

**Islamic Family Mediation and Women's Access to Justice in
Türkiye: Assessing the Applicability of the England Sharia Council
Model**

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ABSTRACT

In England over the last 30 years, there has been a small but steady proliferation of Sharia Councils, although exact numbers are not known. Established to meet the religious needs of the British Muslim population, these focused primarily on providing a forum for resolving marital disputes by offering arbitration, mediation and conciliation services. In research carried out to date, it is seen that the principal applicants to the Sharia Councils are Muslim women. To understand whether Islamic family mediation should be implemented in Türkiye, one must investigate Islamic law distinguishing between men's and women's forms of divorce. Islamic law has specific guidelines for divorce proceedings, with different rights and obligations for men and women. By examining these differences, it can be determined whether Islamic family mediation would be suitable for implementation in Türkiye. Islamic law establishes different rights and responsibilities for men and women in divorce cases, allowing men to unilaterally divorce without court oversight while women need spousal agreement or religious authority intervention. This inequality prompts concerns about the viability and justice of Islamic family mediation in the Turkish legal system.

This research examines these legal discrepancies to assess the potential for Islamic family mediation to achieve fair results, thus assessing its applicability in Türkiye. Focusing on the growth of Sharia Councils in England, which have sparked debates on their credibility and effects on women's legal access, the research evaluates the potential effects in Türkiye when similar entities provide Islamic family mediation. Sharia Councils aim to integrate religious principles into the nation's legal framework. Through analyzing the cultural importance of these councils, their legal framework, and operational procedures, the paper aims to evaluate their capacity to address the particular requirements of women in Turkish households and advance impartial family justice.

This thesis examines the critical question of whether Islamic family mediation can enhance family justice in Türkiye. The study discusses in depth whether resolving marital disputes within the framework of Islamic dispute resolution can achieve family justice in Türkiye. This study contributes to such ongoing debates regarding family law, access to family justice, and Muslim requests for taking easy religious support in family law matters.

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GLOSSARY

<i>‘adl</i>	justice
<i>ayah</i>	section of the Qur'an referred to as a 'verse'
<i>bulugh</i>	maturity or legal majority
<i>fasiq</i>	a sinner
<i>fiqh</i>	the understanding and application of Islamic law
<i>fuqaha</i>	jurists, those who are learned in Islamic law
<i>hadd</i>	crime and punishment in Sharia recorded by Allah
<i>hadith</i>	saying, traditions of the Prophet
<i>hakam</i>	arbitrator
<i>Hanbali</i>	one of the four classical <i>fiqh</i> schools of Sunni, Muslim law founded by Imam Ahmad Ibn Hanbal (in 780 AD)
<i>Hanafi</i>	one of the four classical <i>fiqh</i> schools of Sunni, Muslim law founded by Imam-I-Azam Abu Hanifa (in 699 AD)
<i>huquq</i>	rights of Allah
<i>iddah</i>	waiting period for a divorced or widowed woman
<i>ijma’</i>	consensus of opinion
<i>ijtihad</i>	juridical reasoning of a qualified Islamic legislation
<i>imam</i>	religious leader
<i>hula</i>	the wife's request for divorce by paying compensation to the husband
<i>Maliki</i>	one of the four classical <i>fiqh</i> schools of Sunni, Muslim law founded by Imam Ahmad Ibn Hanbal (in 780 AD)
<i>nikah</i>	marriage
<i>nushuz</i>	granting the wife's request for divorce by paying compensation to the husband
<i>qadi</i>	Islamic judge
<i>qisas</i>	retaliation
<i>qiyas</i>	analogous deduction
<i>Qur'an</i>	holy book of Islam
<i>rushd</i>	maturity

<i>shari'a</i>	Islamic law
<i>Shafi'i</i>	one of the four classical <i>fiqh</i> schools of Sunni, Muslim law founded by Muahmmad ibn Idris ash-Shafi'i (in 713 AD)
<i>sulh</i>	peace, reconciliation, or negotiation between two disputing parties
<i>sunnah</i>	source of law and practice of the Prophet
<i>tahkim</i>	Islamic arbitration
<i>talaq</i>	declaration of divorce by the husband
<i>ulama</i>	traditional Islamic scholars
<i>wakalah</i>	legal representation

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination against Women
CCP	Code of Civil Procedure
ECHR	European Convention on Human Rights
ed.	edition; edited by; editor (plural, eds)
et al.	Latin for “and others”
FMC	Family Mediation Council
n.d	no date of publication known
n.p	no place of publication known
p.	Page
para.	paragraph
s.	section
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Program
v.	Volume

CHAPTER I

INTRODUCTION

The use of family mediation to assist divorcing couples in reaching amicable settlements regarding child custody, property division, and financial support after divorce became more common in the Western world in the second half of the twentieth century.¹ ADR in family justice is a newer form of justice than traditional litigation, offering more procedural flexibility and a wider range of remedies than formal adjudication.² Mediation is also increasingly important in family justice. In the realm of family justice, mediation has proven to be a valuable tool in helping families navigate divorce, child custody, and the division of assets.³ As mediation continues to evolve and expand, it is becoming an increasingly integral part of the family justice system. England, with its diverse Muslim population and established Sharia Councils, offers a valuable model for integrating Islamic principles into the Western legal system. In this respect, it provides Türkiye, with its predominantly Muslim population and developing legal framework, a different perspective on the role of Islamic mediation in a secular state.

This thesis investigates the potential of Islamic family mediation to enhance women's access to justice within the Turkish legal system, a complex issue situated within a patriarchal society and a secular framework that currently lacks explicit provisions for such mediation. Access to justice takes a variety of conceptions and forms, ranging in source, content, and structure. The term "access to justice" refers to the ability of individuals to seek and obtain redress for wrongs by human rights standards via official or informal justice institutions, and it goes beyond mere court access or legal representation.⁴ While women face significant barriers to accessing justice within family courts, this study proposes that Islamic family mediation, when implemented effectively and ethically, can provide a culturally relevant and empowering avenue for resolving family disputes. By grounding mediation in shared

1 Janet Walker, 'Family mediation, the rhetoric, the reality and the evidence' (2010) 37 JNPA 678.

2 Family Mediation Council, 'What is family mediation?' (FMC 2020) accessed 22 June 2024.

3 Rachael Blakey, 'Conceptualisation of family mediation: Access to justice after LASPO' (PhD Thesis, Cardiff University 2021) 2.

4 UNDP, 'Access to Justice' (2004).

religious values and cultural understandings, it may offer a more accessible and equitable space for women to assert their rights and interests. However, the absence of formal legal recognition for Islamic mediation in Türkiye has resulted in practices operating outside established channels, raising concerns about accountability, transparency, and adherence to human rights standards. This research evaluates critically the applicability of the England Sharia Council model, a prominent example of faith-based mediation, as a potential framework for formalizing Islamic family mediation in Türkiye. While the model has demonstrated success within the British Muslim community, its suitability for the Turkish context requires rigorous examination, particularly regarding its potential to both empower women and mitigate risks of gender bias within a patriarchal social structure. Through empirical research, legal analysis, and comparative frameworks, this study aims to generate evidence-based recommendations for developing a culturally sensitive, legally sound, and gender-equitable approach to Islamic family mediation in Türkiye, thereby advancing women's access to justice and contributing to a more inclusive and equitable legal landscape.

To gain deeper insights into the complexities surrounding women's access to justice, it is valuable to explore various international contexts, with a specific focus on comparing Türkiye and England. As the extensive scholarly discourse reveals, the prioritization of women's access to justice in this thesis is not arbitrary; rather, it is based on a multifaceted rationale grounded in historical, social, legal, and theological considerations. Historically, women have faced systemic disadvantages and vulnerabilities within legal systems globally, including those informed by religious doctrines. In the context of Islamic legal traditions, scholars such as Kecia Ali⁵ and Ayesha S. Chaudhry⁶ have highlighted the need for critical engagement with historical interpretations that may have perpetuated gender disparities. In recent years, there has been a growing body of scholarship seeking to reexamine traditional interpretations of Islamic law and provide more equitable frameworks for women's

5 Kecia Ali, *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith, and Jurisprudence* (Simon and Schuster 2016) 32.

6 Ayesha S Chaudhry, *Domestic Violence and the Islamic Tradition: Ethics, Law, and the Muslim Community* (OUP 2013).

rights and empowerment. Scholars like Ziba Mir-Hosseini⁷ and Asma Barlas⁸ offer alternative readings of religious texts to challenge discriminatory practices and advocate for gender-inclusive approaches to jurisprudence. By encouraging critical dialogue and reinterpretation, these academics aim to address the historical injustices faced by women within Islamic legal systems and promote greater gender equality and justice. Socially, as the United Nations Commission on the Status of Women has pointed out, women's access to justice is not only a legal problem but also a crucial component of social cohesion and gender equality.⁹ In Türkiye, women's roles in families and communities are central, and their ability to access legal remedies and protections is essential for their well-being and empowerment. This research aims to shed light on the challenges and opportunities surrounding women's access to justice in Türkiye, with the ultimate goal of promoting gender equality and social cohesion for a more inclusive and sustainable future.

In contrast to Türkiye, England, a diverse nation with a significant Muslim population, has established Sharia Councils to provide Islamic dispute resolution services within the broader English legal system. These councils primarily address family matters, offering an alternative avenue for individuals seeking resolutions aligned with their Islamic beliefs. The choice to compare Türkiye and England in this context is multifaceted. Both countries share a substantial Muslim population and a growing demand for Islamic family mediation. However, their approaches to Islamic mediation and the corresponding legal frameworks differ significantly. While Türkiye lacks formal recognition of Islamic mediation, leading to informal and potentially unregulated practices, England has integrated Sharia Councils into its legal landscape, providing a structured and regulated framework for Islamic dispute resolution. This comparative analysis explores the strengths and weaknesses of each approach, examining their implications for women's access to justice and the potential for cross-cultural learning to inform the development of effective and equitable Islamic family mediation models in both contexts.

7 Ziba Mir-Hosseini, 'Muslim Women's Quest for Equality: Between Islamic Law and Feminism' (2006) 32(4) CI 629.

8 Zayn Kassam, 'Review of "Believing Women" in Islam: Unreading Patriarchal Interpretations of the Qur'an, by A. Barlas' (2003) 11(12) ASJ 156.

9 United Nations Commission on the Status of Women, Access to justice, remedies and redress for women and girls who are victims of violence, discrimination or other human rights violations (2019).

Firstly, the United Kingdom (UK) distinguishes itself among European nations due to the extensive establishment and formal integration of Sharia Councils within its legal and social infrastructure.¹⁰ These councils have a, recognised, and formalized structure, often operating as independent bodies that provide guidance and mediation services in family matters based on Islamic principles.¹¹ In contrast, the implementation of Islamic family mediation methods commonly observed in Muslim nations poses inherent challenges for Türkiye, which is a secular state. Türkiye's intricate and diverse institutional framework necessitates a meticulous evaluation of the appropriateness and flexibility of Islamic mediation by its legal and cultural systems. Therefore, assessing the viability of Islamic family mediation within the framework of Sharia Councils in the UK aligns better with the societal structure of Türkiye.

Secondly, Sharia Councils in the UK have gained recognition and acceptance within the legal system. While they do not hold legal authority, some Muslims, as influential in resolving family disputes, consider their decisions and recommendations. Thirdly, the operations of Sharia Councils in the UK are often guided by a code of conduct or guidelines that outline their procedures and practices. Moreover, the presence of a code of conduct or guidelines outlining the procedures and practices of Sharia Councils in the UK offers a valuable template for establishing standardized procedures and ethical guidelines for similar bodies in Türkiye. These codes ensure transparency, fairness, and adherence to Islamic principles in the mediation process.¹² Lastly, due to the larger Muslim population and historical ties with Muslim-majority extended countries, England has witnessed a longer history of Sharia Councils' establishment and development compared to other European countries. This, more extended history has allowed for the evolution of more extensive networks, resources, and expertise within the Sharia Councils in England.

In general, key factors for selecting family mediation as an example, as practised in Sharia Councils in England, revolve around the establishment period,

10 Mehmet Ali Yargi, 'The Theory of Islamic Judicial Decisions Outside the Lands of Islam, Sâlim Abdüsselâm eş-Şeyhî (Istanbul: Müntede'l-Ulemâ Publications, 2019)' (2020) 7(12) JFTEOU 287.

11 Alparslan Sarac, *Musliman Tahkim Merkezi ve Seriat Mahkemeleri İngiltere ve Kanada'daki Hedefleri ve Yasal Yargi Yetkisi* [Muslim Arbitration Centers and Sharia Courts: Their Objectives and Legal Jurisdiction in England and Canada] (2013) 3.

12 *ibid.*

development, and the degree of recognition and legal system guidance. This thesis embarks on a comprehensive comparative analysis of Islamic mediation in Türkiye and Sharia Councils in England. By scrutinizing the inception and progression of mediation procedures, the research endeavours to enrich insights into the application of Islamic principles in mediation across diverse legal frameworks.

This thesis is structured into an introduction, followed by four chapters, and concludes with a final chapter. The following introduction provides observations on law reform and the comparative method as separate entities, emphasising the necessity of change in modern legal systems. Chapter 2 provides an extensive examination of access to justice and family justice, with a focus on conceptual frameworks and contextual analysis from Western and Islamic perspectives. Chapter 3 delves into the path to family justice in Türkiye, with an emphasis on the evolution of family law and the mediation system. It discusses the historical development and reforms in Turkish family law, particularly the Turkish Civil Code and its impact on family justice. This chapter also explores the Turkish mediation system, including family mediation within Turkish legislation. A key focus is placed on how the mediation process facilitates access to justice for women in Türkiye, examining the role of legal aid mechanisms and the specific challenges women face in accessing justice. The chapter concludes with an analysis of how family justice in Türkiye promotes fairness and addresses disputes.

Chapter 4 shifts attention to Islamic family mediation mechanisms, starting with the legal foundations of mediation in Islamic law. This includes an exploration of mediation in the Qur'an, the Hadiths of the Prophet, and the fatwas issued by Muslim jurists. The chapter further examines the role of the mediator in Islamic law, the functioning of mediation in Islamic family law, and the concepts of *sulh* (amicable settlement) and *tahkim* (arbitration). It compares and contrasts Islamic family mediation with the Turkish family mediation system, highlighting both similarities and differences, as well as the influence of Islamic law on the development of family mediation practices in Türkiye.

Chapter 5 explores the concept of family mediation within the context of Shari'ah Councils in England. It begins with the historical emergence of family mediation in England and traces its role in current family justice practices. This

chapter examines how Shari'ah Councils contribute to family mediation, focusing on their role and responsibilities in facilitating access to justice for English Muslims, particularly in divorce cases. It looks at the procedures followed in Shari'ah Councils, including the role of the Muslim Arbitration Tribunal, and the legal effects of mediated agreements issued by these councils. The chapter also discusses theoretical considerations and gender critiques regarding the functioning of Shari'ah Councils. It concludes by exploring the challenges faced by Shari'ah Councils, both internally (such as standardizing procedures and ensuring training for scholars) and externally (including issues of non-recognition of religious divorce within the broader English legal system, particularly in matters of finance, property, children, and inheritance).

Chapter 6 concludes the thesis by summarizing the key findings from each chapter, reflecting on the importance of family mediation in promoting access to justice across different legal systems, and offering recommendations for improving family mediation practices within both Islamic and Western contexts.

1.1. Background of the Research

In recent times, settling marital conflicts outside formal legal systems has become increasingly popular among legal practitioners, policymakers, and social-legal scholars.¹³ Various forms of alternative dispute resolution (ADR) mechanisms have emerged. ADR mechanisms, which include mediation, collaborative law, arbitration, and negotiation, provide different methods for resolving conflicts without resorting to conventional litigation. These mechanisms oppose and are in conjunction with state-law processes designed to resolve civil, commercial, and family law disputes.¹⁴ The objective of this expanding initiative is to guarantee that every individual is afforded the same opportunity to obtain justice.

Separation and divorce frequently create transitional periods that lead to ambiguity and discord between parents, causing distress for their children. The lack of access to adequate legal information, advice, and representation poses a significant challenge for vulnerable individuals, particularly women and victims of domestic

13 Nora Abdul Hak, *Islamic Arbitration (Tahkim) and Mediation in Resolving Family Disputes: A Comparative Study under Malaysian and English Law* (PhD Dissertation, Glasgow Caledonian University 2002) 117.

14 *ibid* 139.

abuse, within the context of marital conflicts. Emery¹⁵ has found that the detrimental effects of divorce on children stem from their involvement in parental conflict. Dispute resolution involves the reorganisation of family relationships, not the division of family members into hostile camps. Mediation is a kind of 'Alternative Dispute Resolution' (ADR), resolving disputes without a judge's command after a controversial trial. Although it shares standard features with negotiation and arbitration, unlike negotiation in which the parties or their representatives try to find solutions to their disputes through direct discussions, with mediation a neutral third party, the mediator, facilitates the process of reaching an outcome.¹⁶ Besides that, another critical essential feature, distinguished from arbitration, gives control to the parties involved. Controlling the process can empower parties and boost their satisfaction with the final agreement while fostering flexibility and creativity to find mutually acceptable solutions.¹⁷

Family mediation is available for couples going through separation or divorce to settle their differences with the support of an impartial mediator and establish a mutual agreement before court proceedings. Divorce can protect people from a bad marriage, but research (e.g. Anderson¹⁸ and Carroll¹⁹) has shown that it can weaken society, while children who have divorced parents experience psychological and economic stress that prevents their social development.²⁰ Simultaneously, the incorporation of mediation in divorce proceedings and subsequent conflicts is crucial as it facilitates the establishment of effective communication channels between divorced individuals, fosters the maintenance of personal relationships, and promotes the cultivation of a nurturing environment for shared offspring.²¹ In other words, family mediation provides a way to resolve the conflict that prioritises family well-being and children's interests.²² The primary purpose of family mediation practices is

15 Robert Emery, 'Renegotiating family relationship-divorce, child custody and mediation' (1995) 43(1) FCR 23.

16 Miquel Martin Casal, 'Divorce Mediation in Europe' (2005) 9(2) EJCL 35.

17 Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (1st edn, Jossey-Bass 1994) 87.

18 Jane Anderson, 'The Impact of Family Structure on the Health of Children: Effects of Divorce' (2014) 81(4) TLQ 379.

19 Lucy Carroll, 'Muslim Women and 'Islamic Divorce' in England' (1997) 17(1) JMMA 97.

20 Anderson (n 18) 379.

21 Hande Tazici, *Boşanmanın Hukuki Sonuçlarına İlişkin Uyuşmazlıklarda Arabuluculuk* [Mediation in Disputes Regarding the Legal Consequences of Divorce] (Cankaya University 2019) 6

22 Emery (n 15) 25.

to take into account the best interests of the child, to prevent parents at the stage of divorce and separation from ignoring their children and to ensure that the child continues their life with the minimum harm.²³ In addition, couples going through mediation may find the separation process less stressful and emotional, as many resolve conflicts in a less hostile atmosphere by expressing their feelings to an independent third party has no bias or commitment to personal situations.²⁴ Family mediation aims to improve communication between spouses and maintain good family ties even after divorce or separation. Family mediation is probably one of the well-known ways to explore issues and problems and, if possible, assist couples in their conflict. On the other hand, divorce cases in the court cause high social and emotional costs for the parties, children and society in general. Family mediation is used to both reduce court cases and help reconcile couples, especially couples with children, on matters that may result from separation or divorce, including regulations on children and financial matters. In short, family mediation is a creative process that helps parties resolve disputes and help parents collaborate, as well as parties resolve disputes and improve relationships between parents and children.²⁵

Mediation has been present for a long time in family disputes as a method of friendly dispute resolution. In the fifth century BC, Confucius urged family to use mediation instead of going to court.²⁶ The American Jewish community in New York created the Jewish Conciliation Board in 1920 to promote mutual settlement of family disputes.²⁷ Mediation has been extremely popular in resolving family disputes for many centuries, mainly because of the absence of aggressive tactics as well as the principle of not seeking to blame but working towards an end goal that benefits all parties. Furthermore, the attractiveness and popularity of dispute resolution are also because “in many instances of family conflict the parties themselves should arrive at some kind of agreed solution, instead of presenting the matter to a judge for his decision”.²⁸ That is, within the marital boundary, dispute resolutions such as mediation can help to resolve bad feelings between estranged couples, resolve

23 Yasemin Gulluoglu, ‘Aile Arabuluculuğu [Family Mediation]’ (2015) 4(3) ILJ 2.

24 Marian Roberts, *Mediation in Family Disputes*. (England: Ashgate Publishing Limited 2008) 26.

25 Lisa Parkinson and Neil Robinson, *Family Mediation: Appropriate Dispute Resolution in a New Family Justice System* (Bristol: Family Law 2011) 24.

26 *ibid* 10.

27 *ibid* 10.

28 Simon Roberts, ‘Mediation in Family Disputes’ (1983) 46(5) MLR 538.

conflicts, or educate the wrong party(s). In particular, it could help to achieve reconciliation or mutual agreement between spouses.

Muslim communities in many countries worldwide, from Canada to Kazakhstan, have established Conciliation Boards to resolve disputes, including family disputes, with the help of trained mediators.²⁹ In Muslim-majority countries, such mechanisms often operate within the framework of Sharia law, blending traditional Islamic principles with contemporary mediation practices.³⁰ For instance, in Malaysia, the Department of Sharia Judiciary Malaysia provides mediation services for family disputes, emphasizing reconciliation and mutual agreement in line with Islamic teachings.³¹ In Indonesia, the Religious Courts provide mediation as a component of the legal procedure, to peacefully settle family disputes before engaging in litigation.³² In addition to Kazakhstan, countries like Egypt and Saudi Arabia have similar systems. In Egypt, the Family Courts incorporate mediation as a crucial step in resolving disputes, often facilitated by legal professionals who understand both civil and Sharia law.³³ Saudi Arabia's Ministry of Justice has implemented reforms to encourage mediation in family disputes, aligning with the broader movement towards incorporating alternative dispute resolution methods within the Islamic legal system.³⁴

Recognizing the universal importance of mediation, modern organizations have further stressed its importance in familial conflicts, especially underscoring the welfare of children and the necessity of parental collaboration. The European Committee on Legal Cooperation's Committee of Experts on Family Law also underlined the importance of family life for children and the necessity for extensive social support for both parents, as they have everyday obligations for their children's

29 Mohamed M Keshavjee, *Islam, Sharia & Alternative Dispute Resolution: Mechanisms for Legal Redress in the Muslim Community* (I.B. Tauris 2013) 45.

30 Hanis Wahed, *Sulh: Its Application in Malaysia* (2015) 3.

31 *ibid*

32 Mark E. Cammack and R. Michael Feener, 'The Islamic Legal System in Indonesia' (2012) 21 PRLP 15.

33 Nadia Sonneveld, 'Divorce Reform in Egypt and Morocco: Men and Women Navigating Rights and Duties' (2019) 26(1-2) ILS 154.

34 Esther Van Eijk, 'Sharia and National Law in Saudi Arabia' in *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (2010) 163.

upbringing.³⁵ In England and Wales, the Lord Chancellor's Department has stressed the significance of family mediation in aiding divorcing or separating parents to navigate the process amicably, reaching mutual agreements on future arrangements for themselves and their children's well-being.³⁶ Mediation focuses on strengthening communication between disputing spouses and maintaining strong family relationships after divorce or separation.

Making joint and mutual decisions in the context of divorce and separation using ADR procedures, particularly family mediation, has now become a legal/statutory requirement in England.³⁷ The initial documented attempts at family mediation were carried out under the Family Law Act 1996. Despite being initially included and later abandoned in the FLA 1996, the focus of the law on mediation to resolve family conflicts paved the way for its acceptance and eventual establishment in family legal procedures.³⁸ The recognition in the Act of mediation's potential to provide a less adversarial and more constructive approach to resolving family conflicts has helped increase its acceptance and utilization.³⁹ Also, all of this has led to the creation of a mandatory MIAM (Mediation Information and Assessment Meeting) meeting with a professional state-appointed mediator who will assist couples in amicably resolving financial and property-related issues, as well as arrangements for children in the family, before filing a divorce petition with the court.⁴⁰ Parkinson further supports this argument, stating that the FLA 1996, while not yet implemented, greatly boosted the development of family mediation services and the training of mediators.⁴¹

Community-based and family-centric conciliation and mediation services in the UK provide alternative dispute resolution options for marital conflict, focusing on transparent communication and mutual comprehension. Conciliation entails a neutral third party (conciliator) actively facilitating communication and suggesting solutions,

35 Committee of Ministers, Recommendation No. R (98) 1 to Member States on Family Mediation, adopted 21 January 1998.

36 Lord Chancellor's Department, *Looking to the Future: Mediation and the Ground for Divorce* (Cm 2799 1995) para. 6.17 (hereinafter 'The White Paper').

37 Rafidah Cusairi, *The Application of Islamic Shari'ah to the Muslim Minority Living in the UK: A Comparative Study on Family Mediation between English Law and Faith-Based Med-Arb at Shari'ah Councils* (PhD Dissertation, Glasgow Caledonian University 2013) 24.

38 Parkinson (n 25) 46.

39 Jess Mant, 'Neoliberalism, family law and the cost of access to justice' (2017) 39(2) JSWFL 248.

40 Cusairi (n 37) 25.

41 Parkinson (n 25).

while mediation, on the other hand, involves a mediator facilitating communication and guiding the parties toward creating their resolutions.⁴² These services, often provided through local organizations or religious institutions, can be more culturally sensitive and accessible than formal legal processes.⁴³

While these community-driven efforts serve a wide range of people, the fast expansion of particular faith communities, like the Muslim community, requires a nuanced grasp of the changing landscape of family conflict resolution methods in England. Only about 5.9 per cent of the English population identifies as Muslim; however, Islam has become the fastest growing religious group in England.⁴⁴ The growing Muslim population has diversified the social and legal environment. With this growing population, Muslims have become interested in preserving their culture by resolving disputes with Islamic law principles outside the secular court system. Specific rules derived from the Qur'an and *sunnah* govern marriage, divorce, and family conflict in Islamic jurisprudence, as have been elucidated in subsequent chapters. However, living in a non-Muslim state and under a different legal system, managing marriage, divorce and family life by religion is not an easy task. Therefore, the Sharia Council functions as a forum in the UK, where Muslims can address their problems or receive advice and views based on Sharia (the core religious belief of Islam). These bodies have emerged inside the 'private' realm of the local community and created frameworks that are characterized by specific cultural and religious norms and values, framing them as locations where family law disputes are addressed according to the principles of Muslim family law.⁴⁵ Acting as informal court bodies in family law matters, these self-governing religious bodies also develop policies to resolve marital disputes in multicultural England.⁴⁶

Today, community and family reconciliation/mediation mechanisms have emerged in England, which try to resolve marriage disputes both outside the

42 K Kressel, *The Process of Divorce: How Professionals and Couples Negotiate Settlements* (Basic Books 1985) 53.

43 Samia Bano, *Muslim Women and Shari'ah Councils: Transcending the Boundaries of Community and Law* (Palgrave Macmillan 2012) 54.

44 'Muslim Population in the UK - Office for National Statistics', <www.ons.gov.uk> accessed on 28 February 2021.

45 Bano (n 43) 3.

46 *ibid* 3.

framework of traditional state law and in connection with state law mechanisms.⁴⁷ Mediation and *tahkim* (arbitration), applied in Sharia Councils England since the 1990s, seek to facilitate the divorce process by reducing the judicial burden of divorce cases. The Sharia Councils, responsible for managing faith-based dispute resolution and initiating Islamic divorce proceedings, operates as an unofficial system. Rulings issued by the Sharia Council, while not legally binding, hold considerable sway within the Muslim community. These rulings often serve as a foundation for reconciliation and can influence decisions made in formal courts, as detailed in chapter Five.

Imams in Sharia Councils call themselves 'courts', 'judges' appoint, 'decisions' and 'orders'. They do not just give advice or give their opinions. They also publish documents such as divorce papers.⁴⁸ They encourage the view that civil divorces were not enough and that women should come to the Sharia Council for a religious divorce. A report presented to the UK Parliament's Home Affairs Committee regarding Sharia Councils noted: "Numerous Islamic scholars and *imams* across Britain commonly assert that a civil divorce alone is insufficient, emphasizing the necessity for women to pursue a religious divorce for a proper dissolution of marriage."⁴⁹ In addition, the Muslim Arbitration Tribunal (MAT) acts under the Arbitration Act 1996 (England) and makes decisions by adhering to religious judgments, while not disregarding the jurisdiction of Family courts in the UK.⁵⁰ The MAT aims to provide an appropriate alternative for the Muslim community who want to resolve conflicts according to Islamic Law. Accordingly, the decisions of the MATs are legally binding, which operates under Section 1 of the Arbitration Act: "Parties should be free to decide how to resolve their disputes, subject to measures that only benefit the public interest".⁵¹ In summary, in England, there are three main mechanisms for resolving marriage disputes for Muslim population: the state civil procedure, informal community mechanisms (Sharia Councils), and the new Muslim Court of Arbitration.

47 *ibid* 54.

48 Michał Rynkowski, 'Religious Courts in the Jurisprudence of the European Court of Human Rights' (2016) 18(1) ELJ 23.

49 House of Commons Home Affairs Committee, Sharia Councils (HC 123, 2018) para 85.

50 Rynkowski (n 48) 26.

51 Robin Griffith-Jones (ed), *Islam and English Law: Rights, Responsibilities and the Place of Shari'a* (Cambridge University Press 2013) 46.

In fact, the most important feature of Sharia Councils is that they provide family justice to Muslim communities. Existing scholarship shows that Shari'a Councils have created frameworks for governance and administrative processes which are defined by specific and localized cultural and religious norms and values that demonstrate the emergence in the British Muslim community of a new form of 'Muslim family justice.'⁵² Keshavjee highlights that Sharia Councils in England support family justice and women's access to justice through dispute resolution methods like mediation.⁵³ An illustrative case from the late 1970s involved a British woman of Pakistani descent seeking an Islamic divorce, which her husband in Pakistan refused unless she agreed to an unfair financial settlement.⁵⁴ The 'court,' lacking formal jurisdiction over the husband, applied Islamic legal principles (*darura and maslaha*) and utilized personal connections to facilitate a more just resolution, upholding women's rights.⁵⁵ In contrast to sensationalized depictions of Sharia law, this case demonstrates how Sharia-based mediation can effectively manage complex cross-border marital disputes and prioritize women's welfare within an Islamic legal framework.

Sharia Councils in England are recognised for their culturally sensitive dispute resolution within Muslim communities. However, similar concerns about family cohesion and fair outcomes have emerged in other societies. Türkiye's rising divorce rates due to incompatibility, for example, have led to exploring alternative dispute resolution methods that aim to preserve family ties and facilitate amicable separations, reflecting the goals of some Sharia Councils. The increasing trend of divorce⁵⁶ and on-going failing marriages have shown that a situation that threatens the institution of the family has also emerged in Muslim-majority Türkiye. Over time, factors like evolving societal norms, economic pressures, and individualistic attitudes have strained marital relationships in Türkiye. The decline of traditional support systems and the growing impact of Western values have further tested family

⁵² Bano (n 43) 4.

⁵³ Roberts (n 29) 10.

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ According to the Turkish Statistical Institute (TurkStat), divorce rates have steadily climbed over the past few decades. For example, between 2004 and 2020, the crude divorce rate (the number of divorces per 1,000 people) increased from 1.0 to 1.6.

stability in this Muslim-majority nation.⁵⁷ Addressing these challenges necessitates a comprehensive approach that acknowledges social and cultural dynamics to foster enduring and thriving marriages in society. At the same time, various alternative methods are being developed to resolve disputes as local courts and arbitration proceedings increase tensions between the parties and harm legal relations that may be established in the future. One of the first steps in this direction was the “Family and Divorce Process Consultancy” initiated by the Ministry of Family and Social Policies in 2012. Following this practice, which achieved relatively successful results, three workshops were held in 2016-17 for initiating the family mediation practice by the Mediation Department established within the Ministry of Justice, and a draft guidebook was prepared for the family mediation practitioner.

Considering the practices of Muslim countries, there are inconsistencies between the formal (law in the books) and informal levels. Türkiye is an excellent example of this, as it was formed appropriately to maintain the unity of the family and accept the fundamental principles of the Islamic Family Law Code. Hence, this preference for religious norms and values in family matters, as indicated by the 2014 study, offers a solid basis for investigating how Türkiye's integration of Islamic mediation into family law can aid in achieving family justice, especially considering the frequency of marriages performed under civil and Islamic law.⁵⁸ However, data such as the fact that the majority of the population in Türkiye is Muslim, that the family is regarded as a sacred institution by the society, and that the rate of preference for religious marriage in marriages has reached 90% according to TURKSTAT data reveal the necessity of using religious references in solving problems related to the family.⁵⁹

The rising tide of divorce and marital discord within both English and Turkish societies necessitates a critical evaluation of existing family mediation systems, particularly those catering to Muslim communities. The Office for National Statistics (2019) highlights a significant rise in divorce rates across England, with a notable impact on British Muslim communities.⁶⁰ Similarly, Türkiye has witnessed an

57 Kim Caarls & Helga Valk, 'Regional Diffusion of Divorce in Türkiye' (2018) 34 EJP 3.

58 Turkish Statistical Institute (Turkstat), Family Structure Survey (2014), <www.tuik.gov.tr> accessed 30 March 2024.

59 Turkstat, Family Structure Survey (2016), <www.tuik.gov.tr> accessed 23 March 2024.

60 Arab News, 2018.

alarming 52% increase in divorces between 2009 and 2023, raising concerns for family stability and child well-being.⁶¹ The rate of increase in the number of divorces, shown in the table below and which has been gradually increasing over the years, supports this view.

*Table 1. Number of Marriages and Divorces in Türkiye (2009-2023)*⁶²

Number of marriages, crude marriage rate, number of divorces and crude divorce rate, 2009-2023

Year	Number of Marriage	Crude marriage rate	Number of Divorces	Crude Divorce Rate
2009	591 742	8, 21	114 162	1,58
2010	582 715	7,97	118 568	1,62
2011	592 775	7,99	120 117	1,62
2012	603 751	8,03	123 325	1,64
2013	600 138	7,88	125 305	1,65
2014	599 704	7,77	130 913	1,70
2015	602 982	7,71	131 830	1,69
2016	594 493	7,50	126 164	1,59
2017	569 459	7,09	128 411	1,60
2018	554 389	6,81	143 573	1,76
2019	542 314	6,57	156 587	1,90
2020	488 335	5,86	136 570	1,64
2021	563 140	6,69	175 779	2,09
2022	574 358	6,76	180 954	2,13
2023	565 435	6,63	171 881	2,01

Extensive research demonstrates the strong correlation between family structure and children's physical, emotional, and academic outcomes, emphasising the urgency of addressing marital conflict.⁶³ These shared concerns underscore the importance of mediation within family legal systems in both countries. While

⁶¹ Turkstat (n 58).

⁶² Turkstat, Marriage and Divorce Statistics (2023).

⁶³ Anderson (n 18) 381.

mediation holds promise, scholarly analysis of its specific applications remains incomplete. This comparative study explores mediation provisions in Türkiye and England, aiming to illuminate challenges in managing family disputes. The findings may contribute to developing more effective, cost-efficient, and equitable alternative dispute resolution mechanisms for Muslim communities in Türkiye.

When Western countries are examined, Islamic family mediation in England is one of the most remarkable examples Türkiye. In other words, nowhere in Europe and North America is the legal system closer to "recognising" Islamic judgments than in England, especially in family dispute resolution.⁶⁴ Therefore, the family mediation system in England could be a model for future reforms in Türkiye. Moreover, one may question why this thesis has not explored the Egyptian, Pakistani or Saudi model for Türkiye's Islamic family mediation system, but the reason lies in Türkiye's unique legal and social framework. In contrast to Egypt or Saudi Arabia, where Sharia law significantly impacts family law, Türkiye boasts a secular legal framework shaped by European legal practices. The Turkish Civil Code, established in 1926 and modelled on the Swiss Civil Code, highlights secularism and equal treatment under the law.⁶⁵ Establishing family mediation systems as an alternative to secular courts in resolving some disputes has attracted the attention of some Muslim communities in both Türkiye and England. This common interest reflects the desire of some individuals to address family problems within a framework compatible with their own religious and cultural values, as have been seen in the following chapters from the interview results conducted within the scope of the thesis.

This thesis proposes the mediation model of Islamic law to Türkiye by utilising practices in Islamic family mediation law, especially Muslim Arbitration Tribunals and Sharia Councils in England. Furthermore, this thesis identifies the difficulties faced by Muslim couples and the consequences of unrecognise, within and between the Sharia Councils in England (either in their operations or in the process of divorce). England was chosen as a research area because the Muslim Arbitration Tribunal was first established in England, and many Western countries (e.g. the United States) are modelled on the Islamic mediation system in England. The diverse models of mediation in Muslim-majority countries reflect the complex interplay of

64 John R. Bowen, 'How Could English Courts Recognize Shariah' (2009) 7 USTLJ 411.

65 E. Fuat Keyman, 'Modernity, Secularism and Islam: The Case of Turkey' (2007) 24(2) TCS 217.

legal, religious, and cultural factors. The Turkish model, with its emphasis on secular law and general mediation principles, stands in contrast to models in countries where Sharia plays a more direct role in the legal framework. The preference for Sharia Councils in England highlights the importance of culturally relevant and religiously sensitive dispute-resolution mechanisms for minority communities. Also, in this thesis, developments in England are mainly addressed, because it has a more developed and diverse set of institutions applying the Sharia than Wales, Scots and Northern Ireland law. Therefore, in the last part of the study, the Islamic family mediation system in the Sharia Council in England is evaluated for its potential application in Türkiye.

Also, the contribution to knowledge gained via studying Islamic family mediation in Sharia Councils is examined in the thesis's final chapter. It includes recommendations and proposals for prospective modification of Türkiye's family mediation law, and the findings have been presented from a comparative perspective with a critical analysis. In particular, it is hoped that the comparative study helps dissolve a particular social problem regarding Islamic family mediation in Türkiye, using the socio-legal functionalism approach⁶⁶ and variety of purposes of comparative law.

1.2. Aim of the Research

As we have seen the main aim of the thesis is to draw on the operational model of Sharia Councils in England, this doctoral thesis aims to critically examine the viability of implementing an Islamic family mediation system within the Turkish legal system. More specifically, it was answer the following key question: "Might the Sharia Councils in England serve as a potential model for enhancing women's access to justice through Islamic family mediation in the context of Türkiye?" In doing so the study fills a gap in current research, hopefully offering valuable insights for policymakers, legal professionals, and Turkish Muslims. The underlying aim of this thesis is to extract insights from the experiences of Muslims

⁶⁶ The socio-legal functionalism approach examines the relationship between societal norms, legal institutions, and the justice system, focusing on how legal rules maintain social order and promote societal well-being. It emphasizes the practical impact of legal norms on individuals and communities, offering insights into the dynamic relationship between law and society.

obtaining a family mediation divorce from the Sharia Council in England, intending to apply these insights to ensure family justice in Türkiye, where an Islamic family mediation framework is currently absent.

