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# Procedure of Issuing Religious Divorce and Resolving Matrimonial Disputes at *Sharī'ah* Councils in the UK

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## Abstract

The unavailability of the civil courts to hear cases relating to Muslim family law and other related matters persuaded community leaders and religious scholars in the UK to establish several *Sharī'ah* councils. This paper seeks to explore the role played by the *Sharī'ah* councils in resolving matrimonial disputes, especially the process and procedure of issuing an Islamic divorce. Library and empirical research methods were employed. Three main UK *Sharī'ah* Councils were visited wherein mediation and arbitration sessions, as well as monthly meetings were observed to examine how disputes are handled and decisions are made. The study leads to several findings, including: mediation and arbitration are the main methods used in the process; and despite the relative success of the *Sharī'ah* Councils, they face challenges resulting from the dichotomy and overlapping jurisdictions of Islamic and English family laws and the non-alignment of divorce issued by UK courts and religious divorce.

## Keywords

Shariah Councils, quasi-judicial, Islamic/religious divorce, mediation, arbitration, med-arb.

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## 1 Introduction

*Sharī'ah* Councils have been delineated as 'internal regulatory frameworks',<sup>1</sup> 'complex informal networks',<sup>2</sup> and forums where 'new *ijtihād*' (Islamic reasoning) are taking place.<sup>3</sup> The *Sharī'ah*

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<sup>1</sup> D. Pearl & W. Menski, *Muslim Family Law* (London: Sweet & Maxwell, 1998), 396 *et seq.*

<sup>2</sup> S. Poulter, *Ethnicity, Law and Human Rights* (Oxford: Clarendon Press 1998), 61 *et seq.* Ali also notes that this 'private ordering' form of self-governing effort is 'unofficial' and 'extra-legal', S. S. Ali, 'Authority and Authenticity: Sharia councils, Muslim women rights and the English courts', *Child and Family Law Quarterly* 25(2) (2013): 113-137.

Councils came into existence in response to the need for Muslims to abide by Islamic law.<sup>4</sup> They were established following a *Sharī'ah* injunction<sup>5</sup> advocating Muslims living in a non-Muslim State to mandate leaders and representatives<sup>6</sup> to appoint knowledgeable scholars to resolve conflicts and disputes in accordance with the *Sharī'ah*.<sup>7</sup> In this study a fieldwork was conducted mainly at the Islamic Shari'a Council (the ISC) in Leyton in East London. An additional, but not primary visit, was also made to other *Sharī'ah* Councils, including the Muslim Law (Sharī'ah) Council (the MLSC) in Ealing, in South London and the Birmingham Shariah Council (the BSC) in Birmingham. The ISC was chosen due to its reputation as being among the most established<sup>8</sup> *Sharī'ah* Councils in the UK and that it receives more cases annually than any other *Sharī'ah* Council.<sup>9</sup> The ISC has representatives in most parts of the UK including Scotland.<sup>10</sup> This is arguably sufficient to justify the credibility and validity of the data collected. The visit to the BSC was due to its distinct character in being the only *Sharī'ah* Council which had a female member sitting on its bench.<sup>11</sup>

## 2 The Islamic Sharia Council (ISC): A Case Study

The Islamic Sharia Council, (hereinafter 'the ISC') was established in 1982<sup>12</sup> in an attempt to form a quasi-Islamic court.<sup>13</sup> This was after realising the '... acute sense of alienation felt by

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<sup>3</sup> I. Yilmaz, 'Muslim Alternative Dispute Resolution and Neo-Ijtihad in England' *Alternatives: Turkish Journal of International Relations* (2)(1) (2003): 117-139.

<sup>4</sup> Sheikh Abdullah, a religious scholar from the Shariah Council of the UK, in Tottenham, North London: 'As Muslims, we have a duty to live according to the Qur'an and Sunnah even though we may have chosen to live in non-Muslim countries. I think it is incumbent upon us to live up to this responsibility because of the effect of western influences upon our children and ourselves. It is easy to neglect our duties in this secular environment' *qtd.* in S. Bano, 'Islamic Family Arbitration, Justice and Human Rights in Britain', *Law, Social Justice and Global Development Journal* 1 (2007): 1-26. See also S. Bano, 'In Pursuit of Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the 'Sharia Debate' in Britain', *Ecclesiastical Law Journal* 10(3) (2008): 283-309.

<sup>5</sup> Z. Badawi, 'Muslim justice in a secular state', in M. King (ed.), *God's law versus state law: The Construction of an Islamic Identity in Western Europe* (London: Grey Seal, 1995) 77.

<sup>6</sup> S. Bano, 'Shariah Councils and the resolution of matrimonial disputes: gender and justice in the 'Shadow' of the Law', in R. K. Thiara and A. K. Gill (eds.), *Violence Against Women in South Asian Communities: Issues for Policy and Practice* (London: Jessica Kingsley Publishers, 2010) 192.

<sup>7</sup> Badawi, *supra* note 5; Bano, *supra* note 4 at 296.

<sup>8</sup> J. Bowen, 'How Could English Courts Recognize Shariah?', *University of St. Thomas Law Journal* 7(3) (2010): 411-435.

<sup>9</sup> R. Arshad, *Islamic Family Law* (London: Sweet & Maxwell, 2010), 35 *et seq.*

<sup>10</sup> These are; London Central Mosque and Islamic Cultural Centre, London, Muslim World League, Markazi Jamiat Ahl-e-Hadith, UK, UK Islamic Mission, D'awatul Islam, UK, Jamia Mosque & Islamic Centre, Birmingham, Islamic Centre, Glasgow, Islamic Centre, Dewsbury, Manchester, Jamia Masjid Hanafiya, Bradford, Muslim Welfare House, London, East London Mosque. <http://www.islamic-sharia.org/aboutus/>

<sup>11</sup> A visit was paid to the other two *Sharī'ah* Councils primarily to investigate any significant differences in the practice or work carried out. By this, the research seeks to promote an effective procedure and practice as well as uphold the best process or practice among the existing *Sharī'ah* Councils.

<sup>12</sup> <<http://www.islamic-sharia.org/aboutus/>> accessed 20 February 2017.

<sup>13</sup> 'After discussion, dwelling in particular upon the problems facing Muslim families as a result of obtaining judgments in their favour from non-Islamic courts in the country but not having the sanction of the Islamic Shari'a, it was decided to establish the said Council.' <<http://www.islamic-sharia.org/about-us/about-us-6.html>> accessed 4 January 2013. Alternatively, the information can be found at their new webpage at <<http://www.islamic-sharia.org/aboutus/>> accessed 20 February 2017; Pearl & Menski, *supra* note 1; In *Al-Midani v Al-Midani*, the

many Muslims, when ... solving their personal problems',<sup>14</sup> the vulnerabilities faced by many women as a result of their husbands' refusal' to cooperate,<sup>15</sup> and the difficulties in 'obtaining judgements in their favour from non-Islamic courts'.<sup>16</sup> In addition to fulfilling its essential task to decide Muslim family cases in light of Islamic *Sharī'ah*<sup>17</sup> the ISC aims at preserving the Islamic identity and survival of Muslims in a non-Muslim country.<sup>18</sup> The *Sharī'ah* scholars at the ISC come from various backgrounds and origins, making a total number of ten permanent scholars<sup>19</sup> who conduct the final hearing.<sup>20</sup>

### 3 Reasons to Divorce

In Britain, the diverse and multicultural society elements involved in divorce cases are various and at times complicated. Abu Sayeed<sup>21</sup> and Bano<sup>22</sup> reveal various contributory factors, the most common of which are: forced marriage, addiction, incompatibility, children, finance, separation; impotence;<sup>23</sup> family interference or a 'clash of upbringing'; adultery, domestic violence,<sup>24</sup> and intra-family inequality.<sup>25</sup> Other common factors include, issues of power in the family, continuous conflict, family pressure and difficult relationship with in-laws;<sup>26</sup> education,<sup>27</sup> woman's fi-

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court highlights the Shari`ah councils as a 'quasi-Islamic court'; *Al-Midani v Al-Midani* [1999] All ER (D) 188; S. Bano, Complexity, Difference and 'Muslim Personal Law': Rethinking the Relationship between Shari`ah Councils and South Asian Muslim Women in Britain, PhD Thesis, Department of Law, University of Warwick, Warwick, 2004).

<sup>14</sup> <<http://www.islamic-sharia.org/aboutus/>> accessed 20 February 2017.

<sup>15</sup> Arshad, *supra* note 9 at 35.

<sup>16</sup> M. I. Surty, 'The Shari`ah family law courts in Britain and the protection of women's rights in Muslim family law with specific reference to the dissolution of marriage at the instance of the wife', *Muslim Educational Quarterly* (1) (1991): 59-68. Analysis of the work is available in Badawi, *supra* note 5 at 73-80; Pearl & Menski, *supra* note 1 at 78; Bano, *supra* note 13; J. Bowen, 'A Preliminary report on cases and procedures of the Islamic Sharia Council' (12 May 2013) <<http://blog.islamic-sharia.org/?p=12>> accessed 5 June 2013; Arshad, *supra* note 9 at 35; G. Bunt, 'Decision-making concerns in British Islamic environments', *Islam and Christian-Muslim Relations* 19(1) (1998): 103-113.

<sup>17</sup> <<http://www.islamic-sharia.org/about-us/about-us-6.html>> accessed 21 December 2012; Interview with Dr Suhaib Hasan, the ISC Secretary General (11 April 2011). At the interview it was stated that 'the need for a *Sharī'ah* Council was expressed through a general agreement among Muslim scholars that it is a must to establish such institutions to cater for the basic *Sharī'ah* needs of the Muslim community.'

<sup>18</sup> As promoted by the ISC in its website <<http://www.islamic-sharia.org/about-us/about-us.html>> 21 December 2012.

<sup>19</sup> With membership of the ISC comprising those who attended the first meeting of its establishment, and an open invitation to other scholars who did not attend the meeting, it now consists of representatives from several institutions in the UK. <http://www.islamic-sharia.org/aboutus/>.

<sup>20</sup> In an interview with Dr Suhaib Hasan the ISC Secretary General (17 May 2010) said, 'The ISC is a council made up of many representatives and communities. We have, for example, in our panel my origin from Pakistan, one from India, two from Bangladesh, one from Arabian origin, two from Somali origin. So we have diversity in our *shuyukh* and also our community. So it has more representatives than any other council in this country.'

<sup>21</sup> A. Sayeed, 'Reasons for divorce', in *Proceedings of the Seminar on Muslim Personal Law`2004* (London, 2004).

<sup>22</sup> Bano, *supra* note 6 at 196-197.

<sup>23</sup> For detail elaboration of each of these factors refer to Sayeed, *supra* note 21.

