Brook v Brook [1861] 11 ER 703

Casdagli v Casdagli [1919] AC 145

Chaudhary v Chaudhary [1985] Fam 19

Chief Adjudication Officer v Bath [2000] 1 FLR 8

Drevon v Drevon [1864] 34 LJ Ch 129

Dukali v Lamrani [2012] EWHC 1748 Fam

El Fadl v El Fadl [2000] 1 FLR 175

El-Gamal v Al-Maktoum [2011] EWHC 3763 Fam

F v F (Divorce: Jurisdiction) [2009] 2 FLR 1496

Fuld (No3) [1968] P 675

Gereis v Yagoub [1997] 1 FLR 854

Ghafoor v Cliff [2006] EWHC 825 Ch

Gray v Formosa [1963] P 259

Gray v Gray's Trustees [1877] 4 R 378

H v H [2007] Talaq Divorce EWHC 2945 Fam

H v S [2012] 2 FLR 157

Harvie's Executors v Harvie's Trustees (1981) S.L.T. (Notes) 126

Hashmi v Hashmi [1972] Fam 36

Holliday v Musa [2010] EWCA Civ 335

Hudson v Leigh [2009] EWHC 1306 Fam

Hussain v Parveen [2021] EWFC 73

Hyde v Hyde [1866] LR 1 P 130

Ilott v The Blue Cross [2015] EWCA Civ 797

Ilott v The Blue Cross [2017] UKSC 17

In Re Coventry [1980] Ch 461

In Re Khan's Settlement [1966] Ch 567

Inland Revenue Commissioners v Duchess of Portland [1982] 1 Ch 314

Irvin v Irvin [2001] 1 FLR 178

Jassal v Shah [2021] EWHC 3552 Ch

Kerr (Catharine), petitioner [1968] SLT Sh Ct 61

Lawrence v Lawrence [1985] Fam 106

Lindsay's Executor v Forsyth [1940] SC 568

MA v JA [2012] EWHC 2219

Mackintosh's Judicial Factor v Lord Advocate [1935] SC 406

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Karaduman v Turkey App No 1627890Commission Decis 3 May 1993

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Kurtulmus v Turkey App No 6550001 ECHR 24 January 2006

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Molla Sali v Greece App No 2045214 ECHR 19 Dec 2018

Osmanoglu and Kocabas v Switzerland App No 2908612 ECHR 10 January 2017

Refah Partisi and Others v Turkey App Nos 4134098 4134298 4134398 4134498 ECHR 13 Febr 2003

Sahin v Turkey App No 4477498 ECHR 10 Novemb 2005

SAS v France App No 4383511 ECHR 1 July 2014

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