A pivotal aspect of this research involves a thorough analysis of the Turkish family court system, focusing specifically on women's barriers to seeking justice in family-related disputes. This examination delves into the legal, cultural, and procedural factors that obstruct women's access to fair and equitable outcomes in family law cases. By identifying these obstacles, the study aims to highlight systemic issues that undermine women's rights and suggest pathways for reform, as discussed in the third chapter.

Another critical component of this thesis is the evaluation of Islamic jurisprudence on mediation and women's rights. This involves a meticulous analysis of Islamic legal principles derived from the Qur'an, *sunnah*, and *fiqh*, particularly in the context of family disputes. The research seeks to uncover the potential areas of alignment and divergence between Islamic jurisprudence and Turkish secular law in matters of family mediation. This comparative analysis aims to reveal how Islamic principles can be harmonized with the secular legal framework to promote justice and equity in family matters in the fifth chapter.

The operational model of Sharia Councils in England have also been rigorously scrutinized, with a particular focus on how these councils address women's concerns and strive for equitable outcomes in family mediation. This aspect of the research will evaluate the strengths and weaknesses of the Sharia Council model in terms of women's access to justice, considering potential power imbalances and cultural nuances. The objective is to identify specific practices and procedures from the Sharia Councils that could be adapted or modified to enhance women's experiences and access to justice within the Turkish context.

Furthermore, this research aims to develop a comprehensive framework for establishing Islamic family mediation services in Türkiye. This proposed framework prioritises women's access to justice while adhering to Islamic principles. The study will explore strategies for integrating Islamic family law principles with the existing Turkish legal framework, ensuring compliance with secular law, and the protection of women's rights. This integrative approach aims to create a culturally sensitive and

legally sound mediation system that addresses the unique needs of Muslim families in Türkiye. By addressing these multifaceted objectives, this doctoral thesis aspires to make a substantial contribution to the fields of Islamic law, family law, and conflict resolution. The findings hopefully inform policy discussions, legal reforms, and community-based initiatives related to family mediation in Türkiye.

1.3. Significance of the Research

This research is important due to the lack of comprehensive studies on the establishment and implementation of Islamic family mediation systems in the Turkish context. Türkiye's predominantly Muslim population and cultural inclination towards religious guidance in family matters underline the need for alternative dispute resolution mechanisms that are in line with Islamic principles.⁶⁷ As Aybey emphasises, the current reliance on Eurocentric models may not adequately meet the specific needs and values of Turkish Muslims.⁶⁸ By examining the potential of Islamic family mediation, this research seeks to fill a critical gap in understanding culturally relevant dispute resolution mechanisms, particularly for women.

In the upcoming sections, the rising need for Islamic-centered resolutions in family conflicts, as indicated by findings from interviews with religious figures and scholars in this thesis, heightens the significance of this research. Going beyond a purely academic enquiry, this research aims to generate actionable insights with concrete real-world implications. By conducting interviews to examine the functioning of family mediation institutions in Türkiye, the study identifies problematic areas in managing family conflicts, facilitate the formulation of practical solutions and contribute to improving family justice mechanisms. This in turn can lead to better management of family disputes, reduce prejudices and misunderstandings between different mediation systems, and promote co-operation for the benefit of couples struggling with challenging situations.

Consequently, this research aims to create a comprehensive model for Islamic family mediation that is not only effective and culturally compatible, but also

67 Ihsan Yılmaz, 'Evolution of Unofficial Muslim Family Laws to Islamist Legal Pluralism in Erdogan's Türkiye' in *The Sociology of Shari'a: Case Studies from Around the World* (Cham: SIP, 2023) 103.

68 Salih AYBEY, 'Müftülüklere Gelen Evlilikle İlgili Sorunların Çözümünde Dini Danışmanlığın Rolü [The Role of Religious Counseling in Solving Marriage Related Problems Coming to Mufti Offices]' (2016) 9(44) JISR.

respectful of Türkiye's unique legal and social environment. This work contributes to a more just, equitable and harmonious society by empowering individuals and communities to resolve conflicts in a manner consistent with their beliefs and values.

1.4. Research Methodology

This doctoral research employs qualitative empirical research methods to analyse how Islamic family mediation can enhance women's access to family justice in Türkiye. The qualitative investigation employed semi-structured interviews as a method to explore the necessity of Islamic family mediation in enhancing women's ability to obtain family justice. Three complementary methods have been followed to achieve the research objectives: legal research methodology, comparative law method; and interviews for opinion. It aims to critically examine the legal provisions and texts that are specifically applicable to the research question followed by the study of books and other materials that clarify and interpret specific provisions and texts. In this study, the latest publications are more important. They receive more coverage because they are more likely to be up-to-date in their research. We also examine and compare the legislation and legal instruments governing mediation in Türkiye, the British legal system and the Islamic community in England, in Chapter Three, where the discussions focus on domestic disputes in Türkiye. Some basic characteristics and codes of the interviewees have been introduced in the first part of the interview section in Chapter One. The last part of the interview section discusses the data collection tools and analysis methods used. It provides detailed explanations of how the final collection tool and analysis method were determined. A more detailed exposition of the interview methodology, participant selection, data collection tools, and analysis techniques have been provided in chapter three, four and five.

1.4.1. Documentary Sources

This doctoral research sought to select appropriate methods to investigate the impact of Islamic mediation on family justice in Türkiye. This research adopts a comparative approach and investigate the historical and cultural context-giving rise to the development of legal rules in two family mediation systems: Turkish and English. For this form of study, library research is essential in order to gather the

relevant materials necessary for the conceptual and theoretical understanding of mediation, and in particular family mediation. Therefore, research was drawn on primary and secondary sources including books, journals, and family mediation reports.

The Qur'an and the *sunnah* are the principal sources of Islamic law. With the exception of small differences where explicit judgements are accessible in the primary sources, the four major schools⁶⁹ approach to legal matters is largely similar. However, jurists' opinions differ on legal rulings that are not clearly stated in the primary sources or are not available in the primary sources. Therefore, the study focuses on the classic writings of four major Muslim schools to properly comprehend their perspectives on the concept of mediation in Islamic law, as well as literature authored by contemporary Muslim commentators.⁷⁰

A comprehensive exploration of such diverse perspectives necessitates independent scholarly endeavours, as each tradition possesses distinct methodologies and interpretative frameworks despite potential areas of convergence. The advantage of this methodology lies in the way all researchers, legal specialists and others interested in mediation are able to understand the different schools of thought, analyse it, choose it from their interpretations and to adduce legal arguments on the principles formulated by the classical schools. Hence, this study provides a thorough understanding of the principles and rules of Islamic mediation that have been utilized to analyse the current regulations on mediators. It also enhances understanding of mediation rules in Islamic law and their conformity with the Turkish legal system.

1.4.2. Comparative Law Method

The primary and secondary sources reviewed above establish the theoretical foundation for this comparative study. Information gleaned from this literature was synthesised into a conceptual framework that guided the selection and analysis of data. The selection and use of primary and secondary sources form the basis of comparative research. First, when using a comparison method, it's critical to understand why the researcher has selected this method and how it may be supported as a legitimate approach. It is essential to determine the advantages gained by

69 Four main schools of thought guide Sunni Islamic law: Hanbali, Maliki, Hanafi, and Shafi'i.

70 Fikret Karcic, 'Textual analysis in Islamic Studies: A short historical and comparative survey' (2006) 45 IS 191.

comparing laws from different countries. It could involve, for instance, identifying common principles across jurisdictions or comparing legal regulations across jurisdictions to find the optimal solution.⁷¹ Collins suggests that the goal of comparative law should be to enhance and comprehend one's own domestic legal system by examining how other jurisdictions have dealt with similar issues.⁷² Lepaulle⁷³ identifies several advantages of the comparative method, for instance, that this is the best way to evaluate law system, and that there is no other better way for any theory to be supported than in the light of comparison. In other words, comparative law aims not only for the researcher to understand another legal system but also for the researcher to better understand his/her own legal system.⁷⁴ Comparative law is not limited to an understanding of another legal system and a better understanding of the investigator's own legal system but may be enhanced as a trigger for legal changes such as "introducing a new social or economic policy or re-balancing group interests" because foreign law can provide a better response to a particular evolution of society.⁷⁵

As already made clear, the main aims of the thesis is to use comparative law to evaluate how Türkiye generates solutions to the situation of Muslim families who want to use Islamic family mediation and to assess whether Sharia Councils in England can provide a more efficient solution to the same problems. The overarching purpose of using a comparative approach in the thesis is to provide an understanding of suggestions for improving the family mediation system of Türkiye by analysing how England deals with the same problem. In the framework of the present dissertation, England has been chosen as an example of a Western secular country for comparing Western and Islamic legal concepts for the resolution of disputes.

It is essential that we thoroughly examine the principles that underlie the method of family mediation within the Sharia Councils, so that we can assess the processes between the two countries and the challenges in accessing family justice. The information obtained from the formal and informal sources about the functioning

71 Hugh Collins, 'Methods and Aims of Comparative Contract Law' (1991) 11(3) OJLS 396.

72 *ibid* 397.

73 Lepaulle, 'The Functions of Comparative Law' (1922) 35 HLR 853.

74 E Özüçü, *Developing Comparative Law* in E Özüçü and D Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) 43.

75 Mathias M Siems, 'Bringing in Foreign Ideas: The Quest for Better Law in Implicit Comparative Law' (2014) 9 JCL 124.

of the mediator in Sharia Councils has been used and referred to throughout by comparative analysis. The information for the comparative study provides from the written documents about Islamic Sharia Council in England. These sources would be analysed to make the comparative review since there are many published sources and interviews regarding the operation and structure of Sharia Councils and the application of mediation and arbitration procedure. Different methodological models, such as qualitative and quantitative methods of the efficiency of Sharia Councils, have been used to evaluate Islamic mediation in Sharia Councils by researchers. The telephone survey with Sharia Councils used in the exploratory study by Bano⁷⁶ is useful in correcting misunderstandings of religious ADR processes by researching the nature and scope of Sharia Councils in England, for instance. Several reports investigating the functioning of the mediation and arbitration system in Sharia Councils using the interview method have been referred to in this study (such as those of Cusaire⁷⁷ and Hak⁷⁸).

The reasoning behind choosing England for our analysis is three-fold. First, family mediation has developed in both English law and Sharia Councils. According to Sandra Joireman's 2004 study, English law has been the most effective means of building a strong judiciary, at least when compared to the family law system.⁷⁹ In particular, although it is a country with a Muslim minority, the mediation system in Sharia Councils and Muslim Arbitration Tribunals in England is more developed in terms of women's easy access to family justice compared to other countries.⁸⁰

A second reason for choosing England is the abundance and easy access to legal literature for researchers, which provides both descriptive and analytical material on this topic of English law and Sharia Councils. The academic literature about the application of Islamic family mediation in Sharia Councils in England is more developed and can be used as a source of ideas. English law is recognized as a well-defined system and has been grappling with family mediation and family justice

76 Bano (n 43).

77 Cusairi (n 37).

78 Nora Abdul Hak, *Islamic Arbitration (Tahkim) and Mediation in Resolving Family Disputes: A Comparative Study under Malaysian and English Law* (Glasgow Caledonian University 2002).

79 Sandra F Joireman, 'Colonization and the Rule of Law: Comparing the Effectiveness of Common Law and Civil Law Countries' (2004) 15 CPE 315.

80 Keshavjee (n 29) 76.

for a long time.⁸¹ There are numerous discussions and substantial debates in the literature that could provide source of ideas for shaping Turkish jurisprudence in this field of law. Furthermore, London is well known for its Arbitration Centre, where many family disputing parties of many nationalities, including Muslim groups, prefer to settle their disputes.⁸²

The last reason for comparing the comparative approach is the small number of examples of the phenomenon under investigation in Türkiye. In other words, considerable the lack of a significant enough number of cases usually prohibits the analyst from employing traditional statistical approaches. Comparative studies can identify potential patterns, underlying factors, and alternative approaches⁸³ by examining example cases in England, enriching their understanding of the phenomenon in the Turkish context. Since the range of options is often severely constrained, the researcher is often left with of new instances dictated by factors beyond his control.

A likely question arises regarding the above propositions. The question is whether such legal cross-matching is feasible given the identified contrasts between the two systems, which some believe cross-matching is feasible given the identified contrasts between the two systems, which some belief are opposed. Therefore, considering the significant disparities between the two systems, this research neither claims nor intends to engage in a full-scale comparison of the two. This study presents an analytical approach to evaluate the use of Islamic family mediation in Türkiye, comparing it to England, which serves as a "referential" point of comparison. This analysis aims to understand how Islamic family mediation can improve access to family justice in Türkiye. This means the study intends to find congruencies between the two systems wherever possible to facilitate a clear grasp of the subject. This is significant since Islamic law is either an unfamiliar subject or challenging to understand for those who have not been schooled in it.

In short, the comparative approach to the study is considered very appropriate considering the rapid globalisation of family mediation as a means of resolving

81 Lisa Parkinson, 'The Place of Mediation in the Family Justice System' (2013) 25 Child & Fam LQ 201.

82 Keshavjee (n 29) 51.

83 Reza Azarian, 'Potentials and Limitations of Comparative Method in Social Science' (2011) 1(4) IJHSS 115.

family conflicts. Using a comparative approach, we examine the divergent views of Muslim scholars on family mediation, the similarities and differences in the concepts of mediation between Islamic law and the Western perspective, the procedures for issuing civil and religious divorce in Türkiye and England, and the similarities and differences in the practice of mediation between state mediation bodies and Sharia Councils.

1.4.3. Interviews

Qualitative research was conducted on whether the utilization of Islamic family mediation in Türkiye enhances women's access to family justice, whether women can be viewed as a specific focus of mediation, and how mediation can aid in addressing access issues. Furthermore, the study examined the extent to which mediation within Sharia Councils effectively delivers family justice in this context to address the research question. The main reason for choosing the interview method in the research is that Islamic family mediation is not widely used in Turkish society, and there is no legal regulation regarding family mediation in Türkiye. Therefore, since the research population constitutes a limited group, the interview method, one of the qualitative analysis methods was preferred instead of quantitative analysis methods. Thus, more detailed and in-depth information was obtained by asking open-ended questions to the interviewees, about the neglected details of the family mediation system and why Islamic family mediation was accessed.

The decision to use a qualitative research approach to research is concerned with both initial research interests and concerns about making the best use of data and information on the practice of Islamic family mediation under limited access. Also, qualitative research aids in exploring and investigating the meanings, motivations, and experiences of people who mediate within the framework of Islamic values. Qualitative researchers aim to understand and describe human behaviours and experiences in the real world, and to develop insightful concepts about these truths.⁸⁴ Following the researcher's lead, they attempt to comprehend the entire mechanism by which people incorporate meaning and clarify this meaning.⁸⁵ Thus, this method

84 Zubin Austin and Jane Sutton, 'Qualitative Research: Getting Started' (2014) 67(6) TCJHP 437.

85 Robert Bogdan and Sari Knopp Biklen, *Qualitative Research for Education* (MA: Allyn & Bacon 1997) 43.

have been used to illustrate data and knowledge gathered through library research, as well as to investigate the actual mediation process in Türkiye.

Another reason for using qualitative methodology in addition to library information in this study is that there are not enough written sources on the chosen topic, especially on Türkiye. The reason why interviews are conducted especially in Türkiye is that there are similar studies and interviews on this subject in England. For example, Bano's work titled *Muslim Women and Sharia Councils* includes interviews with Muslim women living in Britain about the ADR they received from Sharia Councils during the divorce process. While evaluating the interviews, she also evaluates how much the Shari'a council provides family justice. Another study on this subject is *Islam, Sharia & Alternative Dispute Resolution* of Keshavjee.⁸⁶ This research on the use of alternative dispute resolution services (ADR) by a Muslim community in the London area is a study that includes interviews with a deep insight into a Muslim community's approach to conflict resolution in sensitive family matters. The main literature gap in Türkiye is the lack of qualitative information needed to examine people's family mediation needs and perceptions of Islamic family mediation. Studies based solely on documentary sources provide limited data about family mediation in the law, the process of applying for mediation, and the subject of family mediation cases. No academic research or book based on qualitative methodologies has been conducted on the work of family mediation in Türkiye and the needs of people for Islamic family mediation.

The fact that the Turkish legal and Islamic theological community, including academic institutions, has not yet shown a strong interest in exploring the steps people are taking to meet their legal needs regarding family mediation and family justice can be attributed to several factors, among them not much familiarity with the system because family mediation and Islamic family mediation is a new topic for them. However, there is one exploratory study by Kose and Beriker⁸⁷ that included an interview with *ulama* about concrete steps of mediation, types of disputes, and forms of agreement. However, since that work includes all types of mediation, there is only one case example about family mediation, and it contained only limited

86 Keshavjee (n 29).

87 Talha Köse and Nimet Beriker, 'Islamic Mediation in Turkey: The Role of Ulema' (2012) 5(2) NCMR 136.

information. One of the studied systems in this dissertation, the Turkish Family Mediation System, is considered a new system that requires explanation and in-depth investigation. The dissertation therefore examines an issue that has not had enough scholarly discussion. The earlier study, particularly that on the national system, which is considered as the pillar of this field's research, demonstrates this. Furthermore, Kose and Beriker⁸⁸ and Yilmaz⁸⁹ have discussed the legal and regulatory consequences of Islamic family mediation in terms of the structure of the current legal system and the validity of Islamic law. Kose and Beriker⁹⁰ argue that the secular structure of Türkiye prevents informal conflict resolution, such as arbitration and mediation. However, the textual language and interpretation of the Qur'an and *sunnah* influence Türkiye's society, resulting in Islamic law practice in family relations and informal secular conflict resolution practices. Yilmaz⁹¹ argues that secular official Turkish law and unofficial Muslim law are used together in social and legal fields.

The practical forms of Islamic family mediation were concretely analysed using semi-structured and open-ended interviews to gain in-depth knowledge. Interviews are a traditional way of obtaining systematic knowledge.⁹² Semi-structured interviews (which have been conducted via video) with key participants can provide more information than structured interviews about the appeal of Islamic family mediation and give detailed knowledge of the workings of family mediation in Türkiye. In such interviews, the interviewer is able to adapt the interview questions based on the answers obtained. Unlike structured interviews, semi-structured interviews encourage richer data collection, enabling participants to elaborate on their responses and provide detailed accounts of family mediation process. This style of interview allows each participant to provide their own perspective to the research questions, allowing respondents to explain their situation to others from their own point of view and in their own words.⁹³ Amongst others, the

88 Köse and Beriker (n 87).

89 Ihsan Yilmaz, 'Secular Law and the Emergence of Unofficial Turkish Islamic Law' (2002) TMEJ 113.

90 Köse and Beriker (n 87).

91 Yilmaz (n 89).

92 Steinar Kvale and Svend Brinkmann, Interviews: Learning the Craft of Qualitative Research Interviewing (Sage 2009) 7.

93 *ibid* 11.

role of the interview in legal research is to learn the practical application of certain legal rules or to obtain expert opinions on specific legislation.⁹⁴

While selecting the interviewees, a purposeful and convenient sampling method was used. Fraenkel and Wallen⁹⁵ define the convenient sample as a group of individuals who are conveniently accessible for the study, while they define the purposive-intentional sampling as the selection of individuals because of their special qualities or preliminary indicators of representation. In this context, a wide variety of people interviewed and tried to ensure that sample was as inclusive as possible. Interviews and critical discussion includes authorised persons in the mediation unit at the ministry of justice, *ulama*, counsel dealing with family mediation in the Presidency of Religious Affairs Legal Counsel, Conciliation Bodies and knowledgeable and prominent people in the fields of mediation and family law in Türkiye, academic specialists in Islamic law and family mediation, divorced couples and couples in the process of divorce.

A purposive sampling approach was used to recruit participants with relevant expertise and experience. The sample consisted of four primary stakeholder groups: 1) Preachers and counsellors working in religious and counselling offices who could provide insight into religious and cultural perspectives on family mediation. 2) Researchers who research issues related to family justice, mediation and Islamic law and provide a theoretical understanding of the subject. 3) Women's rights advocates and gender studies faculty whose involvement in women's issues can illuminate the potential benefits and challenges of Islamic family mediation from a feminist perspective. 4) Authorized personnel from the lawyer and family mediator, offering invaluable perspectives from legal experts involved in the administration of the justice system.

Table 2. Interviewees

No	Institution of Interviewers	Profession of Interviewers	Date	Gender
K1	KADEM (Women and Democracy	Activist	12.12.2023	Female

⁹⁴ Charles Chatterjee, *Methods of Research in Law* (Old Bailey Press 2000) 68.

⁹⁵ Jack R Fraenkel and Norman E Wallen, *How to Design and Evaluate Research in Education* (McGraw-Hill International Edition 2006) 45.

	Foundation)			
K2	KADEM (Women and Democracy Foundation)	Activist	10.01.2024	Female
K3	Hazar Foundation	Activist	24.11.2023	Female
K4	KIH (Women for Women's Human Rights)	Activist	23.11.2023	Female
K5	Mor Cati Foundation	Activist	27.11.2023	Female
K6	Family and Religious Guidance Offices (Bursa)	Religious Official	25.10.2023	Female
K7	Family and Religious Guidance Offices (Bursa)	Religious Official	25.10.2023	Male
K8	Family and Religious Guidance Offices (Istanbul)	Religious Official	13.12.2023	Female
K9	Family and Religious Guidance Offices (Ankara)	Religious Official	25.01.2024	Female
K10	Family and Religious Guidance Offices (Ankara)	Religious Official	16.02.2024	Male
K11	Ministry	Lawyer	30.12.2024	Male
K12	Ministry	Lawyer	11.12.2023	Male
K13	Ministry	Family Mediator	19.01.2024	Female
K14	Ministry	Family Mediator	12.01.2024	Male
K15	Ministry	Family Mediator	27.02.2024	Male
K16	University in Istanbul	Researcher	19.12.2023	Male
K17	University in Istanbul	Researcher	04.03.2024	Male
K18	University in Ankara	Researcher	09.02.2024	Female

K19	University in Ankara	Researcher	23.02.2024	Male
K20	University in Bursa	Researcher	05.12.2023	Male

The sample of interviewees in this study comprises 20 individuals from diverse institutions and professional backgrounds, who have a comprehensive perspective on women's access to justice in Türkiye. The gender distribution of the interviewees is balanced, representing women actively involved in activism, legal work, and research concerning women's rights and justice. This gender balance is particularly relevant given the focus of the study on women's issues. The institutions represented in the sample are highly influential in the discourse on women's rights and justice in Türkiye. Activists from prominent women's organizations provide insights from the frontline of advocacy and support for women's rights. Moreover, women frequently look to women's organizations as their initial source of assistance when seeking justice. These organizations offer guidance and services that bring comfort and strength to many women. Ranging from legal aid to counseling, these groups play a vital role in providing a supportive network for women dealing with the intricacies of pursuing justice. When confronted with the hurdles of the legal system, women commonly seek advice, advocacy, and a feeling of unity from these organizations. Religious officials offer perspectives on the intersection of legal and religious frameworks, crucial for understanding the complexities of Islamic mediation. They stress the need for a nuanced approach that respects both legal requirements and Islamic teachings to ensure a fair and just resolution process. Legal professionals and family mediators contribute authoritative views on the practicalities and challenges of implementing justice within the legal system. Legal professionals and family mediators offer valuable insights into the nuances of navigating the legal landscape and resolving disputes through Islamic family mediation. Researchers from leading universities add an academic and analytical dimension to the study. The varied and authoritative sample enhances the study's findings on the complex issues surrounding women's access to justice in Türkiye, ensuring a comprehensive and representative understanding.

Building on the knowledge obtained from various interviewees as detailed in Table 2, this study delves deeper into the implementation of Islamic family

mediation in the Turkish setting. To get information about applying Islamic family mediation in Türkiye and present the underlying meaning and value systems of Islamic mediation practices an interview with *ulama* (Islamic scholars). *Ulama* for this research was determined after careful consultation with theology academics from Marmara University, Istanbul University, the Centre for Islamic Studies (ISAM) and other independent Islamic academics in Istanbul. Interviews with *ulama* were based on information provided by Muslims on how they settle family disputes based on the Islamic Sources of the Qur'an and *sunnah* of the Prophet. At the same time, interviews were also held with the academics in the field who are fully aware of the work on Islamic family mediation and family mediation in Türkiye here as well as prominent legal practitioners in the Arbitration Centre and Department of Mediation to verify data and information collected through the library research and to explore the actual mediation process in Türkiye.

The interviewers have been provided with an interview guide to ensure that each person interviewed has the same basic lines of enquiry. The interview guide aims to provide the interviewees with information about the topics to be covered during the interview, a plan to initiate a follow-up for further conversations with the interviewee, and a note-taking and feedback space for each concept. Both open-ended and closed-ended questions included in interviews. In other words, the interviewees have not restrained to express their views or reporting any discrepancies in the practice. Close-ended questions may therefore be necessary to outline concrete steps of mediation, types of disputes and forms of agreement. However, open-ended questions preferred to understand the meaning of the actions and underlying assumptions of the practices.

During the end of October 2023 and early March 2024, the researcher conducted 20 semi-structured interviews in Türkiye with public and private interviewers to gather qualitative data to inform the development of standards for providing the justice quality of Islamic family mediation. The video interviews (via Zoom), each lasting between 45 and 60 minutes, were conducted and recorded. Due to the subject's sensitivity, everyone's name hidden in the original thesis to ensure confidentiality. Especially in Istanbul, Bursa and Ankara, *imams* and preachers, women activists, researchers on related issues and mediators from the Family and

Religious Guidance Offices were preferred. A study of this sort necessitates adequate access to people and topics, which is difficult to achieve due to the sensitive nature of a subject including religious law, cultural attitudes, community institutions, and interpersonal interactions. Ankara and Istanbul are the central regions of ministries and various national institutions providing mediation services and working on this issue.

1.4.3.1. Research Questions and Indicators

This section aimed to establish criteria for assessing the quality and ensuring the applicability of Islamic family mediation practice in Türkiye. In addition, each indicator has been defined to understand better the objectives of the interview questions created to obtain comprehensive information about the current functioning of family mediation in Türkiye and to discuss whether the family mediation implemented is sufficient for access to family justice.

Given that the interview questions touch upon the intricate intersection of family mediation, Islamic mediation practices, and women's access to justice in Türkiye, it is essential to establish clear indicators for evaluating the responses. These indicators do not only aid in assessing the efficacy of the interview questions but also offer valuable insights into the subtle dynamics involved. Indicators are important social science tools for assessing and monitoring targeted project or qualitative research study performance levels.⁹⁶ Indicators can determine targets and project outcomes depending on specific objectives in a project document. Maranlou⁹⁷ has structured indicators into two key dimensions that consider both user and institutional perspectives of any conceptual framework used to measure access to justice. Based on the interviewee's viewpoints, the measuring methods can be divided into two broad categories: legal needs and legal empowerment.⁹⁸ As a result, the primary focus is on the process that a user experiences in accessing justice through family mediation.

An analysis of research indicators led to the development a ten-category classification system, grouped into three primary areas. The first area investigates the

96 Ilan Kapoor, 'Indicators for Programming in Human Rights and Democratic Development: A Preliminary Study' (1996) CIDA 5.

97 *ibid* 6.

98 *ibid* 7.

efficacy of informal Islamic family mediation practices in Türkiye. Here, the focus is on determining if these informal practices adequately address family disputes. The second area examining Sharia Councils as case studies reveals both the strengths and weaknesses of such approaches, informing the development of more effective models. The last area, exploring the interaction between Islamic law and the Turkish legal system will highlight the influence of religious principles on current family mediation practices. Indicators employed within this framework encompass agreement formation and stability, participant satisfaction, access to family justice, process efficiency, overall value, and fairness. These categories, though interrelated, provide a comprehensive framework to accommodate the diverse interests and needs of parties involved in family disputes. Specific evaluation questions for each indicator aim to shed light on important aspects of the mediation process.

Table 3. Indicators, Explanations and Questions

Indicators	Explanations	Questions
The potential impact of establishing Islamic centres for Islamic mediation practices on the achievement of family justice in Türkiye.	The establishment of Islamic centres with mediation practices, similar to the Sharia Councils in England, could provide an alternative avenue for resolving family disputes, potentially instilling greater confidence in women to seek justice and claim their legal rights. ⁹⁹	How would the impact of the establishment of Islamic centers, such as the Sharia Councils in England, for the implementation of Islamic mediation practices in Türkiye on achieving family justice?
Perceived effectiveness of Islamic mediation in facilitating access to justice for women and marginalized groups.	Increased needs of Islamic mediation services by individuals involved in family disputes due to the perception that it provides a culturally appropriate and religiously grounded	What role do you think of establishing centres practicing Islamic mediation can play in promoting access to justice and resolving family disputes in Türkiye?

⁹⁹ Parkinson (n 25) 86.

	approach to resolving conflicts. ¹⁰⁰	
Authorities and activities' perception of the compatibility of Islamic family mediation with their cultural and social expectations in resolving family disputes.	Testimonials or experiences from individuals who have participated in Islamic family mediation processes, indicating their positive experiences and the effectiveness of the approach in addressing family disputes and promoting access to justice within the Turkish context. ¹⁰¹	Do you think that Islamic family mediation, which is more compatible with the Turkish family structure, should become widespread?
Identification of necessary legal reforms or adaptations to accommodate Islamic family mediation within the Turkish legal system.	This analysis can provide insights into the measures and mechanisms that have been employed to ensure compatibility, such as clear delineation of jurisdiction, adherence to legal principles, and the incorporation of safeguards to protect individual rights and uphold the secular nature of the legal system. ¹⁰²	What measures can be taken to ensure the compatibility of Sharia Councils' practices with the secular nature of the Turkish legal system while addressing the demands for an Islamic family mediation system?
Women's awareness of the Presidency of Religious Affairs' initiatives promoting access to justice.	The initiatives and support provided by the Presidency of Religious Affairs in empowering women to access justice and addressing the challenges they face in seeking legal remedies	What is the role of the Family and Religious Guidance Offices in women's access to justice?

100 Bennett Wolff, 'The Best Interest of the Divorcing Family - Mediation Not Litigation' (1983) 29 LLR 65.

101 Ahmet Kaşdibi and Sinan Yılmaz, 'İslam Aile Hukukunda Aile Hakemliği Ve Günümüzdeki Aile Problemlerinin Çözümünde Uygulanabilirliği [Family Arbitration in Islamic Family Law and Its Applicability in Solving Today's Family Problems]' (2022) 6(2) TİAD 643.

102 ibid 645.

	for their rights.	
Women's perceptions of cultural, emotional, and social barriers in accessing justice for divorce matters	Women in Türkiye can often experience cultural stigma, emotional distress, and social judgment when seeking justice for divorce matters due to societal norms and expectations surrounding marriage and family.	What cultural, emotional, and social costs do women in Türkiye experience when seeking justice for divorce matters?
Women's perception of the role of Islamic mediation in promoting gender equality.	The role of Islamic mediation practices in family justice has been discussed to enhance women's access to information about their legal rights and the legal system, promoting a more inclusive and responsive justice system.	Do you think the acceptance and effectiveness of Islamic mediation practices in addressing family justice issues can have a positive impact on women's rights in Türkiye?
Women's knowledge of the role of <i>imams</i> in facilitating access to justice.	The <i>imam</i> plays a crucial role in providing guidance, support, and mediation services to women seeking access to justice in accordance with Islamic principles.	Do you believe that the decision made by the <i>imam</i> during Islamic mediation can discourage the parties involved from seeking justice through other family mediation centers?
Women's motivations for seeking assistance from <i>imams</i> in Islamic mediation for pursuing justice.	Women can seek assistance from <i>imams</i> in Islamic mediation to pursue justice due to the lack of accessible and responsive legal resources for women in the existing legal system.	Why do women seek help from religious representatives in Islamic mediation to achieve justice?
The impact	There are obstacles in front of women who want to divorce religiously. Muslim women who	Do the women believe that Islamic family

of Islamic family mediation on accessing family justice.	want to divorce face financial demands and social or family pressure problems with the decision to divorce. The practice of Islamic family mediation, by removing or reducing procedural barriers and assuming it favours divorces, "works on the basic principle that if a woman wants a <i>hula</i> , she is entitled to a <i>hula</i> ." Islamic family mediation frames as a viable solution for women seeking religious conflict resolution when many of the options in society are inadequate, and may even help as a model to reframe or resist at least some assumptions of Islamic divorce. ¹⁰³	mediation ensures family justice?
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The above questions imply that specific types of data are necessary to address the main research issue. Interview questions were devised using key indicators from Table 3 to examine different aspects of Islamic mediation practices. Though a detailed analysis of every indicator exceeds the scope of this thesis, the interview results reveal diverse views on the potential effects of establishing Islamic centres. Participants emphasized potential benefits and challenges concerning women's empowerment and alignment with the secular legal system. After determining the study objectives, the data management step was to design the project utilizing the most relevant and successful data collection methods.

1.4.3.2. The Data Management

103 Saher Tariq, 'Muslim Mediation and Arbitration: Insights from Community and Legal Practice' in Samia Bano (ed), *Gender and Justice in Family Law Disputes: Women, Mediation, and Religious Arbitration* (Brandeis University Press 2017) 127.

Data collection is essential to any research project; 'no data equals no project.'¹⁰⁴ Whatever methods are utilised, a systematic approach to data collecting is required.¹⁰⁵ The primary purpose of data management is to establish what to save, how to access it, and what must be retained for data analysis. In addition, data analysis discusses the data collection and tools, and methods of analysis that were examined, as well as a description of how the ultimate collection, tools and analysis technique were chosen.

The participants' confidentiality and anonymity were ensured throughout the data collection process. The participation information sheet (Appendix B) provided to all participants addressed ethical considerations including privacy, confidentiality, anonymity, participant protection, safety, consent, and data protection. The recording and transcription equipment selection and the briefings given to interviewers before data collection are outlined together. To protect the privacy of the personal rights of individuals, it states to the participants that no identifying information would be used within the scope of the research. To ensure that participants understand the research objectives, the background and goals of the study have been presented at each stage of the study. The ethical considerations outlined above were presented for Ethical Approval to the Research and Ethics Committee at the University of Essex. Approval was granted.

All recordings were downloaded to the digital voice editor software that is included with the interview recorders and saved in a password-protected file labelled with the recorder's name. At this point, the identifiers used have tied to the location of each interviewee, after which a number have assigned to each location to ensure that the specific mediation service is not traceable to the identified place. The Dragon Naturally Speaking voice recognition software is also used in Excel and Word to facilitate note taking by speech. It was also utilised to construct some of the incomplete transcriptions offered as verbatim quotations in this thesis.

Express Scribe Transcription for Typists software was obtained from NCH Software in Australia and downloaded to the study computer to aid in audio augmentation. Each recording was uploaded to this application independently, and

104 Tim May, 'Social Research: Issues, Methods and Process, Maidenhead' (Unpublished Thesis, University of Sheffield 2011) 46.

105 Colin Robson, *Real World Research* (John Wiley & Sons, 2024) 23.

notes will be added to each tape to identify it, using the assigned case number, pseudonym, recording location, mediator name, and outcome.

The data obtained from the interviews were converted into text with the Microsoft Word program as raw data without any addition or subtraction. Excel spread sheets and Word documents (Microsoft Office™) were the primary software tools used, and templates were created for each study in the project's investigation. Before the data is coded, the breakdown of the data is examined in detail, and it is aimed to prevent errors that may occur in the analysis of the data. NVIVO™ analysis software were be obtained and used in the study for data coding. In the statistical analysis of the research, NVIVO™ 10-package program have used to calculate percentages and frequency from descriptive statistical methods. NVIVO™ is one of several specialised Computer-Assisted Quantitative Data Analysis Software (CAQDAS) programs developed to manage enormous amounts of data. It assists the researcher in locating, categorising, and retrieving data.¹⁰⁶

1.5. Scope And Limitations

This study comprises the issues of Muslim family disputes and divorce in Türkiye and England. Meanwhile, the majority of the Muslim community in Türkiye have been looking for a suitable mediation system on religious norms and values. Sharia Councils and MAT in England are examples of how to establish an Islamic mediation system in Türkiye, which is a secular government like Britain. This study also proposes to examine the technical and legal perspective of mediation and look at mediation law and practice after divorce and separation. It has not be conceived to cover foreign cases or cases involving foreign mediation systems.

The comparative study idea that it is a well-established, smooth, and unproblematic analysis methodology that, due to its unquestioned logical standing, can provide reliable knowledge if certain technological preconditions are met successfully.¹⁰⁷ However, a comparative study is a problematic strategy that necessitates thinking and careful study study requiring careful thinking.¹⁰⁸ Indeed, a

106 Matthew B Miles and A Michael Huberman, *Qualitative Data Analysis* (Sage Publications, 1994) 34.

107 Jörg Matthes, Christine Davis, and Robert Potter, *The International Encyclopedia of Communication Research Methods* (Wiley 2017) 22.

108 Azarian (n 83) 117.

several fundamental limits and constraints associated with a comparison should serve as a warning against and prohibit any easy-minded, uncritical adoption of this research technique. The most crucial limitation of comparative analysis is that it is more complex and time-consuming than non-comparative studies. Given practical time and resource limitations, it was not feasible to conduct interviews with Sharia Councils in the UK. As such, an extensive review of existing literature and documentation was undertaken to gather insights and perspectives on the functioning of Sharia Councils within the UK. These limitations arose when evaluating interview data from Türkiye, yet considering these issues offers valuable insights for future research and sheds light on the nature of these organizations. Also, children's issues and financial assistance have not been covered in detail in this research as they are beyond the scope of this study. However, when discussing the role of the Sharia Councils, particular emphasis has not been placed on relevant issues, especially children and custody.

The third limitation of the comparative analysis is the focus on English common law only since the United Kingdom has different legal systems. The jurisdictions that apply in the United Kingdom vary depending on where you live in England, Scotland, Wales, or Northern Ireland. When it comes to laws that apply to Muslims in the UK, looking at all the laws of the four nations is not covered by this study. While this study acknowledges the distinct legal systems of Scotland and Northern Ireland, it primarily focuses on relevant provisions within English law and decisions of the English Supreme Court, as these directly impact the legal landscape in Wales due to its historical and ongoing subjection to English law. A comprehensive discussion of the Sharia Council in Scots, Northern and Wales is beyond the scope of this study due to time and resource constraints. At the same time, references and comparisons are made with some relevant provisions of Scotland and Northern Ireland, where relevant. Also, there are references to relevant literature from the United States, Canada, Australia and Asia.

The interviews in Türkiye are also subject to some limitations. The complexity of conducting interviews is evident *ulama* in various conditions within the courts, *ulama*, and mediation centres in Türkiye. In addition, the fact that the information about the Sharia Councils is limited causes excessive generalisations about their

activities and effects. Some difficulties expect in persuading participants to participate. Using an adopted video meeting may make it challenging to develop relationships between interviewers and participants, limiting the data collection. However, this is an early exploratory study that uses simple and indisputable questions over a wide geographic area.

This study aims not to create new theories but to reconsider the relationship between the state and the community-level dispute resolution system and examine if they can be utilized for the well-being of Turkish Muslim families and society. Importantly, it does not propose a plural legal system. Hence, delving into this subject falls beyond the study's focus.