<sup>24</sup> Bano, *supra* note 6 at 196.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, p. 197.

nancial independence<sup>28</sup> and ‘being too westernised’.<sup>29</sup> The ISC’s case files show other reasons for divorce. The major contributor to divorce among Muslims in the UK, based on the ISC’s statistical information, is domestic violence.<sup>30</sup> Others are scenarios such as marriages between a non-practising Muslim with a new Muslim, which almost always ended in crisis, and transnational marriages involving different cultures and religions.

## 4 Process and Procedure of Islamic Divorce at the ISC

Islamic law accommodates several methods of obtaining a divorce. The commonly held methods of marriage dissolution among the Muslim community in the UK are *talāq*, *ḥul’*, *mubāra`āt*,<sup>31</sup> *tafwīd*<sup>32</sup> and *fash*,<sup>33</sup> though, *talāq* and *ḥul’* are the two most sought methods.<sup>34</sup> To provide clarity to the process followed at the ISC, four procedural stages<sup>35</sup> are adopted. These are: the initial contact and application, the investigation, the mediation and reconciliation, and the issuance of certificates.

### 4.1 Stage 1: Initial Contact and Application

The first Stage covers *talāq* and *ḥul’* as their procedures for submitting an application is relatively similar. The common practice shows that most of the applicants make an initial contact with the ISC explaining briefly their marital issues before making any application.<sup>36</sup> Following this, an application form must be submitted either by post, email or fax to the ISC’s headquarters in Lon-

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<sup>28</sup> *Ibid.*, p. 196-197.

<sup>29</sup> *Ibid.*, p. 197.

<sup>30</sup> ‘Statistics’ <<http://www.islamic-sharia.org/statistics/>>, accessed 14 Oct. 2014, Other reasons include: no financial support, separation, neglect, abandonment, unreasonable behaviour, lies (trust issues), not fulfilling duties, polygamy, breakdown of marriage, already pronounced/applied for civil divorce, married for visa/passport, never lived as husband and wife, unhappiness gambling. Other reasons also include does not want children, has criminal record and in prison), and disability.

<sup>31</sup> L. Caroll, ‘Talaq-i-tafwid and stipulations in a marriage contract: important means of protecting the position of the South Asian Muslim wife’, *Modern Asian Studies* (16)(2) (1982): 277-309.

<sup>32</sup> *Ibid.*, p. 279. The MLSC for example, provides in their website a form of *tafwīd* divorce to be filled by the husband. <[http://www.shariahouncil.org/?page\\_id=26](http://www.shariahouncil.org/?page_id=26)> accessed 6 June 2013.

<sup>33</sup> Judicial dissolution of marriage by religious authorities.

<sup>34</sup> L. Caroll, ‘Muslim women and ‘islamic divorce’ in England’ *Journal of Muslim Minority Affairs* 17(1) (1997): 97-115. Arshad’s book could be very useful as general guideline for Muslims in the UK. Arshad, *supra* note 9 at 109-148; S. Bano, *Muslim Women and Shari`ah Councils: Transcending the Boundaries of Community and Law* (Hampshire: Palgrave Macmillan, 2012); Bano, *supra* note 13; S. N. Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce and the Shariah* (London: The Nuffield Foundation, 2001), 7-8 *et seq.* See also Ali, *supra* note 2 at 127. For additional discussion of these types of dissolution of marriage, see discussion in A. R. I. Doi, *Shari`ah: Islamic Law* (London: Ta-Ha Publishers Ltd, 2008) and, Pearl & Menski, *supra* note 1.

<sup>35</sup> As suggested by Bano, *supra* note 13 at 117-123, Bano, *ibid.*, p. 120.

<sup>36</sup> Application to divorce at the ISC is made with conditions. The applicant must (1) be a British resident (husband and wife), or one of the parties resides in the UK, according to the staff interviewed this is to prevent cases such as clients refusing to abide by the ISC’s decision, (2) have an indefinite leave to remain in the UK, (3) have visa for a significant length of time. Part of these can be seen at the ISC’s website ‘three letters to the husband’ <<http://www.islamic-sharia.org/6.html>> accessed 5 June 2013. See also Bano, *supra* note 6 at 202.

don.<sup>37</sup> It must contain supporting documents as well as a detailed explanation of the reasons for divorce to enable the ISC *Sharī'ah* scholars to explore reconciliation and saving the marriage possibilities.<sup>38</sup> The application will not be registered if any details or documents requested in the form are not included.<sup>39</sup> Even though it is not a compulsory requirement for obtaining a divorce,<sup>40</sup> the ISC further requires applicants whose marriages have been registered in the UK or abroad to obtain a civil divorce from the court<sup>41</sup> before making an application to the ISC.<sup>42</sup> Such a requirement by the ISC is to protect clients (especially women) and to avoid limping marriage situation.<sup>43</sup> The pressure of a pending section 10A of the MCA 1973<sup>44</sup> can have the desired effect of speeding up a contested Islamic divorce.<sup>45</sup> Upon receiving a fully completed application, the ISC registers the application and begins its investigation.

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<sup>37</sup> The majority of the work is conducted at its headquarters in Leyton. The ISC is led by its President, Maulana Abu Sayeed. The headquarters consists of five *Sharī'ah* scholars, three counsellors (two full-time male counsellors and one part-time female counsellor working on an appointment basis). The management team is led by a manager supported by three full-time and two part-time staff members including a female receptionist; G. Douglas et al., *Report on Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* (Cardiff: Cardiff University, 2011), 44 *et seq.*

<sup>38</sup> Interview with one of the ISC's administration staffs, 15<sup>th</sup> November 2011.

<sup>39</sup> Among the details required as stated on the form are the name and contact address of the other spouse, copy of ID or passport, Islamic marriage certificate (or a *nikah nama*) as quoted in Shah-Kazemi, *supra* note 34 at 65 (refer note 17). See also Bano, *supra* note 6 at 203; civil marriage certificate (if applicable), copy of decree nisi/absolute, letters from solicitors or court, and registration fee. More importantly, all applicants, including the husband's application for *talāq* and the wife's application for *hul'* and *fash*, must include detailed reasons for seeking a divorce. There is a difference of fee charged for *talāq* and *hul'* procedure where £200 is for *talāq* and £400 for *hul'*, See the ISC's website on 'services & cost' <<http://www.islamic-sharia.org/prices/>> accessed 14 October 2014 and, <[http://www.islamic-sharia.org/wp-content/uploads/2014/05/Khula\\_Application0216.pdf](http://www.islamic-sharia.org/wp-content/uploads/2014/05/Khula_Application0216.pdf)> accessed 20 February 2017.

<sup>40</sup> C. Hamilton, *Family, Law and Religion* (London: Sweet & Maxwell, 1995), 115 *et seq.*

<sup>41</sup> There is pressure from Muslims for legislation to encourage, if not to ensure that a religious divorce is obtained along with a secular divorce. *Ibid.*, p. 115.

<sup>42</sup> Dr S. Hassan. "An Introduction to Shari'a" in *Proceedings of Seminar on Shari'a: A Way of Life - 2008* (London, 2008), 14-15. If the civil divorce has not yet been granted to the parties, evidence must be presented to the ISC verifying that an act has been carried out for that purpose, such as the communication letters between the parties and the solicitor. From the review of the ISC cases file, the research has found examples of correspondence between the ISC and solicitors or mediators who act for the clients. The other two *Sharī'ah* Councils – the MLSC and the BSC – also adopt a similar procedure of requiring the applicants to provide the Councils with a civil divorce.

<sup>43</sup> The term limping marriage denotes 'marriages that are recognised in some jurisdictions as having been validly dissolved, but in other jurisdictions are still subsisting.' Yilmaz, *supra* note 3 at 131. Therefore, in order to avoid conflict resulting from 'limping marriage', the MLSC, for example, in its divorce procedure, will delay the issuance of Islamic divorce until a decree absolute/final civil divorce is issued. However, the ISC would still process a divorce application without a decree absolute provided the wife affords the Council with sufficient evidence that divorce proceedings are under way at the civil court. Despite the different approaches undertaken at the two *Sharī'ah* Councils, both are aware of the conflict of laws and take precautionary steps not to jeopardise the parties' rights.

<sup>44</sup> Matrimonial Causes Act, 1973.

<sup>45</sup> C. Proudman, 'A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry', *Family Law Week* (2012). In fact, English law places an additional requirement in the same Act that a decree absolute cannot be pronounced until the parties settle their religious divorce or a religious divorce is granted. This means, both procedures now require parties to submit a divorce order from divorce issuing bodies before a religious divorce or a final civil divorce is granted. In line with the objective set out in the Matrimonial Causes Act 1973 regarding the 'timing factor' where a consent order cannot be approved and take effect until a final divorce order is made, it is

## 4.2 Stage 2: Investigation

The purpose of the investigation stage is for the ISC *Sharī'ah* scholars to verify the accuracy of the claims and allegations made by the parties, as well as the validity of the evidence presented. At this stage there are two slightly different divorce procedures at the ISC in practice, depending on whether the application for divorce is submitted by the husband or the wife. The discussion will therefore address the procedures for *talāq* and for *hul'* separately.

### 4.2.1 *Talāq* Procedures

The procedure for applying for a *talāq* by a husband is more straightforward without detailed investigation and cross-examination. This is because in Islamic law, *talāq* is usually a right of the husband and 'men do not require the authority of the *Sharī'ah* to end their marriages.'<sup>46</sup> Upon receiving the application and all the documents, the ISC will send to the husband a *talāq nama*<sup>47</sup> which he has to sign in front of two witnesses and return to the ISC. Following this, a written notification is sent to the wife acknowledging her husband's intention to divorce and the proceedings.<sup>48</sup> The notification is also to enquire from the wife, among others things, whether she agrees to the divorce or whether she wants to reconcile, whether there are any outstanding *mahr* and/or whether she has any other claims to make before the divorce. For instance, in one case<sup>49</sup> the wife replied by sending a letter to her husband expressing her wish to reconcile. The husband then contacted the ISC informing them that he agreed to reconciliation. In this case, no divorce certificate was issued and the case was closed.<sup>50</sup> However, in another case,<sup>51</sup> the wife made a claim for *mahr*, financial support during her waiting period (*iddah*)<sup>52</sup> and wedding expenses.<sup>53</sup> Nevertheless, if no response is received within a reasonable timeframe, the ISC will ask the husband to (a), verify his wife's address<sup>54</sup> and (b) ensure that the due amount of *mahr* has been paid in full.<sup>55</sup>

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also pertinent that a religious divorce is sought before a decree absolute is pronounced. This is important as it helps to reconcile any saveable marriages through the Islamic method as the English law point.

<sup>46</sup> Arshad, *supra* note 9 at 37.

<sup>47</sup> As explained above of the '*nikaḥnama*', a '*talāqnama*' refers to a *talāq* certificate. However, in practice at the ISC, a *talāqnama* is not a divorce deed but a draft of divorce paper where the husband writes he divorces his wife with all the details and witnessed by two witnesses.

<sup>48</sup> The wife will be given thirty days to respond, or sixty days if she resides abroad.

<sup>49</sup> CB 7036.

<sup>50</sup> In this situation if the husband has already divorced his wife the ISC will send a *rujū'* (reconciliation) form to the husband and after completing and returning the form to the ISC, a copy will be forwarded to the wife.

<sup>51</sup> CB 7060.

<sup>52</sup> See for example explanation in Arshad, *supra* note 9 at 127-128.

<sup>53</sup> The ISC sent the wife's letter of claim to the husband to which he replied, refusing to agree with the claims. The ISC informed the wife of his reply and invited them both for a joint meeting. At the joint meeting the reconciliation attempts failed and finally a divorce certificate was issued.

<sup>54</sup> Verification and proof of address can be made through any of the four: 1. the person's official statement, passport, electric, gas, or council tax bills, letters from solicitors or courts; 2. overseas parties can be confirmed through address. 3. Internet or email data reference agency and 4. A sworn affidavit, or ISC will advertise the where about of the other party in a local paper and there will be an additional charge which the applicant will have to pay. Case CB 6711.

<sup>55</sup> If there is a deferred *mahr* then the husband has to pay to the wife whatever balance remained. If the marriage is consummated, he is required to pay the full amount of the *mahr* stated during the *nikah* (marriage solemnisation). However, if the marriage is not consummated, the husband must pay half of the *mahr*. Sheikh Dr Suhaib Hasan



The ISC will then send a *talāq nama* to the husband to sign in front of two male witnesses and returned to the ISC<sup>56</sup> or to sign it at the ISC premises witnessed by two ISC staff members.<sup>57</sup> Subject to the ISC satisfaction that all the requirements<sup>58</sup> have been met, a *talāq* certificate will be issued, and a copy of the divorce certificate will be sent to the wife. If the husband has obtained a civil divorce in a civil court proceedings and he presented it to the ISC, the ISC will send to him a *talāq nama* and the process follows as above. However, in reality there are still issues relating to civil divorce petitioned by a husband, which will be elaborated below.

#### 4.2.2 *Hul'* Procedures

The procedures for applying for a *hul'*, divorce by a woman, require a more detailed investigation, and a woman must go to court in order for the marriage to be judicially dissolved.<sup>59</sup> Contrary to *talāq*, which does not necessarily require reasons, a *hul'* divorce requires the wife to demonstrate reasons for seeking it.<sup>60</sup> The ISC, in most situations, encourages the wife to obtain the husband's consent to divorce. However, in many cases, wives are found struggling to obtain such consent.<sup>61</sup> As an alternative, the ISC requires the wife to provide the husband's contact details to enable the ISC to expedite the case and begin the investigation process. Failure to provide the husband's address, halts the procedures as under *Sharī'ah* law the husband must be informed of the wife's intention to seek a divorce. Upon receiving the application, the ISC sends a letter of acknowledgement to the wife and notifies the husband. The ISC's letter reads:

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revealed one case where the *mahr* was £30,000 pounds and the husband had to pay half of the amount since the marriage was not consummated. In any case, this was still a big amount of money. Sayeed, *supra* note 21.

<sup>56</sup> In practice, the husband may also come to the ISC to fill and sign the *talāq nama* (*talāq* form) before two witnesses, i.e., the ISC's staffs. Meanwhile, The MLSC provides guideline in its cover letter to the husband to pronounce the divorce and information to the wife about the waiting period (*'iddah*). The husband also must fill a Declaration Form declaring that he has fulfilled all the required conditions in the form. The MLSC recommends that only one *talāq* is pronounced (AM1). <<http://www.shariahouncil.org/wp-content/uploads/2013/03/AM1-Islamic-Divorce-Application-Form-For-Men.pdf>>; <<http://www.shariahouncil.org/wp-content/uploads/2013/03/AM2-Covering-Letter-For-Islamic-Divorce-Application-Form-For-Men.pdf>> 13 December 2012.

<sup>57</sup> At the MLSC the husband will be asked (as clearly stated in the letter sent to him) to sign the Pronouncement of Islamic Divorce Form in front of adult Muslim witnesses and, preferably, someone known to him and the wife. <<http://www.shariahouncil.org/wp-content/uploads/2013/03/AM2-Covering-Letter-For-Islamic-Divorce-Application-Form-For-Men.pdf>>.

<sup>58</sup> Having paid the *mahr* to the wife and no deferred *mahr* left (money, jewellery, etc.): The MLSC for instance, in the Declaration Form (AM1) requires the husband to observe all the conditions: any outstanding amount of *mahr* and the maintenance for the wife during the period of *'iddah*.

<sup>59</sup> Arshad, *supra* note 9 at 123; Caroll, *supra* note 34 at 101.

<sup>60</sup> It must be filled in her application which will be registered in the ISC's cases file. A woman may divorce her husband even on the grounds that she no longer loves him. This is based on this *ḥadīth*, the woman is reported to have asked the Prophet pbuh if she can divorce her husband since she does not love him anymore and fears of transgressing the limits prescribed by Allah. The Prophet pbuh then ordered the woman to return the *mahr* that was given to her by her husband during their marriage contract and by doing so the woman is freed (divorced by *hul'*) from the marriage. In one of the reviewed cases the wife, in explaining her reason to divorce said that: "We suffered complete breakdown in any sense, constantly suffered from different behaviour, opinion, outlook and needs from one another, ... have reconciled for a period between four to six weeks however, living in different home. There is no hope for us to have a happy marriage life. He insists that I should take action and he will happily sign divorce papers", CB6711.

<sup>61</sup> Much research on Muslim women and divorce reported narrations of women's difficulties and struggle in getting their husband's consent to divorce. Some of these can be found in Shah-Kazemi, *supra* note 34; Bano, *supra* note 6; Bano, *supra* note 34; Caroll, *supra* note 34; D. Gordon, *Foreign Divorces: English Law and Practices* (Ashgate Publishing Ltd, 1988).



Please note that the Islamic Shari`ah Council was set up to help the Muslim community in Britain. We would like you to know that in Islam just as a man has the right to divorce his wife when he wishes so does a woman has the right to ask for divorce by way of *hul`*. However we will assist you in helping you and your wife to come to a common ground and try to resolve any marital problems that maybe affecting your relationship.<sup>62</sup>

The ISC sometimes has to verify the address if no proof of address is provided,<sup>63</sup> or if there is no response<sup>64</sup> from the defendant to the notification letters, or if there is a failure to trace the defendant's whereabouts. At the ISC, personal statements are the most prevalent method of address verification. Even though this may seem an informal and unprecedented method, without verification the ISC may not be able to proceed with a case.<sup>65</sup> However, if all necessary actions to contact and notify the husband have been pursued but failed, the ISC gains the authority to proceed with the case – for example, by dissolving the marriage in the absence of the defendant.

\_\_\_\_\_The investigation process begins with written notifications to each party of the proceedings that are due to take place, to verify the evidence, to give additional information such as proof of their separation and/or to call for a mediation meeting.<sup>66</sup> Evidence to support claims includes the applicant's personal statement, family or close friends' testimony and other written statements. In most cases, the personal statements explaining the marital breakdown set the basis of their application for divorce. There is no limit to the length and detail of the statement; they can be very long and extensive, revealing every little detail of the problems as well as emotional narrations.<sup>67</sup> All parties are given equal opportunity to present and defend their case, to reason and clarify the circumstances, to provide evidence and 'to express their views'.<sup>68</sup> The ISC begins the investigation by forwarding copies of each party's personal statement, claims and evidence to the other party for verification.<sup>69</sup> This happens when the parties prefer not to meet each other, when direct encounter should be avoided or the matter can be dealt with by correspondence. The notification sent to the husband also asks him for a response.<sup>70</sup> If his reply contains claims or conditions the reply will be forwarded to the wife for her response or counter-

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<sup>62</sup> The ISC, Case No CB6711.

<sup>63</sup> Among the documents accepted as proof of address at the ISC are bills or bank statements.

<sup>64</sup> Bowen, *supra* note 16.

<sup>65</sup> In one case the applicant provided a personal statement together with a valid mobile phone number with several text messages to prove communications with her husband and that he had received the ISC's correspondences but simply refused to cooperate. In this case the wife and husband had been separated and living at different addresses for three years. Because of that she was unable to provide evidence or proof of address such as bills or a bank statement. The husband would occasionally meet and speak with his son and wife and the wife would advise the husband to contact the ISC but he would claim that he was too busy and would do it later.

<sup>66</sup> See also Bowen, *supra* note 16. If all necessary actions to contact and notify the husband have been observed but failed, this gives the ISC authority to proceed with the case – for example, by dissolving the marriage in the absence of the defendant.

<sup>67</sup> Bano finds that 'the process of collecting evidence to determine whether a divorce certificate can be issued can be eclectic as well as complex. It encapsulates the power of religious scholars to determine what constitutes evidence while simultaneously placing the onus on the applicant to produce verifiable documentation. The process can therefore result in lengthy delays', Bano, *supra* note 34 at 119.

<sup>68</sup> <<http://www.islamic-sharia.org/khula.html>> 13 December 2012.

<sup>69</sup> In one case, the ISC disregarded a husband's request not to disclose the letter he sent to the ISC to his wife.

<sup>70</sup> A copy of the letter is forwarded to the wife with a reference number for future correspondence with the ISC. Additional information is also attached to the *hul`* form; Bowen, *supra* note 16.

claim.<sup>71</sup> If the husband does not respond in the allocated time,<sup>72</sup> the ISC issues a second letter, followed by a third notification if necessary.<sup>73</sup> The third letter is considered a final notice and opportunity for the husband to reply. If he fails to respond the ISC requests the wife to verify the husband's address.<sup>74</sup> Then, a final notice and copy of the three notifications will be sent to the husband via recorded delivery.<sup>75</sup> For instance, in one case,<sup>76</sup> due to the absence of any reply from the husband, the ISC in an attempt to finalise the case, sent a final notice together with a *talāq nama* for him to sign. The case checklist shows that additional time is also given after the final notice for the party to respond. If the wife has obtained a civil divorce from the civil court, the issuance of one notification is sufficient provided the address of the husband is verified. The wife, in such a case, is required to prove that her husband did not defend the civil divorce proceedings.