CHAPTER II

EXPLORING THE DIMENSIONS OF ACCESS TO FAMILY JUSTICE: CONCEPTUAL FRAMEWORK AND CONTEXTUAL ANALYSIS

2.1. Introduction

The concept of justice is deeply rooted in cultural, religious, and societal influences, shaping diverse interpretations and practices. While justice is a universal endeavour to uphold fairness, equality, and accountability, its manifestations can vary widely across different cultures and societies.¹ In a particular cultural framework, the understanding of justice can be complex, encompassing various dimensions, including restitution, reconciliation, punishment, retribution, distributive justice in distributing resources and burdens, and procedural justice in the equity of processes and decision-making mechanisms. These variations reflect the complex interplay between historical, religious, and societal influences on the development of justice systems. Across societies, the unwavering pursuit of justice champions fairness, equality, and accountability for all. Justice concepts have been explored in more detail in the following chapters.

Access to justice is a fundamental human right, ensuring that individuals can have their voices heard, exercise their rights, and challenge discrimination. However, access to justice becomes more complex when viewed from a gender-sensitive perspective, as women often face obstacles in claiming their rights and obtaining legal aid.² A gender-sensitive approach is essential to ensuring equal access to justice for women, encompassing fair and accountable mechanisms for protecting their rights.³

Mediation's role in family justice paradigms offers an alternative approach to resolving conflicts within the family, emphasising the importance of restoring relationships in a sustainable manner. By considering issues such as access to justice, gender justice, Islamic justice, family justice, and family mediation together, efforts can be made to build a more comprehensive and effective justice system that considers cultural, religious, and social diversity.

1 Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 2008) 345.

2 Gülriz Uygur and Eileen Skinnider, *Understanding Barriers to Women's Access to Justice and Legal Aid in Türkiye* (Council of Europe 2022) 13.

3 *ibid.*

This chapter aims to understand how different concepts of justice interact. Considering issues such as access to justice, gender justice, Islamic justice, family justice, and family mediation can shed light on efforts to build a more comprehensive and effective justice system. In this framework, an important step can be taken to account a just society that considers cultural, religious, and social diversity.

2.2. Access to Justice

Contemporary perspectives frequently perceive justice as the actualisation of human rights.⁴ However, it is to be noted that this interpretation is rooted in well-established societal beliefs regarding fundamental human values and moral virtues such as dignity, equality, and basic entitlements, predating human rights' inception. Though different, most arguments⁵ for justice seek to ensure that all people have equal access and the opportunity to exercise their rights.⁶ For example, John Rawls' concept of justice, which emerged in the 20th century and still has an impact today, requires not only the provision of equal fundamental rights and freedoms but also the fulfilment of the requirements of social justice through the principles of difference and the value of liberty that it brings.⁷ Rawls has also shown the importance of the structure of society by bringing principles of justice to the primary institutions of society.⁸ While Rawls's principles aim to address injustice within the basic structure, Iris Marion Young emphasises the importance of examining injustices that arise from social norms, cultural representations, and everyday interactions, which may persist even within a just institutional framework.⁹ Unequal hegemonic power relations within the structure lead to the constant reproduction of injustice. Ignoring such unequal relations in the structure, for example, those based on social gender, and acting as if these relations are equal ultimately deepens inequalities.¹⁰ Therefore, it is necessary to think about

4 Amartya Sen, *The Idea of Justice* (Belknap Press 2009) 115.

5 David Miller, 'Justice', in Edward N. Zalta & Uri Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Fall 2023 Edition).

6 Liz Curran and Mary Anne Noone, 'Access to Justice: A New Approach using Human Rights Standards' (2008) 15(3) *IJLP* 198.

7 John Rawls, *A Theory of Justice: Revised Edition* (Belknap Press 1999) 266

8 *ibid* 38.

9 Nadire Özdemir, 'Iris Marion Young Teorisi'ne Genel Bir Bakış: Yapısal Adaletsizlik ve Adaletsizlikten Sorumluluğa İlişkin Sosyal Bağlantı Modeli [A General Overview of Iris Marion Young Theory: The Social Connection Model of Structural Injustice and Responsibility for Injustice]', *JTBB* 146 (2020) 248.

10 Sen (n 4) 54.

the justice requirements within the structural injustice framework. In this context, it is possible to find an approach to Nancy Fraser's views. According to Fraser, for justice, work needs to be done in three dimensions regarding distribution issues related to social and economic inequalities, recognition issues (such as social gender, race, class, social or cultural marginalisation, and discrediting), and participation issues in decision-making processes (related to preventing participation in the political process through means such as marginalisation or exclusion).¹¹ Fraser's framework provides a comprehensive approach to justice that considers the complex and interconnected nature of social and economic inequalities.

The various viewpoints underscore the complex and ever-changing essence of the notion of justice. Contemporary discussions frequently associate justice with the achievement of human rights. This perspective is rooted in a deep philosophical and legal heritage, emphasising core concepts like human dignity, equality, and rights. Rawls' influential theory supports the focus on fair and equal access to rights and opportunities.¹² Nevertheless, as Young and Fraser elucidate, attaining genuine justice requires going beyond formal rights and procedures.¹³ Their work necessitates that we scrutinise the role of power disparities, systemic marginalisation, and political exclusion as fundamental factors that sustain injustice.¹⁴ Thus, guaranteeing substantive justice necessitates a comprehensive strategy for addressing systemic disparities and fostering a fair society where everyone has equal access to exercise their rights and fully engage in social and political activities.

Justice encompasses both formal (procedural) and substantive (outcome) justice. Formal justice refers to the ability of individuals to access the court system and exercise their legal rights. In contrast, substantive justice refers to the fair and just outcomes of legal proceedings.¹⁵ Formal justice provides the framework for fair legal processes, while substantive justice ensures outcomes align with societal values and goals.¹⁶ To achieve substantive justice, it is imperative to guarantee access to formal

11 Marjorie Mayo, Gerald Koessl, Matthew Scott, and Imogen Slater, 'Concepts of Justice and Access to Justice' in *Access to Justice for Disadvantaged Communities* (Bristol University Press 2014) 19.

12 Rawls (n 7) 277.

13 Mayo (n 11) 24.

14 *ibid.*

15 Alan S Gutterman, *What is Access to Justice?* (2022) 2.

16 *ibid* 2.

justice.¹⁷ Formal justice is an essential component of the concept of access to justice, as it requires the existence of a standardised set of procedural rules to be applied uniformly.¹⁸ The right to access formal justice is one of the most important fundamental rights and freedoms since exercising all other fundamental rights and freedoms is only possible with the right to access justice.¹⁹ The right to access formal justice protects and strengthens human rights, including the right to exercise civil, social, economic, and cultural rights, seek protection in case of a violation, seek redress, hold violators and decision-makers accountable, and be represented and defended in judicial proceedings.²⁰ The principle of "innocent until proven guilty" in criminal law is an example of formal justice.²¹ However, getting natural justice might mean fixing problems with convicted wrongfully, where the final verdicts are seen as unfair even though they followed fair procedures.²²

In international literature, "access to justice" has been perceived differently over the years, depending on the location. According to some critics²³, the framework in question is overly restrictive. They argue that access to justice should be defined as the most efficient and cost-effective means of securing one's legal rights, with a focus on empowering individuals to understand and exercise those rights.²⁴ This approach emphasises the importance of informing people about their rights, even if they are not currently aware of them, and providing them with the necessary resources to exercise those rights in the most expedient and affordable manner possible. In this thesis²⁵, the concept of access to justice is accepted in its broad scope, and the definition put

17 Kadriye Bakirci, 'Kadınların Şekli ve Maddi Adalet Erişiminde Sosyal ve Ekonomik Hak Olarak Adli Yardım Hakkı [The Right to Legal Aid as a Social and Economic Right in Women's Access to Formal and Material Justice]' (2023) 47(1) MJ 290.

18 Shafi'i Bello, 'The Role of Justice in Islam' (2012) 16.

19 Bakirci (n 17) 290.

20 *ibid.*

21 Gutterman (n 15) 5.

22 *ibid.*

23 Roderick A Macdonald, 'Access to Justice in Canada Today: Scope, Scale and Ambitions' in *Access to Justice for a New Century: The Way Forward* (2005) 19; Marc Galanter, 'Access to Justice as a Moveable Feast' (2015) 9 *Access to Justice* 1; Amanda Pearson, 'Access to Justice and the Anthropological Perspective' (2021) 22(2) HRR 141.

24 Open Society Foundations, *Legal Needs Surveys and Access to Justice* (OECD Publishing 2019) 24.

25 Hereafter, any mention of "access to justice" pertains specifically to the ability to obtain legal justice as defined in this chapter. This encompasses a legal framework that results in equitable and impartial resolutions, with efficient redress for injustices and the actualization of entitlements. Additionally, it signifies that every individual in society possesses equitable entry to this system and the authentic ability to fully utilise its potential.

forward by the United Nations Development Programme (UNDP) is accepted. As defined by UNDP, access to justice refers to individuals' ability to obtain necessary legal remedies through traditional means.²⁶

Access to justice is derived from the civic characteristics of citizenship, which are essentially "the rights required for individual freedom."²⁷ Marshall defined the 'access to justice' as "the right to protect and assert all one's rights on the basis of equality with others and via due process of law."²⁸ Other academics, such as Moorhead and Pleasence, have recognised the link between access to justice and "the rule of law and equity."²⁹ Similarly, Sommerlad asserts that access to justice is essential to "social engagement" and "personhood."³⁰ In consequence, access to justice safeguards and upholds a wide range of legal rights and obligations.

Bedner and Vel's definition of access to justice addresses all aspects of a long-term process. Access to Justice (ATJ) refers to the ability of individuals, regardless of their background or circumstances, to have their legal rights and needs recognized and addressed through fair, efficient, and affordable mechanisms, be it through state law, religious law, customary law, or other recognized legal frameworks, and under the rule of law.³¹ They also set out an analytical framework for access to justice as a process. Here, the stages are: (1) posing a real-life problem; (2) raising awareness; (3) categorising the problem; (4) defining the grievance; (5) identifying existing legislation (in terms of state, religious, and customary law) that can resolve the grievance; (6) reaching the resolution venue; (7) addressing the grievance; and (8) resolving the injustice, which represent the entire process of access to justice.³²

The concept of access to justice encompasses various dimensions. Legal systems are complex and citizens often lack knowledge, necessitating professional legal assistance through publicly funded legal aid to ensure access to justice for those

26 Meral Sungertekin Ozkan, 'Constitutional Complaint and Access to Justice' (2014) 16 DEULDJ 401.

27 Thomas H Marshall, *Citizenship and Social Class* (Cambridge University Press 1950) 10.

28 *ibid* 10-11.

29 Richard Moorhead and Pascoe Pleasence, 'Access to Justice after Universalism: Introduction' (2003) 30(1) JLS 1.

30 Hilary Sommerlad, 'Some reflections on the relationship between access to justice and the reform of legal aid' (2004) 31(3) JLS 350.

31 Adriaan Bedner and Jacqueline AC Vel, 'An Analytical Framework for Empirical Research on Access to Justice' (2010) 15(1) LSJGDJ 5-7.

32 *ibid* 10.

unable to afford private representation.³³ It is stated that access to justice is used in a narrower sense in relation to access to legal aid.³⁴ Francioni refers to "legal aid provided to those in need and which, in their absence, makes legal remedies available only to those who can afford exorbitant legal and court costs."³⁵ Efforts to remove obstacles to access to justice are also seen as part of the process of access to justice: "It refers to the elimination of obstacles arising from economic (...) and social (...) injustice and structural obstacles such as (...) difficult access to courts (...), the complexity of the legal process and procedures, the cumbersomeness of the legal system, ineffective enforcement mechanisms, and (...) the right of everyone to equal access to justice without discrimination for any reason."³⁶

Bedner and Vel's process-focused definition provides a valuable framework for understanding the practical steps in achieving access to justice. However, it's important to acknowledge that the very meaning and core principles underpinning the concept of "access to justice" has been the subject of continuous scholarly debate and redefinition. Roderick A. Macdonald's work delves into this historical evolution, outlining the key shifts that have shaped our understanding in time. The concept of "access to justice," originally understood narrowly as access to courts and lawyers has evolved. Roderick A. Macdonald describes the changes in the debate on access to justice in five waves.³⁷ In the 1960s, access to courts and lawyers was considered the first starting point, with legal aid programmes focusing on the poor. This era saw the emergence of legal aid programmes, primarily aiding low-income individuals in navigating the legal system.³⁸ However, these programmes often faced challenges in overcoming systemic barriers that limited meaningful access to justice.³⁹ The second wave highlighted the inadequacies of the 'legal aid' approach, criticising the performance, procedures, and organisation of courts. Access to justice became an

33 *ibid.*

34 Francesco Francioni, 'The Rights of Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (OUP and Academy of European Law, European University Institute 2007) 64-65.

35 *ibid.*

36 Gökçeçişek Ayata, 'Kadınların Adalete Erişimi: Mevzuat, Engeller, Uygulamalar ve Sivil Toplumun Rolü [Women's Access to Justice: Legislation, Obstacles, Practices and the Role of Civil Society]' (Unpublished LLM thesis, İstanbul Bilgi University, Institute of Social Sciences, Law Master's Program 2009).

37 Macdonald (n 23).

38 Sutatip Yuthayotin, *Access to Justice in Transnational B2C E-commerce* (Springer 2015) 39-40.

39 *ibid.* 40.

issue for both the poor and middle classes.⁴⁰ This wave led to a reassessment of the court system's ability to ensure fair access to justice. The third wave emphasised equality of access to justice, focusing on the ability and opportunity to litigate and the equality of arms of parties facing each other in court.⁴¹ The concept of "equality of arms" became central, highlighting the importance of ensuring everyone has fair opportunities in legal proceedings.⁴²

The fourth wave, which developed in the 1990s, focused on access to justice as a matter of preventive law. In this period, informal dispute prevention organisations and conciliation came to the fore, and access to justice began to be understood in a broader sense, including public participation in the institutions through which laws are created and enforced.⁴³ In the last wave, access to justice was broadly understood as access to the full capacity of all components of the justice system (e.g., courts, legal aid providers, and other justice-related organisations) and authorities within the legal system, ensuring equal opportunities for the marginalised.⁴⁴ This includes access to legal education, the judicial system, public services, including the police, and parliamentary elections. System changes to overcome individuals' feelings of exclusion, powerlessness, and lack of respect were also addressed by measures to ensure access to justice.⁴⁵ Macdonald's five-wave framework offers a valuable perspective on the evolving access to justice debate. It underscores the shift from a narrow focus on legal aid to a more comprehensive approach, encompassing systemic reforms, preventative measures, and empowering marginalized communities.

The successive waves of the access to justice movement exemplify the gradual transformation of its focus from primarily addressing the needs of the impoverished to encompassing a broader scope. The term access to justice has been used in numerous books, articles, reports, and initiatives from various organizations worldwide. For instance, Smith's perspective primarily focuses on the issue of access

40 Macdonald (n 23).

41 *ibid.*

42 Asher Flynn and Jacqueline Hodgson, 'Access to Justice and Legal Aid Cuts: A Mismatch of Concepts in the Contemporary Australian and British Legal Landscapes' in *Access to Justice & Legal Aid: Comparative Perspectives on Unmet Legal Needs* (2017) 4.

43 Macdonald (n 23).

44 Macdonald (n 23).

45 Yuthayotin (n 34) 40.

to justice as it pertains to individuals of lower socioeconomic status.⁴⁶ In contrast, Cappelletti's work, encompassing four volumes, takes a more comprehensive approach and primarily views access to justice as a matter to be addressed through legal frameworks, institutions, and resources.⁴⁷ Smith, in 2010, compared the phrase to the rule of law, stating that it is a "feel-good" concept that everyone can agree on without critical examination.⁴⁸

Access to justice is generally understood as access only to the proceedings or to the courts. However, in a broader sense, it is defined as the fulfilment of other requirements of equity and justice, starting with the conditions for ensuring that a voice is heard in the proceedings. The most common notions of access to justice centre on the idea that individuals should be given the ability to exercise their legal rights. Access to justice, as defined by customary international law, includes an individual's right to seek a legal remedy before an impartial court or tribunal.⁴⁹ The concept of access to justice in academic studies encompasses the evaluation of whether the theoretical framework of a just legal system, as prescribed by laws, is consistently equitable in practise.⁵⁰ Accordingly, it is acknowledged that the issue of access to justice goes beyond the provision of essential legal services such as access to courts, legal representation, and due process.⁵¹ Consequently, the notion of access to justice extends beyond the mere existence of laws to encompass the fairness of their implementation and outcomes.

Contemporary debates continue to recognise the decisive role played by classical approaches in emphasising the significance of access to justice, particularly in relation to the principles of the welfare state and the inherent connection between justice and law.⁵² This conventional view, exemplified by the rise of early legal aid

46 Asbjørn Storgaard, 'Access to Justice Research: On the Way to a Broader Perspective' (2023) 13(4) OSLs 1215.

47 Maurice Cappelletti, *Access to Justice* (Giuffrè 1978) 65.

48 Alan Paterson, *Lawyers and the Public Good: Democracy in Action?* (Cambridge University Press, 2011) 60.

49 In the United States, access to justice is associated with access to courts. See *Developments in the Law Access to Courts* (2008) 122 HLR 1153.

50 Duygu Hatipoğlu Aydın, 'Kadınların Adalete Erişimi [Women's Access to Justice]' (2015) 4 ABJ 79-107.

51 MacDonald (n 23); Catherine R. Albiston and Rebecca L. Sandefur, 'Expanding the Empirical Study of Access to Justice' (2013) WLR 101; Katherine S. Wallat, 'Reconceptualizing Access to Justice' (2019) 103 MLR 581.

52 BM Kalkınma Programı 2004; Robinson, 'A Theory of Access to Justice' (2005) TJLP; BM Kalkınma Programı 2008a.

programs, addressed the immediate barrier of financial resources but failed to account for the broader systemic obstacles that could impede an individual's ability to achieve fair treatment.⁵³ However, more contemporary approaches have recognized the limitations of solely addressing financial barriers and have instead shifted focus towards comprehensive strategies that address systemic inequities. Programs encompassing community-based solutions, alternative dispute resolution mechanisms, and proactive legal education initiatives demonstrate a deeper engagement with structural inequalities and seek to empower individuals from a holistic perspective.⁵⁴ Traditional access to justice focused on overcoming barriers within the existing justice system, often characterised by complexity, cost, and systemic issues.⁵⁵ These traditional methods emphasised formal legal institutions and procedures, while contemporary approaches have expanded to include alternative dispute resolution, participatory roles for affected parties, and solution-oriented, holistic justice measures.⁵⁶ Access to justice is currently characterised by several significant concerns, including the provision of legal aid, the financial implications, duration, and efficiency of the judicial process, the clarity and accessibility of court language, as well as the utilisation of alternative dispute resolution methods.⁵⁷

However, access to justice is a process, not a goal, and its most important aim is to ensure material justice rather than access to this process. This justice is not only justice in accordance with the law and the outcome envisaged by the existing normative structure, but also social justice⁵⁸ in a broad sense. Access to justice is the possibility for severely poor and disadvantaged individuals, especially, to have their complaints heard and to be treated by their grievances before state or non-state institutions, based on state law, religious law, or customary law, and under the rule of law, to redress these injustices when they are victims of injustice.⁵⁹ This entails justice according to the law and the expected outcome, along with broader social

53 Deborah L. Rhode, *Access to Justice* (Oxford University Press 2004) 14.

54 Cappelletti (n 43) 66.

55 *ibid* 6.

56 Rebecca L Sandefur, 'Access to What?' (2019) 148(1) DJ 50.

57 Mustafa Serdar Özbek, *Alternatif Uyuşmazlık Çözümü* [Alternative Dispute Resolution] (Yetkin Publishing 2013) 34.

58 Social justice refers to the concept of ensuring a just and equitable distribution of wealth, opportunities, and privileges within a society while also upholding and safeguarding the rights of individuals. (Mary T Clark and others, *Augustine and Social Justice* (Lexington Books 2015) 5.

59 Hatipoğlu (n 46) 85.

justice. It provides the opportunity for severely underprivileged individuals to have their grievances heard and resolved through state or non-state institutions, under various legal systems and rule of law, to address injustices they face as victims.

2.2.1. Access to Justice and Human Rights

Access to justice is discussed⁶⁰ in different but interrelated fields such as human rights, legal theory, and political theory as a fundamental constitutional right and a requirement of the rule of law and in relation to social justice. The term "human rights" encompasses various conceptualizations. As understood within law, human rights encompass the fundamental freedoms acknowledged and protected by legal statutes, commencing with international conventions. From an ethical standpoint, the concept of human rights traditionally emphasizes human dignity, autonomy, and freedom, diverse philosophical frameworks including those focused on equality, social justice, utilitarianism, and deontological ethics also contribute significantly to their justification. One instance of such delineation can be found in Ioanna Kuçuradi's conceptualization of human rights, which is grounded in the principle of human dignity. Kuçuradi asserts that human rights can be understood as assertions pertaining to the advancement of human structural capacities, elucidating the concept of human dignity within this framework.⁶¹

According to Kuçuradi, access to justice is regarded as a fundamental requirement for safeguarding human rights. In this context, the concept of access to justice necessitates the establishment of social and political relationships that are founded upon the principles of human rights.⁶² The right to access justice holds significant importance in the realm of international law as it serves as a fundamental human right that facilitates the safeguarding and fulfilment of various other human rights, such as the right to equality and non-discrimination.⁶³ In this conceptual framework, the notion of the right to access justice is intrinsically interconnected with the safeguarding of fundamental human rights.⁶⁴ The acknowledgement of access to

60 Valesca Lima and Miriam Gomez, *Access to Justice: Promoting the Legal System as a Human Right in Peace, Justice and Strong Institutions* (Springer International Publishing 2021) 1-10.

61 Ioanna Kuçuradi, *Human Rights: Concepts and Problems* (LIT Verlag Münster 2013) 2-4.

62 *ibid.*

63 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) art 14.

64 Kuçuradi (n 61) 34-35.

justice as a fundamental entitlement is intricately linked to the enforcement and realisation of human rights. Within the context of this particular relationship, scholarly literature highlights the distinction between access to justice as a fundamental right and other rights. Access to justice is intricately connected to the notion that the protection and realisation of human rights can be achieved by means of a proficient judiciary.⁶⁵

The United Nations Development Programme (UNDP) defines access to justice as the provision of formal or informal avenues for individuals to engage with justice institutions in alignment with established human rights principles.⁶⁶ The definition of access to justice in post-United Nations human rights standards has been condensed to the essential elements of the fair trial provision, which primarily emphasises the right to equal treatment before the tribunal, reflecting a basic comprehension of equal administration of justice.⁶⁷ Furthermore, it is noteworthy that both the Universal Declaration of Human Rights⁶⁸ and the European Convention on Human Rights⁶⁹ encompass the inclusion of the right to effective remedy as a safeguard for the rights enshrined within these aforementioned texts.

As mentioned in the previous explanations, it indicates that the concept of access to justice should be understood in the context of the protection of human rights. For instance, this framework highlights the potential harm individuals can experience within the legal process itself, including psychological trauma from adversarial proceedings, the stress of navigating complex legal systems, and the financial burden of representation.⁷⁰ Therefore, ensuring the right to access to justice becomes essential in upholding the principle of equality before the law, alongside other fundamental social rights like the right to education and the right to work.⁷¹

65 Francioni (n 55) 4.

66 UNDP, Toolkit: Women's Access to Justice (UNDP 2018).

67 Sahar Maranlou, *Access to Justice in Iran: Women, Perceptions, and Reality* (Cambridge University Press 2014) 21.

68 For the full text <<https://dspace.ceid.org.tr/xmlui/handle/1/612>>.

69 For the full text <<https://dspace.ceid.org.tr/xmlui/handle/1/614>>.

70 Francioni (n 55) 105.

71 Mayo (n 11) 22-23.

2.2.2. Gender Equality in Access to Justice

Gender equality issues are a prominent focus of discourse⁷² within the realm of access to justice. Gender gaps and structural barriers prevent women from having equal access to justice, according to the Council of Europe's Gender Equality Strategy Paper for 2018-2023.⁷³ The presence of these structural barriers (economic barriers, institutional barriers) hinders the ability of both women and men to exercise their rights, as they are confined to traditional gender roles. The right to access justice is a fundamental entitlement that applies to all individuals.⁷⁴ However, it is particularly essential for women, especially marginalised and disadvantaged communities, as their rights are often subjected to ongoing violations. This encompasses gender-based violence, economic inequalities, discriminatory legislation and regulations, and constrictive societal standards.⁷⁵ These interconnected factors constrain women's independence and exacerbate their susceptibility to various forms of abuse, exploitation, and injustice, while also hindering their ability to access essential resources, thus undermining their health, well-being, and economic security.⁷⁶ The recognition of women's entitlement to access justice is thus crucial for safeguarding their human rights and liberties and promoting gender equality within the legal and judicial framework.⁷⁷

Gender justice aims to ensure that women's status and treatment are not determined by biology, discrimination or socially constructed rather than biologically determined gender roles.⁷⁸ Gender justice acknowledges the differences between men and women, respects their specific conditions, and aims to eliminate unjust treatment resulting from these differences. Gender justice does not discard the concept of

72 Council of Europe, Equal Access to Justice in the Case-Law on Violence Against Women before the European Court of Human Rights (Council of Europe 2015) 5.

73 Council of Europe, Council of Europe Gender Equality Strategy 2018-2023 (Council of Europe 2018) 5.

74 UDHR 1948, art 8.

75 Sarah Bott, Andrew Morrison, and Mary Ellsberg, 'Preventing and Responding to Gender-Based Violence in Middle and Low-Income Countries: A Global Review and Analysis' (2005) 3.

76 *ibid* 4.

77 See CEDAW Committee, General Recommendation No. 33 on Women's Access to Justice (CEDAW 2020) paras 2, 6.

78 Neal Devins, 'Gender Justice and Its Critics' (1988) 76 CLR 1379.

equality but goes beyond it to ensure a just and fair distribution of responsibilities and opportunities between men and women.⁷⁹

The idea of gender justice is attractive to some groups⁸⁰ within the global women's movements because the contemporary ideal of equality does not consider women's unique characteristics.⁸¹ UN Women (United Nations Women's Organisation) has adapted UNDP's definition of "women's access to justice" as follows in light of the CEDAW (Declaration on the Elimination of Discrimination against Women) Committee's General Recommendation No. 33 of 23 July 2015 on women's access to justice:

Gender justice is the provision of equitable, effective, accessible and transparent means to protect rights, prevent abuse of power and resolve conflicts, with a special focus on women from poor and marginalised communities. This encompasses the capacity of women to pursue and attain a just and equitable redress through both formal and informal systems of justice, as well as their capacity to exert influence and engage in the processes and institutions involved in the creation of laws.⁸²

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems is a significant international document pertaining to the topic of access to justice.⁸³ The sixth principle outlined in this document places significant emphasis on the topic of gender. It is emphasised that States are prohibited from engaging in discriminatory practises based on any form of status, including gender, when providing legal aid.⁸⁴ Furthermore, Principle 10 explicitly includes women as one of the gender-sensitive groups, emphasising the need for targeted

79 Sare Aydın Yılmaz, 'Eşitlik Üstü Adalet [Justice Above Equality],' *Star Daily Newspaper* (13 December 2014).

80 Not all groups within global women's movements prioritize gender justice to the same extent. Some strands of feminism focus primarily on formal legal equality, aiming to ensure women have the same rights as men under existing systems. Others may not place as much emphasis on women's unique experiences or the need to address intersectional disadvantages. (Robin A. Hadley, 'Ageing without Children, Gender and Social Justice' in *Ageing, Diversity and Equality* (Routledge 2018) 66-81).

81 Sare Aydın Yılmaz, 'A New Momentum: Gender Justice in the Women's Movement' (2015) 13(4) *TPQ* 108.

82 UN Women, UNDP, UNODC and OHCHR, 2018.

83 Auke Willems, 'The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: A Step Toward Global Assurance of Legal Aid?' (2014) 17(2) *NCLR* 189.

84 *ibid.*

interventions in relation to legal assistance for these groups.⁸⁵ Furthermore, Directive No. 9 within the aforementioned document pertains to regulating matters concerning the facilitation of women's access to legal assistance.

The Committee of Ministers of the Council of Europe's recommendations also highlight the significance of gender in relation to access to justice. The Committee's recommendation regarding legal protection against gender discrimination emphasises the expeditious resolution of such cases, focusing on cost-effectiveness and the provision of free legal aid, if required.⁸⁶ In a subsequent recommendation regarding women who have experienced violence, the Committee underscored the necessity for the legal framework to establish suitable mechanisms for addressing and preventing violence against women.⁸⁷

Moreover, the report issued by the United Nations General Assembly on the topic of extreme poverty and human rights⁸⁸ underscores the significance of ensuring women's entitlement to equitable access to the judicial system. The report mentioned above highlights those women, who are among the groups impacted by structural discrimination, face barriers in seeking legal recourse due to apprehensions regarding social repercussions.⁸⁹ For instance, despite being victims of domestic or sexual violence, they may hesitate to take action independently without the presence of a male companion. The social stigma of being blamed for the violence they experienced, especially in cases of sexual assault, can deter women from coming forward and seeking legal recourse.⁹⁰ Also, in patriarchal societies, women who challenge the status quo by pursuing legal action may face a loss of social standing or even threats to their safety.⁹¹ Consequently, they cannot avail themselves of the available mechanisms for accessing justice.⁹² The report's significance lies in its

85 *ibid.*

86 Council of Europe, Committee of Ministers, Recommendation No. R (83) 8 (1998).

87 Council of Europe, Committee of Ministers, Recommendation No. (2002) 5 on the Protection of Women Against Violence.

88 UN General Assembly, Report of the Special Rapporteur on Extreme Poverty and Human Rights (9 August 2012).

89 María Magdalena Sepúlveda Carmona and Philip Alston, Report of the Special Rapporteur on Extreme Poverty and Human Rights (United Nations General Assembly 2015) 7.

90 Mary P. Koss, 'Blame, Shame, and Community: Justice Responses to Violence Against Women' (2000) 55(11) AP 1333.

91 Hilary Charlesworth and Christine Chinkin, 'The Feminist Dilemma in Mediation' (1992) 4(1) IRCPP 68.

92 *ibid.*

ability to shed light on the diverse challenges women encounter when seeking access to justice. In line with this, UNDP and UN Women have launched the Gender Justice Platform to implement joint initiatives that seek to close the gender justice gap and empower women. Through this platform, they aim to address the immediate justice needs of women and girls, promote women's full enjoyment of their rights, and enable access to justice for thousands of individuals across various countries.⁹³ This initiative is part of the UN's comprehensive efforts to promote gender equality, protect women's rights, and ensure that rule of law systems work for all women and girls.⁹⁴

At the same time, numerous studies and reports⁹⁵ from international organizations, including the United Nations, the World Bank, the Council of Europe, and the United Nations Committee on the Elimination of Discrimination against Women, have emphasized the unique challenges women encounter when trying to access justice. These challenges include but are not limited to: lack of data measuring women's access to justice and documenting successful interventions, institutional, policy, and legislative failure to remove discrimination, gender bias, stereotyping, stigma, and indifference, and shortcomings of the justice system, including corruption and impunity.⁹⁶ These reports highlight the urgent need for data on women's access to justice and successful interventions, as this area remains underexplored.⁹⁷ Although access to justice has gained importance in development discussions, statistical evidence documenting women's specific experiences with law and justice as users and providers is scarce.⁹⁸

The increasing importance of ensuring access to justice for all is underscored by the specific attention given to women's access to justice in general recommendation No. 33 of the CEDAW Committee. The Committee has categorised its diverse

93 UNDP, *Improving Women's Access to Justice* (2016) 10.

94 *ibid.*

95 Aydin Yilmaz (n 79) 108; Olaitan O. Olusegun and Olatunji S. Oyelade, 'Access to Justice for Nigerian Women: A Veritable Tool to Achieving Sustainable Development' (2022) 22(1) *IJDL* 7.

96 Un Women, *Guidance Note Framework For Measuring Access To Justice Including Specific Challenges Facing Women* (2016) Commissioned By Un Women In Partnership With The Council Of Europe.

97 UN Women (2012); World Bank (2012); Council of Europe (2014a); Council of Europe (2014b); CEDAW Committee (2015); and UN Women/UNICEF/UNDP (2009).

98 In 2014, the European Institute for Gender Equality conducted a comprehensive analysis on the state of governments' data collection efforts pertaining to gender-based violence. The report aimed to identify any deficiencies or areas of improvement in this regard. The Council of Europe published the report titled "Administrative data collection on domestic violence in Council of Europe member states" (2008).

country observations on access to justice into several distinct headings. Consequently, the key areas of concern and proposed solutions in relation to women's access to justice encompass enhancing women's understanding of their rights, advocating for legal and institutional reforms, providing comprehensive training for justice officials (such as judges, prosecutors, and police officers), offering legal aid services, conducting thorough and diligent investigations into crimes targeting women, prosecuting and penalising offenders, and guaranteeing effective remedies and appropriate compensation.⁹⁹

Access to justice for women, similar to that of other marginalised individuals, is constrained by two primary factors. The first aspect concerns the framework of laws, institutions, and systems that are charged with safeguarding and enforcing the right. Discriminatory laws, the gender bias of justice sector agencies, such as lawyers, judges, and police, the complexity, cost, and lengthy process of litigation, and a lack of judicial independence are all factors that work against women's right to access justice.¹⁰⁰ The individual characteristics and circumstances of the victim, on the other hand, are what give rise to the second factor that can act as a constraint. These personal barriers to justice for women can range from lack of economic independence to having little to no financial means to cover court costs to social stigma, illiteracy, and ignorance of their rights and related legal protections.¹⁰¹ These limitations both reflect and further entrench women's structural inequality.¹⁰²

Women face additional barriers to accessing justice due to a complex combination of social, economic, and legal factors. A significant hurdle arises from the gendered division of labour, where women disproportionately shoulder the burdens of unpaid domestic chores and caregiving responsibilities.¹⁰³ This unequal distribution constrains women's economic agency and impedes their ability to engage with the legal system.¹⁰⁴ Additionally, economic discrimination exacerbates these

99 CEDAW, 'Access to Justice-Concept Note for Half Day General Discussion' (January 2013) 6-7.

100 Ajnin Begum and Nirmal Kumar Saha, 'Women's Access to Justice in Bangladesh: Constraints and Way Forward' (2017) 44 JMCL 42-48.

101 Jane Anderson, 'The Impact of Family Structure on the Health of Children: Effects of Divorce' (2014) 81(4) TLQ; DCAF, OSCE/ODIHR and UN Women (2019) 12.

102 Anea Gheaus, 'Gender Justice' (2011) 6 JESP 3.

103 Lina Eriksson and Robert E Goodin, 'The Measuring Rod of Time: The Example of Swedish Day-fines' (2007) 24(2) JAP 126.

104 Pamela J Smock, Wendy D Manning and Sanjiv Gupta, 'The Effect of Marriage and Divorce on Women's Economic Well-Being' (1999) 64(6) ASR 802.

obstacles, with women facing wage disparities and encountering challenges when re-entering the workforce after assuming caregiving roles.¹⁰⁵ These economic disparities, not only diminish women's financial capability to seek legal remedies, but also reinforce systemic barriers to justice.

Moreover, legal frameworks present formidable impediments to women's access to justice. In various regions, women encounter unequal legal rights compared to men, constraining their ability to seek recourse for discrimination, violence, or other injustices.¹⁰⁶ Gender-based violence poses a particularly pervasive challenge, disproportionately affecting women and erecting significant barriers to seeking legal redress.¹⁰⁷ Social stigma, fear of reprisals, and systemic obstacles to accessing legal support further hinder women's pursuit of justice in cases of gender-based violence.¹⁰⁸ Additionally, entrenched societal norms steeped in gender stereotypes curtail women's choices and opportunities within the legal system, shaping their interactions and experiences with legal authorities.

The presence of institutional barriers is evident in the insufficiencies surrounding the protection of women and the provision of legal support, particularly in instances where women experience violence. Additionally, women encounter obstacles in expressing themselves in their native language and practising their religion during judicial proceedings.¹⁰⁹ As per the findings of the Committee, a significant barrier to the attainment of justice that warrants attention within this category pertains to the insufficiency of suitable avenues for redress in instances of harm, particularly those involving acts of violence.¹¹⁰ Numerous justice systems exhibit deficiencies in guaranteeing equitable access to preventative, prompt, unbiased, satisfactory, proportionate, and transformative forms of redress.¹¹¹

Generally, women have limited opportunities to participate in and control judicial procedures due to their subordinate position compared to men in the majority

105 Gheaus (n 102) 4.

106 *ibid* 10.

107 *ibid* 4.

108 Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 2008) 27.

109 Samia Bano, 'Muslim Family Justice and Human Rights: The Experience of British Muslim Women' (2007) 2 JCL 38 - 39.

110 Cedaw (n 99) 11.

111 *ibid*.

of societies.¹¹² As a result, a gender-equal, or at least a gender-sensitive, justice system that takes into account and responds to the vulnerability of the women litigants is made possible when women are given equal access to justice.¹¹³

2.2.3. Muslim Justice

Access to justice in Islamic law encompasses the provision of legal assistance, legal aid, and legal literacy, reflecting its recognition of the fundamental importance of ensuring fair and equitable access to the legal system for all individuals. While the idea of access to justice, particularly in its contemporary register, was not part of previous Islamic understandings, it is implicit in the Islamic emphasis on justice and may be seen as one part of an Islamic ethic of justice.¹¹⁴ The Islamic perspective on access to justice differs significantly from the Western one, which is state-centred and places emphasis on institutions of access, due to Islamic justice's essentially religious character and its emphasis on individuals.¹¹⁵ The definition of justice in classical Islamic thought is essential to comprehending how modern Muslim societies conceptualise its accessibility.

Access to justice, as the capacity for individuals or groups to reach justice-providing venues, is implicit in the Islamic emphasis on justice and can be seen as part of an Islamic ethic of justice. The emphasis on justice as a reflection of the divine justice also suggests a concern with fairness, not being biased or prejudiced.¹¹⁶

Access to justice holds a prominent position in Islamic ideology, serving as a focal point of discussion across the course of Islamic civilization. The Islamic conception of justice is explored in various contexts, including political, theological, philosophical, ethical, legal, social, and international justice.¹¹⁷

The Arabic term for justice is "*al-Adalah*" or "*al-'Adl*," which denotes the evaluation of something as being equivalent to something of virtuous, righteous, or

112 Sarah Douglas, Gender Equality and Justice Programming: Equitable Access to Justice for Women (UNDP 2007) 5.

113 L Schetzer and J Henderson, Access to Justice and Legal Needs; Stage 1: Public Consultations (Law and Justice Foundation of New South Wales, 2003) 42-44.

114 Arif A Jamal, 'Access to Justice and an Islamic Ethic of Justice', in *The Role of Lawyers in Access to Justice: Asian and Comparative Perspectives*, ed Helena Whalen-Bridge (Cambridge University Press 2022), 248.