In some cases the ISC receives a swift reply from the husband to the first notification. However, such a reply is sometimes not because the husband wants to cooperate but rather to object to the wife's application for divorce. In a *fash* case,<sup>77</sup> the husband was furious and refused to cooperate. He contacted the ISC by telephone, insisting on his position and refused to reply or meet anyone, putting a condition that his wife had to talk to him first before he would agree with her intention to divorce.<sup>78</sup>

A detailed and systematic investigation process is important to avoid any injustice to the parties; therefore the process can be very time-consuming, especially in the Ping-Pong claim and counterclaim exchanges. As the ISC adopts a flexible approach in not pressuring the parties, and as the parties might request holding or withdrawing the case, the time gap between notifications might be significant, reaching up to eight months.<sup>79</sup> The time gap also depends on the time spent in the reconciliation attempts, the complicated<sup>80</sup> nature of the case and the parties' speed of coop-

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<sup>71</sup> In all its correspondence the ISC asks each party to verify whether or not the content is true to the best of their knowledge and to provide the ISC with their views and comments. At this stage, the ISC acts as a neutral facilitator (Should we use mediator?) going back and forth with claims and counterclaims for and against each party.

<sup>72</sup> Each notification gap is thirty days if he is a British resident and sixty days if he resides abroad.

<sup>73</sup> Subject to the husband's response, a maximum of three notifications will be sent with one or two months gap between each notification if he resides in the UK or overseas.

<sup>74</sup> Similarly the verification of address can be made using any of the four methods explained earlier in the *talāq* procedure. The ISC also offers to arrange an individual trace report for a fee to locate the other party's whereabouts such as publishing a notice in a local newspaper to convey the wife's demand for divorce. The notice will solicit (request) the husband to contact the ISC within a month from the date of the notice, and send his views on the application for divorce. Case CB6711.

<sup>75</sup> The ISC also sends a notification letter to the wife notifying her that the three notifications have been sent to the husband based on the address she provided. The ISC also advises the wife that if she cannot confirm her husband's current address or an alternative address the ISC will be unable to proceed with her case because under the Islamic law the husband must be informed that his wife is seeking a divorce.

<sup>76</sup> CB6711.

<sup>77</sup> CB7953.

<sup>78</sup> In fact, the husband disagreed with the divorce. In this case the ISC had to give the husband the opportunity and asked the wife to contact him since he claimed he still loved her. However, the husband later complained that the wife had got him in trouble with the police and that he was accused of being a terrorist. This was in contradiction with his disagreement to divorce. The husband then sent a letter to the ISC stating that he would never compromise or cooperate or be willing to be separated from his wife and asked for reconciliation.

<sup>79</sup> This happened in one of observed cases – case CB6711 – as the gap between the third notice and the final notice was around eight months.

<sup>80</sup> Bowen's report found that 'resolving the case takes longer when more complex issues arise, when the husband disputes the claims made by his wife, or when there are children, or disputes over repayment of marriage goods.

eration.<sup>81</sup> Bowen's preliminary report suggests three patterns of 'wide range of time to decision':<sup>82</sup> the quickest period of 6–8 months, the moderate period of 10–19 months, and the longest period of 23–41 months. He agrees that 'six months is a fairly short time to complete the procedures, quite comparable to an uncomplicated civil divorce procedure.'<sup>83</sup> This might be justified by the need of the Council to make sure that the marriage is truly irreconcilable and to balance the 'benefit and harm' of divorce and its effect on the children.<sup>84</sup> However, case reviews and observations on mediation-arbitration sessions agree with Bowen's report that 'very frequently, delays come from the unwillingness of the husband to respond to letters.'<sup>85</sup> The main concern here is that a prolonged time-gap will prevent the wife from contracting a new marriage until her previous marital status is cleared. This is, unfortunately, true in most of the cases. The defendant may object to the applicant's claims or refuse to cooperate. However, the procedure for *ḥul'* may become as straightforward as *talāq* if a husband agrees to divorce either with or without conditions, such as by returning the *mahr* without further counterclaims, as in one case concerning a mutual *ḥul'* divorce.<sup>86</sup>

### 4.3 Stage Three: Med-Arb

Part of the divorce proceedings, is to ask the couple to attend an interview or meeting with the ISC's scholars, referred to as 'med-arb'.<sup>87</sup> Two distinguished key processes undertaken at *Sharī'ah* Councils, as compared to national mediation bodies, are mediation (or reconciliation) and counselling sessions. Mediation is one of the fundamental features of the work at the ISC<sup>88</sup> and other *Sharī'ah* Councils.<sup>89</sup> This is embodied in the ISC's principles as a moral duty and religious obligation to preserve the sanctity of the Muslim family and, more importantly, that a divorce cannot be pronounced without going through reconciliation.<sup>90</sup> This approach has been clarified by Raza from the MLSC who said that the Council usually discourages divorce.<sup>91</sup> Badawi on explaining the procedure at *Sharī'ah* Councils, said: 'We decided to see how we could deal with this problem in a manner that would resolve the dispute without breaking either the *Sharī'ah*

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Other cases take longer, for many reasons. Sometimes the husband replies to the wife's charges and the Council tries to ascertain whose position is stronger. They may wish to allow them time to reconcile their problems.' Bowen, *supra* note 16.

<sup>81</sup> Bowen clarifies that the longer procedure may happen because 'one or both [parties] live far away, or postpones the meeting, or simply refuses to come. Usually the Council asks the husband to take the action of granting his wife a divorce, and he may delay his answer.' *ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*; Bano, *supra* note 34 at 119.

<sup>85</sup> *Ibid.*

<sup>86</sup> CB7089. The couple in this case were students who got married at a young age and the marriage lasted less than a year. They have mutually decided to divorce after they attended counselling sessions at the ISC.

<sup>87</sup> Bowen, *supra* note 16.

<sup>88</sup> Interview with Dr Suhaib Hasan, interview (11 April 2011).

<sup>89</sup> Arshad, *supra* note 9 at 139.

<sup>90</sup> Badawi, *supra* note 5 at 77-78; Similar weight is given to the importance of reconciliation'. Bano, *supra* note 6 at 203.

<sup>91</sup> Raza stated that the Council "[d]oes not just distribute divorces on a footpath... we are not encouraging divorce – that's not our role. When a woman rings here to find out about divorce or to request an application form, we are initially reluctant to issue a divorce application. We ask her that you should try to rethink your position, because divorce is something that is considered a stigma in society and divorce is nothing good for you, and if they have children that will be another problem after divorce so we discourage it." *Qtd in* Bano *supra* note 6 at 203.

or the law. We decided that the best thing was to call the two parties before us to negotiate the issue.’<sup>92</sup>

In *Shari‘ah* Councils, mediation is principally an inquest into the possibility of reconciling the parties.<sup>93</sup> The conciliatory characteristic of Islamic family law and the need for mediation have been emphasised by many scholars.<sup>94</sup> Therefore the mediation stage is crucially important and integral to the ISC’s proceedings, which includes two processes: an investigation and gathering of information, and an attempt at reconciliation. With this in mind, a husband who wishes to divorce his wife is required to attend a mediation meeting.<sup>95</sup> Such procedural restriction placed on men’s right to unilateral and fast-tracked divorce may help to save more marriages and protect women. Therefore, under the ISC’s procedure, any divorce applications will not be processed unless and until both parties attend a mediation session with one of the *Shari‘ah* scholars.<sup>96</sup> In fact, all the Councils visited offer and commence the process with mediation in line with Islamic law principles in resolving family conflict or facilitating a divorce.<sup>97</sup> Bowen recognises that ‘this procedural rule resembles that followed in a civil divorce’ in UK<sup>98</sup> which, in effect, may equally prolong the case between the initial filing and awarding of a divorce.<sup>99</sup>

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<sup>92</sup> Badawi, *supra* note 5 at 77-78.

<sup>93</sup> Bano, *supra* note 6 at 203; Mediation in Islamic law is utilised primarily to reconcile the parties and their failing relationship, Interview with Dr Suhaib Hasan, interview (17 May 2010).

<sup>94</sup> For instance see Badawi, *supra* note 5.

<sup>95</sup> *Ibid.* The MLSC highly recommends a man seeking divorce to meet a religious scholar and stated this in a cover letter sent to the husband when responding to his application to divorce (Am2). See e.g. covering letter <<http://www.shariahouncil.org/wp-content/uploads/2013/03/AM2-Covering-Letter-For-Islamic-Divorce-Application-Form-For-Men.pdf>> accessed 13 Dec. 2011. An example can also be seen in the Pakistani Muslims Family Law Ordinance 1961 section 7, placing restrictions on the husband’s privilege to a unilateral divorce which many refer to as an easy divorce. The law requires, *inter alia* (1) the husband to notify local officials and his wife, (2) for the husband to observe a 90-day period following a notification, and (3) (most significantly) an attempt at reconciliation by a local official during the interval period. Caroll, *supra* note 34 at 99. This procedure is identical to the one currently practised in the MIAM under English law.

<sup>96</sup> Bano, 2008, *supra* note 4 at 299.

<sup>97</sup> Besides *Shari‘ah* Councils, mediatory intervention among the Muslim community in Britain is also always available through local mosques, for example see Bunt, *supra* note 16 at 106. Estranged parties may, without referring to any *Shari‘ah* Councils, refer their dispute to family members, relatives or community leaders such as an Imam. Badawi from the MLSC notes that some of these reconciliation meetings were ‘arranged by elders of the couple’, Badawi, *supra* note 5. Dr Suhaib from the ISC reasons that as nowadays elders or senior family members are no longer actively involved in family reconciliation, *Shari‘ah* Councils assume the role and arbitrate matrimonial disputes, especially for couples who visit the ISC office. However, when a dispute is brought to a *Shari‘ah* Council the resolution process becomes more formal as mediation has now become a requirement. The ISC also notes that mediation is usually for clients who come just for mediation and that not many cases involve mediation *per se*. The majority of cases relate to divorce applications which, therefore, require arbitration, interview with Dr Suhaib Hasan, interview (17 May 2010).

<sup>98</sup> Bowen, *supra* note 16. A similar procedure is adopted at the BSC studied by G. Douglas et al. *supra* note 37 at 45.

<sup>99</sup> *Ibid.* The varying time gap between filing the case and issuance of a decision depends, largely, on the response of the parties to the case (usually the wife), any reconciliation attempt between the spouses and whether the husband is uncooperative or missing. Bowen’s preliminary report suggests three patterns of ‘wide range of time to decision’: the quickest period of 6–8 months; the moderate period of 10–19 months; and the longest period of 23–41 months. He agrees that ‘six months is a fairly short time to complete the procedures, quite comparable to an uncomplicated civil divorce procedure.’ In most cases the delay was not necessarily from the *Shari‘ah* Councils but due to the complicated nature of the cases and the parties’ lack of cooperation. Indeed, the delay from the ISC lies in the Council wanting to make sure that the marriage truly has broken down before ending it and being aware of the damage divorce can do to children. The scholars try to balance ‘benefit and harm’, and doing so may take

It is important to note that, in the observation of the process of resolving marital and divorce disputes, the researchers have noticed that the ISC uses the arbitration method.<sup>100</sup> The researchers also find that mediation and arbitration are sometimes applied simultaneously or overlap each other. This is because *Shari'ah* scholars sometime impose or suggest solutions to the parties in situations where both seem to face a 'dead-end' negotiation. Consistent with Islamic law, the session is a *tahkīm* process which normally commences with mediation as an early attempt to reconcile disputants and proceeds into arbitration if reconciliation fails.