115 Maranlou (n 67) 25.

116 Jamal (n 114) 249.

117 Maranlou (n 67) 26.

truthful nature. The Islamic understanding of access to justice starts with the fundamental entitlement to justice.¹¹⁸ According to Islam a fundamental goal of the universe's creation was to establish justice and eradicate evil and cruelty, which places a clear emphasis on the supremacy of justice. The Islamic conception of justice is rooted in God's Divine nature, and the Qur'an states, "Verily, God does not do even an atom's weight of injustice".¹¹⁹ For Muslims, justice is an inherent part of the universe. The Qur'an states, "God raised up the heavens and established the Scales of balance";¹²⁰ a phrase, which commentators take to mean: "He established justice (*athbata al- 'adl*)."¹²¹ The Islamic definition of justice revolves around the notion of balance, wherein it involves the fulfilment of the rights (*ḥuqūq*) owed to others, or the act of giving what is rightfully owed to each individual.¹²² The Qur'an also establishes justice as a fundamental principle for reaching a compromise: "And if two factions among the believers should fight, then make settlement between the two... then make settlement between them in justice and act justly. Indeed, Allah loves those who act justly."¹²³ The emphasis on justice being done, that is, justice as something to be acted out and applied, is one of the notable senses of justice in the Qur'anic text.¹²⁴

The concept of justice and the practice of acting in a just manner are also evident in the *sunnah*, which refers to the compilation of traditions of the Prophet Muhammad. The *sunnah* emphasizes the importance of treating others with fairness and equity, and it provides guidance on how to uphold justice in various aspects of life.

Behold! The Dispensers of justice will be seated on the pulpits of light beside God, on the right side of the Merciful, Exalted and Glorious. Either side of the Being is the right side both being equally meritorious. [The Dispensers of justice are] those who do justice in their rules, in matters relating to their families and in all that they undertake to do.¹²⁵

118 Maranlou (n 67) 31.

119 The Qur'an 6:152.

120 The Qur'an 55:7.

121 T Wildan And Ismail Fahmi Arrauf Nasution, 'Jalāl Al-Dīn Al-Mahallī And Jalāl Al-Dīn Al-Suyutī's Interpretation Method Of The Mutasyābihāt Verse In Tafsīr Jalālayn' (2022) 46(1) MJIK 6.

122 *ibid*.

123 The Qur'an 2:218.

124 Jamal (n 114) 249.

125 Sahih Muslim, 1827 (Book 33, *Hadith* 21).

Islam promotes justice in all situations that impact individuals, without any bias, by ensuring that each person receives what is rightfully theirs and refraining from causing them harm.¹²⁶ The Islamic concept of justice is based on the idea that society's virtues and well-being should take precedence over personal gain. The correct measure of fairness requires that, on the one hand, compensation for good deeds should never fall short of what an individual has worked for, and, on the other, punishment for wrongdoing should never be more severe than the wrongdoing itself.¹²⁷ Adhering to both of these principles would be beneficial to the administration of justice.

The goal of Sharia, according to Ibn Al-Qayyam, is to create justice and fairness among the people, as Allah (SWT) has expressed it clearly in His laws.¹²⁸ Thus, any path that aligns with justice is an integral component of Islam and cannot conflict with it. Khadduri argues that the concept of justice varies significantly across different societies, with each society establishing its own standards and principles.¹²⁹ However, despite the variations in differences, all of them exhibit shared characteristics that can be classified into two distinct categories.

The first category pertains to a society that believes it has the authority to formulate and enforce its own laws in accordance with their consensus. This form of justice is acknowledged to be inadequate as society consistently seeks to enhance and perfect it through an ongoing process of social evolution. The second category belongs to a society that believes human beings are fundamentally feeble and cannot adequately establish their legal systems. In this society, a divine authority is invoked to establish the fundamental principles of public order and establish a standard of justice. The term used to describe this form of justice is Islamic justice, which is considered to be of divine origin.¹³⁰

Access to justice is a crucial aspect of Islamic law, as it ensures that all individuals have the opportunity to seek fairness and equality in the resolution of their disputes. In Islamic law, courts and other forums play a crucial role in providing

126 AJ Al Jaza'iri, *Minhaj Al Muslim*, 4th edn (Darussalam Printing and Distribution 2000) 448.

127 MS Attahiru, *Religiosity, Islamic Culture and Islamic Business Ethics Practice in Sokoto Business Dealings: A Moderating Role of Hisbah Principles* (Universiti Utara Malaysia 2018) 34.

128 A Ibn Al-Qayyim, *Al Turuk Al Hukmiyya* (Dar Alim Al Fawaa'id 2007) 1213.

129 Majid Khadduri, *The Islamic Conception of Justice* (JHU Press 1984) 139.

130 *ibid* 139.

access to justice.¹³¹ These institutions are responsible for resolving disputes and ensuring that the rights and interests of all parties are protected. Hallaq provides a detailed explanation of the specific procedure employed in *qadi* courts¹³² and emphasises the crucial importance of equity.¹³³

The resolution of disputes has not limited to Sharia Councils, however; other forums were also available.¹³⁴ In fact, mediation and arbitration have been integral parts of Islamic legal systems for centuries. Mediation and arbitration also play a crucial role in upholding the principles of justice and fairness in Islamic law, as they provide opportunities for parties to come to mutually agreements with the help of impartial third parties. This multifaceted approach recognizes the importance of peaceful conflict resolution and fosters social harmony.¹³⁵ Furthermore, by providing options other than litigation, Islamic law shows sensitivity to individual requirements and situations, guaranteeing that justice is attainable for everyone.¹³⁶ The Qur'an acknowledges the utilisation of amicable settlement through mediation (*sulh*) as well as the utilisation of arbitration (*takhim*).

And if a woman fears cruelty or desertion on her husband's part, there is no sin on them both if they make terms of peace between themselves; and making peace [*sulh*] is better¹³⁷

The believers are nothing else than brothers [in the Islamic religion]. So make reconciliation [*sulh*] between your brothers, and fear Allah, that you may receive mercy¹³⁸

Sulh, or reconciliation, is deeply rooted in Islamic tradition and is considered to be a noble and virtuous way of resolving conflicts. According to Ann Black and

131 The Qur'an 4:58: "Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice."

132 The *qadi* courts were an integral part of the Islamic legal system, responsible for resolving disputes and administering justice based on Islamic law. The courts were administered by *qadis*, individuals who possessed extensive knowledge in Islamic jurisprudence and were designated by the governing powers. The *qadi* courts played a crucial role in maintaining social order and upholding the principles of justice within the Islamic community.

133 Wael Hallaq, *Shari'a: Theory, Practice and Transformations* (Cambridge University Press 2009) 343.

134 Jamal (n 114) 256.

135 N J Coulson, *A History of Islamic Law* (Aldine Transaction 2011) 46.

136 Hallaq (n 133) 34.

137 The Qur'an 2:128.

138 The Qur'an 49:10.

others, *sulh* is not only considered a valid method of resolving conflicts within the Islamic justice system, but for some, it is seen as the morally and religiously superior way of settling disputes.¹³⁹ Mediation, conciliation, and arbitration have always been integral components of pre-Islamic and Islamic systems for resolving disputes and ensuring access to justice.¹⁴⁰

The Universal Islamic Declaration of Human Rights (UIDHR)¹⁴¹ is a fundamental document outlines the rights and protections for individuals.¹⁴² It affirms the right to a fair trial, ensuring that all individuals are equal before the law, regardless of their social or political status.¹⁴³ The UIDHR also guarantees the right to seek justice, emphasising individual accountability and preventing unjust punishment.¹⁴⁴ Article 20 of the UIDHR addresses the prohibition of arbitrary and unjust treatment, prohibiting arrest, restriction of freedom, exile, or punishment without legitimate reason.¹⁴⁵ It also prohibits torture, humiliation, cruelty, or indignity and forbids subjecting individuals to medical or scientific experimentation without their consent. The prohibition of emergency laws further strengthens the protection of individual rights. The principles enshrined in the UIDHR align with Islamic jurisprudence and international human rights standards, highlighting the universality of these norms.¹⁴⁶ Islamic legal schools recognize key principles essential for access to justice, such as the prohibition of crime or punishment without a pre-existing law and the presumption of innocence.¹⁴⁷

It stipulates that no crime or punishment shall be recognized except as provided for in Sharia, aligning legal procedures with Islamic principles.¹⁴⁸ This requirement seeks to harmonize legal procedures with Islamic principles, ensuring that the

139 Ann Black, Hossein Esmail, and Nadirsyah Hosen, *Modern Perspectives on Islamic Law* (Edward Elgar 2013) 15.

140 Jamal (n 114) 257.

141 The Cairo Declaration on Human Rights in Islam (CDHRI) was adopted on August 5, 1990, by representatives from 54 Muslim countries. It serves as guidance for member states in matters of human rights.

142 Maranlou (n 67) 36.

143 S H Eslami, 'The Universal Islamic Declaration on Human Rights and the Problem of Inequalities of Rights between Men and Women', (2012) 07(2) TJHR 238.

144 *ibid*

145 Maranlou (n 67) 36.

146 Azeez A and others, 30.

147 Eslami (n 143) 235.

148 Abdul Azeez Maruf Olayemi, Abdul Hamzah Alabi, and Ahmad Hidayah Buang, 'Islamic Human Rights Law: A Critical Evaluation of UIDHR & CDHRI in Context of UDHR' (2015) 1(3) JILJ 30.

administration of justice complies with Islamic teachings' moral and ethical standards.¹⁴⁹ However, its effectiveness and prevalence are still topics of continuous scholarly discussion and examination. Some interpretations may contradict international human rights standards, especially in terms of gender equality and freedom of expression. Critics argue that the practical application of Sharia in some contexts may lead to discriminatory practices, despite the UIDHR's efforts to align Islamic law with human rights principles.¹⁵⁰ For example, the testimony of women and non-Muslims in specific legal situations may not be considered as significant as that of Muslim men, which could weaken the idea of equal justice access.¹⁵¹ Furthermore, punishments dictated by Sharia law, such as amputation for theft or stoning for adultery, have faced significant criticism for being cruel and breaching fundamental human rights norms.¹⁵² This has sparked worries about the alignment of specific elements of Sharia with the principles of the Universal Declaration of Human Rights. Despite these challenges, the UIDHR is still a crucial document for comprehending Islamic access to justice. It represents an attempt to incorporate universal human rights principles into an Islamic legal structure, highlighting the significance of justice, accountability, and moral integrity.¹⁵³

The concept of justice in Islamic thought differs from Western theories by being rooted in the Qur'an and highlighting the connection between individual rights and societal well-being. Western justice theories have developed over extensive philosophical traditions. Plato, Aristotle, Locke, Mill, and Rawls present various viewpoints on individual rights, societal well-being, and the state's responsibility in promoting justice.¹⁵⁴ Islamic justice is deeply rooted in the ontological basis of truth as something established and fixed, emphasising the manifestation of clarity and the preservation of harmony.¹⁵⁵ Islamic justice is grounded in the principles of mercy and compassion, aiming to restore equilibrium and rectify injustices in a manner that

149 *ibid* 29.

150 Ann Elizabeth Mayer, 'Islamic rights or human rights: an Iranian dilemma' (1996) 29(3-4) IS 276.

151 *ibid*.

152 Eslami (n 143) 238.

153 Jamal (n 114) 281.

154 Michael J. Sandel, 'Justice: What's the Right Thing to Do?' (2010) 12(1) THR 86.

155 Andrey Smirnov, 'Understanding Justice In An Islamic Context: Some Points Of Contrast With Western Theories' (1996) PEW 347.

embodies the divine qualities of forgiveness and comprehension.¹⁵⁶ This holistic approach to justice aims to uphold the rights of individuals while also considering the broader societal impact, ultimately striving for a harmonious and equitable resolution to conflicts and disputes.¹⁵⁷ In contrast, Western justice often revolves around receiving an “equipollent recompense”¹⁵⁸, focusing on the principles of fairness, equality, and rational calculation. Within the Western tradition, justice is often treated as an aspirational ideal, motivating individuals even if they doubt its perfect realisation.¹⁵⁹ Islamic law guarantees the personal security of the individual. It guarantees a fair trial and individual justice while complying with international conventions on the protection of human rights but with different interpretations of what constitutes cruel and unusual punishment in some cases.¹⁶⁰ The Western secular model privileges a rational, irrational mind-set in the pursuit of individual and collective fulfilment. In contrast, the Islamic model emphasises justice and traditions based on a legitimate community and family.¹⁶¹

As discussed above, Islamic concepts of access to justice are intertwined with social, political and procedural justice and how these concepts can be realised for individuals as their rights (*haqq*) on the path to justice. From an Islamic perspective, alternative dispute resolution emphasises social justice and avoids the delay and cost of formal litigation. Thus, access to justice in Islamic law, as in other legal systems, requires individuals to be informed about their rights, to have the capacity to participate meaningfully in legal processes, and to be provided with the social and institutional support necessary to pursue justice effectively.

2.3. Exploring Family Justice Paradigms: Access and Systems in Context

The disruptions in the functioning of the judiciary and the disappointments they create in the beneficiaries of the legal system play a role in the emergence of the concept of family justice. However, the inability of the legal system to respond to expectations as a result of the increase in legal demands and the increase in the

156 Lawrence Rosen, *Varieties of Muslim Experience: Encounters with Arab Political and Cultural Life* (University of Chicago Press 2008) 151.

157 Smirnov (n 155) 347.

158 *ibid.*

159 *ibid.*

160 M. Cherif Bassiouni, *The Islamic Criminal Justice System* (1982) 45.

161 Sminov (n 155) 347.

diversity of legal issues is only one of the social developments that reveal the movement of family justice. In order to fully comprehend the possibilities of family justice, it is crucial to conduct a comprehensive analysis of its theoretical foundations. An examination of this framework can clarify how it addresses systemic limitations and provides a comprehensive approach for families seeking resolution. The following sections examine these theoretical frameworks and examine how they shape approaches to accessibility, justice, and the overall design of family justice systems. It explores how these paradigms address challenges in traditional systems and offer more holistic and potentially transformative solutions for families in conflict.

2.3.1. The Meaning of Family Justice

The term family justice refers not only to Family Law, the legal framework within which lifelong personal obligations are managed and regulated, but also to the justice system that provides legal information, counsel and support in times of family stress.¹⁶² Marriage, cohabitation, separation, divorce, parental responsibilities, financial obligations resulting from marriage or relationship dissolution, property distribution, and child protection are all part of family justice.¹⁶³ Family justice can be used as both an adjective and a noun. The adjectival sense describes the procedures and rights connected to family law, whereas the noun sense describes the results that the parties obtain as a result of their involvement with the family justice system.¹⁶⁴ The family justice process and outcomes may not always be fair. While certain procedures are followed in resolving disputes and issuing judgements, their existence does not determine the character of justice.¹⁶⁵ According to Lord Neuberger, the civil and family justice system, provide "collective advantages for society as a whole" by ensuring the rule of law.¹⁶⁶

162 Barbara A. Babb and Judith D. Moran, *Caring for Families in Court: An Essential Approach to Family Justice* (Routledge 2019) 4.

163 Lisa Parkinson, 'The Place of Mediation in the Family Justice System' (2013) 25 CFLQ 202.

164 Anne Barlow et al, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave Macmillan 2017) 6.

165 *ibid.*

166 *ibid* 7.

The family justice system is intended to aid families in avoiding conflicts, but it is also intended that disagreements or issues are resolved quickly and with minimal infliction on those involved. As Justice Cromwell has stated:

In general terms, members of our society would have appropriate access to civil and family justice if they had the knowledge, resources and services to deal effectively with civil and family legal matters. I emphasize that I do not have a "court – centric" view of what this knowledge in these resources and services include. They include a range of out-of-court services, including access to knowledge about the law and the legal process and both formal and informal dispute resolution services, including those available through the courts. I do not view access to justice...as simply access to litigation or even simply as access to lawyers, judges and courts, although these are, of course, aspects of when access to justice requires.¹⁶⁷

This concept of the family court system aligns with an older definition of an organization that describes it as "the arrangement of individuals for enabling the accomplishment of an agreed purpose through the allocation of duties and responsibilities."¹⁶⁸ Keeping the knowledge, resources, and services about access to family justice to deal with family legal concerns efficiently would ideally include giving individuals the knowledge and skills to allow them to assume responsibility for the resolution of their own disputes.¹⁶⁹

Family justice is essential for protecting the wellbeing of individuals and promoting the stability of families. Effective family justice systems, through timely dispute resolution, safeguarding rights, and emphasizing restorative methods, greatly enhance individual mental welfare and emotional stability.¹⁷⁰ By providing a framework for resolving disputes, establishing custody arrangements, and addressing financial matters, family justice aims to promote fair and equitable outcomes for all parties involved. Additionally, family justice systems often offer resources and services to help families access counselling, mediation, and other forms of support to

167 Thomas A. Cromwell, 'Access to Justice: Towards a Collaborative and Strategic Approach' (2012) 63 UNBLJ 38.

168 John M. Gaus, Leonard D. White, and Marshall E. Dimock, *The Frontiers of Public Administration* (University of Chicago Press 1936) 66.

169 Barlow et al (n 164) 6.

170 Martin Partington, *Introduction to the English Legal System 2019-2020* (Oxford University Press 2019) 234.

address their unique needs. Family justice systems aim to promote communication, understanding, and cooperation among family members by offering a range of options and support, ultimately fostering healthier relationships and outcomes.¹⁷¹ Ultimately, the goal of family justice is to promote the welfare of families and ensure that they have the tools and assistance necessary to overcome challenges and thrive.

2.3.2. A Conceptual Analysis of Family Justice

Feminist theories provide a useful source of inspiration when formulating key debates on family justice. Feminists have engaged in the most continuous and sophisticated thinking about gender justice in general, and about family duties, connections, and dynamics in particular, because the typical heterosexual family is a fundamentally gendered institution.¹⁷² The necessity to eradicate systemic barriers that hinder certain individuals from engaging as equals with others, as complete members of society, is emphasised in the renowned feminist theory of justice put forth by Nancy Fraser this.¹⁷³ This necessitates the reallocation of economic resources and the acknowledgment of identities and social standing.¹⁷⁴ Recognising the importance of care work, putting an emphasis on the social and economic context of decision-making, promoting safety and freedom from abuse and violence, and achieving substantive equality through redistribution are all central to a feminist perspective on family justice.¹⁷⁵ This feminist approach aims to ensure equal participation and equality in social interactions.

The system's acceptance of autonomy-as-justice in family disputes is deeply gendered, and it may erase many of formal law's recent improvements in women and children's well being. Therefore, Nancy Fraser defined an influential family justice in terms of the need to remove gendered institutionalised barriers that prohibit some people from participating as equal partners in social interaction on a par fully with others.¹⁷⁶ Combining the procedural and substantive parts of family justice, family

171 David B. Wexler and Bruce J. Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press 1996) 46.

172 Barlow et. al (n 164) 9.

173 Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World*, (Columbia University Press 2009) 16.

174 Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition, Participation* (Routledge 1998).

175 Barlow et. al (n 164) 9.

176 Fraser (n 173) 18.

conflict resolution that results in oppression for either party is unfair, whereas a just resolution results in respect for both parties.¹⁷⁷ Both parties should have the necessary resources and support to participate effectively in the process, and agreements should ensure substantive equality between the parties.¹⁷⁸

In assessing financial outcomes in family disputes from a feminist approach in terms of family justice, it is crucial to consider the gender division of labour, which often results in women taking more responsibility for childrearing and housework.¹⁷⁹ This unequal division of labour can lead to women having reduced income, earning capacity, and pension entitlements, potentially resulting in long-term poverty for them and their children.¹⁸⁰ Feminist perspectives assert that the family is not an inherent or secluded domain, but rather a societal establishment supported by legal frameworks and should be governed by principles of fairness.¹⁸¹ Therefore, financial outcomes should ensure substantive equality between the parties, providing them with an equal ability to move on with their lives, considering all circumstances and the surrounding context.¹⁸²

Feminist theories of family justice advocate for a more equitable distribution of power and resources within familial relationships, challenging traditional views and emphasizing substantive equality. These theories address the unequal gender division of labour and financial implications, ensuring equal opportunities for both parties to rebuild their lives. However, these perspectives are not immune to criticism, reshaping our understanding of family dynamics.¹⁸³

In summary, some feminist perspectives on family justice acknowledge gender disparities and the unequal distribution of power and resources based on gender¹⁸⁴. A 'just' conclusion is neither just the result of power and resource imbalances, nor is it

177 Rosemary Hunter, "Consent in Violent Relationships," in *Choice and Consent* (Routledge-Cavendish 2007) 165.

178 Jay Folberg and Ann Milne, *Divorce Mediation: Theory and Practice* (Guilford Press, 1988) xviii.

179 Sonia Harris-Short, 'Building a House upon Sand: Post-Separation Parenting, Shared Residence and Equality-Lessons from Sweden' (2011) 23 CFLQ 349.

180 Mair et al., 'Family Justice Without Courts: Property Settlement on Separation Using Contracts in Scotland', in Mavis Maclean, John Eekelaar and Benoit Bastard (eds), *Delivering Family Justice in the 21st Century* (Hart Publishing 2015) 193.

181 Robert Leckey, "Marriage and the Data on Same-Sex Couples," in *Wealth and Poverty in Close Personal Relationships* (Routledge 2017) 107.

182 Richard J. Arneson, 'Feminism and Family Justice' (1997) 11(4) PAQ 315.

183 *ibid.*

184 Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1993).

the result of any type of abuse.¹⁸⁵ Family dispute resolution, combining procedural and substantive aspects, can be considered unjust if it oppresses either party, while a just resolution is one that respects both parties.¹⁸⁶ Both parties should have the necessary resources and support to participate effectively in the process, and agreements should ensure substantive equality between the parties, with reference to both recognition and redistribution requirements.

2.3.3. Mediation in the Family Justice System

Mediation is defined as follows in Article 1 of the 2002 recommendation of the Committee of Ministers of the Council of Europe: "For the purposes of this recommendation, mediation refers to a means of dispute resolution based on the fact that the parties have to discuss dispute matters to reach an agreement, with the assistance of one or more mediators."¹⁸⁷ Mediation according to the 2008 European Parliament and Council Directive depicts a voluntary process for two or more parties to the dispute to reach an agreement on dispute resolution, with the assistance of a mediator, regardless of nomenclature or form of application.¹⁸⁸

A new focus on family mediation at the tail end of the 20th century was developed to supplement the formal family justice system that had been in place for a considerable amount of time before this. It is now widely acknowledged that the family justice makes use of mediators and other dispute resolution professionals, whose goal is to facilitate the resolution of disputes outside of formal court processes.¹⁸⁹ The practice of family mediation lies at the centre of the recently implemented family justice.¹⁹⁰

The purpose of the Directive on Certain Aspects of Mediation in Civil and Commercial Matters that was issued by the Council of the European Union was stated to be "to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial

185 Roger Smith, Digital Delivery of Legal Services to People on Low Incomes: Quarterly Update, (The Legal Education Foundation 2015) 23.

186 *ibid.*

187 Parkinson (n 163) 187.

188 *ibid.*

189 Parkinson (n 163) 200.

190 Simon Roberts, 'Mediation In Family Law Disputes' (1983) 46 MLR 537. On the need for lawyers and mediators to offer a complementary service see Janet Walker, 'Is There a Future for Lawyers in Divorce?' (1996) 10(1) IJLPF 52.

proceedings".¹⁹¹ A significant departure from the existing conceptualisation of access to justice would be required if mediation infringed upon the right to access the court.¹⁹² As a result, there was a hierarchy of ascending importance for the different methods of conflict resolution that could be utilised in family and civil law. To illustrate this contention, Murch and Hooper defined the family justice system as consisting of two "districts": litigation and the courts in the inner zone;¹⁹³ and alternative dispute resolution, such as conciliation and mediation, were included in the outer zone.¹⁹⁴ Thus, the court's priority in family justice was maintained, and the view that access to court was the same as access to justice, because mediation was kept outside the safety zone of the courts. The objective of mediators and other practitioners of dispute resolution are to promote the settlement of disputes in the context of potential or actual court proceedings. It now appears to be generally accepted that mediators and other practitioners of dispute resolution have a place in the family justice system.¹⁹⁵

Family mediators play an important role in the family justice system by assisting separating couples to resolve issues largely by themselves, with little access to legal services.¹⁹⁶ They provide information and encourage consideration of dispute resolution as a pre-requisite for most applications to the family court.¹⁹⁷ Although the family justice system primarily focuses on the safety of children, its jurisdiction also encompasses cases not solely centred on the child. In divorce, separation, property disputes, or elder care concerns, the system aims to facilitate the impartial resolution of familial conflicts, safeguard individual rights, and promote equitable outcomes, even in the absence of children.¹⁹⁸ Family mediation plays a significant role in this process, especially in high-conflict scenarios where traditional litigation can exacerbate tensions.¹⁹⁹ Additionally, they are responsible for assessing the suitability

191 Lisa Parkinson, *Conciliation in Separation and Divorce: Finding Common Ground* (Routledge 1986) 78.

192 *ibid.*

193 Mervyn Murch, *Supporting Children When Parents Separate: Embedding a Crisis Intervention Approach Within Family Justice, Education and Mental Health Policy* (Policy Press 2018) 61.

194 *ibid.* 62.

195 Parkinson (n 163) 202.

196 Parkinson (n 163) 200.

197 Barlow (n 164) 307.

198 Robert E. Emery, David Sbarra, and Tara Grover, 'Divorce Mediation: Research and Reflections' (2005) 43(1) FCR 22.

199 Parkinson (n 163) 206.

of individuals for mediation, ensuring safeguarding of vulnerable adults and children, and encouraging participants to focus on the needs and interests of the children as well as their own.²⁰⁰ They also play a role in empowering people to keep control of their own affairs without surrendering control to statutory authority.²⁰¹

Family dispute resolution (FDR), which is simply ADR in the family-law context, is used as a means of securing justice when family-law conflicts arise. The intricacy of family justice concerns that arise in family disputes makes designing an adequate dispute resolution method difficult.²⁰² Meanwhile, the family justice line²⁰³ shifted from protection to 'supporting fair and informed settlement,' indicating a preference for ADR and mediation over courts and attorneys.²⁰⁴

Members of the Institutes of Family Law Arbitrators (IFLA) and mediators are entrepreneurs in a booming new market in family justice, like in the UK. Arbitrators and mediators exemplify Lord Neuberger's opinion that "justice is nothing more than an element of the service sector of the economy, rather than a branch of government."²⁰⁵ Indeed, rather than being answerable to the courts, these service providers perceive themselves as accountable to their clients. Mediators and arbitrators are not officers of the court, unlike lawyers who become involved in negotiating the private resolution of family problems.²⁰⁶ Also, Lisa Parkinson affirms mediators' autonomy-their independence from the courts –and states that mediators should stay independent of the legal system since they "provide a sort of participatory justice different from formally imposed justice."²⁰⁷ But a family justice process is one that is easily accessible and effective, in the sense that it provides us acceptable access to legal counsel and representation, proper dispute resolution forms, and the courts without undue delay or cost, and without relying on personal resources.²⁰⁸ As a

200 Emery et al (n 198) 23.

201 *ibid.*

202 Lola Akin Ojelabi and Judith Gutman, 'Family Dispute Resolution and Access to Justice in Australia' (2020) 16(2) *IJLC* 197.

203 Countries like the United States, Canada, Australia, and the United Kingdom have all made significant strides in promoting ADR within their family justice systems.

204 Mavis Maclean and Bregje Dijksterhuis (eds), *Digital Family Justice: From Alternative Dispute Resolution to Online Dispute Resolution?* (Bloomsbury Publishing 2019) 215.

205 Thomas O. Main, 'ADR: The New Equity' (2005) 74 *UCLR* 329.

206 Julie Doughty and Mervyn Murch, 'Judicial Independence and the Restructuring of Family Courts and Their Support Services' (2012) 24 *CFLQ* 333.

207 Parkinson (n 163) 212.

208 Hazel Genn, 'Civil Mediation: A Measured Approach?' (2010) 32(2) *JSWFL* 198.

result, it's a process that encourages equal involvement, ensures that each party's opinion is heard and respected equally, and works to eliminate rather than simply maintain or amplify power disparities.

Decreased public funding for various services, reduced availability of lawyers for those without resources, and a lack of resources leading to continued searches for alternative and cheaper dispute resolution methods have led governments to use family mediation to ensure family justice.²⁰⁹ However, families face difficulties, especially financially, in accessing family justice, as the family mediation system, which is new in most countries, is underdeveloped and not widespread.²¹⁰ As part of extensive family law reform in the last decade, various cost-saving strategies have been implemented in FDRs that have been introduced for access to family justice in various countries, notably the UK government.²¹¹ With cutbacks to publicly finance legal aid and other resources, parents are now expected to take responsibility for addressing their legal issues without resorting to the courts. However, in such a situation, parents facing complex family law issues have little options. These alternative approaches can simplify the dispute resolution process and lead to outcomes more tailored to the specific needs and interests of the parties involved, rather than solely based on the strict application of formal rules and procedures that characterize the judicial system.²¹² However, Kurczewski and Fuszara discussed how the courts would be used, arguing that the existing power of the courts as an institution of family justice was underestimated.²¹³ They claim that ADR, or mediation, was not the first technique that most people with justiciable disputes consider.

209 For instance, the decline in legal aid funding in the US has impacted low-income individuals seeking legal representation in family matters. (Rhode (n 49) 1788). In Canada, public legal aid is limited, and provinces heavily promote mediation in family law disputes. (Noel Semple, 'Mandatory family mediation and the settlement mission: A feminist critique' (2012) 24 CJWL 208.) In the UK, cuts to legal aid have reduced access to justice, leaving many without legal representation in family disputes. (Ministry of Justice, *Legal Support: The Way Ahead* (2019). Mediation has been increasingly promoted as an alternative. In Australia, funding for legal aid has faced pressure, and family dispute resolution services have been bolstered as alternatives to litigation. (Kathryn Crontin, 'Law Reform in a Federal System: The Australian Example' (2019) 21 EJLR 36).

210 Ana Speed, 'Just-ish? An Analysis of Routes to Justice in Family Law Disputes in England and Wales' (2020) 52(3) TJLPUL 278.

211 *ibid* 278.

212 Jay Folberg and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (Jossey - Bass 1986).

213 Jacek Kurczewski & Małgorzata Fuszara, 'Patterns of Preference for Dispute Resolution in Poland' (2017) 200 PSR 510.

On one hand, Smith and Trinder have acknowledged settlement procedures as having the potential to be "a more efficient, managed, and uniform system."²¹⁴ Settlement may aid to expedite the resolution of legal issues and provide the parties the autonomy they need to manage any family issues that have arisen due to the dispute. Studies indicate high satisfaction with family mediation, a strong rate of settlement agreements, highly effective outcomes, financial benefits, and significantly faster case resolution.²¹⁵

On the contrary, there have been worries that the agreement would make it more difficult for people to get access to justice because of the expectations that are placed on lawyers from a structural standpoint to finish a case.²¹⁶ The final agreement may not have been thoroughly reviewed and result in an unfair decision if the legal system, including the court, attorneys, and other dispute resolution mechanisms, strongly incentivises settling.²¹⁷ Therefore, to reach an agreement, the wants and rights of disputants may be ignored entirely. There are serious concerns raised by both sides, leading to a potentially critical claim: settlement is an integral part of contemporary family justice, but it shouldn't be pursued to exclude other considerations like fairness and equality. In a similar vein, Baitar claims that an agreement is not necessarily equivalent to party satisfaction or, more precisely, to access to justice.²¹⁸

2.4. Conclusion

Within the complex framework of family law, which encompasses legal, social, and cultural aspects, the ongoing pursuit of justice, equality, and welfare remains a central objective.²¹⁹ These sections of this investigation have explored the fundamental principles of justice, explored the intricate aspects of gender equality within legal

214 Leanne Smith and Liz Trinder, 'Mind the gap: parent education programmes and the family justice system' (2012) 24(4) CFLQ 429.

215 Nancy Ver Steegh, 'Yes, no, and maybe: Informed decision making about divorce mediation in the presence of domestic violence' (2002) 9 WMJWL 147; Another study cites figures of 50% to 80%. Jennifer P. Maxwell, 'Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators' (1999) 37 FCCR 335.

216 Gwynn Davis, Stephen Cretney and Jean Collins, *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press 1994) 211-212.

217 *ibid* 212.

218 Rachid Baitar and others, 'Post-divorce wellbeing in Flanders: Facilitative professionals and quality of arrangements matter' (2012) 18(1) JFS 64.

219 *ibid* 65.

frameworks, and analysed the convergence of Islamic principles with the availability of justice. In dealing with the intricacies of family law, it is recognised that it is both necessary and urgent to strive for a comprehensive, adaptable, and effective family justice system.

The understanding of justice, as expressed by prominent intellectuals like John Rawls and Nancy Fraser, and within the Islamic tradition, encompasses much more than just legal proceeding in a courtroom. It includes the complex network of societal structures and norms, highlighting the necessity for an approach that tackles systemic inequalities at their fundamental causes. Recognising and addressing systemic injustices, especially in relation to gender equality, is crucial for removing obstacles to accessing family justice. Furthermore, the concept of justice also extends to economic and political systems, where power imbalances can perpetuate inequality and oppression.

Gender equality is a crucial issue that goes beyond simply acknowledging equal rights through legal means. A comprehensive analysis of the societal, economic, and legal factors that sustain inequalities is required. The obstacles encountered by women in obtaining justice, such as economic bias, gender-related violence, and deeply ingrained social expectations, emphasise the necessity of a comprehensive and interconnected comprehension of justice within the realm of family law. To overcome these obstacles, it is necessary to employ comprehensive strategies that address various aspects, including the legal, social, and economic domains.

The evolution of family justice paradigms echoes societal shifts in attitudes, needs, and preferences. From traditional court-centric approaches to the embrace of alternative dispute resolution mechanisms like mediation, the landscape is dynamic. Yet challenges persist, with limited resources and systemic inequalities acting as persistent hurdles. The pursuit of family justice must not only adapt to these changing dynamics but also actively work towards dismantling systemic barriers that hinder equal access.

CHAPTER III

PATH TO FAMILY JUSTICE IN TÜRKİYE

3.1. Introduction

The family courts in Türkiye play a vital role in resolving family-related disputes, including divorce, child custody, and alimony. These courts are responsible for ensuring that family matters are handled in a fair and just manner, taking into consideration the best interests of all parties involved. Additionally, the Office of Family and Religious Guidance provides support and counselling to families, aiming to promote healthy family relationships and prevent conflicts. Understanding the path to family justice requires a comprehensive examination of the background of law reforms, particularly within the Turkish Civil Code, and the subsequent modifications that have shaped family law, provided in section 3.1.

In this chapter, the understanding of family justice in Türkiye and the problems families experience in accessing family justice has been discussed. This chapter describes different aspects of family justice in Türkiye, beginning with the history of family courts and ending with a discussion of family justice. Despite the efforts made to ensure family justice, as explored in section 3.4, women in Türkiye still face various challenges in accessing the legal system. These challenges may include social stigmas, financial constraints, and lack of awareness about their rights. Addressing these barriers is essential to ensure that women can effectively seek justice and protection in family-related matters.

3.2. The Background of the Law Reform

The Turkish Civil Code has experienced substantial modifications throughout its history. During the time of the Ottoman Empire, Islamic law was utilised, and religious tribunals oversaw its enforcement. The non-Islamic religious communities were governed by the regulations and jurisdiction of their respective denominations, while simultaneously being subject to the overarching legal framework of Sharia law.¹ The first major reception of European law took place during the Ottoman

¹ Arzu Oguz, 'The role of comparative law in the development of Turkish civil law' (2005) 17 PILR 373.

Empire, and the concept of codification as a guarantee of a rational and fair legal system gained a foothold.² In 1923, when the Turkish Republic was proclaimed, the country began the process of updating its legal system. The Turkish Parliament formed a committee to compare the civil codes of European countries, and the Swiss civil code was chosen as a model for the Turkish civil code.³ The Turkish Civil Code (TCC) was officially established on February 17, 1926, and it recognised divorces that led to the complete and unrestricted separation of the married individuals. The Code introduced sweeping reforms across various domains of social life, reflecting the contemporary drive towards modernization and secularization.⁴ The equality of men and women was recognised for the first time.⁵ The major codes underwent significant amendments, such as the Civil Code in 2002, which resulted in the expansion of women's rights and the advancement of their position within the institution of marriage.⁶ The amendments made to the Turkish Code of Civil Procedure in 2020 aimed to address various ambiguous aspects that had emerged in practical implementation during the period following the Code's enactment in July 2012.⁷

The legal framework governing family matters in Türkiye lies at the heart of this thesis. The Turkish Civil Code and related legislation form the cornerstone, delineating the rights and responsibilities of family members. Exploring recent legal reforms becomes paramount, as Türkiye continually adapts its legal infrastructure to align with evolving societal norms and international standards. The rest of this section discusses the background of the divorce law reform in Türkiye, including the changes in Turkish divorce laws, the historical and socio-political conditions that led to the adoption of a European civil code in Türkiye, and the eligibility criteria for obtaining a divorce in Türkiye. Additionally, it explores the types of divorce recognized by Turkish family law, the grounds for opening court cases for divorce or separation.

2 *ibid.*

3 Muhammad Rashid Feroze, 'Family laws of the Turkish republic' (1962) 1(2) IS 132.

4 *ibid* 134.

5 [1926] TCC.

6 Feroza (n 3) 134.

7 Selahattin Sulhi Tekinay, *Türk Aile Hukuku* [Turkish Family Law] (Filiz Kitabevi, 1996) 32.

3.2.1. Turkish Civil Code

The Turkish Civil Code, which was derived from Swiss legal principles, was officially published in the Official Gazette on 4 April 1926, and subsequently enacted on 4 October 1926.⁸ The Turkish Civil Code, like most other legal codes, has undergone multiple rounds of revision as its provisions became out dated and it proved unable to keep up with changing economic and social conditions.

The New Turkish Civil Code, officially known as Law No. 4721, was enacted by the Turkish Grand National Assembly on 22 November 2001 and subsequently implemented on 1 January 2002.⁹ The primary legislation in Türkiye that encompasses the regulations pertaining to civil law is the main statutory framework. The Turkish Civil Code underwent a modernization process known as "Turkishization." This involved translating and rewriting the legal text in the new Turkish alphabet and linguistic style, departing from its Ottoman Turkish roots.¹⁰ The goal was to make the code more accessible and understandable to the Turkish population.

The Old Turkish Civil Code No. 1926 codified gender-based disparities within Turkish law.¹¹ Provisions relating to inheritance, divorce, child custody, and property ownership granted men substantial legal advantages, reflecting patriarchal social structures.¹² Divorce proceedings, for instance, heavily prioritized the rights and authority of the husband, making it far more difficult for women to initiate or obtain a divorce, and granting them little to no agency in the process.¹³ Similarly, child custody determinations often defaulted to the father, unless he was deemed unfit, rather than considering the best interests of the child.¹⁴

However, the tide began to turn in the late 19th and early 20th centuries, as feminist movements gained momentum and women began demanding greater

8 Sera Reyhani Yüksel, 'Türk medenî kanunu bakımından kadın-erkek eşitliği [Equality between men and women in terms of Turkish civil law]' (2014) 18(2) AHBVUFLJ 175.

9 *ibid* 179.

10 Bilge Oztan, *Aile Hukuku [Family Law]* (Turhan Publication, 2000) 47.

11 [1926] TCC 743.