Mediation activities include investigation and gathering of evidence and information; verification and cross-examination of the parties' claims; discussion of reasons or causes of the marriage breakdown, inducing the couple to talk to each other and, where possible, exploration of possibilities for reconciliation.<sup>101</sup> Mediation is conducted by the ISC's scholars either at the ISC headquarters or at its representatives' offices. The parties are required to attend a joint meeting (provided the husband is legally able to do so)<sup>102</sup> or a separate meeting,<sup>103</sup> with one of the ISC's scholars or representatives in their area (if applicable).<sup>104</sup> However, if matters or problems are too complicated and a joint meeting is crucially required, the ISC summons both parties to a joint meeting at its headquarters.<sup>105</sup>

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time, Bano, *supra* note 34 at 119. Bowen's report found that 'resolving the case takes longer when more complex issues arise, when the husband disputes the claims made by his wife, or when there are children, or disputes over repayment of marriage goods. Other cases take longer, for many reasons. Sometimes the husband replies to the wife's charges and the Council tries to ascertain whose position is stronger. They may wish to allow them time to reconcile their problems.' Longer procedure according to Bowen may 'occur because the Council asks one or the other parties to come for a meeting, and this proves difficult – one or both live far away, or postpones the meeting, or simply refuses to come. Usually the Council asks the husband to take the action of granting his wife a divorce, and he may delay his answer.' Bowen, *supra* note 16. Case reviews and observations on med-arb sessions agree with Bowen's report that 'very frequently, delays come from the unwillingness of the husband to respond to letters'. The procedure for *hul'* may become as straightforward as *talāq* if a husband agrees to divorce either with or without conditions, such as by returning the *mahr* without further counterclaims, as in one case CB7089.

<sup>100</sup> In the ISC headquarter the room where the med-arb session is held is marked 'Arbitration Room'.

<sup>101</sup> Bano, *supra* note 4.

<sup>102</sup> This refers to a husband who is residing overseas and incapable of attending the interview at the ISC. A lot of cases brought to the ISC involve a breakdown of an arranged marriage back in their home country. Therefore, a woman who may want to divorce her husband would not give him a visa. That is why many men could not attend the meeting scheduled at the ISC; Interview with Dr Suhaib Hasan, interview (11 April 2011).

<sup>103</sup> A mediation meeting is either conducted in a separate session or at a joint meeting depending on the request from and the consent of the clients. In some cases the meeting is held separately or only one party cooperates, either due to violence or refusal to cooperate by the other party. The ISC, on some occasions especially when the case involves violence and police, offers a teleconference session. In one case involving domestic violence (CB7013), the wife made a request to the ISC that either she or her husband should be on a teleconference or a dial-in meeting to protect her from possible harm from the husband.

<sup>104</sup> Contact detail of the representative is provided in the letters sent to the parties. The parties are given 21 days from the date the letter is posted to make an appointment with the scholar. As explained earlier the ISC has its representatives i.e. *Shari'ah* judges or imam, located in many mosques or *Shari'ah* council's branches throughout the UK, such as in mosques in Bradford, Manchester, Leeds, Glasgow, Edinburgh, Cardiff and Dublin (Ireland). Accordingly, the ISC will send a notification letter to the respective scholar informing him about the case. After the interview a report from the representative will be sent to the ISC's headquarters in London for further action; see also Bowen, *supra* note 8 at 419.

<sup>105</sup> Interview with Dr Suhaib Hasan, interview (17 May 2010). However, parties from London will come to the ISC's headquarters in Leyton, South London, for a mediation meeting.

The number of mediation sessions is not fixed in the procedure; this depends on the attitude of both parties. According to one of the scholars,<sup>106</sup> if there is no willingness on either side to pursue mediation or reconciliation, the ISC will allow the couple some ‘cooling-off’ time and request them to come back at a later date.<sup>107</sup> As *Sharī‘ah* Councils require proof of civil divorce – a decree nisi – before processing a divorce application, the period between the pronouncement of decree nisi and decree absolute can be usefully spent saving the marriage. This means that the *Sharī‘ah* Councils’ med-arb process significantly contributes in assisting the civil court proceedings and achieving the ultimate goals of the law.<sup>108</sup>

#### 4.3.1 The Interview Report

At the meeting the mediator-arbitrator will be required to fill in a checklist form containing details of the case,<sup>109</sup> which concludes with recommendations by the interviewing scholar, such as requesting the wife to apply for civil divorce, or sending a notice to the husband or that the husband be sent a *hul’* document.<sup>110</sup> In one case<sup>111</sup> in which the wife claimed that her husband made adultery allegation against her, the interview form reported that the husband denied his wife’s claims and wanted to give the marriage a second chance; therefore, the husband was given one month to try.<sup>112</sup> In another case,<sup>113</sup> the recommendation was that one month notice be given to the husband to sign the *talāq nama* sent to him, and if he did not sign it the ISC would dissolve the marriage. Usually, if it is difficult to bring the parties to agreeable terms, or if one of the par-

<sup>106</sup> Dr Suhaib Hasan, 11 April 2011, interviewed at the ISC.

<sup>107</sup> In some cases clients attend the mediation session more than six times. *Ibid.*

<sup>108</sup> Occasionally, if a civil divorce is recent and the man has not remarried, the mediators-arbitrators may try to prevent the decree nisi becoming absolute and successfully reconcile the parties, Badawi, *supra* note 5 at 77-78. In one case (CB7036), the husband applied for a unilateral divorce (*talāq*), but the wife replied asking for reconciliation, and this was subsequently accepted by the husband.

<sup>109</sup> This includes the scholar conducting the mediation (the term ‘scholar’ is used in the form to refer to the mediator-arbitrator), the applicant and the defendant, the date the case was initiated, the number of notifications sent to the other party and the date the response/s received, details of any evidence attached to the response, the number of meetings and whether they are joint or separate, and any suggestions of settlement by the parties.

<sup>110</sup> If a meeting is arranged the applicant’s failure to attend the meeting may cause delay or closure of the case. This does not mean that the ISC will simply close the case without due consideration. In fact, sometimes a case is reopened when the parties have contacted the ISC about their case. There are no clear-cut rules about this; the ISC is flexible as its mission is to assist couples with their problems. This matter can be one of two situations; in the first, if the applicant is the one who later refuses to cooperate further, it is very likely that the ISC will close the case, while in the second, if the defendant is the party who refuses to cooperate, the ISC is likely to proceed with the case after fulfilling all the procedural requirements prior to making a decision in the applicant’s favour.

<sup>111</sup> CB7053. In this case the marriage was not consummated. The recommendation of the scholar in one of the interview form stated, “Ask her to apply for civil divorce. Provide us with the proof and then send him a *talāq nama* to sign. Give him one month’s notice; if he does not sign then dissolve the marriage.” In the interview form of another case the representative recommended that the husband be sent a *hul’* document or a *talāq nama* in exchange for jewellery. (In UK a marriage that is not consummated is not a divorce it is an annulment and you don’t need to wait you can get this done anytime) → Check original source. (The scholar at the ISC use the word/term ‘divorce’ generally to mean procedure to end the marriage. From the cases analysed, the word ‘divorce’ has been used like a ‘blanket term’. The exact procedure (civil divorce or annulment) is basically for the civil courts to determine when parties brought their cases. )

<sup>112</sup> The husband asked the ISC to help him to communicate with his wife or receive message from her to him. The scholar then made a recommendation to also give the wife a month to contact the ISC.

<sup>113</sup> CB6711.

ties is reluctant to divorce, the ISC will give both parties one month to consider or suggest other solutions.<sup>114</sup> This probably explains why some cases are prolonged.

It is important to note that all scholars' recommendations remain provisional until the ISC monthly meeting, at which the interview report, including the recommendations, will be filed and forwarded to its headquarter.<sup>115</sup> The ISC will issue a final decision at the monthly meeting. However, the decision only becomes final once conditions stated in the decision (*al-Hukm*) are executed by the parties and/or a divorce certificate is issued by the ISC.<sup>116</sup> The report may be written in English or Arabic depending on the scholar's preferences.<sup>117</sup>

In general Scholars at the *Sharī'ah* Councils persist in making repeated attempts to reconcile marriages.<sup>118</sup> However, sometimes reconciliation failure is not because the marriage was not saveable but rather the existing disputes and unresolved issues sparked tension between the couple and made the reconciliation attempt more difficult. In this case some couples are given additional cooling-off and reflection periods.<sup>119</sup> This is arguably in line with the divorce procedure under English law where, after making a divorce application, parties are given time to reflect upon their situation and decision and it is within this period that they are required to try mediation or MIAM, which is now compulsory.<sup>120</sup> However, it is important to note that the procedures of mediation at the *Sharī'ah* Councils do not overshadow the mediation provided by the state professional mediation bodies.

To strengthen its work, the ISC offers a counselling service provided by permanent and temporary male and female counsellors,<sup>121</sup> though it is not compulsory for clients to see a counsellor before a med-arb session.<sup>122</sup> Upon the parties' request, the mediator-arbitrator may adjourn the med-arb session to allow the couple to see a counsellor. The counselling and med-arb sessions are also flexible and can be adjourned to allow the couples to try other alternatives. In one

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<sup>114</sup> CB7053.

<sup>115</sup> The ISC's headquarter manages cases from all its branches and handles (if this is changed to 'hears' would it make a difference) cases in its locality. (what's the difference between manage and handle - 'manage' here means the ISC sorts and processes all applications, correspondence and the final hearing. Even though the med-arb session will take place in parties locality. Apart from managing cases/application, the headquarter also hears cases in its locality)The clients do not have to come to the ISC headquarters. However, in some severe or difficult cases, the ISC will require the parties to attend a meeting at its headquarter.

<sup>116</sup> This will be further discussed below.

<sup>117</sup> Meanwhile, MLSC's official documentations are produced in English. Shah-Kazemi, *supra* note 34 at 21.

<sup>118</sup> Bano, *supra* note 34 at 131.

<sup>119</sup> This is arguably in line with the divorce procedure under English law where, after making a divorce application, parties are given time to reflect upon their situation and decision and within this period they are required to try mediation or MIAM, which is now compulsory. Despite the surrounding dilemmas, the procedure of mediation at the *Sharī'ah* Councils does not overshadow the mediation provided by the state professional mediation bodies.

<sup>120</sup> MIAM has now become a legal requirement through section 10(1) Children and Families Act 2014. The Act was given Royal Assent on 13<sup>th</sup> of March 2014, <http://services.parliament.uk/bills/2012-13/childrenandfamilies.html>.