12 Eylem Kaya, 'An overview of Turkish women's status in Turkey' (2014) 3(5) TDJ 213.

13 Oztan (n 10) 48.

14 Ayşe Havutcu, 'Mukayeseli Hukuktaki Gelişmeler Işığında Türk Medeni Kanunu Açısından Zorla Evlenme Probleminin Değerlendirmesi (Consideration of the Problem of Marriages under Compulsion to Turkish Civil Code in the Light of the Developments in Comparative Law)' (2013) YUE 1348.

equality in all aspects of life, including marriage and divorce.¹⁵ The New Turkish Civil Code (Law No. 4721 of 2001), effective January 1st, 2002, ushered in a paradigm shift by unequivocally establishing gender equality as a foundational legal principle.¹⁶ This overhaul fundamentally revised discriminatory aspects of the prior code and significantly enhanced the legal protections afforded to women. This shift in societal attitudes and legal reforms gradually chipped away at the traditional patriarchal norms that had long governed marriage and divorce, paving the way for a more equitable system. One of the most significant changes was the introduction of "no-fault" divorce, which allowed couples to dissolve their marriage without having to prove that one party was at fault.¹⁷ This made divorce more accessible to women, as they no longer had to endure the humiliation of public accusations or the burden of proving their husband's wrongdoing.¹⁸

3.2.2. Modifications Implemented to Family Law through the Turkish Civil Code and Innovations

The implementation of the secular Turkish Civil Code in 1926 created a legal anomaly, as family law had been a cornerstone of Islamic tradition.¹⁹ The code's radical departure from Islamic law, which had long governed personal status matters, sparked both widespread opposition and widespread support. Traditionalists lamented the loss of Islamic influence in the legal sphere, while progressives saw it as a necessary step towards modernising Türkiye and establishing a secular identity.²⁰ Turkish law officially adopted a secular approach to family matters for the first time, while Islam remained the primary religion for most Turkish citizens.²¹ The new secular law aimed to transform Turkish family life, aligning it with Western models.²² Its impact on Turkish society was profound, ushering in a period of rapid social and cultural change.

15 Betül Karagoz, *Osmanlı İmparatorluğu'ndan Türkiye Cumhuriyeti'ne Kalan Bir Mesele: Kadınların Konumu* [An Issue from the Ottoman Empire to the Republic of Türkiye: The Status of Women] (Karadeniz Publication 2016) 33.

16 Ibid 35.

17 Havutcu (n 14) 1349.

18 Ibid.

19 İhsan Yılmaz, 'Secular law and the emergence of unofficial Turkish Islamic law' (2002) TMEJ 114

20 Niyazi Berkes, *The Development of Secularism in Turkey* (Routledge 2013) 43.

21 Yılmaz (n 19) 115.

22 Ibid.

This profound shift in the legal landscape, marked by the adoption of the new Turkish Civil Code, ultimately led to a restructuring of family law based on four key principles: the principle of the family as the foundation of society, the principle of safeguarding the family, the principle of civil matrimony, and the principle of equality.²³ The rationale for implementing significant and fundamental modifications in the Family Law stems from the notion that the principle of "equality between men and women," universally acknowledged as a fundamental principle in all contemporary legal frameworks, should be upheld in our legislation as it has been historically. Consequently, any provisions that contradict this principle of equality should be eliminated from the law or adjusted to guarantee parity.²⁴

The new regulations in the Turkish Civil Code have embraced the principle of spousal equality in the field of family law. On one hand, it mandates that each spouse be afforded maximum freedom and autonomy to maintain their individuality and financial well-being within the confines of marriage, and that both spouses have equal rights and authority in this matter.²⁵ On the other hand, if it is deemed necessary to restrict this autonomy in order to safeguard the interests of the marital union, it is imperative that such limitations apply to both partners, with equal responsibilities imposed on each.²⁶ Women have been granted equal rights with men in legal arrangements, and their responsibilities for contributing to the family's financial support have also been heightened. These regulations²⁷ mandate that both spouses have the responsibility to provide for the family's sustenance, not just the husband. Augmenting the obligations of both partners towards the marital union reinforced the concept of unity.²⁸

The area of divorce was also affected by some of the reforms enacted by civil law as in the former Civil Code (TCC Art. 161-166). In the Turkish Civil Code, the grounds for divorce are divided into two as special grounds and general grounds.

23 Eşref Yazar, Incompatibility between spouses in Islamic Family Law and its solution (*Nüşuz*) (Unpublished master's thesis, Atatürk University Institute of Social Sciences 2007) 11.

24 *ibid* 18.

25 Ece Göztepe, Anayasa Şikayeti [Constitutional Complaint] (Ankara University Faculty of Law 1998) 108; [2002] TCC 185.

26 *ibid*; [2002] TCC 186.

27 [2002] TCC 185 - 186.

28 Gökçen Türker, Family Residence in Turkish Civil Code (Unpublished master's thesis, Ankara University Institute of Social Sciences 2005) 8.

Special grounds consist of specific, legally defined acts or situations that unequivocally justify divorce proceedings, including adultery, life endangerment, serious ill-treatment, criminal conviction, abandonment, and mental illness.²⁹ In contrast, the general ground centres on the concept of an irretrievably broken marital union, where the marriage's core foundation has eroded beyond reconciliation.³⁰ The Turkish Civil Code outlines key principles that establish a structured framework for determining the legal validity of a divorce. These principles encompass fault, essential impairment, will, and impropriety.³¹ Each principle addresses distinct factors influencing divorce, ensuring a systematic decision-making process. One notable principle is the will principle, stating that both spouses need to have the intention and consent for divorce, emphasizing the significance of mutual agreement and genuine consent in concluding the marriage. This principle is especially relevant when a marriage was initially entered into without genuine desire, ensuring that the divorce is a considered and mutual decision.³² These principles form the foundation of the reasons for divorce as specified in the, ensuring that divorce cases are evaluated and decided in a systematic and principled manner. It can be concluded that the legal process for divorce in Türkiye is designed to be thorough and fair, taking into account various factors and ensuring that the decision is made with careful consideration of all relevant circumstances and principles.

Furthermore, a new justification for divorce, namely "grossly dishonourable behaviour," has been included as a third criterion in Article 162 of the TCC.³³ This article specifically governs the exceptional grounds for divorce, which currently consist of attempted murder and severe misconduct. Conversely, in order for divorce to be granted based on the commission of a criminal offence as stipulated in Article 163 of the TCC, it must cause extreme suffering for the other spouse.³⁴ In essence, it

29 [1926] TCC 161-165.

30 [1926] TCC 166.

31 *ibid.*

32 TCC 129-134.

33 M. Akif Tutumlu, *Annulment of Marriage, Divorce According to the Provisions of the New Turkish Civil Code, Reasons for Separation and Legal Consequences of Divorce* (Ankara 2002) 162.

34 Muhabbet Doyran, 'Discussions and Developments During the Preparation of The Turkish Civil Laws Accepted in 1926' 2001 (2023) 11 KATAJ 1090.

is insufficient for the spouse to have solely committed a criminal offence; rather, the other spouse must also experience a state of intolerability.

Under the recent regulation (Article 199 of the TCC), the judge is empowered to implement specific measures throughout a marriage or on divorce. During the marriage or in the event of a divorce, the judge will determine which party will have the right to use the shared residence and household items and will take appropriate actions to enforce this decision (Art. 197/11 of the TCC). As a precautionary measure, the judge may also opt to limit the authority of one of the spouses to make decisions regarding property or assets.³⁵ Similarly, the judge has the authority to independently decide to make a note on the title deed, which limits one spouse's ability to transfer their ownership rights over their immovable property (Art. 199/III of the TCC). This last situation is a special form of the measures to be taken by the judge.³⁶ The Article 194 and 195 in the Turkish Civil Code contend that the provision serves the specific objective of preventing a husband, who is intent on divorcing, from transferring his assets to third parties solely to evade his obligation to pay alimony or compensation to his wife.³⁷ This provision indirectly protects women.³⁸ The preamble explicitly states that the provision is specifically designed to prevent the husband from unlawfully taking possession of property belonging to his wife.³⁹ This provision aims to prevent both spouses, including the husband, from engaging in property theft against each other.⁴⁰ This outcome is consistent with the principle of equality.

Turkish civil law includes protections for women's rights, but the actual availability and implementation of these measures need to be examined more closely. This emphasises the importance of investigating alternative dispute resolution (ADR) methods, like mediation. While Turkish civil law provides legal protection for women, it may not always guarantee fair access to justice in reality. It is crucial to

35 *ibid* 13.

36 Tutumlu (n 30) 418.

37 Turgut Akıntürk, *Aile Hukuku* [Family Law] (Ankara 1996) 59.

38 *ibid* 59.

39 Doğan Koçak, '17 Şubat 1926'da Kabul Edilen Türk Medeni Kanunu'na Göre Türk Kadınının Hak ve Özgürlükleri [Rights and Freedoms of Turkish Women According to the Turkish Civil Code Adopted on 17 February 1926]' (2017) 8(1) AJ 81.

40 Tutumlu (n 30) 14.

explore alternative dispute resolution (ADR) models, such as mediation, to potentially fill these gaps.

3.3. Mediation System In Türkiye

An essential step on the path to family justice in Türkiye involves the exploration of mediation practices. Understanding the dynamics of family mediation, its scope, effectiveness, and societal reception is vital for evaluating its role in promoting justice within Turkish families.

The Ottoman Empire used negotiated conflict resolution traditions, while mediation in present-day Türkiye has evolved significantly.⁴¹ The practice is now established within a legal framework, backed by specialised institutions and procedures, and acknowledged as a unique profession that demands specialised skills.⁴² This transformation underscores a shift from informal mechanisms embedded within traditional structures towards a systematised approach integrated into the Turkish legal system.⁴³

Following this, the development of alternative dispute resolution methods in Western countries and taking into consideration the need for remedies in Türkiye, mediation, one of the alternative dispute resolution methods, has been accepted by the Law on Mediation in Civil Disputes (LMCD) numbered 6325 (Mediation Law), which entered into force in Türkiye on 07.06.2012. Also, the regulation of Mediation Law in Legal Disputes on 26.01.2013 and the "Mediation System and Model Ethics and Practice Rules for Mediators" were accepted in March 2013, and mediation was subject to legal arrangements as an alternative dispute method.

Pursuant to the LMCD in Türkiye, drawn up based on the Australian Federal Law model, in legal disputes arising from a situation in which the interests of the parties are freely controlled, the parties are free to negotiate with the mediator without recourse to the judge. In addition, the parties who were unable to negotiate

41 İpek Sağlam, 'Türk Medeni Kanunu Madde 40 Üzerine Bir Değerlendirme [An Evaluation on Turkish Civil Code Article 40] (2004) 8(3-4) EBYFLJ 467.

42 Muzaffer Ercan Yılmaz, 'Türkiye’de Arbuluculuk Uygulamaları [Mediation Practices in Türkiye]' (2012) 1(3) İTBAJ 10.

43 Çiğdem Yazıcı, 'Türkiye’de Arbuluculuğun Gelişimi [Development of Mediation in Türkiye]' (2020) 9(2) JITAL 314.

before the mediator have the right to eventually appeal to the court or to pursue the open case.⁴⁴

The definition of mediation is made in article 2/1 (b) of the LMCD and article 4/1 (b) of the regulation. In these definitions, mediation is defined as “a dispute resolution method that is carried out voluntarily and with the participation of an impartial and independent third person who has received specialist training, which brings the parties together for negotiations by applying systematic techniques, establishes the communication process between them to provide that they understand each other and thus produce solutions themselves”.⁴⁵

Considering the legal existence of mediation, the resolution of disputes is essentially the responsibility of the courts and the state.⁴⁶ Due to its legal nature, mediation is not a solution method that replaces the state jurisdiction. This is because, in the Mediation Law, the areas where the mediation process can function are limited as private law disputes that are not taken into account by the public order and where the parties can openly dispose of them.⁴⁷

The mediator must ensure that all parties understand properly the rules, processes and results of the mediation from the outset.⁴⁸ The parties have the right to appeal to the mediator, to continue, finalize, or renounce such a procedure. They agree, primarily through mediation, to finalize the dispute. Parties have the right to participate in mediation proceedings and can withdraw from the process at any time.⁴⁹

44 Alper Uyumaz and Kemal Erdogan, 'Alternative Dispute Resolution of Disputes Arising from Family Law' (2015) 17 DEUHFJ 122.

45 See Regulation of the Law on Mediation in Civil Disputes, Article 4(1)(b).

46 Yilmaz (n 42) 11.

47 Hande Tazıcı, Boşanmanın Hukuki Sonuçlarına İlişkin Uyuşmazlıklarda Arabuluculuk [Mediation in disputes regarding the legal consequences of divorce] (unpublished master's thesis 2019) 33.

48 Regulation of the Law on Mediation of Civil Conflicts Article 14 reads in its entirety as follows: “(1) A mediator is obliged to personally and directly enlighten the parties about the fundamentals, process and judicial outcomes of mediation, in early beginning of the mediation activity. However, while carrying out such obligation, he abstains from any attitudes and behaviours letting to any doubt about his impartiality. (2) A mediator informs the parties especially about the quality and judicial outcomes of the document of understanding obtaining a nature of document in quality of court decree, which shall be issued in case the parties have agreed as result of legal disputes solved via mediation and as result of mediation activity and after the relevant court has annotated”.

49 Regulation of the Law on Mediation of Civil Conflicts Article 5 paragraph 1 reads in its entirety as follows: “The parties are free to resort to a mediator, to sustain, finalize or renounce such a process and shall agree to finalize such a dispute primarily by means of mediation. The parties won't be included, by no means, into such process and may renounce, in every stage, such solution of dispute via mediation”.

Türkiye does not have a specific regulatory framework for family mediation, but studies⁵⁰ conducted since 2015 suggest progress towards its formal recognition. The next section explores the specifics of family mediation in the Turkish context. Investigate the relationship between existing legal regulations and mediation techniques, analyse the benefits and challenges, and propose strategies to customise family mediation procedures to effectively meet the requirements of Turkish families.

3.3.1. Family Mediation in Turkish Legislation

In Türkiye, there is no special law on family mediation for family disputes. Therefore, the provisions of the Law on Mediation of Civil Disputes also apply to the resolution of family law disputes.⁵¹ However, it is considered to make a special law for mediation in family law disputes or to introduce special provisions to the Law on the Establishment, Duties and Trial Procedures of Family Courts.

The main regulations on family mediation are set out in the Law on the Establishment, Duties and Trial Procedures of Family Courts (FCC). According to Article 7 of the FCC, "Family courts, according to the characteristics of the cases and proceedings before them, shall, before entering into the merits, identify the problems faced by the spouses and children in order to protect the mutual love, respect and tolerance within the family, and encourage their solution through reconciliation, by making use of experts when necessary.⁵² If settlement cannot be achieved, the proceedings shall continue and a decision shall be taken on the merits. Without prejudice to the provisions of special laws, the procedural provisions of the Turkish Civil Code relating to family law and the provisions of the Code of Civil Procedure shall apply in matters not provided for in this Law."

50 e.g. Abdurrahman Kavasoglu and Tansu Gundogdu, 'Aile Arabuluculugunun Tarihi Gelistimi Ve Ulkemizdeki Mevzuat Acisindan Değerlendirilmesi [Historical Development of Family Mediation and Its Evaluation in Terms of Legislation in Our Country]' (2021) XI(2) SDUFLJ 771; Levent Boru, 'Aile Arabuluculugu Konusunda Güncel Gelistmeler [Current Developments in Family Mediation]' (2019) 2 Internal II. International Symposium on Women and Law 1043.

51 Seda Özmumcu, Arabuluculuk Modelleri [Mediation Model] (Oniki Levha Publishing 2021) 201.

52 CCP 137.

Although the law encourages mediation before the case is concluded, it does not prohibit mediation after the case is concluded.⁵³ Mediation is permissible at any point before the case's resolution. Furthermore, mediation can be beneficial even after a court judgment has been issued. In such cases, mediation can facilitate the enforcement of the judgment or resolve any disputes arising from its interpretation.⁵⁴

Apart from the Law on Mediation in Civil Disputes, it is known that the Ministry of Justice is working on making special legal arrangements for the resolution of family law disputes through mediation.⁵⁵ The Ministry of Justice plays a crucial role in regulating mediation, establishing training requirements, and certifying mediators.⁵⁶ Recent discussions about Türkiye suggest that family mediation could be beneficial in dealing with family law disputes that involve matters the parties cannot freely control, such as divorce, nullity of marriage, determination of paternity, and custody issues.⁵⁷ First of all, the mediation method is cheaper and less costly compared to the traditional judgement method.⁵⁸ Increasing divorces and family law disputes cause high social and economic costs not only for the parties to the dispute but also for the state and society.⁵⁹ Compared to the judicial process, the cost of resolving family disputes through mediation is much lower.⁶⁰

Another advantage of resolving family law disputes through mediation is the confidentiality of the mediation process. According to Article 4 of the Mediation Law, "Unless otherwise agreed by the parties, the mediator is obliged to keep confidential the information, documents, and other records submitted to him or obtained in any other way within the framework of the mediation activity. Unless otherwise agreed, the parties and other persons participating in the negotiations are

53 İbrahim Ercan, 'Aile Mahkemesinde Uyuşmazlıkların Sulh Yoluyla Çözümlemesi [Amicable Resolution of Disputes in the Family Court]', Prof. Dr. A Gift for Yavuz Alangoya (Istanbul 2007) 91.

54 Harika Koltaş, Sulhte Yargısal Yükümlülük ve Sorumluluk (Judicial Obligation and Responsibility in Peace (unpublished master's thesis, Institute of Social Sciences 2016) 34.

55 BÖRÜ (n 50) 1050.

56 Cemre Atçeken, Türk Hukukunda Aile Arabuluculuğu [Family Mediation in Turkish Law (Karatay University 2021). 43.

57 Mustafa Serdar Özbek, Alternatif Uyuşmazlık Çözümü [Alternative Dispute Resolution] (Yetkin Publishing 2013) 75.

58 Sevdâ Yaşar Coşkun, 'Advantages and Disadvantages of Mediation in Family Disputes' in 9th International Social Sciences Conference in the Balkans: 43 (2019) 46.

59 İbrahim Özbay, 'Alternative Dispute Resolution Methods' (2006) 10 AUEFLJ 465.

60 Coşkun (n 58) 47.

also obliged to observe confidentiality in this respect."⁶¹ In a traditional judicial process, in an environment where a large number of people are present, the parties may not want some sensitive issues to be raised due to the nature of family relations; they may not be able to express them, or they may not want the other party to learn about them.⁶² Under these circumstances, it will not be possible to talk about a fair and permanent settlement of the dispute. Moreover, confidentiality in the mediation process is valid for the mediator and the parties, as well as for the third person or persons participating in the process.⁶³ Confidentiality is crucial in family mediation for continuity and achieving permanent solutions.⁶⁴ It ensures parties express disputes comfortably, without prejudice or blame, allowing for a comfortable and peaceful resolution without fear of falling out.⁶⁵

One of the advantages of family mediation is the impartiality of the mediator. Indeed, according to Article 9 of the Mediation Law, "The mediator shall fulfil his/her duty diligently, impartially, and personally. The person appointed as a mediator is obliged to inform the parties in the event of the existence of important circumstances and conditions that require doubting his impartiality. Despite this explanation, if the parties request the mediator together, the mediator may undertake this duty or continue the duty he has already undertaken. The mediator is obliged to observe equality between the parties. The mediator may not subsequently act as the lawyer of one of the parties in the lawsuit filed in relation to the dispute in which he has acted in this capacity."⁶⁶ Impartiality will be maintained by prohibiting the mediator from acting as a lawyer for any party in family disputes and from forming personal or professional connections with the parties before or during the mediation process.⁶⁷ The mediator must consider the power imbalance between parties and their equally interests in the mediation process, ensuring that the will of the parties to

61 Turkish Mediation Law in Legal Disputes, art 4.

62 Coşkun (n 58) 47.

63 Lisa Parkinson and N Robinson, *Family Mediation: Appropriate Dispute Resolution in a New Family Justice System* (Family Law 2011) 23 – 24.

64 Atçeken (n 56) 25.

65 Coşkun (n 58) 47.

66 (n 61) art 7.

67 Ugur Yaşa, 'The Necessity of Family Mediation in Preserving Family Integrity' (MS thesis, Institute of Health Sciences 2019) 40.

the dispute is the primary factor in resolving the dispute.⁶⁸ In mediation, parties can jointly decide on a solution, resulting in a psychological outcome where the decision taken through the mediation institution is adopted and internalized by the family, despite the traditional judicial process's lack of influence on the decision.⁶⁹

Mediation is a peaceful dispute resolution method that may not further deteriorate the parties' relations.⁷⁰ It addresses the lack of communication, which is the basis of most family disputes, allowing parties to better understand each other's feelings and thoughts.⁷¹ This, in turn, significantly improves the relationship between the parties involved.⁷²

The resolution of family disputes, which is an extremely sensitive area, through the mediation method carries some disadvantages in itself. Family mediation, despite its collaborative nature, can be susceptible to power imbalances within the family unit.⁷³ A dominant or abusive partner may pressure a vulnerable party to accept an unfavourable agreement, leading to coercion. This is especially harmful in cases of domestic violence or control. Family mediation relies on a shared willingness to compromise and reach collaborative solutions.⁷⁴ However, highly acrimonious disputes, abuse histories, or complex legal issues may not be suitable for mediation alone. Parties deeply entrenched in conflict may find it difficult to negotiate fairly, hindering the possibility of finding mutually agreeable solutions.⁷⁵ Complex legal matters, such as asset division, contested child custody arrangements, or legal agreement interpretation, may require court intervention to protect all involved rights and reach legally sound resolutions.⁷⁶

68 Süleyman Duran, 'Türk Aile Hukukundan Doğan Uyuşmazlıklarda Arabuluculuk [Mediation in Disputes Arising from Turkish Family Law]' (MS thesis, Izmir University of Economics 2022) 68.

69 Coşkun (n 58) 47.

70 Huriye Reyhan Demircioğlu, 'Aile Hukuku Uyuşmazlıkları Bakımından 6325 Sayılı Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu'nun Uygulanabilirliği [Applicability of the Mediation Law in Civil Disputes No. 6325 in Terms of Family Law Disputes] (2015) 6(23) TAAJ 48.

71 Duran (n 68) 69.

72 Coşkun (n 58) 47.

73 Demircioğlu (n 70) 49.

74 Coşkun (n 58) 48.

75 Yaşa (n 67) 41.

76 Tolga Akkaya, 'Boşanma Davasında Alınabilecek Geçici Hukuki Korumalar veya Hâkimin Müdahalesi Yoluyla Çocuğun Korunması Kapsamında Zorunlu Arabuluculuk ve Boşanma Süreci (Aile) Danışmanlığı [Compulsory mediation and divorce process (Family) counseling within the scope of temporary legal protections that can be obtained in the divorce case or the protection of the child through the intervention of the judge]' (2014) 4 ABJ 46.

Mediation in family law disputes is viewed as an attack on women's equality, as it fails to address women's rights issues.⁷⁷ It may make women invisible and deepen gender inequality. Women's rights experts argue that mediation may normalise violence against women, soothe them, and force couples to continue their marriages.⁷⁸ The mediation process is criticised for promoting men's power and independence, favouring the stronger party⁷⁹. There are concerns about the loss of women's rights and violations of their rights, as agreements between unequal parties often favour men. The inclusion of family law disputes in mediation puts women's security at risk, which mediators cannot provide and which the state should provide for women.⁸⁰ Additionally, divorce and violence against women will be considered "private matters" under family mediation.⁸¹

3.4. Family Justice in Türkiye: Promoting Fairness and Resolving Disputes

In recent work⁸² on access to family justice, the starting point and consistent focus of Türkiye's action plan about application of family mediation is on a wide range of legal issues faced by the public, not just those decided by the courts. The fact that it examines everyday legal problems through the perspective of families who are experiencing them is key to this understanding of the judicial system. Access to family justice in Türkiye has always been thought of as a term centred on the formal judicial system (courts, tribunals, lawyers, and judges) and its procedures.⁸³ However, the need for a broader, more user-centered vision for an accessible family justice system is being debated, particularly among legislators in Türkiye.⁸⁴ There is a need for a system that provides the necessary institutions, information, resources and services to prevent, manage and resolve family legal issues and disputes.

77 Coşkun (n 58) 49.

78 Demircioğlu (n 70) 49.

79 Akkaya (n 76) 46.

80 Coşkun (n 58) 49.

81 Coşkun (n 58) 50.

82 Seda Kalem Berk, 'Türkiye'de "Adalet Erişim" Göstergeler ve Öneriler' ['Access to Justice' Indicators and Recommendations] (2012) TESEV 13.

83 Lisa Moore, Nicole Aylwin, and Trevor CW Farrow, 'Canadian Access to Justice Initiatives: Justice Development Goals Status Report' (2017) CFCJ 46.

84 Kalem Berk (n 82) 3.

3.4.1. Access to Justice in Türkiye

Access to family justice is a concept that entered the field of law in the 20th century in the 2000s in Türkiye with the interest of researchers, non-governmental organizations and decision makers.⁸⁵ Although access to family justice is an area in Türkiye that has started to be discussed conceptually late, it has gained a lot of importance in recent years, especially in relation to the functioning of the judiciary. The growing significance of this matter is evident through the heightened attention from researchers and civil society, as well as the more thorough incorporation of the issue in governmental policies.⁸⁶ Despite the complexity of the conceptual framework developed around access to family justice in Türkiye, it is seen that the issue is approached within the framework of some basic issues in the studies and policies developed on the subject in Türkiye. For example, the increasing interest in the subject emerges as an understanding that equates access to family justice with access to judicial services in Türkiye.

In the Strategic Plan prepared by the Ministry of Justice for the period 2010-2014, access to family justice is defined as “the state providing all the necessary facilities and effectively promoting the existence of these opportunities so that all segments of the society can easily access the family justice they need and seek their rights effectively”⁸⁷. The Ministry also states “all individuals and families should be able to obtain the family justice they need and effectively seek their rights.”⁸⁸ The Turkish Ministry of Justice's definition of access to family justice is a positive step towards ensuring that all individuals and families in Türkiye have the opportunity to obtain the justice they need.⁸⁹

Access to legal services constitutes an area where women are disadvantaged in accessing justice. An important determinant of access to legal services is the difficulty of physical access to legal support, legal information and basic advisory services. Access to family justice in Türkiye is significantly hindered by the physical

85 Verda Irtis, 'Conflicting Values: Family Justice in Turkey Between "Modern" and "Traditional"' RHFJS (2013) EEP 215.

86 *ibid* 216.

87 Turkish Ministry of Justice, 'TC Adalet Bakanlığı Stratejik Planı 2010-2014 [Tr Ministry of Justice Strategic Plan] (2014).

88 *ibid*.

89 Ceylan Engin, Hazal Hürman, and Kimber Harvey, 'Marriage and family in Turkey: trends and attitudes' (2020) IHDMF 107.

difficulty of accessing the courts.⁹⁰ Therefore, in this section, first, information has been provided about the family courts and the office of family and religious guidance, which are crucial in family justice in Türkiye. Then, the challenges women encounter in accessing family justice has been addressed.

3.4.1.1. History of Family Courts

The first Family Court was established in Türkiye in 2003 under Law No. 4787 on the Foundation of Family Courts, they're Function, and the Proceedings of the Judgment. According to the Civil Code, these courts are responsible for problems like marriage, divorce, property ownership, paternity, adoption, and custody, as well as the recognition and enforcement of foreign court rulings (in conformity with International Private Law).⁹¹ In family courts, which were established to handle cases and works arising from family law, experts such as psychologists and pedagogues' work as assistants to the judge. These courts are responsible for cases involving Family Law, a section of the Civil Code revised in 2001.⁹²

Prior to the establishment of family courts in Türkiye, family law disputes and matters were handled in general courts (law courts of First Instance). These courts had to deal with other civil cases as well as family cases. These courts did not include psychologists, pedagogues and social workers that were currently working in family courts and were assigned to help minimize the negative consequences that may arise during and after the settlement of disputes. This situation prevented the general courts from fulfilling the function expected from them in resolving cases and matters arising from family law.⁹³ The establishment of family courts paved the way for legal specialization in the field of family law, and the level of contemporary legal systems, which aim to fulfil important functions such as taking protective, educational, and social measures to protect of the family.⁹⁴

90 Duygu Aydın Hatipoğlu, 'Kadınların Adalet Erişimi [Women's Access to Justice]' (2015) 4 ABJ 87.

91 Mavis Maclean, Benoît Bastard, and John Eekelaar, 'Delivering family justice in the 21st century' (2015) DFJ 21st Century 80.

92 *ibid* 86.

93 Aziz Serkan Arslan, 'Türk Aile Mahkemelerinin Yapısı ve Yargılama Usulü [Structure and Trial Procedure of Turkish Family Courts]' (2010) ABJ 189.

94 İzzet DOĞAN, 'Aile Mahkemelerinin Kuruluş, Görev ve Yargılama Usullerine İlişkin Yasaya Göre Aile Mahkemeleri [Family Courts According to the Law on the Establishment, Duties and Trial Procedures of Family Courts]' (2006) LLJ 48.

In Article 6 of the AMK, the legislator has tried to determine the protection measures to be taken for adults and minors separately. These mentioned protection in Article 6 measures fall under the category of temporary legal protection measures in terms of their legal nature, and they are among the temporary legal protection measures for regulatory purposes.⁹⁵ Also, concerning the procedural regulations, courts should encourage a "friendly settlement" before starting with a case to safeguard respect, tolerance, and mutual love within the family by addressing the challenges encountered by the spouses and children.⁹⁶ In specific cases, the court will seek the advice of specialists. The judicial procedure will continue if reconciliation cannot be reached.⁹⁷ This procedure to be applied in family courts is regulated in Article 7 of the AMK. According to this, "family courts determine the problems faced by spouses and children in terms of the protection of mutual love, respect and tolerance in the family, before going to the merits, according to the characteristics of the cases and works that come before them, and encourage their *sulh* (amicable resolution) by making use of experts when necessary. If a *sulh* cannot be reached, the trial continues and a decision is made on the merits."⁹⁸

The procedure to be applied in family courts is regulated in Article 7 of the Code on the Establishment, Duties and Judicial Procedures of Family Courts (FCC). Accordingly, 'Family courts, according to the characteristics of the cases and matters brought before them, before entering into the merits, identify the problems faced by the spouses and children in order to protect the mutual love, respect and tolerance within the family and encourage their solution through peaceful settlement, by making use of experts when necessary'.⁹⁹ If the court proceeds with the merits of the case without attempting to resolve it through settlement, it would be deemed a procedural violation as outlined in the article, and could serve as grounds for reversal.¹⁰⁰

95 *ibid* 49.

96 Maclean et al (n 91) 61.

97 *ibid*.

98 Bahattin Aras, "Aile Mahkemelerinde Taraflarin Sulh Yoluyla Çözümüne Teşviki [Encouragement of Parties to Settlement Through Peace In Family Courts]" (2004) YJ 303.

99 *ibid*.

100 Selma Baktir, Aile Mahkemeleri [Family Courts] (Yetkin Publishing 2003) 77.

If a settlement cannot be reached, the legal proceedings will proceed and a decision will be made based on the merits of the case.¹⁰¹ Mediation is a new provision that was added to the law with the FCC 2012, and it requires the court to make an effort to bring the parties together through negotiations.¹⁰²

Although family courts in Türkiye refer the parties to a *sulh* before the divorce, it is hard to say that institutionalised family resolution centre exists. But lately, mediation as ADR in court is starting to gain importance in family matters.¹⁰³ In addition, the policy debate on mediation in civil disputes began in 1998.¹⁰⁴ The legislative negotiation process took several years, with lawyers claiming to be the only professional group that could mediate.¹⁰⁵ As evidenced by the content of the 2012 Act, lawyers are the only people allowed to mediate, even if they need additional training after graduating from law school. In this case, despite all efforts, family mediation generally does not excite plaintiffs and is not sufficient to ensure full family justice (which has been discussed in more detail in the next section).

The most distinctive feature of family courts in Türkiye is that they are only responsible for dealing with cases related to family law. While resolving disputes, they are primarily designed to ensure peace between the parties, and they have the opportunity to benefit from expert assistance in resolving family disputes. Even while family courts in Türkiye are not yet fully organized in terms of technical infrastructure, legislation, and expertise, the establishment of these courts has been an important step in increasing access to family justice.

3.4.1.2. Family and Religious Guidance Offices

It is worth mentioning that another institution dealing with family issues that has been institutionalized since 2002 has come to the fore in access to family justice: Family and Religious Guidance Offices. These Offices have been established within the mufti offices since 2003, the year the first Family Court was opened, to contribute to the solution of the problems that occur in the family and to strengthen the family institution. In the Working Directive of the Family and Religious

101 Aras (n 98) 303.

102 Baktir (n 100) 77.

103 ibid 78.

104 Maclean (n 91) 63.

105 ibid.

Guidance Offices of the Presidency of Religious Affairs, the purpose of these offices is stated as follows:

To ensure that the society is correctly informed about the family from a religious point of view, to contribute to the protection of the family structure, to provide spiritual support services to strengthen family members against the risks and new problem areas they face as a result of social, economic and cultural changes, to provide religious guidance and spiritual support services in institutions and organizations affiliated to the Ministry within the framework of the protocol with the Ministry of Family and Social Policies, to contribute to the solution of the religious problems of our people, especially related to family and family members, to carry out joint studies with relevant public institutions and organizations, universities and non-governmental organizations when necessary, to organize programs with religious content in places such as student dormitories, youth centers, factories, etc.¹⁰⁶

The Directive outlines the working procedures and principles of Family and Religious Guidance Offices, which can be conducted face-to-face or via phone or email.¹⁰⁷ The personal situation and social structure of the interviewer should be considered, and confidentiality should be maintained. The offices should inform other institutions or organizations of issues of concern. They can also conduct informative and educational activities addressing large masses, not just families and spouses, but other groups in need of support. This cooperation indicates that these offices provide institutionalized services, as they cooperate with other institutions to provide support to various groups in need.¹⁰⁸

The operations in Family and Religious guidance Offices are not conducted randomly. Procedures are carried out systematically and with care to ensure that individuals and families receive the support and guidance they need under their

106 The Working Directive of the Family and Religious Guidance Offices of the Presidency of Religious Affairs, Art 5. (This Directive entered into force with the Presidential approval dated 23/07/2015 and numbered E.14480.)

107 *ibid* art 9.

108 Ahmet Kaşdıbi. 'Aile ve Dini Rehberlik Bürolarına Yapılan Başvurular Bağlamında Ailede Ortaya Çıkan Sorunların Analizi: İstanbul Örneği [Analysis of Problems Emerging in the Family in the Context of Applications Made to Family and Religious Guidance Offices: The Istanbul Example]' (2023) 12(2) İnsan ve Toplum Bilimleri Araştırmaları Journal 848.

specific circumstances. Certain criteria are considered when selecting personnel to perform these tasks.¹⁰⁹ These criteria include experience working with families and individuals, strong communication skills, and a commitment to upholding the values and beliefs of the religious organization.¹¹⁰ For example, the operations in these offices are primarily carried out by specialists who have participated in some training related to the field.¹¹¹ This sensitivity in the selection of staff is noteworthy in terms of the importance given to issues such as family in these offices.

Also, theology faculty graduates are employed in these offices. These are preferred among positions within the institution such as preacher, religious services and religious education specialist.¹¹² These officers, who serve in Family and Religious Guidance Offices, attend a training seminar on domestic violence, gender equality, child neglect and abuse, social service for families, women's health education, poverty and social improvement.¹¹³ This additional training equips them to support better individuals and families facing various challenges within their communities.

The Presidency of Religious Affairs, which defends and strengthens the family institution, established pilot Family and Religious Guidance Offices in six provinces in 2002.¹¹⁴ The pilots were launched in 15 provinces in 2003, 18 in 2006, 11 in 2007, 14 in 2008, three in 2009, and 15 in 2010. Since then, their numbers have continuously increased. In 2017, 81 provinces and 293 districts established Family and Religious Guidance Offices. These offices employ a total of 2,178 people, including 1,457 women and 721 men.¹¹⁵

In 2010, the Diyanet directive¹¹⁶ established the Family and Guidance Offices' goals, which include: a) providing religious guidance and information to families; b) contributing to the protection of the family structure; c) contributing to the resolution

109 ibid 849.

110 Hatice Kılınçer, 'Maneviyat yönelimli aile danışmanlığı: yaşantısal aile danışmanlığı çerçevesinde bir model önerisi [Spiritual Counseling and Guidance for Families: Family and Religious Guidance Offices]' (2023) 21(45) JVE 197.

111 Presidency of Religious Affairs Directive, Family Guidance and Guidance Offices Working Directive, No. 633, art 7 March 19, 2010 art 7.

112 Kılınçer (n 110) 198.

113 Omer Soylev, 'Religious Counseling And Guidance in Türkiye in the Context of Psychological Assistance Services' (2015) 1(2) JICS 289.

114 Maclean (n 91) 65.

115 Republic of Türkiye Presidency of Religious Affairs. General Directorate of Religious Services.

116 Directive (n 111).

of Türkiye's problems and questions, particularly those relating to the family, through religion; and d) working in collaboration with public institutions and civil society organizations for providing to family justice, if necessary. Furthermore, the number of male and female employees in these bureaus is equal, and the coordinator is a woman, usually a religious specialist.¹¹⁷

The Family and Guidance Offices' religious consultation on women's and family concerns is coordinated with lectures and panels given at mosques and local cultural centres. These seminars are usually arranged by female employees at local mufti offices to address the most common issues of women.¹¹⁸ In other words, the main target of these offices is children and women.

Religious guidance is promoted as the best way to happiness in Türkiye due to the structure and religious foundation of society. A healthy society requires healthy families. In this sense, divorce is considered a real danger that should be avoided at the first stage.¹¹⁹ The preservation and enhancement of the family institution are now stated in terms of bringing religious services to all segments of society and increasing their efficacy. It is underlined that religion is an important source of reference in Turkish society. Religious leaders, who have a recognized status in society due to their close association, are confronted with a plethora of applications that must be consulted.¹²⁰

The significant role of religious studies conducted on applications to Family and Religious Guidance Offices in spiritual counselling services is evident. However, the extent to which these offices contribute to addressing the issues of female clients remains unclear. Although some positive outcomes have been reported on an individual level, the absence of a systematic follow-up hinders obtaining precise information. Consequently, this thesis seeks to explore women's involvement in seeking justice and their ability to engage in Islamic family mediation, with a particular focus on conducting interviews with Family and Religious Guidance offices.

117 Hikmet Kocamaner, 'Regulating the family through religion: Secularism, Islam, and the politics of the family in contemporary Turkey' (2019) 46(4) AE 298.

118 *ibid* 299.

119 İbrahim Yılmaz 'The Legalization of the Arbitration Institution as a Preventive Measure the Divorce in Islamic Family Law' (2017) 339.

120 Maclean (n 91) 65.

3.4.1.3. *Examining the Need for Islamic Family Mediation Centres in Relation to Applications Submitted to Family and Religious Guidance Offices*

From the past to the present, religion, morality and legal rules have generally been determinants of family relations, including the solution of problems between spouses.¹²¹ Religious solutions are more advantageous due to the additional otherworldly sanctions for non-compliance, making them widely accepted by society.¹²² In many cases of problems or lack of solutions, religious sources, *hadiths*, clergy, religious teachings, people who have adopted a spiritual way of life, religious elders of the past, spiritual teachings and experiences of cultural norms can be consulted. Religion is a crucial reference for institutional relationships, particularly family, and can protect strong socially based institutions like marriage and family formation by gaining 'religious legitimacy', thereby enhancing the protection of these relationships.¹²³ From this point of view, in Türkiye, where the majority of the population is Muslim, the Family and Religious Guidance Offices studies that try to find solutions to family and especially inter-spousal problems based on religious principles are very important.

Applications to the Family and Religious Guidance Offices are shaped around five main topics, according to a general evaluation conducted by analysing the data group of those applications (*fiqh* questions, health, family, social situations, marriage-divorce-marriage).¹²⁴ Upon analysing the particular areas of concern, it is evident that the highest occurrence is attributed to "*fiqh* questions"¹²⁵, accounting for 45.7% of the total. The category labelled "marriage and divorce" has the highest proportion, accounting for 25.7% of the total. It is followed by the category

121 Uğur Yaşa and Hür Mahmut Yücer, Aile Bütünlüğünün Korunmasında Aile Arabuluculuğunun Gerekliliği [The Necessity of Family Mediation in Preserving Family Integrity], in II. Uluslararası İnsan Hakları - Ailenin Korunması Hakkı. Ankara Sempozyumu (Human Rights and Equality Institution 2019).

122 *ibid.*

123 Betül Hale Kaya, Aile içi sorun ve suçların önlenmesinde dini-ahlâkî değerlerin etkisi [The effect of religious-moral values in preventing domestic problems and crimes] (MS thesis, Necmettin Erbakan University 2021) 103.

124 Yasemin Angın and N. Altaş 'Aile ve Dini Rehberlik Bürosu Görevlilerinin Karşılaştıkları Psikososyal Sorunlara Yaklaşımlarının Dini Danışmanlık ve Rehberlik Açısından Değerlendirilmesi [Evaluation of the Approaches of Family and Religious Guidance Office Officers to the Psychosocial Problems They Encounter in Terms of Religious Counseling and Guidance]' (2018) 18(2) ÇUFTJ 665.

125 It means obtaining information about the provisions of Islamic law from its sources. These are questions that explain the religious-legal ruling of a *fiqh* issue.

"family"¹²⁶ with a percentage of 20.3%, "social situations"¹²⁷ with 4.2%, and "health"¹²⁸ with 4.1%.¹²⁹

The Family and Religious Guidance Offices primarily focus on addressing the needs and challenges faced by women within families.¹³⁰ According to research, women are the segment of society that benefits the most from the service.¹³¹ The applicants for The Family and Religious Offices consisted of 13,586 women and 2,302 men out of 15888, highlighting a significant female majority.¹³² Women are more likely to face these issues, experience victimization, and actively seek solutions.

This is possibly because in Turkish society, the conventional concept of masculinity places importance on emotional restraint and stoicism, valuing the ability to remain composed and exhibit self-control when confronted with difficulties.¹³³ This cultural ideal of the "strong man" discourages men from openly expressing vulnerability or seeking help for emotional difficulties, including those related to family problems.¹³⁴ The impact of this cultural expectation extends beyond individual help-seeking behaviour. Men experiencing marital or family problems may be reluctant to confide in friends or family due to the fear of being perceived as weak or incapable. This can result in social isolation and a lack of support networks, further hindering help-seeking and potentially exacerbating existing difficulties.¹³⁵ Additionally, the low utilization of family counselling services suggests a general hesitance among men to engage in open discussions about family issues within a

126 These are issues such as domestic violence, family communication and family worship life.

127 These topics are superstition and suicide.

128 These topics are abortion, bad habits, psychological problems and different sexual preferences.

129 A detailed table can be found in Appendix C.

130 Angın and Altaş (n 124) 664.

131 Presidency of Religious Affairs, 'Diyanet İşleri Başkanlığı 2016 Yılı İdare Faaliyet Raporu [Presidency of Religious Affairs 2016 Administration Activity Report]' (2016).

132 Family and Religious Guidance Offices Presidency unpublished chart data (2023).

133 Sıtkı Yıldız, Aynur Tekke, 'Türk Toplumundaki Erkeklik Yüklerinin Lisansüstü Tezler Üzerinden Analizi [Analysis of Masculinity Harnesses in Turkish Society Through Graduate Theses]', (2020) JSCS 137.

134 Elif Sarıca Darol, Alperen Karapınar, 'Cinsiyet ve Medeni Durum ile Stres Zemininde Oluşan Bazı Hastalıkların İlişkisi [Gender and The Relationship Between Marital Status and Some Stress-Based Diseases]', (2022) 12(2) RA 266.

135 ibid 267.

professional setting.¹³⁶ Based on interviews and the number of applications, these offices are preferred as a solution centre. This indicates their significant positive contributions to the problems. Marriage and divorce involve notions of familial honour and shame and are consequently confined to the private spheres of the family and home. The consequences of discussing private issues through what is ultimately seen as a public forum can have detrimental effects on women and their families as the following views of interviewees shows.

We understand that divorce can be a difficult decision for many women, especially from a spiritual perspective. We strive to create an environment where individuals can openly discuss their faith concerns and explore how their religious beliefs influence their decision-making. That's likely the reason why women seek our support when going through a divorce. (K9)

Women in divorce are the ones who come to us the most. Our approach is based on Islamic teachings of compassion and understanding. For women struggling with the idea that divorce is against their faith, we offer guidance from the Qur'an and *hadith*, providing a framework for making this difficult decision in a manner consistent with their faith. (K8)

Women often feel immense pressure to preserve the family unit, even in harmful situations. Religious counselling centres can provide a counterbalance – assuring these women that their faith supports their safety and well being, even if divorce becomes the necessary path. (K10)

The interviews conducted at Family and Religious Guidance Offices in Ankara, Bursa, and Istanbul emphasize the important role these institutions play in supporting Muslim women in navigating the complexities of divorce. The focus of the religious counsellors on compassion, Islamic teachings, and personalized guidance fosters an atmosphere in which women can reconcile their faith with the challenging choice to end a marriage. The interviews underscore the significance of

136 Mehmet Meder and Türkan Erdoğan, 'Boşanma Olgusunun Sosyolojik Analizi: Denizli'de Uygulamalı Bir Araştırma (Sociological Analysis of the Phenomenon of Divorce: An Applied Research in Denizli)' (2013) 54.

culturally and religiously sensitive support in empowering women to navigate challenging life transitions while maintaining their spiritual welfare.

Family and Religious Guidance Centre's provide valuable support to women seeking spiritual guidance during divorce. However, their scope may be limited as they often lack the comprehensive conflict resolution and negotiation offered by professional family mediation like Sharia Councils. The principles of active listening are extremely important in the context of family mediation. A mediator's ability to use techniques such as focused eye contact, open-ended questions and reflective statements facilitates the exploration of the underlying causes of family disputes by promoting a sense of trust and understanding.¹³⁷ This client-centred approach ensures that all parties involved feel listened to and valued. This approach contrasts with situations where mediators may exhibit interruptive behaviour or prioritise personal anecdotes, potentially hindering resolution. The interviews conducted in the Family and Religious Guidance Offices show that sometimes, but not always, there is an erroneous approach to the issue.

Although we are provided with information and seminars on the issues we should pay attention to in our meetings with applicants, our support is based on religious rather than legal grounds. Since we do not have a legal background, we provide spiritual counselling rather than mediation services. (K3)

Dealing with the challenges women face during the divorce process, spiritual counselling stands out as a particularly tough issue for me. Perhaps there are countless reasons behind divorce, but people often mention just one. It has been reported that there is a significant issue at hand. As they don't see us as mediators, they are not willing to disclose everything. (K7)

As an illustration, a client who sought assistance from the Family and Religious Guidance Office expressed her intention to depart from her residence because of conflicts with her spouse. However, instead of attempting to comprehend the underlying motivations behind her desire, the religious office personnel simply

137 *ibid.*

replied "a prudent woman does not abandon her home."¹³⁸ A different client expressed dissatisfaction with her husband's inadequate financial support, which failed to fulfil her requirements. The religious office personnel remarked to the individual, " If men weren't thrifty, women would have financial difficulties. We'd have neither a home nor a car." She referred to more severe instances of violence and recommended that she appreciate her current circumstances.¹³⁹ It is feasible to replicate comparable instances. If the advice provided, even with well-meaning intentions, fails to address the needs of the other person or is unrelated to their situation, it cannot only be unhelpful but also damage the counselling relationship.

The goal of family mediation is to empower clients to understand their experiences, evaluate their choices, and make informed, dynamic decisions that foster improvement.¹⁴⁰ In certain family and religious guidance offices, however, employees might not follow a methodical counselling process and instead provide cursory advice. This is evident in cases where clients expressing complex marital difficulties are given simplistic responses such as "Your duty is to accept him as he is" or "Do not disturb your peace... by examining these issues." Such responses prioritise immediate conflict resolution over guiding the client towards self-awareness and developing effective decision-making skills. This highlights a critical distinction between offering quick-fix solutions and facilitating a deeper understanding that supports sustainable change within the family dynamic. The fact that a client shares their problem with a religious official means that they want to solve their problem with the basic references of religion, but this should not be the method used in the counselling relationship. Interview responses highlight a lack of training and expertise in family mediation among religious counsellors, emphasizing the need for specialized training and a clearer distinction between spiritual guidance and legal or therapeutic interventions. As the following quotations reveal, counsellors who were interviewed acknowledging their limitations and the potential

138 Family and Religious Guidance Offices in Bursa, Female Religious Counsellor, 26.09.2023.

139 Dib, (2009). Notes for Family Guidance and Guidance Bureau Officials (11-22 May 2009 Family Guidance and Guidance Bureau Officials Seminar). Directorate of Religious Services, Guidance Services Branch Directorate. Ankara Presidency of Religious Affairs.

140 Hasan Tan, 'Psikolojik Danışma ve Evlilik Sorunları [Psychological Counseling and Marriage Problems]' (1976) 12 PS 103.

need for referrals to specialists highlights a growing awareness of the complexities of family mediation and a commitment to client well-being over rigid boundaries.

We may not find the answer to every question. We may not have the expertise to offer complete solutions in all situations, especially in complex areas such as family mediation. Our staff are not authorised or equipped to offer counselling or legal assistance in those cases. We are now concentrating on providing assistance in accessing suitable resources. (K6)

We are often in touch with women's problems at the time when they decide to divorce, but we realised that we were making mistakes in some areas. For example, we should not comment. You know, just listening to their ideas, repeating them, and reminding them of what they said. Honestly, I don't think that such training is enough. I mean, if it is necessary to do this, I think there is a need for extra family mediation training. (K9)

When it comes to divorce or issues between spouses, there are situations that can be difficult to handle. At times, professional mediation may be necessary to address certain issues. Therefore, we can guide these families towards more skilled and specialised professionals. Similarly, there may be occasions when we feel inadequate. (K8)

Although we are provided with information and seminars on the issues we should pay attention to in our meetings with applicants, our support is based on religious rather than legal grounds. Since we do not have a legal background, we provide spiritual counselling rather than mediation services. (K3)

These counsellors understand the importance of providing spiritual guidance and support, but they also recognise the complexities of family disputes and the need for specialised expertise in mediation. As a result, data takes a proactive approach by emphasising on going professional development for counsellors and establishing referral pathways to qualified mediators and legal professionals.

The effectiveness of Islamic family mediation, particularly for women, can be significantly enhanced when the mediator shares the client's religious beliefs and values. This is especially true for women seeking guidance within an Islamic framework. The results of the interviews with family and religious guidance counsellors indicate that people going through a family disputes and experiencing psychological issues typically need counsellors who are understanding and respectful of their religious convictions. Religious beliefs can offer individuals a sense of meaning, purpose, and comfort during challenging times.¹⁴¹ Women involved in Islamic family disputes can benefit from a female mediator who deeply understands of Islamic principles to facilitate open communication in a safe environment. This shared understanding allows the mediator to recognise important elements that might be missed by individuals unfamiliar with Islamic traditions and beliefs. Furthermore, a mediator who respects Islamic values avoids inadvertently challenging the client's religious identity, which can be a major barrier to seeking help.¹⁴²

Female clients with religious sensitivity find it more comfortable to talk about family issues with other women because of gender-specific communication styles and cultural conventions. Women are usually socialized to be more open about their feelings and personal experiences, fostering a supportive atmosphere for addressing sensitive issues with fellow women.¹⁴³ Religious considerations enhance this inclination, with various religions providing guidance on modesty, gender roles, and suitable male-female interactions that impact the ease of female clients.¹⁴⁴ By fostering an environment of shared values and religious sensitivity, Islamic family mediation can create a more therapeutic space for women navigating complex family issues.

3.5. Access to Justice for Women in Türkiye

Women encounter various challenges stemming from legal, institutional, and structural factors that are pervasive in nature. One of the aforementioned factors is

141 Allen E. Bergin and P. Scott Richards, *A Spiritual Strategy for Counseling and Psychotherapy* (American Psychological Association 2005) 16.

142 *ibid* 18.

143 Deborah Tannen, 'You Just Don't Understand: Women and Men in Conversation' (1990).

144 Doug Oman and Carl E. Thoresen, 'Do Religion and Spirituality Influence Health' (2005) *HPRS* 439.

the "discriminatory legal framework".¹⁴⁵ Typically, national legislation lacks provisions that safeguard women against discriminatory practises and acknowledge their entitlement to fundamental rights. The Committee acknowledges the importance of acknowledging and ensuring women's access to justice at both the substantive legal and legislative levels, as well as through formal and informal justice mechanisms.¹⁴⁶ The second group of barriers is "institutional and procedural barriers".¹⁴⁷ The plurality of legal mechanisms and systems can be an obstacle to women's access to justice. Officials such as judges, prosecutors, police, and lawyers in charge of judicial processes do not show sufficient sensitivity to violations of women's rights.¹⁴⁸ Especially at the beginning of the judicial process, the weakness of the police, prosecutors and institutions hinders access to justice, and cursory investigations, evidence collection, etc are concrete examples of this.

The concept of access to justice encompasses various dimensions, connecting the safeguarding of fundamental rights with the efficient delivery of justice services to individuals, irrespective of any form of discrimination, including gender. Disadvantaged groups who experience discriminatory treatment in society and face unfavourable physical, social, and economic circumstances encounter challenges and barriers when seeking access to justice.¹⁴⁹ In the context of Türkiye, women are considered to be part of the marginalised population due to the presence of gender-based discrimination, limited access to education, and the prevalence of poverty.¹⁵⁰

According to the United Nations, Türkiye has made important legal and policy reforms to prevent and respond to violence against women and girls, but these fall short of its full capacity, potential, and responsibilities to protect women and girls living on Turkish soil and do not correspond to the gravity of the situation.¹⁵¹ Lack of linkages between different authorities and services, legal services with poor

145CEDAW, 'Access to Justice - Concept Note for Half Day General Discussion' (January 2013) 10.

146 *ibid.*

147 *ibid.*

148 *ibid.*

149 Louis Schetzer and Judith Henderson, *Access to Justice and Legal Needs* (Law and Justice Foundation of New South Wales 2003) xiv-xvi.

150 Kadriye Bakırcı, 'Kadınların Şekli ve Maddi Adalet Erişiminde Sosyal ve Ekonomik Hak Olarak Adli Yardım Hakkı [The Right to Legal Aid as a Social and Economic Right in Women's Access to Formal and Material Justice]' (2023) 47(1) MJ 289.

151 Türkiye: Stemming Tide of Violence Against Women and Girls Should be Priority <www.Ohchr.Org/En/Press-Releases/2022/07/Turkiye-Stemming-Tide-Violence-Against-Women-And-Girls-Should-Be-Priority> accessed on 10 October 2023.

knowledge, skills and commitment, and community members who tend to normalise violence are some of the barriers preventing women from seeking help to access justice, despite the protection provided in gender-based violence legislation.¹⁵²

The legal aid mechanism, a prominent aspect of access to justice initiatives, serves a crucial function in facilitating women's unrestricted access to legal information and representation.¹⁵³ Legal aid, in its most basic sense, refers to the provision of complimentary legal assistance to individuals who lack financial resources. The Legal Profession Act governs¹⁵⁴ legal aid in the Turkish legal system, primarily offering legal assistance to individuals who lack the financial resources to afford legal representation and cover the expenses associated with legal proceedings.¹⁵⁵

Given the existing barriers that hinder women's access to justice, particularly those of an economic nature, legal aid can be regarded as a crucial instrument in mitigating this impediment. However, it is widely acknowledged that these arrangements do not consistently fulfil their intended objective of enhancing women's access to justice.¹⁵⁶ The 2014 Progress Report on Türkiye by the European Commission highlights the enhancement of access to justice in Türkiye as a result of the implementation of legal aid regulations. Nevertheless, despite efforts made, the aforementioned enhancement was deemed inadequate. Lack of public awareness of legal aid, especially in rural areas and among disadvantaged groups, has been identified as a challenge.¹⁵⁷ This can hinder individuals from accessing the legal aid services they need. Also, the legal aid system in Türkiye has been noted to have unattractively low fees for experienced lawyers, which can affect the quality and

152 *ibid*; The obstacles faced by women will be discussed in detail in section 3.4.2.

153 Berk (n 82) 41-42.

154 Attorneyship Act No. 1136. The Legal Profession Act in Türkiye establishes a legal aid system to help individuals who cannot afford legal services and court costs. The system operates through Legal Aid Bureaus across Türkiye's 81 provinces, determining eligibility based on income, assets, and the nature of the legal issue. Eligible individuals receive free legal representation, advice, and court fees. However, legal aid does not cover all legal matters or guarantee a specific outcome. Non-governmental organizations and private lawyers may offer pro bono services or flexible payment arrangements. The Act aims to level the playing field and protect individual rights.

155 Legal aid in criminal cases is regulated separately from the Law on Lawyers. In certain cases specified in the Criminal Procedure Code, bar associations may appoint a defence counsel within the Criminal Procedure Code Implementation Services. The subject of this report is legal aid in civil proceedings, which is dealt with in the CPL and the Law on Attorneys.

156 Berk (n 82) 6.

157 European Commission, Türkiye 2014 Progress Report.

availability of legal representation.¹⁵⁸ Consequently, the subsequent section of the report emphasised the necessity to enhance and refine the extent of legal aid, as well as implement measures to effectively monitor its provision.¹⁵⁹ The subsequent sections provide a detailed examination of the challenges associated with accessing legal aid.

This section examines how these organisations provide services to women who try to meet their legal needs and solve their problems with the support of civil society instead of the bar association, which also provides legal aid services, how well the services provided meet their legal needs and the state of relations between the Bar Association and NGOs. In the first part of the section, the issue of access to justice and women has been discussed conceptually, and in the following part, the problems identified locally have been evaluated.

3.5.1. Ensuring Access to Justice: The Role of Legal Aid Mechanism

Pursuing access to justice, a fundamental principle within legal systems necessitates a multi-faceted approach. While various methods can contribute to achieving this goal, scholarly literature frequently emphasises the crucial role of legal aid in ensuring equitable access to legal representation and the justice system as a whole.¹⁶⁰ As in every field, marginalised populations encounter greater challenges in obtaining legal assistance, a fundamental resource for attaining equitable access to the justice system.¹⁶¹

Legal aid refers to the provisional exemption granted to individuals lacking adequate financial resources, allowing them to be exempt from legal fees and associated costs in civil and administrative proceedings upon formal request.¹⁶² The European Commission on the Efficiency of Justice (2014) defines legal aid as "assistance provided by the state to persons who lack sufficient financial means to

158 Duygu Hatipoğlu Aydın and Mustafa Berkay Aydın, 'The Gender of Justice System: Women's Access to Justice in Turkey' (2016) 47 IJLCJ 78.

159 Türkiye 2014 Progress Report, 46

<www.ab.gov.tr/files/ilerlemeRaporlariTR/2014_ilerleme_raporu_tr.pdf>accessed on 5 July 2023.

160 Berk (n 82) 19.

161 ibid 40-41.

162 A. Yakar-Önal, *Toplumsal Cinsiyete Duyarlı Bütçeleme* (CEİD Publishing 2021) 23.

defend themselves in a court case or to bring a lawsuit".¹⁶³ For this reason, legal aid is considered as a fundamental right that ensures the realisation of de facto and de jure equality before the judicial and enforcement bodies and is related to the law of social justice.¹⁶⁴

Upon initial examination, the aforementioned definition may imply that the Commission views legal aid solely as a mechanism to guarantee individuals' ability to enter the judicial system. Nevertheless, subsequent sections of the report do acknowledge additional forms of support that qualify as legal aid, beyond the mere facilitation of court access.¹⁶⁵ These encompass various forms of support that are designed to facilitate individuals' access to legal counsel, legal knowledge, and alternative methods of resolving conflicts.¹⁶⁶

Currently, the primary challenges impeding access to justice revolve around insufficient legal understanding and representation.¹⁶⁷ According to statistics, a sizable portion of women in particular face barriers when attempting to access free legal aid, such as gender-based or subjective assessment of their claims, evidentiary difficulties, women's lack of knowledge about their rights and available legal remedies, and burdensome procedural requirements and document requests.¹⁶⁸¹⁶⁹ Individual services primarily concentrate on delivering direct legal aid to individuals, encompassing legal counsel, advocacy, and facilitation of negotiations.¹⁷⁰ In contrast, public legal education endeavours to provide the general public with knowledge pertaining to their legal entitlements and obligations, alongside the various legal avenues and provisions at their disposal.¹⁷¹ Legal aid can have a substantial impact on facilitating women's empowerment and their strategic pursuit of justice. Through

163 CEPEJ Report on "European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice", 68 <www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf> accessed on 18 July 2023.

164 Meral Sungurtekin Özkan, 'Anayasal şikâyet ve adalet erişim [Constitutional complaint and access to justice]' (2014) 16 DEUFLJ 399.

165 *ibid* 401.

166 *ibid* 402.

167 EU Twinning Project, 2016.

168 Gülriz Uygur and Eileen Skinnider, 'Understanding barriers to women's access to justice and legal aid in Türkiye' (Council of Europe 2022) 15.

169 However, it is essential to note that men can also face challenges in accessing legal services, such as income thresholds, which can pose a higher access barrier to single men living in poverty than women. Additionally, men may benefit more from legal aid in criminal matters, as they are more likely to face criminal charges than women. (OECD, Equal Access to Justice (2015) 5).

170 *ibid*.

171 *ibid*.

the provision of essential information, resources, and support, legal aid can assist women in making well-informed decisions and undertaking suitable actions to effectively address their legal obstacles. Public legal education has the potential to enhance the empowerment of women by providing them with the necessary knowledge and skills to proficiently navigate the legal system.¹⁷² The provision of legal aid facilitates the attainment of justice for individuals who are economically disadvantaged, socially marginalised, or facing various forms of disadvantage. Legal aid helps these persons navigate the justice system, which can be complicated and overwhelming.¹⁷³

The European Convention on Human Rights (ECHR) plays a crucial role in safeguarding the right to a fair trial, enshrined in Article 6.3 for criminal proceedings and Article 6.1 for civil and criminal cases.¹⁷⁴ The allocation of legal aid by governmental entities enhances the probability of clients benefiting from the assistance of legal professionals at reduced or no cost, as well as obtaining financial support during court proceedings.¹⁷⁵

The objective of legal aid service systems should encompass not only the improvement of justice systems, including law enforcement agencies, but also the promotion of accountability and the preservation of the rule of law.¹⁷⁶ This means that legal aid programs should not only aim to improve access to justice for all, including members of vulnerable groups, but also ensure that those who violate the law are held accountable for their actions.¹⁷⁷

In the United Nations document regulating the principles and guidelines of access to legal aid in the criminal justice system, special provisions have been established for women, children and some other groups due to their need for

172 OHCHR, 'A Practitioner's Toolkit on Women's Access to Justice Programming, MODULE 1: The Theory and Practice of Women's Access to Justice Programming', (2017) 57.

173 Access to Justice Project Legal Aid Committee Report 2015, 5, <www.adrcenter.com/international/Legal_Aid_Committee_Report.pdf>, accessed on 17 July 2023.

174 UNODC, 'Access to Legal Aid', <www.unodc.org/unodc/en/justice-and-prison-reform/legal-aid.html> accessed on 29 September 2023.

175 European Commission on the Efficiency of Justice, 'Legal aid', <<https://www.coe.int/en/web/cepej/legal-aid>> accessed on 29 September 2023.

176 Uygue and Skinnider (n 168) 14.

177 *ibid*.

additional protection or their vulnerable position.¹⁷⁸ Pursuant to Article 10 of the document, which regulates the principle of equality in access to legal aid, disadvantaged segments of society with different needs should be ensured to benefit from legal aid and necessary measures should be taken for this purpose.¹⁷⁹ Article 9, which include an instruction on the situation of women, states that States are obliged to take the necessary measures to ensure women's access to legal aid.¹⁸⁰ Accordingly, legal assistance, advice and other support services should be provided to women in order for them to access justice and to prevent possible victimisation.

The constitutional framework serves as the primary source for establishing the legal foundation of the legal aid regulation within the Turkish legal system. The article that governs the entitlement to a just and equitable trial encompasses legal aid in the ECHR, of which Türkiye is a signatory. As per the ECtHR, which provides guidance to member states on the interpretation of the provisions of the Convention through its legal decisions, the provision of legal aid in civil and administrative law disputes is considered to be encompassed within the "right of access to a court" as outlined in Article 6/1 of the Convention.¹⁸¹

Everyone has the right to have his case heard within a reasonable time, in fairness and in open court by an independent and impartial tribunal established by law, which shall decide on disputes concerning his civil rights and obligations as well as on criminal charges against him. The judgement shall be delivered in open session; provided, however, that in the interests of public morality, public order and national security in a democratic society, the protection of minors or the confidentiality of the private life of the parties to the proceedings, or in special cases where the administration of justice would be prejudiced by an open session, the proceedings may, to the extent that the court considers it necessary, be

178 United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, <https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf> accessed on 15 July 2023.

179 *ibid.*

180 *ibid.*

181 The "right to court" is implicitly recognised in the Article. See: *ibid.*

closed to the press and the public for the whole or part of the duration of the trial.¹⁸²

Article 36 of the Turkish Constitution guarantees the right to a fair trial, which includes the ability to retain legal counsel, and this principle is at the heart of Türkiye's dedication to legal aid.¹⁸³ Bar associations in Türkiye play a crucial role in implementing these legal principles by supporting legal aid.¹⁸⁴ The Legal Profession Act (Law No. 1136) provides a comprehensive framework, establishing eligibility criteria, outlining the scope of services, and mandating the establishment of legal aid bureaus within each of Türkiye's 81 provincial bar associations.¹⁸⁵ These bar associations play a crucial role in processing applications, assigning cases to lawyers, and ensuring the overall quality of services provided.¹⁸⁶

The significance of providing access to legal aid for women in Türkiye within the framework of "justice for all" has been highlighted internationally.¹⁸⁷ The Annual Report on Türkiye by the European Union (EU) for the year 2020 emphasised the necessity for enhancements in the provision of legal aid services, the promotion of gender equality, and the evaluation and mitigation of gender-based violence.¹⁸⁸ In 2020, the European Commission stressed the need for Türkiye to adopt a gender equality framework and address gender inequality by ensuring that procedural rights, such as legal aid, are in line with European standards.¹⁸⁹ These international perspectives denote their deep interconnectedness with broader global efforts to improve legal aid to promote access to justice and gender equality.¹⁹⁰

Additionally, the Judicial Reform Strategy, the National Human Rights Action Plan, and the 2021-2025 Fourth National Action Plan on Combating Violence Against Women have the objective of enhancing the availability and responsiveness

182 Article 6: Right to a Fair Trial (1).

183 S Akço Bilen et al, *Adalet Erişim İçin Yerelden Öneriler* [Local Suggestions for Access to Justice] (TESEV 2015) 10.

184 Adem Ceren and Tefik Erdem, 'Poverty and Social Assistance Practices in Türkiye' (2018) 2(1) MUSSIJ 8.

185 *ibid* 9.

186 *ibid*.

187 The United Nations places significant emphasis on the importance of guaranteeing equitable access to justice for all individuals, including women and marginalised populations, as demonstrated by initiatives such as the Sustainable Development Goals (SDGs), particularly Goal 16, which focuses on "Peace, Justice, and Strong Institutions."

188 Uygur and Skinnider 16.

189 *ibid*.

190 *ibid* 17.

of legal assistance and support services for women in Türkiye.¹⁹¹ These services are specifically designed to meet the needs of women. The Fourth National Action Plan, for example, has a chapter devoted to women's access to justice, highlighting the importance of having easy access to legal aid services for women.¹⁹² Gender-sensitive measures in the legal aid system¹⁹³ need to be integrated into policies and practises, despite the existence of standards developed by civil society organisations (CSOs) and this initiative on access to justice in Türkiye signalling a commitment to improving women's access to justice.¹⁹⁴

According to the Istanbul Bar Association's Working Report of the Board of Directors, the most common legal aid applications in 2012 dealt with divorce, alimony, and the application of Law No. 4320, which is designed to protect the interests of the family.¹⁹⁵ The law underwent a shift in 2013 and 2014, the implementation of Law No. 6284, which focuses on safeguarding the family and preventing violence against women, along with the corresponding enforcement measures. The law incorporates provisions for pre-emptive and safeguarding actions designed to compel individuals who commit acts of domestic violence to cease all forms of harassment and mistreatment.¹⁹⁶ These measures include restraining orders that prohibit alleged perpetrators from approaching or communicating with the victim. During the period spanning from 2012 to 2014, there were 5,284 male applicants and 23,659 female applicants for such orders.¹⁹⁷

Another important advancement in relation to the provision of legal aid services and the facilitation of women's access to such mechanisms is the integration of the women's rights centres affiliated with the Istanbul and Izmir bar associations,

¹⁹¹ *ibid* 15.

¹⁹² For details, see General Directorate on the Status of Women IV. National Action Plan on Combating Violence against Women (2021-2025).

¹⁹³ This encompasses accessibility considerations such as flexible service provision and language sensitivity. It further includes training legal aid providers in gender-based violence, trauma-informed approaches, and the complexities of gendered power dynamics. Finally, legal literacy campaigns focused on women's rights and collaborations with women's organisations aim to raise awareness and challenge harmful stereotypes. (Senem Elçin Berber et al., Support to the Improvement of Legal Aid Practices for Access to Justice for All in Türkiye Project (ILAP/Legal Aid Phase II) (2021) 64).

¹⁹⁴ OHCHR, "Türkiye: Stemming tide of violence against women and girls should be priority, says UN expert," <<https://www.ohchr.org/en/press-releases/2022/07/turkiye-stemming-tide-violence-against-women-and-girls-should-be-priority>> accessed on 8 September 2023.

¹⁹⁵ Istanbul Bar Association, Working Report of the Board of Directors, (2012).

¹⁹⁶ OHCHR (n 194).

¹⁹⁷ Istanbul Bar Association Board of Directors Working Report 2012-2014, 400-401.

which are among the most prominent bar associations in Türkiye, with the existing legal aid centres.¹⁹⁸ The Istanbul Bar Association Women's Rights Centre was founded in 1995 as a women's rights organization, a first of its kind, and has continued to offer legal aid as a centre so that it can respond more quickly and effectively to women's complaints.¹⁹⁹ However, in 2008, the Centre was incorporated into the Legal Aid Centre of the Istanbul Bar Association, which meant that many of the women lawyers working at the Women's Rights Centre who specialised in women's issues had to be added to the legal aid list.²⁰⁰ This meant that female complainants applying for legal aid had to be assisted by a lawyer appointed from a list, which meant that women victims were less likely to have access to the specialist female lawyer they preferred to meet with.²⁰¹ In 2003, the Izmir Bar Association Women's Rights Centre was shut down due to the justification that the Bar Association's "public service office" was already in operation and effectively fulfilling the same role.²⁰² In a socio-cultural environment characterised by high levels of violence against women and a prevailing lack of effective and functional mechanisms to prevent their victimisation, the restriction of legal aid services offered by proficient lawyers, who play a crucial role in facilitating women's access to justice²⁰³, presents a significant challenge in terms of ensuring equitable access to the legal system.

The Ankara Bar Association's Gelincik Centre is seen as an example of a specialist organisation providing legal aid and other services to women victims and a hotline for victims. The establishment of the Gelincik Centre was initiated by the

198 Uygur and Skinnider (n 168) 34.

199 Koyuncuoğlu, 'Baro'da Gönüllü Avukatlar [Volunteer Lawyers at the Bar Association]', *Radikal*, 25 Ocak 2009

www.radikal.com.tr/Radikal.aspx?aType=EklerDetay&ArticleID=918351&CategoryID=42 accessed 10 October 2023.

200 For the decision of the Board of Directors of the Istanbul Bar Association, see. www.istanbulbarosu.org.tr/Detail.asp?CatID=1&SubCatID=1&ID=3821 accessed on 10 October 2023.

201 Ayata Gökçeççek, 'Kadınların adalete erişimi: Mevzuat, engeller, uygulamalar ve sivil toplumun rolü [Women's access to justice: Legislation, obstacles, practices and the role of civil society]' unpublished master's thesis, Istanbul Bilgi University, Institute of Social Sciences, Law Master's Program (2009) 100.

202 *ibid.*

203 Official data, which covers only women in civil marriages, shows that 39% of women in Türkiye have been victims of physical violence at some point in their lives: General Directorate on the Status of Women, 2009, "Research on Domestic Violence against Women in Türkiye Summary Report", www.ksgm.gov.tr/Pdf/siddetarastirmaozetrapor.pdf accessed on 23 December 2023.

Ankara Bar Association with the primary objective of offering pro bono legal consultation services to women who have experienced instances of violence.²⁰⁴ In addition to the provision of legal aid, supplementary services are accessible, including counselling and assistance provided by psychologists and social workers.²⁰⁵ The Gelincik Centre offers a range of training programmes to women, as part of its collaboration with the Federation of Women's Associations of Türkiye (TKDF) and Ankara Bar Association. These programmes cover a variety of topics including legal rights, legal procedures, as well as challenges and potential remedies.²⁰⁶

Understanding the various strategies employed by women and their interactions with the legal system when confronted with challenges and the need to seek legal remedies is of significant importance. Women in Türkiye often turn to non-governmental organisations (NGOs) for assistance when they face legal issues, particularly those involving family law, even though the bar association in Türkiye is responsible for providing legal aid services..²⁰⁷ In 2012, the TESEV Democratisation Programme convened a gathering in Konya with various women's rights associations.²⁰⁸ During the meeting, participants representing various associations underscored the challenges encountered when collaborating with other civil society organisations to address barriers hindering women's access to justice. Women tend to seek resolution for their legal issues through non-governmental organisations, as opposed to the bar association or the courts, is a noteworthy aspect in assessing the influence of law and justice mechanisms on women's lives.²⁰⁹ For instance, the Counselling Centre of the Van Women's Association (VAKAD) offers both psychological and legal aid to women. Nevertheless, a significant issue that arises is the lack of legal representation and absence of legal information support in

204 Lale Incesu, 'Bir Gönül Projesi : Gelincik [A project of the Heart: Gelincik]' (2015) ABJ 306.

205 *ibid.*

206 Uygur and Skinnider (n 168) 87.

207 İdil Elveriş, Galma Jahic, and Seda Kalem, *Mahkemede Tek Başına: İstanbul Mahkemeleri'nde Müdafiliğin Erişilebilirliği ve Etkisi* [Alone in Court: Accessibility and Impact of Advocacy in Istanbul Courts] (İstanbul Bilgi Üniversitesi 2007) 13.

208 Bilen et al (183) 21.

209 *ibid.*

organisations outside of the bar association.²¹⁰ Civil society organisations are currently facing a notable dearth of legal information and legal professionals.²¹¹

In this context, a large number of family associations and some other organisations meet this need in society to a considerable extent.²¹² Rural areas are particularly vulnerable to underreporting due to limited access to support services, isolation, and social stigma associated with reporting abuse.²¹³ An impediment to women's access to justice is, however, the failure to report problems that have the potential to become legal issues. It is an issue of access to justice if women's legal needs are not being met because they are being prevented from obtaining legal representation, whether for ideological or structural reasons.²¹⁴

3.5.2. The Role of Mediation in Facilitating Women's Access to Justice

Legislators and policy makers in Türkiye have actively promoted and privatised modern dispute resolution processes due to the potential benefits they offer, such as increased flexibility and efficiency, improved access to justice, and the attraction of foreign investment.²¹⁵ The search of alternative solutions to conventional court proceedings has various causes. These include reasons such as deficiencies in judicial performance, slowness and heavy workload in the functioning of courts, high costs for individuals and states²¹⁶, as well as the aim of facilitating and improving access to justice, social peace and social reconciliation, as discussed in this thesis. The objective is to substitute the rights-based and judge-determined (and coercive) dichotomy of winner and loser in the conventional court system with an approach where the parties reach their own resolutions through compromise and within the context of their interests by engaging in future-oriented discussions regarding their conflict.²¹⁷ In this context, mediation serves as a mechanism that facilitates various

210 *ibid* 22.

211 *ibid* 22.

212 *ibid* 23.

213 *ibid* 519.

214 *ibid*.

215 Şükran Şıpka, "Hukuk uyuşmazlıklarında arabuluculuk kanunu tasarısı"nın değerlendirilmesi [Evaluation of the draft law on mediation in legal disputes] (2007) 164.

216 *ibid* 165.

217 Ayşe Erarslan, İdil Elveriş, Handan Duygu Türemez, 'Kadınların Adalete Erişimi İçin Arabuluculuk Hizmeti Üzerine Bir Değerlendirme [For Women's Access to Justice an Evaluation on Mediation Service]' (2016) TESEV 10.

outcomes that may not be feasible within the confines of a court setting, primarily due to temporal constraints and procedural regulations.²¹⁸

Proponents of mediation promote its ability to enhance conflict resolution by reducing costs and time, increasing satisfaction through self-determination, maintaining relationships, offering innovative solutions, adapting procedures, maintaining informality, and preserving judicial resources.²¹⁹ Mediation enables the creation of new and creative solutions without being restricted by established legal rulings, and procedural flexibility helps address the unique requirements of each conflict.²²⁰ The informal setting can create a relaxed atmosphere for negotiation. Mediators facilitate parties' comprehension of their conflicts, enhance communication between them, and bolster parties' capacity to resolve problems.²²¹ As a whole, these advantages present opportunities for facilitating the availability of access to justice.²²²

Nevertheless, certain critics contend that the assertions made by mediation regarding its access to justice need to be examined more closely.²²³ Professor Owen Fiss argues against settlements, arguing that they deprive parties of the remedial help of a lawsuit.²²⁴ Fiss contends that focusing on expedience and compromise, often inherent in the settlement process, may sacrifice true justice.²²⁵ Some critics argue that mediation lacks public norms to guide agreements, leading some disputants to perceive it as unfair.²²⁶ Moreover, there is an assumption that the enforcement of women's rights can solely be achieved through formal justice institutions, thus necessitating the minimization of the role of alternative institutions.²²⁷ However, mediation does offer access to dispute resolution and can provide a sense of justice

218 *ibid.*

219 Jennifer W. Reynolds, 'Judicial Reviews: What Judges Write When They Write About Mediation' (2013) 5 PSYAM 143 -145.

220 Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (1st edn, Jossey-Bass 1994) 32.

221 Laurence Boulle and Nadja Marie Alexander, *Mediation: Skills and Techniques* (LexisNexis Butterworths 2020) 3.

222 *ibid* 35.