<sup>121</sup> The BSC has a different mediator working cooperatively with the *Sharī'ah* Council. Mediation is offered outside the 'premise' of the *Sharī'ah* Council, before their case is brought to the monthly meeting in the presence of scholars in which, the mediator acts as an advisor. ; Bano, *supra* note 34 at 107; Shah-Kazemi, *supra* note 34.

<sup>122</sup> Applicants are strongly encouraged to attend counselling sessions to try to resolve problems between them, if possible, and to afford them more time to think and reflect upon their situation before taking any decisions. This process is, arguably, consistent with the requirement under English divorce law. The counselling service also offers advice and counselling sessions to the general public who are not involved in the proceedings.



observed med-arb session, a male counsellor was called in to help<sup>123</sup> and the mediator-arbitrator allowed the counsellor to take charge to calm and counsel both parties.<sup>124</sup> Finally, the couples managed to reach and sign an agreement. This proves to be an advantage for the ISC, and any *Shari'ah* Council, and also shows the importance of having skillful and knowledgeable mediators-arbitrators or counsellors to contribute to an effective mediation process and outcome.<sup>125</sup> If reconciliation is unsuccessful, the mediation session will be geared to finding amicable solutions and agreements between the parties as to future arrangements and consequences of the divorce, such as the care of any children, *mahr*, and spousal and child maintenance, according to Islamic law.<sup>126</sup>

#### 4.4 *Stage 4: Monthly Meeting: Decision Making*

All cases which have gone through the required procedural and investigation stages are prepared, presented<sup>127</sup> and discussed before a panel of religious scholars at the ISC's monthly meeting of 'collegial deliberation'.<sup>128</sup> Usually this is the second step following a failed attempt to reconcile couples during the first stage of mediation. It, primarily, involves arbitration and adjudication, though the observation reveals that the ISC's (and the other *Shari'ah* Councils') process is more akin to adjudication than to arbitration: the way the cases are heard and the decision (or ruling) making process seem to be similar to adjudication.<sup>129</sup> The monthly meeting<sup>130</sup> is held on every last Wednesday of the calendar month and is attended by the ISC's permanent<sup>131</sup> and affiliated scholars.<sup>132</sup> The agenda of the meeting includes, *inter alia*, discussing new and present cases,<sup>133</sup> and other relevant matters.<sup>134</sup> The process begins with the presentation of cases by the Secretary General assisted by the Manager. To facilitate a smooth revision and discussion, each scholar is

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<sup>123</sup> Both parties disagreed with each other and the crux of the dispute was the wife's objection to her husband's plan to visit his second wife abroad and to take their child with him.

<sup>124</sup> The impact of counselling in this case was quite extensive.

<sup>125</sup> This is expressly proven in a research conducted by Shah-Kazemi, where a mediator who understands the religion is preferred by clients over one who does not, Shah-Kazemi, *supra* note 34.

<sup>126</sup> John Bowen, 'Private Arrangements: "Recognizing sharia" in England', *Boston Review* (2009) Mac/April 15, 16 <<http://bostonreview.net/john-bowen-private-arrangements-sharia-England>> accessed 3 June 2013.

<sup>127</sup> The ISC manager is responsible to ensure information collected is sufficient before cases may be forwarded to the monthly meeting.

<sup>128</sup> Bowen, *supra* note 16; Bano, *supra* note 34 at 107.

<sup>129</sup> Similar method is applied at other major *Shari'ah* councils such as the BSC and the MLSC as was expressly admitted by the scholars interviewed.

<sup>130</sup> The meeting is held at the London Central Mosque & Islamic Cultural Centre at Regent's Park once a month. Bowen, *supra* note 126 at 16; *supra* note 8 at 419.

<sup>131</sup> The number of the panel during each meeting might be odd – five, seven or nine –, or even – 10 – depending on the availability of invited ISC scholars and other specially invited scholars. It is important to note that the ISC does maintain the requirement of the Islamic law of *tahkīm* on having an odd number of scholars in the decision making process, as the decision is arrived at based on consensus of at least three of the ISC's scholars present at the monthly meeting.

<sup>132</sup> Bowen, *supra* note 126 at 16.

<sup>133</sup> On average, around 15 cases are reviewed and discussed at the meeting which usually lasts around 5 hours – 2.00 to 7.00pm. Therefore, because of the high number of pending cases an extra meeting may sometimes take place at the ISC headquarters. At the extra meeting at least three *Shari'ah* scholars are required to be present to issue valid decisions. See also a report by Bowen, *supra* note 16.

<sup>134</sup> The information about the agenda of the meeting is included in the invitation to monthly meeting sent to the ISC panel. One of the researchers also has received similar invitation for the research purpose.

given a copy of each case's file which includes<sup>135</sup> the Interview Report stated above.<sup>136</sup> The panel members discuss and debate the case and pass recommendations for a final decision or further action. Most importantly, the panel members consider whether the marriage has been 'irremediably',<sup>137</sup> or 'irretrievably',<sup>138</sup> broken down<sup>139</sup> and verify and review the evidence presented.<sup>140</sup> The panel members also debate the recommendations and proposals for settlement and/or for further action stated in the Interview Reports. Although these recommendations and proposals are not mandatory and are only for guidance, the panel members take into account the mediator-arbitrator's extensive knowledge of the case and give considerable attention to these recommendations and proposals when making final decisions.

Before the ISC scholars take final decisions in regard of each case other activities take place. The panel may decide to give more time to the parties to attempt reconciliation, or require more evidence if the panel is not satisfied with the evidence presented, or dissolve the marriage and issue a divorce order if all the requirements have been satisfied<sup>141</sup> especially where a complete breakdown in the marriage is clear and reconciliation attempts have failed, or if the circumstances warrants that a divorce should be automatically granted to the wife.<sup>142</sup> In complicated cases, the ISC might summon a couple to the panel meeting or to the next monthly meeting to present their case.<sup>143</sup> If the husband refuses to cooperate in the process (of *hul'*) or to divorce his wife (*talāq*), the ISC will dissolve the marriage through *fashh* if it appears that the couple can no longer live together.<sup>144</sup> In all cases a divorce certificate issued by the ISC usually states the type

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<sup>135</sup> Bowen, *supra* note 16.

<sup>136</sup> A slightly different approach is taken at the BSC monthly meeting where the scholars are provided with summary of cases in advance (usually by post) before the day of the hearing to provide the scholars with sufficient information of the cases.

<sup>137</sup> *Ibid.*

<sup>138</sup> Douglas et al. *supra* note 37 at 45.

<sup>139</sup> This would also mean that a divorce may be granted. Accordingly, this raises other issues such as those relating to children, where the ISC will 'seek assurances that the father [or the mother] will be able to see the children' or, if there is 'documented fault on the part of the husband' (such as a court order against him or a jail term on drug charges). Bowen, *supra* note 16.

<sup>140</sup> Bowen submitted that 'Although the scholars weigh the versions of events provided by both the husband and the wife, they are not a court and have no subpoena powers, and usually do not see the husband. Moreover, they do not need to engage in a long process of fact-finding, as in a trial, for if they can assure themselves that the marriage is over and that the father's rights and children's rights are considered, these grounds may be sufficient to dissolve the marriage.' *ibid.*

<sup>141</sup> See for example in Bowen, *supra* note 126.

<sup>142</sup> These are if the husband (1) suffers certain physical defects, which are well-known in the *Shari'ah* and are considered to be legal grounds for dissolution of the marriage, (2) accuses the wife of unchastity: in such cases, the process of "li'aan" is to be applied (see the Quran, Surah 24<sup>th</sup>), (3) is untraceable, or (4) the wife embraces Islam but the husband refuses to do so, (5) the husband ill-treats the applicant or fails to fulfil his marital obligations or does not maintain her, despite having the means to do so, (6) the husband does not divorce his wife for one of the reasons mentioned, when so ordered by a judge, cited in <<http://www.islamic-sharia.org/6.html>> accessed 6 June 2013.

<sup>143</sup> This rarely happened during the researcher's observation.

<sup>144</sup> Dr Suhaib provides examples of where a husband refuses to cooperate such as 'He says: "whatever you want to do, do yourself. I am not going to do anything"; or, if he says "no, I don't want to divorce this woman at all" and it came that these two persons can't live together so we have to dissolve it': Interview with Dr Suhaib Hasan, interview (17 May 2010).

of divorce, (*talāq* or *ḥulʿ* or *fashḥ* or divorce by *tafweed*).<sup>145</sup> In some cases, depending on the evidence and the investigation, a *ḥulʿ* application may turn out to be a *fashḥ* case. In one case,<sup>146</sup> even though the wife was the one who initiated the divorce application, after it had been suggested by her husband, the ISC decided to dissolve the marriage through *fashḥ*. Decisions at the ISC must be arrived at collectively among the scholars, with a minimum of consensus of three presiding members.<sup>147</sup> This is following the fundamental principle of the Islamic law of *taḥkīm* that decisions cannot be made if arbitrators have conflicting views. ‘The results of the deliberations are recorded in the ISC register and communicated to the parties.’<sup>148</sup>

The ISC often issues provisional or conditional decisions (*al-Ḥukm*) containing conditions that must be executed by the clients before the decision is made final. For instance, in one case a divorce certificate was issued subject to the condition that the client should return the jewellery (constituting the *mahr*), and upon the husband receiving the same and signing the *talāq nama* the divorce was made final.<sup>149</sup> In a *ḥulʿ* case if the wife refuses to return the decided amount of *mahr* given to her, the divorce certificate will be revoked or will not be issued.<sup>150</sup> If the dispute involves issues relating to children, the ISC requires the respective parties to provide the Council with a solemn declaration,<sup>151</sup> assuring that the other parent or both will be allowed access to the children following a divorce.<sup>152</sup>

The ISC’s decisions are usually based upon rulings derived from the four recognised main schools of law (*madḥab*) – the Ḥanafī, Malikī, Shāfiʿī and Ḥanbalī – together with the primary sources recognised within the Sunni Tradition,<sup>153</sup> including the Qur’an, prophetic traditions (*ahādīth*) and legal reasoning (*ijtihād*).<sup>154</sup> Considering the diverse legal opinions in Islamic juris-

<sup>145</sup> Divorce by delegation: A husband delegates the right of divorce to his wife). According to Dr Suhaib, tafweed divorce is very rare. In Pakistani marriages they make a clause such as ‘has the man delegated the right of divorce to the wife? Yes/No? If he said ‘Yes’, then the woman can divorce herself. Because she has been given the right “I divorce myself on his behalf”/“I am exercising my right of divorcing myself”. Dr Suhaib Hasan, interview, 17 May 2010.

<sup>146</sup> CB6711.

<sup>147</sup> Interview with Dr Suhaib Hasan, interview (17 May 2010).

<sup>148</sup> Bowen, *supra* note 16.

<sup>149</sup> CB7107.

<sup>150</sup> The process of returning the *mahr* or jewellery usually takes place at the ISC as the ISC in most cases is the depository. The ISC then notifies the husband and requires him to collect them at the ISC office. Dr Hasan also claims that the ISC has in its depository a lot of jewellery from clients which are either waiting to be collected or were never collected. The ISC will keep a *mahr* for a maximum period of six months and if the husband does not collect it within this period, the ISC will return it to the ex-wife unless otherwise advised (for example, where she wants to donate it to the ISC): Interview with Dr Suhaib Hasan, interview (17 May 2010).

<sup>151</sup> Bowen, *supra* note 16. A solemn declaration is a written statement acknowledging that the other spouse is not denied his/her right to the children (such as contact) provided that such action is not prohibited by the law such as in child abuse and domestic violence cases.

<sup>152</sup> *Ibid.*

<sup>153</sup> The ISC is also made of scholars representing all major schools of law among the Sunnis <<http://www.islamic-sharia.org/aboutus/>> accessed 20 February 2017; Shah-Kazemi’s work on the MLSC meanwhile found that ‘it is a matter of policy that the members of the MLSC represent all the five different schools of law: Hanafi, Maliki, Shafi’i, Hanbali and Shi’i Imamiyya’, *supra* note 34 at 10.

<sup>154</sup> One of the sources used by the ISC is a codified Muslim Personal Status Law by Dr Mustafa al-Siba’i, Mustafa al-Siba’i, *Muslim Personal Law (Marriage & Divorce)*, draft copy based on *Qanun Al-Ahwal Al-Shakhsiyya*, Khola Hasan, (ed.), (Dr Suhaib Hasan trans), in *Muslim Personal Law: Proceedings of a Seminar*, 22 August 2004 at The Islamic Cultural Centre, London. The draft law contained 162 clauses on Islamic family law matters.

prudence and various schools,<sup>155</sup> and in order to ensure neutrality of the scholars regardless of the school of law they personally adhere to,<sup>156</sup> the ISC adopts a flexible approach in its deliberation. The parties are given the option to either follow a school of law of their own choice or a ruling in accordance with the school of law to which the parties adhere. In circumstances where each party adheres to a different school, the scholars consider the opinion which is fair and just to both parties' situation. However, this happens rarely and in isolated cases,<sup>157</sup> as some clients are found expressing their preference in their personal letters to the ISC.<sup>158</sup>

#### 4.5 *Assessment of the ISC Performance and Activities*

Although the ISC's prime function is to mediate cases, some issues do need further attention. So far, and to the researchers' knowledge, the ISC panels are composed of only permanent male counsellors and mediators-arbitrators. The study also found no female either conducting the med-arb process or sitting in the ISC's monthly meeting.<sup>159</sup> The ISC's headquarters, currently, has only one female counsellor, (in addition to two permanent male counsellors,) who attends on an appointment basis.<sup>160</sup> In Bano's view the most common criticism of *Sharī'ah* Councils is probably due to their refusal to permit Muslim women to 'act as religious scholars on par with male scholars when issuing Muslim divorce certificates'.<sup>161</sup> The reason for not appointing a female counsellor is twofold. The first is, it is wrongly assumed within the Councils that Muslim women are, simply forbidden under Islamic law and jurisprudence to act as religious scholars in family law

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See S. Ahmed, 'Recent Developments: Pluralism in British Islamic Reasoning: The Problem with Recognising Islamic Law in the United Kingdom', *Yale Journal of International Law* 33 (2008): 491-511.

<sup>155</sup> For example, I. Doi, *supra* note 34, Chapter 7; S. Ahmed, *ibid.*, p. 493-494; I. Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralism in England, Turkey and Pakistan* (Aldershot: Ashgate Publishing Ltd. 2005) 31-35 *et seq.*

<sup>156</sup> Bano, *supra* note 34, at 107; Maulana Raza during an interview confirms the flexibility of approach with regards to selection of opinion as well as honouring party's choices: 'if the applicant says that she is the follower of a particular madhhab and she would like the *Sharī'ah* Council to process her application according to *ahkām* of that particular madhhab we will respect her wishes. If she says that 'I am a Hanafi and I want my decision according to *ahkām* of Hanafi fiqh' we will do that. If she does not express her wish then we will be making a decision in the best interest of the parties using any of the *madāhib*.' Interview on 17 January 2012.

<sup>157</sup> During an observation of a monthly meeting at one of the *Sharī'ah* Councils, there was one case where it was obvious that the client did not have sufficient knowledge of *Sharī'ah* and the *madhhab* issue and just wanted to argue that a woman cannot ask for a divorce from her husband, regardless of the reasons and that the opinion followed by the *Sharī'ah* Council in determining his divorce case was different from the one he was following (the source of which was unclear to the researcher).

<sup>158</sup> In reality, during the period of fieldwork, there was no case at the ISC where clients insisted on following their preferred school of law; i.e., it was never raised by clients to a point where a mediation session or monthly meetings became so contentious except in the case narrated above (footnote 157) at another *Sharī'ah* Council. The majority of the clients, arguably, have little or very limited knowledge of the complex issue of Islamic jurisprudence. Probably, for this reason, they prefer to leave it to the discretion of the ISC's scholars.

<sup>159</sup> Bano's study between 2000-2004 found 'no evidence of Muslim women acting as religious scholars or forming part of the council panels' even though, after the completion of the research, a female scholar was included in the panel of one *Sharī'ah* council. Muslim women were given roles as counsellors and mediators at some other *Sharī'ah* councils and 'only one council reported the involvement of women on the council panel and this was to facilitate and manage the dispute resolution process but did not involve giving advice.' Bano, *supra* note 34 at 107; S. Bano, *An Exploratory Study of Shari'ah Councils in England with respect to Family Law* (Reading: University of Reading, 2012), 6 *et seq.*

<sup>160</sup> An appointment will be arranged for any clients who request to see a female counsellor.

<sup>161</sup> Bano, *supra* note 34 at 277.

matters.<sup>162</sup> In the researchers' view there is no evidence from Islamic primary sources that can support a ruling not to allow women to assume the role of mediator-arbitrator in Islamic *Sharī'ah*. The second is, the view stated by one of the counsellors at an interview where he stated that a woman is either emotionally or intellectually incapable of carrying out the role of mediator or counsellor. Obviously this view is both weak and scientifically unproven.

The unavailability of permanent female mediators-arbitrators or counsellors is crucial and may have a negative impact on the ISC's central duty as a family dispute settlement institution. This is argued in line with the view that Islamic law does not disallow Muslim women to assume roles as mediators-arbitrators in any dispute including family or matrimonial disputes.<sup>163</sup> Taking into account that the majority of ISC's clients are female, it is reasonable and highly important to include more female mediators-arbitrators and counsellors, not only, at the ISC headquarters but also at its office branches.<sup>164</sup> Most importantly, due to the delicate nature of marriage disputes, female clients may not be able or willing to disclose their personal or private matters in front of a male counsellor and will be more comfortable to disclose these to a female mediator-arbitrator. Therefore, this study identifies the need for female religious scholars to assist in and improve the process and to effect a policy change that gives greater importance to women's role in solving family disputes.<sup>165</sup> This issue, however, is being addressed by some of the Councils: for example, the BSC and the Muslim Arbitration Tribunal (MAT) now have Muslim women who can act as religious scholars in family law disputes and have the capacity to issue Muslim divorce certificates.<sup>166</sup> The ISC's management team also has a female administrator working as a frontline staff member providing early advice and information to clients, especially women. These are good steps which are hoped to be followed and enhanced by the Councils.

## 5 Issues and Problems

Among the major issues dominating almost every monthly meeting are the issues of *mahr* and undefended civil divorce, both of which require extensive discussion and scholarly debate during meetings.<sup>167</sup> To begin with, due to an increasing number of *hul'* divorce applications, the ISC

<sup>162</sup> *Ibid.*

<sup>163</sup> For example, in the Shāfi'ī School see Shamsuddīn Muhammad bin al-Khatīb al-Sharbīnī, *Mughnī al-Muhtāj ila Ma'rifah Ma'āni Alfāz al-Minhāj*, (Beirut-Lubnan: Dār el-Ma'rifah 1997) vol 3, 261, 345, vol 4, 501-502. For the Ḥanafīs see Al-Kāsānī, *Badāi' Al-Ṣanāi' fi Tartīb Sharāi'* (Beirut-Lubnan: Dār al-Kutub al-'Ilmiyyah 1986) vol 7, 3; *Burhān al-Dīn Abī Al-Hasan bin Abī Bakr Al-Marghīnānī*, *Al-Hidāyah sharḥ Bidāyah Al-Mubtad'i* (Qahe-rah: Dār el-Ḥadīth 2008) vol. 3, 150; al-Hummām Mawlānā al-Shaykh Nizām, *al-Fatāwā al-Hindiyyah* (Beirut-Lubnan: Dār al-Kutub al-'Ilmiyyah 2000) vol 3, 398; Zainuddīn bin Ibrāhīm Ibn Nujaym, *al-Bahr al-Rā'iq Sharḥ Kanz al-Daqā'iq* (Beirut-Lubnan: Dār al-Kutub al-'Ilmiyyah 1997) vol 7, 44. See also opinions of contemporary Muslim scholars such as Muhammad Sa'īd Ramadān Al-Būtī, *Qadāyā Fiqhiyyah Muāsirah* (Damascus: Dār al-Fārābī 2006) vol 1, 176; Abd al-Karim Zaidan, *al-Mufassal fi Ahkām al-Mar'ah wa al-Bait al-Muslim fi al-Sharī'ah al-Islāmiyyah* (Beirut: Mu'assasah al-Risālah 1993) vol 8, 421; Wahbah Al-Zuhayli, *al-Fiqh al-Islāmī wa Adillatuhu* (Damascus: Dār al-Fikr, 1985) vol 6, 482-483, 757. See also Ali, *supra* note 2 at 133.

<sup>164</sup> The ISC does not have any similar branches working on the same basis as in Leyton, London. However it has its own representatives throughout the UK, all are male scholars who also sit in the ISC's monthly panel meeting.

<sup>165</sup> During the early phase of the fieldwork, the ISC did not have female counsellor or female personnel working at their premise.