223 Hazel Genn, 'What is Civil Justice For - Reform, ADR, and Access to Justice' (2012) 24 398.

224 Owen Fiss, 'Against Settlement' (1984) 93 Yale Law Journal 459.

225 *ibid.*

226 Deborah R. Hensler, 'Suppose It's Not True: Challenging Mediation Ideology' (2002) JDR 90 – 94.

227 Sarah Douglas, *Gender Equality and Justice Programming: Equitable Access to Justice for Women* (UNDP 2007) 14 – 15.

and fairness when disputes are resolved according to the parties' freely chosen terms.²²⁸

A central feminist critique centres on the capacity of mediation to amplify pre-existing disparities in power. In situations marked by domestic violence, economic inequalities, or cultural biases, the pressure to reach a swift agreement and avoid lengthy court proceedings may coerce a woman into accepting compromises detrimental to her interests. When dealing with domestic violence, a woman might be compelled to accept unfavourable agreements in order to avoid a lengthy legal dispute. This phenomenon has been emphasised by scholars such as Grillo²²⁹ and Murphy and Robinson²³⁰. Feminist theory challenges the idea of mediator neutrality by highlighting how implicit biases perpetuate gendered expectations in the process, as shown by studies conducted by Babcock and Laschever.²³¹ The focus on conciliation in mediation can sometimes hide the systemic injustices that affect women and reduce their legal rights. Moreover, the diversion of disputes from courts through mediation raises concerns regarding the concept of "privatised justice," which undermines the ability to hold parties accountable and enforce legal rights.²³² In response, feminist visions advocate for procedural safeguards that screen for power imbalances (especially in domestic abuse cases), prioritising advocacy and empowerment throughout mediation.²³³

In the context of Türkiye, there are two prominent factions that emerge within the discourse surrounding the role of mediation in facilitating women's access to justice. Legal scholars have presented arguments proposing that the mediation process, through its facilitation of mutual negotiation between parties, holds the capacity to augment women's legal pursuits of justice.²³⁴ Advocates of this

228 Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, (1997) 48 HLJ 708.

229 *ibid* 705.

230 Jane Murphy & Robert Robinson, 'Domestic Violence and Mediation: Responding to the Challenge of Crafting Effective Screen', (2005) FLQ 39.

231 Linda Babcock and Sara Laschever, 'Women Don't Ask: Negotiation and the Gender Divide' (2004) SEJ 71.

232 Austin Sarat and William LF Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (Oxford University Press 1995) 65.

233 Mahnaz Afkhami, Yakın Ertürk, and Ann Elizabeth Mayer, 'Feminist Advocacy, Family Law and Violence Against Women International Perspectives' (2019) RSDS 16.

234 Ayşe Gül Altınay and Yeşim Arat, 'The Role of Mediation in Women's Access to Justice in Türkiye' (2016) 37(1) JWPP 1.

perspective assert that the assessment of mediation should be conducted with regard to women's ability to attain justice.²³⁵ Ayse Gul Altinay and Yesim Arat argue that mediation can provide a more accessible, efficient, and culturally appropriate alternative to formal legal institutions for women who have experienced gender-based violence and other forms of discrimination.²³⁶ Mediation can also provide a space for women to voice their concerns and needs, and to negotiate solutions that are tailored to their specific circumstances. However, there exists a group of individuals who harbour doubts regarding the potential impact of mediation on the societal and economic inequities faced by women within the legal system and their ability to seek justice. Critics of mediation argue that it may reinforce patriarchal power structures and perpetuate gender-based violence by prioritizing the preservation of family and community harmony over women's rights and safety.²³⁷ Additionally, mediation may not be appropriate or effective in cases of severe violence or abuse, where legal sanctions and protections may be necessary. The preservation of family and community harmony, often prioritized in mediation, can conflict with the prevention of domestic violence, leading to ineffective policies based on poor theoretical understanding.²³⁸

Advocates mention various possible advantages. The benefits of faster resolutions and protective orders are facilitated by reduced court backlogs.²³⁹ Mediation offers a less confrontational and structured setting, which helps to minimise the potentially traumatizing stress found in legal proceedings.²⁴⁰ Customised agreements can be achieved through mediation, accommodating the victim's unique requirements and situation.²⁴¹ On the other hand, opponents of mediation raise important objections. They highlight significant power imbalances

235 *ibid.*

236 Ayşe Gül Altınay and Yeşim Arat, *Türkiye'de Kadına Yönelik Şiddet Araştırması* (Research on Violence Against Women in Türkiye [Research on Violence Against Women in Türkiye] (PY 2008) 67.

237 *ibid.*

238 Jesse Robert McKee, *Patriarchal Ideology and Violence Against Women: A Theoretical Contribution Using Longitudinal, Individual-Level Analyses* (PhD dissertation, Old Dominion University 2014) 8.

239 Human Rights Watch, "Türkiye: Domestic Violence Survivors Need Protection," www.hrw.org/news/2021/03/08/Türkiye-domestic-violence-survivors-need-protection accessed on 20 October 2023.

240 Ferhat Yıldırım, 'Mediation As an Alternative Remedy in Turkish Legal System' (2016) 2(3) *IJSSER* 752.

241 (n 239).

in abusive relationships, asserting that mediation platforms give more power to abusers, allowing them to use coercion and manipulation to force victims into accepting settlements that harm them.²⁴² This emphasis on compromise may diminish or weaken important safeguards established in Turkish domestic violence laws.²⁴³ Importantly, mediator training remains a contested concern. Mediators without specific training may misinterpret signs of duress, reinforce stereotypes unintentionally, and harm the well being of victims.²⁴⁴ These criticisms highlight the continued importance of setting up safeguards and protocols prior to widely introducing mediation in Turkish domestic violence cases.

While mediation may provide a more accessible and culturally appropriate alternative to formal legal institutions, it may also perpetuate gender-based violence and undermine women's legal rights and safety. Both of these perspectives highlight the necessity of engaging in a discourse regarding the integration of mediation practises to enhance women's access to justice. This introductory chapter sets the stage for an in-depth examination and analysis of the subject matter. The subject matter aims to examine the intricacies, difficulties, and possible remedies associated with the incorporation of mediation techniques in order to enhance women's access to justice. The following sections undertake an extensive examination of the relevant theories, practical implementations, and case studies in order to offer a nuanced comprehension of this crucial field of research.

3.5.2.1. *Barriers to Women's Access to Justice and Family Mediation*

The examination of women's access to justice necessitates particular attention given their societal status. Women encounter numerous challenges throughout and following the divorce proceedings due to the influence of gender perception.²⁴⁵ Factors such as economic considerations and the availability of urban transport services play a significant role in the various stages of engaging with judicial authorities, accessing legal information, and initiating legal proceedings.

242 Seda Özümucu, 'A General View on The Mandatory Mediation System with Regards to the Turkish and Comparative Law' (2016) 74(2) JIULF 827.

243 *ibid* 828.

244 Serpil Işık, 'Mediation as an Alternative Dispute Resolution Method and Mediation Process in Turkish Law System: An Overview' (2016) 48(65) AFDI 69.

245 Handan Karakaya, 'Toplumsal Cinsiyet Bağlamında Boşanma/Boşanma Süreci ve Kadın: Elazığ Örneği [Divorce/Divorce Process and Women in the Context of Gender: Elazığ Example]' (2018) 4(2) KKAD 262.

In the context of Türkiye, women encounter two distinct types of challenges when seeking access to justice: legal and institutional barriers, as well as socio-economic and cultural barriers. Legal and institutional barriers encompass various factors that impede gender equality. Women face numerous obstacles in accessing justice, including legal discrimination, legislative gaps, a lack of gender-specific provisions in legislation, prioritisation of out-of-court dispute resolution, protracted judicial processes, discriminatory practices, and the influence of negative gender stereotypes on courts and law enforcement agencies.²⁴⁶ The use of gender stereotypes, as well as gender-based violence, limited access to education and employment, and cultural practices that undermine women's rights are all examples of cultural and social barriers.²⁴⁷

Broader societal issues like poverty and inequality, particularly in domains such as education and participation in daily urban life, contribute to the differential experiences of women in their pursuit of justice. In the context of daily life, it is worth noting that the utilisation of legal mechanisms to resolve disputes, which is predicated upon the principle of equality, does not invariably ensure a satisfactory resolution. In fact, it is plausible that this approach may inadvertently exacerbate existing forms of inequality, including but not limited to gender inequality.²⁴⁸ The potential for gender-based inequality in the practical outcomes experienced by women within the court system is a significant concern. This discussion critically analyses how supposed "equality" before the law can sometimes translate into real-world disadvantages for women.

The following subjects that have been addressed can be perceived as problematic areas concerning access to justice, not only for women but for the general population as well. Although both men and women have their own distinct positive and negative gender-related encounters with the justice system, women, on the whole, are more prone to being excluded from justice mechanisms²⁴⁹ – as has now been discussed.

246 Bakırcı (n 150) 290.

247 *ibid.*

248 Hatipoğlu (n 90) 85.

249 Douglas (n 227) 6.

3.5.2.1.1. *Economic Barriers and Family Mediation*

The recognition of access to justice as an integral component of fundamental human rights, encompassing legal aid and the right to a fair trial, has been elucidated in preceding chapters. However, patriarchal systems perpetuate resource inequality, with men typically controlling distribution and women lacking equal input. This situation leads to the strengthening of men's social positions and makes it difficult for women to change their positions in society.²⁵⁰ The unequal position of women in the economic sphere directly affects their entire social life, and one of these areas of influence is women's access to justice.²⁵¹ Economic weaknesses create structural obstacles to women's access to justice by limiting their participation in social life, as well as obstacles such as women's inability to afford litigation fees and expenses and their inability to benefit from legal representation.²⁵² Additionally, the overlap of economic disparity and patriarchal power dynamics can cause women to be hesitant in confronting those they rely on, which can impede their quest for justice.²⁵³

It is clear that women do not have the same level of economic participation as men when you consider their limited ability to exercise their property ownership rights, their increasing poverty, their limited access to employment opportunities in comparison to men, the disparity in wages they receive, and the predominance of unpaid labour they perform.²⁵⁴ In the absence of affirmative action, the employment gender disparity, which is characterized by men frequently holding higher-paying roles in fields like management and business administration while women typically hold lower-paying positions, contributes to the wage gap and perpetuates income inequality.²⁵⁵ Research consistently shows that gender bias in performance and hiring evaluations often disadvantages women.²⁵⁶ The inequality as mentioned earlier exacerbates the economic obstacles that hinder women's ability to attain justice.

250 Çağdaş Demren, 'Erkeklik, Ataerkillik ve İktidar İlişkileri [Masculinity, Patriarchy and Power Relations]' (2003) TCSK 34.

251 Gülriz Uygur and Nadire Özdemir, Gender Equality in Access to Justice Mapping and Monitoring Study Extended Summary (2021) 3.

252 *ibid.*

253 UN Women, Flagship Programme Initiative: Women's Access to Justice, (2016) <www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2016/FPI-Brief-Access-to-Justice.pdf> accessed on 22 October 2023.

254 Uygur and Özdemir (n 251) 4.

255 *ibid.*

256 *ibid.* 5.

Through an examination of women's involvement in economic activities, a more comprehensive understanding of the prevailing circumstances can be attained, shedding light on the reasons behind their heightened susceptibility to encountering barriers rooted in economic factors that impede their access to justice. Women, who make up half of the world's population, provide 60-80 per cent of the world's agricultural labour, work more than 60 per cent of the world's working hours, yet own less than 20% of agricultural land globally, with considerable regional variations.²⁵⁷ There is no discernible variation in the ratio within the context of Türkiye. Men hold approximately 92 per cent of property ownership, while men also possess approximately 84 per cent of the gross national product.²⁵⁸ Based on the available data from 2021, it can be observed that approximately two-thirds of the total population of 27 million individuals residing below the relative poverty threshold in Türkiye are of the female gender.²⁵⁹ In the year 2021, the proportion of employed females in Türkiye was recorded at 26.9 per cent, whereas the corresponding figure for males stood at 60.1 per cent.²⁶⁰

Furthermore, it can be inferred that gender inequality amplifies overall economic challenges regarding the attainment of justice. Based on the 2021 Gender Gap Report released by the World Economic Forum, which evaluates various dimensions of women's involvement in economic and political spheres, as well as their access to education and healthcare, Türkiye is positioned at the 133rd rank out of 156 countries in terms of progress made towards achieving gender equality.²⁶¹ Based on the findings of the report entitled "Women in Türkiye" released by the General Directorate on the Status of Women (KSGM) in September 2019, the employment rate among women in Türkiye stood at 34.2% in 2018.²⁶² The primary factor hindering women's engagement in the labour force was identified as the responsibility of household chores, accounting for 54.8% of the cases.²⁶³ Studies in

257 Songül Sallan Gül, 'The Role of the State in Protecting Women Against Domestic Violence and Women's Shelters in Turkey' (2013) 109.

258 *ibid* 110.

259 Turkish Statistical Institute (TUIK), Statistics on Women (2021)

260 *ibid*.

261 WEF Gender Gap Report 2021 <www3.weforum.org/docs/WEF_GGGR_2021.pdf> accessed on 10 October 2023.

262 Nurcan Önder, 'Türkiye'de Kadın İşgücünün Görünümü [The Outlook of the Female Workforce in Türkiye]' (2013) 1(1) CDD 37.

263 *ibid*.

Türkiye have highlighted that inadequate support and incentives for child; disabled, and elderly care to reduce care obligations on women is an obstacle to women's access to justice.²⁶⁴

Economic hardship can severely limit the realisation of fundamental human rights like access to legal aid and fair trials. In particular, low-income individuals may face financial difficulties in accessing the justice system. The costs of legal representation, judicial costs and other legal processes can be a serious obstacle for economically disadvantaged individuals.²⁶⁵ The costs associated with legal proceedings are a significant factor that impacts the ability to exercise the right to access justice effectively.²⁶⁶ Trial expenses refer to the various costs that are incurred throughout the course of a trial, specifically within the context of ensuring access to justice. These expenses encompass a range of items, such as fees, discovery processes, notification procedures, expert witness fees, and legal counsel fees. Excessive judicial expenses within a nation can impede economically disadvantaged individuals from effectively exercising right to access justice.²⁶⁷

The data obtained from Korkmaz and Cilingir's interviews with lawyers on women's access to justice in Türkiye also emphasise an important problem that women face economically.²⁶⁸ These data show that Turkish women face economic difficulties in accessing legal aid and that these difficulties may be one of the factors that undermine a fair trial. For example, in a system with high judicial costs, women's economic situation may be a deterrent factor in seeking justice. Prevailing societal perceptions of women's lack of economic independence create additional barriers for women in need, limiting their access to legal aid programs.²⁶⁹

As a matter of fact, the distribution of resources by men in favour of men is primarily to the detriment of women in the economic sphere. The unequal position of women in the economic sphere directly affects their entire social life.²⁷⁰ Additionally,

264 Müge Gülmez Korkmaz and Meline Çilingir, 'Toplumsal ve Siyasi Zeminde Adalet Erişiminden Beklentiler: Türkiye'de Kadınların Adalet Erişimi [Expectations from Access to Justice on Social and Political Grounds: Women's Access to Justice in Türkiye]' (2021) *PODEM* 15.

265 İbrahim Subaşı, 'Adalet Erişim Hakkı Bağlamında Yargı Harçları [Judicial Fees in the Context of the Right to Access to Justice]' (unpublished master thesis, Gazi University 2018) 45.

266 *ibid.*

267 Korkmaz and Çilingir (n 264) 12.

268 *ibid.* 17.

269 *ibid.*

270 *ibid.* 3.

the overlap of economic disparity and patriarchal power dynamics can cause women to be hesitant in confronting those they rely on, which can impede their quest for justice.²⁷¹

The economic constraints women face significantly hinders their access to justice. Transportation costs to courts can be significant, particularly for women in rural areas with limited public transport.²⁷² Additionally, concerns about safety on public transportation, especially at night or in high-crime areas, can deter women from accessing courts, and financial dependence on others may further limit their ability to cover transportation costs.²⁷³ Unforeseeable court procedures, along with rigid employment regulations, especially common in low-paying or hourly jobs, put women's financial stability at risk when pursuing legal action.²⁷⁴ Managing the conflict between work obligations, childcare, and legal proceedings poses a major obstacle for women. Balancing the demands of work, family, and the legal system can lead to increased stress, financial strain, and potential job loss for women.²⁷⁵ The lack of support and understanding from employers only adds to the challenges faced by women navigating the legal system. Again, due to the length of the court proceedings, women may have to pay these expenses not only once, but also repeatedly.²⁷⁶ The majority of applications by women (or generally) received by counselling centres operated by non-governmental organisations, which offer psychological and legal assistance to women, primarily pertain to women's economic demands.²⁷⁷ Economic factors pose a significant barrier for women seeking to initiate legal proceedings in court.²⁷⁸ Thus, numerous women are compelled to decide

271 UN Women. (2016). Flagship Programme Initiative: Women's Access to Justice. <www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2016/FPI-Brief-Access-to-Justice.pdf> accessed on 25 March 2024.

272 Berk (n 82) 14.

273 World Bank. (2011). World Development Report 2012: Gender Equality and Development. <www.openknowledge.worldbank.org/handle/10986/4391> accessed on 25 March 2024.

274 National Women's Law Center, Fair and Family-Friendly Workplaces (2017).

275 UN Women. (2016).

276 Duygu Hatipoğlu Aydın, 'Kadınların Adalete Erişimi [Women's Access to Justice]' (2015) 4 ABD 89.

277 Bilen (n 183) 10.

278 *ibid* 9.

between pursuing justice and keeping their jobs, thus exacerbating gender disparities in the workplace.²⁷⁹

The OHCHR's concept note, finalised during its 53rd half-day session in 2013 and endorsed by CEDAW, underscored the tangible and financial obstacles women face in accessing justice.²⁸⁰ Obstacles include the fact that many women are not financially independent and must rely on friends, family, or even their abusers for things like transportation, food, shelter, and security.²⁸¹ In order to tackle these challenges, the document proposed the implementation of various support mechanisms such as cost-efficient legal aid, crisis centres, shelters, hotlines, counselling services, and medical or psychological support.²⁸²

Research has indicated that the financial implications associated with legal proceedings pertaining to women's access to justice extend beyond the direct costs incurred within the court system. Women often find themselves in a situation where they must bear these expenses repeatedly due to the protracted nature of legal proceedings.²⁸³ This multifaceted financial challenge compounds the difficulties that women encounter when trying to access justice.²⁸⁴

During divorce proceedings, women often find themselves with limited financial resources, potentially earning less than their husbands. Obtaining additional expert advice, such as from a lawyer or an association, becomes challenging for women due to their constrained financial situation.²⁸⁵ This financial disadvantage may, however, create a more favourable environment for women to reach an early agreement through affordable family mediation.²⁸⁶ In theory, family mediation can lessen the harm that results from gender-based economic inequality.²⁸⁷ This implies

279 Human Rights Watch. (2019). "Boxed In": Women and Saudi Arabia's Male Guardianship System. <www.hrw.org/report/2016/07/16/boxed/women-and-saudi-arabias-male-guardianship-system> accessed on 26 March 2024.

280 OHCHR, Access to Justice – Concept Note for Half Day General Discussion Endorsed by the Committee on the Elimination of Discrimination against Women at its 53rd Session (2013) 4.

281 *ibid.*

282 *ibid.* 5.

283 Aydın (n 90) 87.

284 *ibid.*

285 Erarslan et al (n 217) 17.

286 Rachael Field, "Family Law Mediation: Process Imbalances Women Should Be Aware Of Before They Take Part" (1998) 14 QUTLJ 25.

287 Equality before the Law (discussion paper 54, July 1993) para 5.9; House of Representatives Standing Committee on Legal and Constitutional Affairs, Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia (1992) 11(4) EOI 9.

that family mediation possesses the capacity to afford economically disadvantaged women the opportunity to attain justice. As the following quotations shows, a family mediator from the ministry, relying on their professional knowledge, supported this conclusion with specific examples from their experience during the interview.

As an illustration, a woman with limited post-secondary education working in a low-income service occupation who has been out of the workforce for an extended period while caring for young children faces significant disadvantages when seeking a divorce from a better-educated husband with consistent employment in a higher-earning profession. This economic disparity can create obstacles in court proceedings, as the husband may have a greater ability to secure skilled legal representation. This power imbalance can pressure the wife to accept a less favourable settlement. Mediation offers an alternative path for women in such situations. It can be particularly beneficial by reducing the need for costly legal battles and providing a forum where women can actively participate in shaping the terms of their divorce. In this way, women can more easily advocate for their specific needs regarding childcare and property division in a mediation process where legal complexities and financial power imbalances can be less overwhelming. (K12)

I would like to illustrate this with a case from a divorce proceeding that I encountered. Mediation created a secure and impartial environment for the petitioner to voice her needs and worries. It equalized the situation, allowing both sides an equitable chance to speak and be heard. Breaking down the legal procedure into straightforward terms aided the petitioner in grasping her rights and choices. Gradually, the petitioner gained confidence and assertiveness. Eventually, she was able to broker a settlement that catered to her and her children's needs, something she had initially deemed unattainable. (K13)

Indirect costs may be reduced as well due to the faster pace of the process compared to court proceedings.²⁸⁸ By potentially reducing lost wages due to court

288 Erarslan et al (n 217) 54.

appearances, mediation could empower women to pursue justice without jeopardizing their financial stability or making untenable sacrifices in other areas of their lives.²⁸⁹ This could lead to a more equitable justice system where women feel supported and empowered to seek resolution for their grievances, as interviewees emphasised:

I have seen how the fear of financial ruin can stop women from seeking legal recourse. They feel trapped in difficult situations, driven away by a lack of financial resources to navigate the legal system. This can have severe impacts on their emotional health, physical safety, and general quality of life. (K14)

Mediation offers a more cost-effective option than traditional court proceedings. It usually comes with lower fees and, in some instances, may be accessible at zero cost through community mediation centres or pro bono services. This can help lessen the financial burden on women seeking legal solutions. (K15)

However, women's weaker financial circumstances may force them to accept an early settlement, reached through inexpensive ADR, even if the settlement is inadequate and does not reflect her actual legal rights to a share in marital property or a right not to be discriminated against.²⁹⁰ This can result in women not receiving a fair settlement and being left in a financially vulnerable position.²⁹¹ Furthermore, family mediation may cause substantial economic risks for women. Gendered income disparities can create power imbalances that may cause women to agree to unfair settlements due to financial pressure, even if these settlements violate their legal rights.²⁹² This is particularly concerning when women have limited earning potential due to taking on primary caregiving roles, leaving them in a vulnerable bargaining position.²⁹³ Women's financial vulnerability during disputes exposes

289 Pearson, J., & Thoennes, N, 'Mediation and divorce: the benefits outweigh the costs' (1981) 2 TFA 29.

290 Samia Bano (ed), *Gender and Justice in Family Law Disputes: Women, Mediation, and Religious Arbitration* (Brandeis University Press 2017) 32.

291 *ibid* 33.

292 Nancy G Maxwell, 'The Feminist Dilemma in Mediation' (1992) 4(1) IRCPP 73.

293 *ibid*.

systemic inequalities and underscores the potential for seemingly expedient solutions to have long-term economic disadvantages.

While mediation might seem more affordable upfront, unfair settlements can lead to lasting financial hardship. Research shows that women who use mediation to settle disputes during divorce tend to experience more negative economic outcomes in the years after the divorce when compared to those who go through litigation.²⁹⁴ Furthermore, interviews with women emphasise that the mediation process may seem hurried, needing more time to completely understand their choices' legal and financial consequences.²⁹⁵ Studies such as Emery indicates that women who pursue legal action may experience higher upfront expenses but could potentially achieve more favourable financial results in the future because of the court's enhanced ability to enforce agreements.²⁹⁶ This emphasises the intricate balance between legal and financial aspects in family law disputes, where the perceived swiftness of mediation might conflict with the necessity for comprehensive understanding, especially for women.

3.5.2.1.2. Social Barriers and Family Mediation

The formal judicial system contains a number of obstacles that make it difficult for women to obtain equal access to justice. The impact of societal norms prioritizing male authority deeply undermines women's access to justice. These norms uphold the idea of male superiority, women's submissiveness, the importance of family honour, and the tendency to blame victims, leading to harmful attitudes and behaviours in different situations.²⁹⁷ In law enforcement, this can be seen in officers possibly minimising women's reports of violence and insufficient training in gender-sensitive investigations.²⁹⁸ Such biases can also infiltrate the legal system, where out-dated laws, implicit judicial prejudices, and harmful stereotypes surrounding victims can

294 Robert E Emery, David Sbarra and Tara Grover, 'Divorce Mediation: Research and Reflections' (2005) 43(1) FCR 23.

295 N Semple, 'Mandatory family mediation and the settlement mission: A feminist critique', (2012) 24 CJWL 213.

296 Emery et al (n 294) 22-37.

297 Korkmaz and Çilingir (n 264) 20.

298 Mostafa El-Harazi, 'Navigating a Human Rights Roadblock: Making the Case for the Women's Equality Act' (2023) 45 UPJIL 497.

disadvantage women seeking redress, particularly in custody disputes and sexual assault cases.²⁹⁹

The United Nations Development Programme (UNDP) has identified a lack of "qualified and appropriate female staff in justice institutions to receive and process women's complaints" as a barrier to women's access to justice.³⁰⁰ For instance, the gender of judges may constitute an additional determinant that could potentially influence women's ability to access justice. Research indicates that female judges may show more sensitivity to power imbalances in family law disputes.³⁰¹ In domains like family law and workplace discrimination, female judges may employ gender-sensitive analysis to expose the limitations of male-centric legal frameworks.³⁰²

The proportion of female judges presiding over first grade courts in Türkiye is approximately half that of their male counterparts.³⁰³ Based on the 2018 report by TESEV, the aggregate count of judges and prosecutors in Türkiye amounts to 12,898, with a subset of 6,210 representing the count of female judges and prosecutors.³⁰⁴ When examining the representation of women in the prosecutor's office, a profession traditionally dominated by men in society, it becomes evident that the proportion of women in the Council of State, a prominent judicial institution, stands at 42 per cent.³⁰⁵ When examining the performance of prosecutors in lower courts, there is a decrease in the rate. According to the data from 2022, the proportion of female judges stands at 46 per cent, whereas the percentage of female prosecutors is 16 per cent.³⁰⁶ The overall proportion of female judges and prosecutors amounts to 36.61 per cent.³⁰⁷

299 UN Women (n 271).

300 Douglas (n 227) 18.

301 Christina L Boyd, Lee Epstein and Andrew D Martin, 'Untangling the Causal Effects of Sex on Judging' (2010) 54(2) AJPS 398.

302 *ibid* 399.

303 HSK [Council of Judges and Prosecutors], 2022. Hakim ve Cumhuriyet Savcılarına İlişkin İstatistikî Bilgiler (Statistical Information On The Judges and Prosecutors), Hakimler ve Savcılar Yüksek Kurulu, <www.hsk.gov.tr/Eklentiler/22092022112522-09-2022-hakim-savci-durumlaripdf.pdf> accessed on 13 September 2023.

304 Betül Emrah Öder, 'Yargıda Kadın Temsili ve Türkiye/TESEV Değerlendirme Notları [Women Representation in the Judiciary and Türkiye/TESEV Evaluation Notes]' (2018) 2.

305 *ibid*

306 For data see (n 303).

307 Öder (n 304) 2.

Furthermore, in addition to the gender of judges and public prosecutors, it is worth noting that sexist perspectives can exert influence on the decision-making process.³⁰⁸ These viewpoints, including ideas about female inadequacy, conventional gender roles, the tendency to blame victims, and downplaying women's experiences, may be expressed as unconscious prejudices by judges, prosecutors, law enforcement, and jurors.³⁰⁹ Women are only a nominal presence in justice sector agencies, reflecting extreme male domination.³¹⁰ This patriarchal system works to the detriment of women's access to justice by creating a justice system insensitive to women's causes and making only minimal efforts to protect women's rights.³¹¹ According to the interview of the Foundation of Women's Solidarity, the legal system in Türkiye is predominantly male-oriented and family-centric, which is a significant concern for women's access to justice.

A range of factors influences the pursuit of justice for women, including familial pressures and social exclusion, which have a notable impact on their circumstances. Women frequently experience marginalisation within our society based solely on their gender. Regrettably, the issue of gender-based inequality continues to endure within our judicial institutions, encompassing courts and law enforcement agencies, thereby presenting a substantial barrier to women's attainment of justice. (K4)

These situations negatively affect women's access to justice in two ways. For one, fewer individuals in the system are aware of or able to address women's unique needs, which can make them, feel threatened.³¹²

The question of whether mediation provides a viable solution to these problems is an important topic of debate, particularly in a nation where the prevalence of violence against women is extremely high.³¹³ The ability for women to effectively express themselves within the adaptable framework of mediation, as opposed to their position before a judge in a courtroom, is regarded as a significant and favourable

308 M. Sancar and S. Aydın, 'Biraz Adil, Biraz Değil...' Demokratikleşme Sürecinde Toplumun Yargı Algısı ["Somewhat Fair, Some Not..." Society's Justice Perception in Democratization Process]' (2019) TESEV 35.

309 Christina L. Boyd, Lee Epstein, and Andrew D. Martin, 'Untangling the causal effects of sex on judging' (2010) 54 AJPS 399.

310 Oder (n 304) 3.

311 ibid 4.

312 Şükrü Bardakçı and Sema Oğlak, 'Gender Gap Index and Türkiye' (2002) 3(1) TJSP 87.

313 Börü (n 50) 185.

aspect of mediation.³¹⁴ The negotiation process and the inclusive nature of this approach are perceived as key factors that can alleviate social barriers.³¹⁵ Mediation specialists argue that fair treatment of all parties involved, together with their cooperative negotiation and self-determined resolution process, can act to reduce the incidence of violence.³¹⁶ In contrast to conventional litigation, mediation establishes frameworks that regulate future interactions and fosters a nurturing and empowering atmosphere for women, facilitating their ability to develop safety measures.³¹⁷ This involves creating customised agreements that cover communication protocols, safety zones, and specific co-parenting arrangements.³¹⁸ As such, mediation appears to be a feasible substitute for resolving the shortcomings that are present in the current legal system.

Moving from the advantages of mediation in providing women with a platform to express themselves effectively, it is imperative to underscore the significance of having a diverse group of mediators, which includes both men and women, as interviews have emphasized. When women encounter mediation panels comprised exclusively of men, there may be a perception of gender bias or power imbalance that inhibits their ability to express themselves effectively. During interviews with women's organizations, a major concern was raised about the potential impact of mediator gender on the mediation experience for women. Specifically, there are worries that if a woman is uncomfortable with a mediator's gender, it could affect the impartiality of the process. This could result in situations where women may not fully benefit from mediation, as these quotations show:

In such cases, the impartiality of the mediation process may be jeopardised, potentially resulting in women not fully reaping the advantages of mediation. The inclusion of female mediators can facilitate the establishment of an atmosphere conducive to women's enhanced self-

314 *ibid*, 186.

315 *ibid* 188.

316 Şengül Yaman Efe and Sultan Ayaz, 'Kadına yönelik aile içi şiddet ve kadınların aile içi şiddete bakışı [Domestic violence against women and women's perspective on domestic violence]', (2010) 11 APD 25.

317 Karen K. Klein, 'A Judicial Mediator's Perspective: The Impact of Gender on Dispute Resolution: Mediation as a Different Voice' (2005) 81 NDLR773.

318 *ibid*.

expression, thereby fostering a mediation process that is characterised by fairness and efficacy. (K4)

The ability to choose mediators that women feel comfortable with, regardless of gender, is vital for ensuring their effective expression and engagement in the mediation process. (K5)

The correlation between the efficacy of women in the field of mediation and the diversity and inclusivity of the mediation panel is a significant factor to consider.³¹⁹ This highlights the importance of ensuring a fair and equitable representation of both genders among mediators.

In addition, the report of the TBMM (The Grand National Assembly of Türkiye) Divorce Commission, issued on 14 May 2016, highlights the inclusion of mediation as a potential alternative for resolving disputes in family law.³²⁰ The report further presents recommendations within this context. However, the Commission's approach places a significant emphasis on family unity and the protection of family integrity, which may not always coincide with the interests of women seeking justice. This approach seems to support the objections and concerns of women's organisations regarding access to justice and the protection of women's personal rights, against the *raison d'être* of the Commission and the recommendations, including mediation, made in the report.³²¹ There is concern that focusing on preserving the family unit could result in downplaying or disregarding cases of domestic violence or coercive control.³²² Moreover, mediation in these situations could unintentionally sustain current gender-based power disparities.³²³ This could

319 Rachael Field, 26.

320 TBMM, Aile, Çalışma ve Sosyal İşler Komisyonu, Boşanma ve Boşanmaya Bağlı Uyuşmazlıkların Çözümüne İlişkin Rapor, 2016, <www.tbmm.gov.tr/komisyon/ailebosanma/raporlar/2016/20160514.pdf> accessed on 26 October 2023.

321 KADER'den Boşanma Komisyonu'na: Boş Ol, Boş Ol, Boş Ol! <<http://bianet.org/bianet/toplumsalciinsiyet/174884-ka-der-den-bosanma-komisyonu-na-bos-ol-bos-ol-bos-ol>> accessed on 23.07.2023;

“Kadın ve Çocuk hakları, TBMM Boşanma Komisyonu aracılığıyla gasp edilmeye çalışılıyor”: <www.kadinininsanhaklari.org/bosanmakomisyonu> accessed on: 23.07.2023.

322 *ibid.*

323 Sevda Yaşar Coşkun, 'Aile Uyuşmazlıklarında Dava Şartı Arabuluculuğun Avantaj ve Dezavantajları [Advantages and Disadvantages of Lawsuit Mediation in Family Disputes]' (2019) in 9th International Social Sciences Conference in the Balkans 49.

put women at a disadvantage during negotiations and impede their ability to achieve fair and secure results.

Furthermore, it is emphasised that the alternative dispute resolution proposal should take a more planned and realistic approach to the protection of women's rights to life and other rights, and should include relevant measures and recommendations.³²⁴ Women's bias can be a big problem, especially in cases of sexual assault and domestic violence. According to one WWHR activist;

In cases of violence, mediation should be avoided. Women's pursuit of justice is hampered by the fact that meeting the offender in person can put them in danger. As a result, finding more secure and effective alternatives is essential. (K1)

While mediation holds promise as a tool to empower women, its application in cases involving violence demands extreme caution and a victim-centred approach.³²⁵ Failing to prioritize the safety and well-being of the victim in cases of violence can lead to further harm and perpetuate cycles of abuse.

3.5.2.1.3. Information Barriers and Family Mediation

Lack of education is recognised as a major obstacle for women seeking justice, understanding the legal process, and defending their rights. One problem is the fact that women who are illiterate may be hampered in their pursuit of justice because they may not be able to read legal documents or follow the proceedings in court.³²⁶ Another problem is that many women who have difficulty participating in social life are not experienced in dealing with government offices, explaining their problems, filling out documents, or seeking their rights.³²⁷ Also, the practical limitations imposed by illiteracy extend beyond legal documents and court proceedings. As women with limited social engagement may lack experience navigating bureaucratic

³²⁴ TBMM (n 321).

³²⁵ Alexandria Zylstra, 'Mediation and domestic violence: a practical screening method for mediators and mediation program administrators' (2001) JDR 253.

³²⁶ United Nations. (2023). Education as the Pathway towards Gender Equality. <https://www.un.org/en/chronicle/article/education-pathway-towards-gender-equality> accessed on 24 April 2024.

³²⁷ Ayata (n 201) 68.

systems and advocating for their rights, these challenges compound the obstacles to justice.³²⁸

The 2022 Annual Report on the European Union's relationship with Türkiye highlighted challenges in the domains of gender equality and the prevention of gender-based violence, with a particular focus on rural regions and marginalised communities, where limited literacy rates contribute to these setbacks.³²⁹ This underscores the global challenges in achieving equitable access to justice for women.

As regards literacy rates, data enhances comprehension of the challenges encountered by women in their engagement with legal procedures, particularly in cases where their literacy proficiency is limited. Despite Türkiye having made strides in education, a significant gender gap persists. The rate of illiterate women in Türkiye is still very high. According to 2022 data, the total population in Türkiye is 84 million 780 thousand. Of this population, 42 million 411 thousand, that is, 2 million 877 thousand women, who constitute approximately half of the population, are illiterate.³³⁰ The literacy rate for women stands at 95.9%. In contrast, male literacy in Türkiye is higher at 99.3%.³³¹ This number shows that 85.2 per cent of the total illiterate population is made up of women.³³²

Moreover there is a correlation between low educational attainment among women and elevated poverty rates. As women face limited opportunities for education, they may find themselves trapped in cycles of poverty and vulnerability. Low-educated women are more likely to live in poverty, have poor health, and be marginalised in society.³³³ Moreover, educationally disadvantaged women are less likely to take part in decision-making and have fewer opportunities for advancement in their personal and professional lives.³³⁴ In Türkiye, the pursuit of education plays a crucial role in advancing gender equality and fostering social justice.³³⁵ However,

328 Ayşe Şeyma Turgut, Türkiye'deki Gelir Eşitsizliğinin Toplumsal Cinsiyet, Kadının İstihdamı ve Kadın Yoksulluğu Açısından Değerlendirilmesi (Evaluation of Income Inequality in Türkiye in Terms of Gender, Female Employment And Female Poverty), (2019) KOSBED 321.

329 *ibid.*

330 Tuik, (2021), Women in Statistics.

331 Turkish Statistical Institute (TurkStat), National Education Statistics, 2022 (TurkStat, 2023).

332 Tuik (n 331).

333 United Nations. (2023). Education as the Pathway towards Gender Equality, <www.un.org/en/chronicle/article/education-pathway-towards-gender-equality> accessed on 23 March 2024.

334 *ibid.*

335 Uygur and Skinnider (n 168) 58.

numerous obstacles impede women's ability to access educational opportunities in the country, such as inadequate infrastructure in rural areas, a lack of safe transportation to schools, and social biases against investing in girls' futures.³³⁶

In addition, it is important to also take into account women's ability to obtain legal aid within the framework of accessing legal information and fundamental counselling services. Limited dissemination of basic legal rights, compounded by the absence of counselling facilities within key public institutions (such as bar associations, courthouses, and police stations), exacerbates these problems.³³⁷ Women encounter increased difficulties in understanding and participating in legal processes due to the limitations imposed by traditional gender roles and their economic vulnerability.³³⁸ It is possible to speculate that the lack of widespread dissemination of basic legal information in Türkiye may be due to the lack of or inadequate coverage of such information in formal education or the failure of public institutions to provide such information in a way that is understandable and accessible to citizens.³³⁹

Although there is a limited amount of well-documented case studies available, legal aid organisations and women's rights advocates often receive reports of women depending on family members, community leaders, or even paid intermediaries to interpret legal documents.³⁴⁰ An empirical investigation was conducted in ten courthouses located in Istanbul, which yielded findings indicating the absence of both counselling units and front desks within these facilities.³⁴¹ However, it is not difficult to see that this access problem is particularly problematic in the context of women's access to justice, considering their relatively weak position in economic life, their presence in the public sphere limited by patriarchal cultural codes, and their rate of participation in basic education. These social expectations deny women autonomy, devalue their potential outside the home, and often result in the

336 *ibid* 59.