<sup>166</sup> *Ibid.*

<sup>167</sup> Another issue that has received equal attention by the panels is the issue of *talāq*, especially a *talāq* pronounced in a state of anger as many of such cases has reached the ISC. During one of the observed meetings the scholars dis-

monthly meetings were always inundated with problems relating to the payment of *mahr*. For example, the ISC President<sup>168</sup> highlighted the issue of excessive *mahr* among the Bangladeshi community which creates problems either during the marriage or its dissolution.<sup>169</sup> In one case, the scholars were in a dilemma deciding a *hul'* application by a woman whose *mahr* was £50,000. The dilemma was twofold: first, if she wanted a divorce by way of *hul'* she had to return the *mahr* in full; second, the husband had done no harm to her during the marriage which, if the husband had caused harm, it could be used by the ISC as a ground to dissolve the marriage through *fash* to save the wife's *mahr*; and third, the wife was discovered leaving the matrimonial home. Some of the scholars opined that it was obligatory for the wife to return the *mahr* before she could release herself from the marriage. Other scholars tend to be stricter in their approach.<sup>170</sup> However, surprisingly, one leading scholar has a different suggestion, in which he tried to find a balance between rendering justice to both parties and not imposing too much difficulty to the wife. He suggested that the wife could recalculate all the husband's missed responsibilities (such as deferred maintenance to her and the children, his debts to her, and all her and the children's needs, etc.). The amount could then be deducted from the *mahr* to reduce the amount of *mahr* she had to pay back to the husband. This effort shows a high level of flexibility and fairness. In this case, a decision was pending until the wife provided the ISC with the required details.

Another issue relates to civil divorce and undefended civil divorce, to which the ISC has two different positions depending on whether it is the husband or the wife who is the petitioner for divorce in the English civil court. First, if the husband applies for a civil divorce, it does not necessarily mean that he does that with the intention of divorcing his wife. The possibility behind his action, as disclosed in the ISC's case file, may be to clear his civil marriage status in order to bring a second wife into the country or to marry another woman in the UK. In one case the wife could not bear a child therefore the couple agreed that he would marry a family member from Pakistan. Consequently, he petitioned for a civil divorce in order to bring the second wife into the country while the first marriage remained intact since there was no Islamic divorce. However, when their relationship deteriorated, the first wife used the civil divorce and claimed that she was divorced from her husband Islamically because he is the one who petitioned for the civil divorce. The husband was contacted by the ISC and was informed of the wife's divorce application and the grounds thereof. The husband responded to the ISC's letter giving his side of story that he did not have the intention to divorce his first wife and therefore asked for a ruling on the matter. However, the wife requested a *hul'* since it was not clear-cut that she was divorced.

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cussed the ISC stand on this matter. One of the opinions referred to was of Ibn Qayyim's, who categorised this into three: soft, mild, and extreme anger. In the latter a divorce is considered invalid or cannot be executed as the husband probably does not realise what he is uttering due to losing control of himself. On the other hand a divorce is enforceable in the first situation as the husband is considered able to understand what he is saying. However, a *talāq* pronounced in the middle category receives conflicting opinions/debates as the husband's state of mind when uttering his words is unclear. It was not clear to the researcher during the meeting whether any consensus was reached regarding the issue. See Carroll, *supra* note 34 at 97.

<sup>168</sup> Maulana Abu Sayed, who is a Bangladeshi by origin.

<sup>169</sup> Sayeed, *supra* note 21.

<sup>170</sup> As claimed by Razack in S. H. Razack, 'The 'Shari'a Law Debate' in Ontario: The Modernity/Premodernity Distinction in Legal Efforts to Protect Women from Culture' *Feminist Legal Studies* 15 (2007): 3; A. Shachar, *Multicultural Jurisdictions: cultural differences and women's rights* (Cambridge: Cambridge University Press, 2001), 50 *et seq.*

In the scenario of undefended civil divorce petitioned by a wife, the issue was whether the undefended civil divorce was due to the husband's implied consent to divorce or due to other reasons. One of the ISC opinions inclined towards accepting lack of defence by the husband as implying his consent to it.<sup>171</sup> Another opinion, however, expressed the need for further investigation including asking the husband if his lack of defence in the divorce proceedings was intentional and implying his consent to the civil divorce<sup>172</sup> or whether he had other reasons to explain his absence. In general there were cases where husbands did not defend their cases due to financial constraints, as contested divorce proceedings in UK can sometimes be expensive.<sup>173</sup> In the absence of clear consent from the husband, the ISC does not accept the civil divorce as Islamically terminating the marriage. Even if an undefended civil divorce satisfies the Islamic law and *Sharī'ah* Councils requirements as implying a husband's consent, the real underlying reasons for absence of defence are sometimes questionable especially if it relates to the financial situation of the parties. The reality of the financial stability of Muslim households in Britain proves that the matter should not be taken lightly when determining this issue.<sup>174</sup> One member of staff at the ISC shared the Council's concern in this regard as one of the ISC's complex difficulties.<sup>175</sup> One of the reviewed cases provides an example of the complexity relating to civil divorce.<sup>176</sup> A Muslim woman married another man after getting a civil divorce thinking that the civil divorce had Islamically dissolved her previous marriage. The interesting part was that she herself went to apply for a *ḥul'* divorce at the ISC. When this issue was raised, one of the ISC staff commented that:

If she thinks she is divorced, then why she applies for *ḥul'*? She has already shown that she is now a free woman, a divorcee but then at the same time she is applying for an Islamic divorce because she did not consider herself a free woman from the point of Islamic law to remarry. You are contradicting yourself. The wife even said her second marriage is not very Islamic.<sup>177</sup>

In the above case the husband instructed a solicitor and claimed he did not agree with the divorce and wanted reconciliation. However, the civil court had already granted a decree absolute as the case involved abuse and police intervention, in addition to lack of response from the husband de-

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<sup>171</sup> Arshad, a Muslim family law Barrister, notes that some Muslim scholars (their affiliations are unknown) opine that provided the English divorce procedure is fully complied, the civil divorce terminates the Islamic marriage. There is no need therefore for the women to consult a *Sharī'ah* council for judicial separation of *ḥul'*, interview on 9 February 2012; see also Arshad, *supra* note 9 at 123. Similarly, Ali's article among other seeks to support that 'civil divorces are evidence of breakdown of marriage and thus 'Islamically' recognised dissolution', *supra* note 2 at 127.

<sup>172</sup> Interview with the ISC Manager, 31<sup>st</sup> January 2013. This is also highlighted in Ali, *supra* note 2 at 131.

<sup>173</sup> For instance see, <http://www.divorce.co.uk/divorce-approaches/court-proceedings> [accessed on 26.11.2015].

<sup>174</sup> Arshad also raises similar concern during interview on 9 February 2012.

<sup>175</sup> However, a report by Douglas reveals that the BSC 'regard the obtaining of a civil divorce as clear evidence of the parties "view that the marriage is over, and for the Shariah Council, this is conclusive, such that it does not deem it necessary to grant a religious divorce to enable the parties to remarry under Islamic law although it will do so to reflect the parties "wishes for recognition" by the Council of the ending of their marriage' *Qtd.* in Douglas et al., *supra* note 37 at 47-48.

<sup>176</sup> CB6955.

<sup>177</sup> ISC's staff interviewed at the ISC headquarters.



spite several notifications and a final notice.<sup>178</sup> As the husband also did not respond to several ISC notices, the ISC decided that it would have to issue a decision dissolving the marriage because the husband did not show interest. Facing the above dilemma and complexities surrounding civil divorce, the researchers would suggest that the ISC and other *Sharī'ah* Councils should make clear the Islamic law position with regard to this matter and publicise their position through online *fatwa* on their website as a safeguard to prevent incidents such as the one above which may lead to other complicated issues.

Case reviews also demonstrate that a substantial amount of *hul'* divorces have been issued by the ISC to female applicants. This raises a question mark as to why women were granted *hul'* and not *fashh* when it was evident that the husbands were at fault. According to the ISC, there are two reasons explaining their approach. First, the evidence provided by the wife is insufficient to prove the husband's fault thus making it difficult for the ISC to dissolve the marriage by way of *fashh*. Second, a *hul'* divorce could prevent the husband from challenging the ISC's decision at a later stage.<sup>179</sup> A *hul'* is therefore perceived as the safest option. The issue with *hul'* divorce is that it requires the wife to return<sup>180</sup> the *mahr* to the husband which means additional cost is imposed upon her.<sup>181</sup>

## 6 Termination of the Med-Arb Process

The med-arb process at the ISC formally terminates when a divorce certificate is issued or when the couple resume married life if the mediation is successful. However, applicants can terminate the process before a decision is made by the ISC if the wife or the husband or both decided to withdraw their application before a final decision is issued.<sup>182</sup>

## 7 Conclusion

The importance of mediation and arbitration and religious bodies as a recognised third party to help resolving marital disputes between spouses is well demonstrated in this paper. The paper reveals some similarities of the procedure of divorce between med-arb by *Sharī'ah* Councils and mediation under English law. The main concern of both is reconciling saveable marriages and maintaining the welfare of the parties and their children. Despite the partial success of the

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<sup>178</sup> The wife stated that suddenly a solicitor's letter was received and it was revealed (or claimed by the wife) that the solicitor was the wife's brother. (should this not be husband's brother) - It is the wife's brother. Her brother and her family basically disagree with her wish to divorce) She also claimed that they were against her. They were asking to adjourn the ISC proceedings because the husband was away. The ISC replied that the Council had sent many notifications but the husband had not shown any interest or response. In this situation, the ISC decided that it would have to issue a decision and dissolve the marriage because of no interest shown from the husband's side.

<sup>179</sup> The researcher tried to clarify this matter with the ISC and among the responses received was that the ISC, with best intention, awarded *hul'* in order to dissolve the marriage amicably. The ISC and presumably other *Sharī'ah* Councils try to resort to a more conciliatory way. The ISC avoids dissolving the marriage through *fashh* as it is considered a risky decision; what is more important is to ensure that the marriage is dissolved through mutual agreement and satisfaction between the parties without direct involvement from the ISC.

<sup>180</sup> *Supra* note 150.

<sup>181</sup> Shah-Kazemi, *supra* note 34 at 72.

<sup>182</sup> <[http://www.islamic-sharia.org/resources/khula\\_application.pdf](http://www.islamic-sharia.org/resources/khula_application.pdf)>

*Sharī'ah* Councils, they continue to face challenges resulting from the dichotomy and overlapping jurisdictions of Islamic and English family laws. With these legal issues, the prominent roles played by the *Sharī'ah* Councils in the life of the Muslim community in UK might be diminished and weakened. With regard to the claim of lengthy process at *Sharī'ah* Councils, the paper found that this is unavoidable taking into account the necessity of reconciling saveable marriages. In fact, the process is 'purposely delayed' in order to give way to mediation and to help parties to consider amicable solutions. Med-arb at *Sharī'ah* Councils remains a process alternative to litigation, though both parties are still free to apply to the civil courts if mediation breaks down or a Councils' decision is considered unsatisfactory. This option, however, only applies to parties whose marriages and divorces have been civilly registered. Meanwhile, issues relating to civil divorce and Islamic divorce discussed in this paper require further attention. The ISC and other *Sharī'ah* Councils should clearly declare and publicise their Islamic law position regarding this matter to ensure public awareness. The other challenge faced by the *Sharī'ah* Councils is the lack of recognition of these Councils by the UK government. This and other relating issues will be the focus of another paper to be published soon.