337 Ayata (n 201) 109.

338 Ayşe Nur Saktanber, *Gender and Identity Construction: Women of Central Asia, the Caucasus and Turkey* (1999) 34.

339 *ibid*.

340 Ayata (n 201) 111.

341 Kalem Seda, Galma Jahic, and İdil Elveriş, 'Adliye gözlemleri, İstanbul mahkemeleri: Fiziksel şartlar, duruşmalar ve gecikmeler (Courtwatch, courts of Istanbul: Physical conditions, hearings and delays)' (2008).

prioritization of sons' education over daughters'.³⁴² This systemically relegates women to a disadvantaged position compared to men, curtailing their ability to meaningfully engage in public life and achieve their full potential through education.³⁴³

Academic critiques in the field of family law emphasise the common portrayal of women as the disadvantaged party, especially in societies that are strongly influenced by patriarchal power structures.³⁴⁴ When combined with lower education levels, this disparity increases risks inherent in mediation proceedings.³⁴⁵ It is also considered that women are the weaker party in need of legal protection in family law, and therefore the practice of mediation in family law carries the risk of resulting in the oppression of women with low levels of education.³⁴⁶ This matter was also highlighted in an interview with a scholar from Istanbul University specializing in family mediation:

We discovered a concerning intersectionality between gender and education. Women with lower educational attainment often face a double disadvantage. Not only do they contend with societal biases, but they may also lack the legal knowledge and negotiation skills necessary to navigate mediation effectively. This makes them susceptible to agreeing to unjust settlements or feeling coerced into choices they wouldn't normally make. (K17)

The question of whether mediation inherently places women at a greater disadvantage compared to litigation or other methods of resolving disputes is intricate and a matter of on-going discussion. Mediation might offer greater personal agency than rigid court systems, yet critics argue that existing power imbalances may be amplified in less formal settings.³⁴⁷ Women who have low levels of education experience increased vulnerabilities. In the absence of legal counsel, individuals who are illiterate or have a limited comprehension of their rights may be susceptible

342 UNICEF, Gender Disparities in Education in Türkiye (2003).

343 Ayata (n 201) 119.

344 Turkish Ministry of Justice, 'Expert Mediation in Family and Inheritance Law', 85.

345 *ibid.*

346 Börü (n 50) 1073.

347 Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (John Wiley & Sons 2014) 53.

to manipulation or disadvantageous contracts.³⁴⁸ Additionally, mediation often relies on compromise, potentially pressuring women, socialized to prioritize familial harmony, into accepting inequitable resolutions that they would reject in a more adversarial court setting,³⁴⁹ as emphasised by the following interviewees:

Women with limited education or literacy skills face unique challenges in any dispute resolution process. In mediation, they may struggle to understand legal terminology, the full implications of proposed agreements, or even their own rights. This can make them more vulnerable to manipulation or pressure to accept unfair settlements. (K11)

This is a complex issue. Even though mediation can provide women with a less confrontational setting to express their grievances, it's important to recognize that power dynamics still exist outside of a courtroom. For instance, women who may not have legal expertise or are up against a more powerful adversary may feel compelled to make concessions in ways they wouldn't in court. (K13)

However, positive models for informing women about mediation services and their access to justice are thought to make mediation more widely adopted in the future.³⁵⁰ The potential advantages of mediation, such as its relatively low cost and efficiency, are perceived as particularly beneficial for women with lower educational attainment due to their higher poverty rates.³⁵¹ Mediation environments, in contrast to the frequently rigid and technical nature of litigation, can be less daunting, facilitating improved understanding.³⁵² Advocates of the procedure for underprivileged women highlight its emphasis on elucidating legal principles in comprehensible language, enabling informed decision-making.³⁵³ Furthermore, mediation's solution-focused methodology effectively addresses the practical requirements of women affected by social factors or financial situations that cannot

348 Shailaja Fennell and Madeleine Arnot, *Gender Education and Equality in a Global Context*, (Sociology of Education 2008) 37.

349 Moore (n 348) 54.

350 *ibid.*

351 *ibid.*

352 Mustafa Oğuz Tuna, "What's Wrong with Mediation?," (2024) 27 LJR 4.

353 Zehra F. Kabasakal Arat, "Feminisms, Women's Rights, and the UN: Would Achieving Gender Equality Empower Women?," (2015) 109 APSR 679.

be easily resolved through rigid legal resolutions.³⁵⁴ This adaptability has the potential to enhance the creation of more environmentally friendly agreements when dealing with intricate elements of family conflicts. Ultimately, the non-confrontational nature of mediation can promote the development of effective communication and the ability to advocate for oneself, thereby cultivating a sense of empowerment that goes beyond the immediate legal dispute.³⁵⁵ Meanwhile, as the following quotations illustrate, the experiences of professionals directly assisting underprivileged and illiterate women emphasise that mediation, when applied with consideration for prevailing power disparities, can provide women with an opportunity to gain more control and achieve fairer results within the legal system.

The women we help often come in overwhelmed because they don't know terms like 'custody' or 'maintenance'. Mediation can provide a step-by-step process so that they can really grasp the implications before any agreement is reached. (K7)

Many women, especially those who feel inadequate educationally and financially, have serious anxiety about speaking in front of a judge. Elsewhere their voices have been silenced. The mediation process aims to give due weight and consideration to their perspectives. The experience of participation itself is important, even if the results are not optimal. (K2)

The impediment of limited court accessibility poses a significant challenge to women seeking access to justice. The accessibility of mediation services is on the rise due to the establishment of specialised mediation associations, often led by trained mediators, and the creation of mediation centres through partnerships between local governments and non-governmental organisations.³⁵⁶ The establishment of these centres is believed to have the potential to enhance the accessibility of courts for women with disabilities, thereby facilitating their access to justice. Indeed, in the Dispute Resolution Centre, which was established as a pilot project within Besiktas Municipality in Istanbul, women made the majority of the

³⁵⁴ *ibid* 670.

³⁵⁵ Irlanda, Law Reform Commission, Report: Alternative Dispute Resolution: Mediation and Conciliation (Law Reform Commission, 2010) 112.

³⁵⁶ Berk (n 82) 14.

applications in the seven-month period. It was stated that this was related both to the greater accessibility of municipal services by citizens and to physical proximity.³⁵⁷

3.6. Conclusion

Women's access to justice is a pivotal aspect of legal development, serving both as an end in itself and as a fundamental component of human development. Recognizing women's inherent equality to men, enshrined as a universal human right, is imperative for fostering a just and equitable society. Improving women's access to justice not only contributes to their empowerment but also positively influences social, political, and economic development at large. Moreover, within the framework of the rule of law, itself a crucial end and means of development, ensuring access to justice for all is paramount.

In the context of Türkiye, where law reform has been a central focus, particularly in areas such as the Turkish Civil Code and family law, the mediation system may play a significant role in promoting fairness and resolving disputes. The history of family courts and the existence of the Office of Family and Religious Guidance highlight Türkiye's commitment to providing avenues for justice in familial matters. However, the specific challenges faced by women in accessing justice necessitate a closer examination of the mechanisms in place.

The legal aid mechanism and the role of family mediation emerge as critical components in ensuring women's access to justice in Türkiye. Economic, social, and information barriers present challenges that must be addressed to empower women to fully utilize the legal system. Economic barriers, such as financial constraints, and social barriers, including cultural stigmas, can hinder women's access to justice. Information barriers, such as a lack of awareness about legal rights and available resources, further compound these challenges.

In conclusion, family mediation gives people the freedom to negotiate flexibly with the other party and clearly express their needs without being subject to the strict requirements imposed by legal protocols.³⁵⁸ The aforementioned constraints, including limited educational opportunities, economic challenges, restricted access to

³⁵⁷ *ibid.*

³⁵⁸ *ibid* 10.

information, and limited access to legal institutions, underscore the significant role that mediation plays in facilitating women's access to justice.

Family mediation has frequently proven to be a valuable mechanism for resolving disputes. Family conflicts that do not have a clear and indisputable resolution, along with the approaches to ensuring justice for both female victims and offenders in legal proceedings, align well with the concept of facilitated self-determination.³⁵⁹ In situations where the parties involved have some degree of control over the way in which the negotiations are conducted, this is much simpler to achieve.³⁶⁰

359 Gay Clarke and Iyla Davies, 'ADR - Argument for and Against Use of the Mediation Process Particularly in Family and Neighbourhood Disputes' (1991) 7 QUTLR 86.

360 Serene Reza, 'The Shortcomings of Family Mediation and Restorative Justice Proceedings' (2017) 4 SOASLJ 86.

CHAPTER IV

ISLAMIC FAMILY MEDIATION MECHANISMS

4.1. Introduction

People who have conflicts between them often resolve their problems through mediation, arbitration, *sulh* (peace), and the court. This chapter discusses the place of mediation, one of the dispute resolution methods, in Islamic law. Concept analysis related to Islamic mediation has been made, mediation and other dispute resolution methods in Islam has been compared, and the application of Islamic law to family law have also been evaluated. The principles and rules of mediation have now been analysed based on the Qur'an, *sunnah* and secondary sources, such as Islamic law *ijma'* (consensus) and *qiyas* (deductive analogy). Based on the perspectives of the four main schools, the mediator explains how mediation works and what conditions to look for. To better understand the concept of family mediation, it is necessary to distinguish it from other forms of dispute resolution in Islam such as *sulh* (peace), arbitration, and *wasatah* (mediation); all these have been discussed in this chapter.

4.2. Islamic legal basis of mediation

It is generally accepted that any research related to an Islamic subject must begin with an inquiry into the Qur'an and *sunnah* as they are the main authoritative texts in Islamic law. The *sunnah* is what all the Muslims of the time of Prophet Muhammad, saw and followed and passed on to the next generations. The *hadiths*, which are the oral evidence of the *sunnah*, guide Muslims on the words and deeds of the Prophet. The *hadiths* offer a guide to understanding the Qur'an from which the concepts of Islamic jurisprudence are derived. Mediation has been legitimized with different concepts, the Qur'an, *sunnah* and Companions' opinion, which are sources of Islamic law.

4.2.1. Mediation in the Qur'an

In addition to settling the conflict between people, ensuring peace and tranquillity in society is an issue that Islamic law focuses on with sensitivity, because resolving

disputes and ensuring unity in the society is the unchangeable provision of the Qur'an.

There are two main *ayah*¹ of proof for mediation in the Qur'an; first, the assistance feature of mediation is mentioned as follows in the surah al-Maidah Verse 2:

... Cooperate with one another in goodness and righteousness, and do not cooperate in sin and transgression. And be mindful of Allah. Surely Allah is severe in punishment.²

The second proof consists of evidence of the surah, which suggests peaceful resolution of the dispute in general and mediation in particular. Evidence suggesting peaceful conflict resolution can be found in verses and *hadiths* of the Qur'an. These verses provide guidance on how to approach disagreements and disputes in a way that fosters understanding, reconciliation, and peace. It can be listed in the following verses on the subject.

If you [believers] fear that a couple may break up, appoint one arbiter from his family and one from hers. Then, if the couple want to put things right, God will bring about a reconciliation between them: He is all knowing, all aware.³

The verse clearly explains the procedure to be applied when there is a concern over separation between spouses. The main criterion of mediation relates to the assistance of a neutral third party (a mediator) to facilitate the disputed parties to communicate their dispute amicably and to reach consensus on a binding agreement whenever possible.⁴ On the other hand, although the mediator does not have the power and authority to separate spouses, there may be situations where the mediator helps the parties to accept the inevitability of divorce.

The Qur'anic verse endorsing the selection of two arbitrators in marital conflicts, with one representative from each family, encourages a procedure that

1 The technical term of the word surah is the title given to each individual division or chapter of the Qur'an.

2 Qur'an translate by M. A. S. Abdel Haleem (Oxford: Oxford University Press, 2008), (Al-Maide:2).

3 *ibid*, (An-Nisa:35).

4 Rafidah Binti Mohamad Cusairi, the application of Islamic Shari'ah to the Muslim minority living in the UK: a comparative study on family mediation between English law and faith-based med-arb at Shari'ah councils (PhD thesis, Glasgow Caledonian University 2013).

resembles mediation rather than contemporary legal arbitration.⁵ The Qur'anic verse advocating for the appointment of two arbitrators in marital disputes, one from each family, promotes a process more akin to mediation than modern legal arbitration.⁶ While arbitration involves a binding decision by a neutral third party, mediation emphasizes facilitated communication voluntary agreement between disputing parties.⁷ The verse's emphasis on reconciliation and the involvement of family members suggests a mediation-like process, as the primary goal is to restore peace and encourage a mutually agreeable solution.⁸ The verse uses the term "arbitration", but its historical and cultural context suggests a more flexible role for the arbitrators, prioritizing reconciliation over imposing a strict judgment.⁹ Therefore, while the verse technically mentions arbitration, the system it describes aligns more closely with mediation due to its emphasis on reconciliation and voluntary agreement. The Qur'anic emphasis on preserving familial harmony and promoting peaceful conflict resolution supports this interpretation.¹⁰

The verses emphasize that those appointing a mediators are also obligated to follow their decisions, demonstrating the practical application of mediation within Islamic law and its integration within the legal framework.¹¹ As stated in the conceptual framework, the referees also have mediation roles in the first stage in the light of these verses.

In addition, the Qur'an encourages mediation in the surah of Hujurat. It says:

If two groups of the believers' fight, you [believers] should try to reconcile them; if one of them is [clearly] oppressing the other, fight the oppressors until they submit to God's command, then make a just and even-handed reconciliation between the two of them: God loves those who are even-handed.¹²

5 Ahmet Akgündüz, 'Hakem' (The Arbitration) in DIA (İstanbul 1997) 172.

6 Azwina Wati Abdull Manaf, Hafiza Binti Abdul Razak and Jalilah Binti Mohd Ali, 'Mediation in Islamic Banking Dispute in Malaysia' (2018) 24(7) ASL 5174.

7 Fahrettin Atar, İslâm Adliye Teşkilâtı (Islamic Judicial Organization) (Presidency of Religious Affairs Publication 1991) 129.

8 Yusuf Şen, 'İslam Hukukunda Arabuluculuk (Mediation in Islamic Jurisprudence)' (2012) 11(22) HUFTJ 111.

9 *ibid.*

10 Manaf and others (n6).

11 *ibid* 2.

12 The Qur'an, (49:9).

According to this verse, when there is disagreement or dispute between the two parties of believers, then a third will reconcile the two parties.¹³ First of all, Allah ordered peace between the two warring factions, and yet said that mediation could not be achieved if even one of the parties continued the persecution. Thus, in all disputes, including war, mediation is not allowed if one party behaves unjustly toward another.

Besides, Allah highlights justice and equality among people in verses that mention mediation.¹⁴ The Qur'anic principle of justice and fairness, as exemplified in verse 4:58, is crucial in resolving family disputes. This verse also serves as a guiding principle for mediators involved in family disputes, reminding them of their ethical obligation to uphold justice and fair treatment.¹⁵

It is important for the welfare of the society to run family mediation first so that the family that forms the basis of the society does not break up.¹⁶ Adopting the way of persuasion between the couples on issues that can be resolved before proceeding with the court process, and trying to convince the parties is a method recommended by the Qur'an. Allah says in Nisa verse 35 that if there is a fear of violation of the marriage contract between a man and his wife, two mediators or arbitrators, one from the man's family and one from his wife's family, should be appointed, and if both are willing to make peace, reconciliation will be made.

“If a wife fears high-handedness or alienation from her husband, neither of them will be blamed if they come to a peaceful settlement, for peace is best. Although human souls are prone to selfishness, if you do good and are mindful of God, He is well aware of all that you do.”¹⁷

This verse emphasizes that it would be better to resolve the dispute between them or their problems through mediation. In cases where the woman is uncomfortable with her husband or does not like her husband's appearance, it is recommended that the woman assist the mediator. Islamic mediation views the mediator as an active agent in the mediation process, being intimately involved in

13 Manaf and others (n6).

14 *ibid.*

15 Şen (n8) 112.

16 *ibid.*

17 The Qur'an, (4:128).

finding a solution to the conflict as long as the husband and wife agree to their presence.¹⁸

Also, this verse outlines a process for resolving marital disputes. In any conflict, each spouse should choose a representative from his or her respective families to negotiate a solution. The Islamic mediation process involves three key aspects: first, the mediators should be chosen from the husband and wife's relatives. Second, the representatives act as proactive mediators, actively seeking a settlement. Third, due to their involvement, these mediators have an insider perspective during the negotiation process.

The expressions in the verses show that the mediation system offered by the Qur'an is fair and solution-oriented. For instance, Hallaq argues that the Quran's emphasis on mediation reflects a broader Islamic ethos of prioritizing community cohesion and avoiding unnecessary conflict.¹⁹ Although the spouses have religious and social responsibilities regarding obeying the marriage law and protecting the family, this may not be possible for various reasons and the family may collapse.²⁰ Therefore, the verses bring about mediation as a key means to resolve marital disputes, aiming to preserve the family or safeguard the family institution.

In conclusion, mediation in Islamic family disputes cannot be described solely as an issue-oriented process, but rather as an on going process aiming to foster a healthier family life. The informal nature of this method allows conflicts between husband and wife to be settled within the circle of the family without interference by an outsider in the role of neutral party.²¹ This informal mediation process is crucial for resolving family disputes before divorce proceedings begin and a judge makes a decision.

4.2.2. Hadiths of the Prophet on Mediation

The concept and practice of Islamic mediation can also be found in the *hadith* (the words of the Prophet Muhammad (pbuh) and *sunnah*, the secondary Islamic source.

18 Ratno Lukito, 'Mediation in Islamic Family Law, "Religious ADR: Mediation in Islamic Family Law Tradition"' (2006) 44(2) Al-Jami'ah: JIS 333.

19 Wael B. Hallaq, A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh (Cambridge University Press 1997).

20 Sayed Sikander Shah, 'Mediation in marital discord in Islamic law: Legislative foundation and contemporary application' (2009) 23(3) ALQ 337.

21 Lukito (n 18) 334.

Practices of the Prophet Muhammad (pbuh) regarding the issue show that mediation was an important element that the Prophet prioritized in his time.

First and foremost, Imam Nawawi, one of the six great *muhaddiths*²², relates that the Messenger of Allah (peace be upon him) said that one who reconciles people by speaking favourably and conveying good words is not a liar.²³ Also, the Prophet (pbuh) reconciled parties in dispute. For instance, when the Prophet (pbuh) received information that a dispute arose amongst the people of Quba, once even escalating to the point of throwing stones at each other, he said, "Let us go to bring about a reconciliation between them" and prevented bloodshed.²⁴

Many *hadiths* about ensuring peace among people were narrated by the Prophet (pbuh). "Shall I tell you what is more virtuous than fasting, prayer, hajj and charity?" When they were said "Yes, the Messenger of Allah", the Prophet (pbuh) said: "mediate between people and mediating them"²⁵.

However, the Prophet (pbuh) promoted mediation as a path to fairness but also recognized that individuals might have legitimate reasons to refuse it. In such situations, the judge is tasked with delivering a just and unbiased verdict, relying solely on the evidence presented.²⁶ This approach aligns with the Islamic legal system's focus on both reconciliation and justice, guaranteeing that disputes are settled in a way that protects the rights of all involved.²⁷

At the same time, as in all areas of conflict, there are mediation practices in the *sunnah* and *hadiths* regarding marital disputes between husband and wife or any member in the family. Even in a situation where reconciliation fails and one or both parties insists on separation, the Prophet (pbuh) advised the marriage parties to resolve their issues. It is reported from Aisha (wife of the Prophet) that:

The following verse: If a woman fears cruelty or desertion on her husband's part (i.e. the husband notices something unpleasant about his wife, such as old age or the like, and wants to divorce her, but she asks him to keep her

22 A *muhaddith* (Arabic: محدث) is a scholar dedicated to studying, collecting, and interpreting hadiths—the recorded sayings, actions, and approvals of the Prophet Muhammad.

23 Sahih Al-Buhari, vol 3, book 45, *hadith* 1 <<https://sunnah.com/muslim/45>> accessed 29 October 2023.

24 *ibid*, book 49, *hadith* 858.

25 Abū Dāwūd, *as-Sunan*, Adab 50.

26 Sen (n8) 117.

27 Kurtubî, *el-Câmi'li ahkam'il Kur'an*, 296.

and provide for her as he wishes). (4.128) 'There is no blame on them if they reconcile on such basis.'²⁸

The *hadith* clearly advocates a harmonious, peaceful and friendly resolution of family conflicts. A solution achieved through mediation and communication is thought to be much more advisable and greater in benefits than using public proceedings such as in courts.²⁹

4.2.3. Fatwas of Muslim jurists on Mediation

In view of the foregoing, Muslim jurists state that any peaceful solution, including mediation, is recommended by Islamic law. They also emphasize that the foundations of mediation in Islam can be derived from these texts and general principles of Islamic law. As a matter of fact, in the judicial instruction that Umar ibn al-Khattab (r.a) sent to the *qadi* Abu Musa al-Ash'ari in Kufa, Umar (the second caliph of the Rashidun Caliphate) said: "Guide people to mediation, because the verdict of the cases by court decision creates hostility among them."³⁰ Caliph Uthman ibn Affan also encouraged mediation in most jurisdictions.³¹

However, the definitions of Islamic mediation of the Hanafi, Shafi'i, Hanbali and Maliki schools differ. In Islamic law, mediation (*sulh*) is defined as an agreement concluded by the parties of their own accord to settle the dispute for a price³². In the Malikîs, the field of mediation is not only limited to the legal relations on which there is dispute, as in other sects, but also includes the situations where there may be a dispute between the parties and they accept the agreements that will prevent such an event from occurring.³³

As for the Islamic definitions of mediation by Shafi'is, it shows that it is an agreement that the parties have made with their free will and that the parties cannot be forced to make peace. The definition of "the contract that puts an end to controversy", made by Hanafi scholars, is the most appropriate definition of

28 (n 23) *hadith* 859.

29 Cusairi (n 4).

30 The Mejjelle (C.R. Tyser and others English trans, The Other Press 2001) art 1826.

31 Mâverdi, *el-Havi'l-kebir*, vol 6, 366.

32 Davut Yaylalı, *İslam Hukukunda Sulh* (Taştan Matbaacılık 1993) 13.

33 Adil Ahmed Abdulmevcûd and Ali Muhammed Muavvid, *Dâru Alemlî'l-Kütüb* (Beirut 1423/2003) 427.

mediation in Islamic law, because this definition is more concise and more comprehensive than others.³⁴

4.3. Role of the Mediator In Islamic Law

Islamic mediation law stipulates certain qualities that must be observed for a mediator to qualify. These qualities include being Muslim, having legal knowledge, and meeting certain conditions in their duties.

The first critical factor is religious adherence. The mediator's religious adherence is crucial for effective legal mediation, as it reflects their deep understanding of Islamic law and enables them to navigate legal nuances effectively.³⁵ That is, religion is considered a precondition and authorises Muslims over non-Muslims in matters that concern Muslims. Furthermore, Islam does not encourage non-Muslims to occupy a position over Muslims.³⁶ Accordingly, it is not permissible for a non-Muslim to deal with the cases of Muslims.³⁷ At this point, Islamic mediation is separated from other legal mediation systems.

Second, legal capacity (*Ahliyyah*) is paramount. The legal competency of mediators involves three conditions: the external standard of puberty (*bulugh*), full mental development and discretionary power (*rushd*). In essence, these conditions emphasize that a mediator must be a mature and mentally capable individual who has reached the age of puberty and possesses the ability to make informed decisions. A person who cannot use his / her rights and competence cannot conciliate by solving other people's conflicts. The Hanafis, Shafi'is, and Hanbalis have made clear that a mediator should have full legal competence.³⁸ The mediator cannot simply be a respected figure or someone who is well-versed in Islamic law; they must have the power to enforce their decisions. For example, Imam Shafi'i upholds that the mediator must have intelligence and ingenuity in order to be entrusted with this responsibility.³⁹

34 ibid 429.

35 Nora Abdul Hak, S Ahmad and UA Oseni, 'Alternative Dispute Resolution in Islam' (2013) IIUMP 58.

36 Faihan ibn Farraj ibn Hagshah, 'Arbitration in Islamic Shari'ah; A Comparative Study with International Law and English Law' (PhD thesis, Lancaster University 2013) 110.

37 Ebû'l-Hasan Ali b. Muhammed b. Habîb el-Mâverî, *el-Ahkâmu's-sultâniyye ve'l-velâyâtud-dîniyye* (Dâru'l-Kutubi'l-Îlmiyye, Beirut 2003); Sîrâzi, *el-Mühezzeb*, 593.

38 Cusairi (n 4) 174.

39 Muhammed ibn Idris al-Shafi'i, *Kitab al-Umm*, 177.

Regarding fairness (*adalah*) and trustworthiness, some debate exists. The four schools of Islamic jurisprudence have different views on the need for the mediator to be fair. According to Shafi'i, Maliki and Hanbali scholars, the mediator must be fair. Hanafis, on the other hand, stated that fairness is not a requirement in this regard, but this is only a sign of competence. Therefore, the mediation of a sinner (*fasiq*) person is permissible and as long as it does not exceed the limit of the law, the decision made by the mediator is accepted. However, some scholars prohibit *fasiq* from mediating a dispute on the grounds that 'it is forbidden to have legal power because of doubt about the character of such a person'.⁴⁰

The purpose of the mediation process is to reconcile the parties to the dispute, as mentioned in chapter one. In cases where reconciliation is not possible, the mediators are there to assist the parties with future arrangements, with regard to their property and finances as well as the upbringing of their children, for instance. In this regard, the appearance and reputation of the mediator is as important as building a good relationship in the process as well as gaining the trust of the parties. This is especially true when mediating family matters involving intimacy and confidentiality, based on the mediator's ability to trust the mediator to assist parties in providing and resolving a safe place to disclose private and confidential matters.⁴¹ Therefore, fairness (*adalah*), which must be present in everyone as a moral qualification, should be an important feature sought for mediation.

Finally, legal knowledge emerges as a central point of discussion.⁴² What is meant by the legal knowledge of the people who are in a position to resolve the disputes of the parties is to know the Qur'an and the *sunnah* and to take examples of the practices of the Prophet (pbuh) according to changing and developing conditions. The mediator should have both a sufficient knowledge of the law in its basic principles and rules, and the ability to make legal judgments by analogy (*qiyas*), and to make correct and fair decisions in accordance with the recognized sources of the law.

40 Mahdi Zahraa and Nora A. Hak, '*Tahkīm* (Arbitration) in Islamic Law within the Context of Family Disputes' (2006) 20(1) ALQ 17.

41 Cusairi (n 4) 176.

42 For Hanbali see Ibn Qudamah (n 52) vol 14, 14-16; for Hanafi see Al-Kasani (n 162) vol 7, 3; Ibn Nujaym (n 65) vol 6, 428; for Maliki see Muhammad bin Muhammad al-Hattab al-Ru'ayni, *Mawahib al-Jalilli Sharh Mukhlasar Khalil*, 66-68.

According to most of the Islamic scholars⁴³ other than Hanafis, the mediator must have legal knowledge about the problem subject to mediation. Although it is not necessary to know all parts of the law, it is stated⁴⁴ that it would be good for the mediator to have a general knowledge of law, apart from the subject of mediation. Conversely, Hanafis argued that while the mediator's legal knowledge would be beneficial, it shouldn't be mandatory.⁴⁵ As a justification, they argued that the mediator, whose legal knowledge was insufficient, could adjudicate by taking the opinion of other lawyers. However, it was not considered appropriate to mediate by someone who had no knowledge of the law, because it is possible for an ignorant person to spoil many things that are right and make wrong decisions without knowing it.⁴⁶

The well-known Shafi'i jurist Mâverdi is of the opinion that the mediator should be wise enough to make case law. According to him, a person who does not have this qualification cannot be a mediator and his provision is also invalid.⁴⁷ Nonetheless, if it is understood that Mâverdi's requirement of "*ijtihad*" is understood as having all the religious information in the Qur'an, *sunnah*, *ijma'* and *qiyas* enough to make a new judgment from the evidence, it is often not possible to find mediators who fulfil this requirement.

When evaluate all the opinions, it is essential that the person to be appointed as the mediator is a *mujtahid* (interpreter of Islamic law) as the most appropriate opinion, but if such a person is not found, a person who has the ability to properly evaluate the evidence of the parties can be used.

4.4. The Functioning Of Mediation In Islamic Family Law

Marital conflicts can arise from various factors. In Islamic law, for example, "*shiqaq*" (discord) between spouses can stem from "*nushuz*"⁴⁸

43 Abi Walid Sulaiman bin Halaf bin Sa'ad al-Baji, al-Muntaqa Sharh Muwatta' Malik (Dar al-Kutub al-Ilmiyyah 1999) vol 5, 405.

44 Nora Abdul Hak, 'Qualities of a Mediator in Family Disputes; The Shari'ah Perspective' (Asia Pacific Mediation Forum (APMF) Conference, Kuala Lumpur, 16-18 June 2008).

45 Muwaffaq al-Din Abi al-Maqdisi, Muhammad 'Abd Allah bin Ahmad ibn Qudamah, al-Mughni (1997).

46 Kazi N Ahmed, The Muslim Law of Divorce: With a Forew. by S. Anwar-ul-Haq (Bhavan 1978) 278.

47 *ibid.*

48 *Nushuz*, which means protrusion, bump, means "rebellion". It is a concept used in the sense of behaviours that damage loyalty and cause discord for spouses, or rebellion and rebellion against the

(negligence/disobedience) by either the husband or wife.⁴⁹ Other causes include violations of each partner's marital rights. Islam proposes several preliminary measures and solutions to prevent the destruction of the family home due to simple and solvable issues. Therefore, in the Islamic legal tradition, in disputes involving family members, especially between husband and wife, mediation is always encouraged as a method of resolution to settle disputes between them.⁵⁰ The mediation method proposed by Islam, which allows rethinking in the name of saving the family, will be effective in solving an important social problem.

The authority to mediate family disputes in Islam is found in the Qur'an in verse 35 of an-Nisa, as stated earlier. Islamic law provides clear guidance on managing marital disputes, as outlined in an-Nisa 34. Despite the mediator's efforts to reconcile the Qur'an, the mediator appeals to arbitration if the mediator is afraid that the ongoing debates between the couple will lead to the breakdown of the marriage. This is an indication of the joint functioning of both mediation and arbitration in Islamic mediation.

On the other hand, in circumstances where the conflict is severe and there is severe incompatibility, appealing to the mediator is considered a necessary step after all personal efforts have failed to restore harmony. These procedures are fully set out in the Qur'an and explained in more detail by Muslim scholars.

4.5. *Sulh* (Amicable Settlement)

Sulh, the form of conflict resolution in Islam established by the Qur'an, means the reconciliation, discontinuation or cessation of dispute or disagreement and contention, and legally means the termination or elimination of a dispute or litigation between two parties.⁵¹ It applies to all amicable settlements negotiated on their initiative by the parties to the conflict or with the help of a third party or a *qadi* (judge) appointed by them.⁵² The Ottoman Civil Code, the *Mejelle*, stated that *sulh* is

husband for the wife, and tormenting the wife for the husband. It is the state of being the focus of discord in the family. al-Husayn b. Muhâmmad er- Râgıp al-Isfehâni, al-Mufredât fi gari-bi'l-Qur'an, Kahraman Yayınları 1986, p. 751. Nisa, 106/34.

49 Shah (n 20) 336.

50 Sen (n8) 118.

51 Nora Abdul Hak and Hanna Khan, 'The Application of Sulh in Resolving Community Disputes,' paper presentation at 1st World Congress on Integration and Islamicisation of Acquired Human Knowledge (FWCII-2013), Prince Hotel & Residence, Kuala Lumpur, 2013 2.

52 Cusairi (n 4) 153.

a contract that, by consensus, removes disputes and concludes by offering and accepting the conditions lay down.⁵³

The Qur'an and *hadith* declared that resolving disputes between conflicting parties with justice and equity was necessary, especially among Muslims. The Qur'an notes that a third party can help settle disputes between parties when there is a disagreement between two peoples, enabling each of them to choose their representative to resolve the matter. The relevant verses are:

The believers are brothers, so make peace between your two brothers and be mindful of God so that you may be given mercy.⁵⁴

There is no good in most of their secret talk, only in commanding charity, good, or reconciliation between people. To anyone who does these things, seeking to please God, We shall give a rich reward.⁵⁵

The Prophet preferred *sulh* as an essential element that he gave priority to during his time. On the grounds of the *hadith*, the *sulh* is appropriate, provided that it is in accordance with the Islamic Law. Those that consult *sulh* are seen as people who render justice and are compensated. Abu Hurairah reported that the Prophet (*Pbuh*), on supporting the *sulh*, said:

There is a *sadaqa* (giving charity) to be given for every joint of the human body (which number 360); and for every day on which the sun rises, there is a reward of a *sadaqa* for the one who establishes (*sulh*) and justice among people.⁵⁶

The sources of Islamic law indicate that *sulh* is pivotal to the Islamic legal system, and that judgment by the judiciary is not the best form of conflict resolution, and *sulh* should be attempted and encouraged whenever it is convenient to do so.⁵⁷

This practice was also observed during the era of the Islamic Caliphates. As recorded by Mahiuddin⁵⁸, Umar ibn al-Khattab (r.a), the second Caliph of Islam, instructed Abu Musa al-Ash'ari:

53 The Mejlle (n 30) art 1531.

54 The Qur'an (49:10).

55 The Qur'an (4:114).

56 Al-Bukhari, Abu Abdullah Muhammad bin Ismail, azih al-Bukhāri, Dar al Shabi, v.3 543.

57 Cusairi (n 4) 154.

And an amicable settlement (*al-sulh*) is permitted or lawful between Muslims (in dispute), except in the case of an amicable settlement which forbids a permissible one (*halal*) and permits a prohibited one (*haram*).

Peace and reconciliation are often encouraged in disputes involving family members, especially between a husband and a wife, with a view to eliminating differences or conflicts between them. Given the fragility of family relationships and the sensitive nature of domestic issues, Islamic marriage law encourages couples to resolve disputes amicably within the home.⁵⁹ In the Qur'an 35 and 128 of an-Nisa are two verses that clearly command the application of *sulh* and the appointment of arbitrators to solve the conflict between the Muslims in marriage:

If you [believers] fear that a couple may break up, appoint one arbiter from his family and one from hers. Then, if the couple wants to put things right, God will bring about reconciliation between them: He is all knowing, all aware.⁶⁰

If a wife fears high-handedness or alienation from her husband, neither of them will be blamed if they come to a peaceful settlement, for peace is best. Although human souls are prone to selfishness, if you do well and are mindful of God, He is well aware of all that you do.⁶¹

These verses state that if the wife thinks that the husband fails to fulfil his obligation as a husband, or attempts to desert her and she is not prepared for divorce, by *sulh*, she can address and negotiate the matter face to face with the husband. The settlement reached by peace consultation and communication is more advantageous and recommended than the use of public trial, for example in the courts.⁶² In addition, *sulh*, which is accomplished through mutual consent and consensus, fulfils the principle of justice. The law continues to urge parties to the marriage to resolve their problems and divorce amicably, even in a situation where reconciliation has

58 Mahiudin Abu Zakaria Yahya Ibn Sharif En Nawawi, Minhaj et Talibin: A Manual of Muhammadan Law According to the School of Shafi'i, trans E.C. Howard (London 1914) 318.

59 Cusairi (n 4) 155.

60 The Qur'an (4:35).

61 The Qur'an (4:128).

62 Cusairi (n 4) 155.

failed and one or both parties insist on separation.⁶³ In short, during the subsistence of marriage or after divorce, *sulh* may be enforced for dispute arises.

There are many forms in Islamic law that have to be practiced in order to achieve a *sulh* and peaceful settlement. This entails methods such as arbitration, mediation, consultation, and conciliation that involve a third party. This thesis focuses solely on mediation as a form of *sulh*, as it is the only type relevant to this research.

4.6. *Tahkim* (Arbitration)

Tahkim is the Arabic translation of the word “arbitration”. *Tahkim* means that the parties with a legal dispute appoint a third person or persons to settle this dispute and the agreement they have made in this regard⁶⁴ Some contemporary Islamic jurists, on the other hand, described *tahkim* as "an agreement in which the two defendants appoint another arbitrator of their own accord to settle the matter of the case between them."⁶⁵ The meaning of the arbitrator in Arabic is called *hakam*. The verbal noun of the Arabic word "*hakkama*" is *tahkim*, which ‘primarily signifies the turning of a man back from wrongdoing’.⁶⁶ Although the jurists differ in definition, they do agree on the meaning and scope. *Tahkim* is an appointment and, along with it, an authority made by the disputed parties of a third party to settle disputes of the parties.⁶⁷

From these definitions, it is understood that *tahkim* can be exercised voluntarily in Islamic law, that is, by the parties' own consent. *Tahkim* has come to this day as a method used in the resolution of disputes in different areas in Islamic legal systematics. However, modern law views *tahkim* differently, influenced by evolving social structures and needs reflected in judicial procedure regulations. It is now considered mandatory in some Islamic countries.

In Islamic law, some many verses and *hadiths* form the basis for the resolution of disputes between the parties by arbitration. In the Qur'an, the word arbitrator is in three places (an-Nisa 4/35; al-An'am 6/114), and the verbs derived from the adverb of *tahkîm* are in two places (an-Nisa 4/65; al-Maidah 5/42-43). The verse that

63 ibid 156.

64 The Mejjelle (n 30) art 1790, 317.

65 Wahba Muṣṭafā Zuhili and Wahbah Al-Zuhayli, *Al-Fiqh al-Islami wa-Adillatuh* (Dar Al-Fikr Al-Mouaser 1989) 756.

66 EW Lane, *Arabic-English Lexicon* (The Islamic Texts Society 1984) 616.

67 Zahraa and Hakk (n 40) 11.

directly indicates arbitration in the Qur'an is the verse 35 of the surah of an-Nisa as cited earlier. In the verse, it is ordered that all people, especially judges, and that the parties apply to *tahkim* before the divorce.

There are also several *hadiths* on *tahkim*, in addition to the verses of the Qur'an, which clearly indicate that Prophet accepted it as an institution in Islam by the Prophet himself. For example, the Prophet stated, "Whoever *hakkama* (arbitrates) between two disputing parties and both agree with the arbitrator, yet he does not judge justly, Allah will curse him."⁶⁸

Tahkim is used in Islamic family disputes to resolve disputes between spouses. It involves two stages: mediation and arbitration. The first stage involves mediation, where arbitrators are entrusted with the task of resolving disputes between spouses by finding the causes of their grievances and inducing common grounds.⁶⁹ The purpose of mediation is to remove ill feelings and re-establish harmony between the married partners.

The second stage involves arbitration, where arbitrators are entrusted with the task of a semi-judicial and private adjudication.⁷⁰ After examining the evidence presented by both parties, the arbitrators will issue an award to resolve the dispute between the spouses.⁷¹ The term mediation-arbitration (med-arb) is adopted to represent the whole process of *tahkim*. Therefore, Muslim jurists consider mediation and arbitration as part of the same process, known as *tahkim*, without distinguishing between them.⁷²

The role of the third party in the process has never been discussed separately in Islamic law. This dissertation aims to focus on mediations, but the discussion on the qualifications of the third party will mirror exactly the qualifications of the arbitrator as in the second stage of *tahkim*. However, reconciling disputing spouses and bringing them back to a peaceful union is among the main aims of appointing a mediator-arbitrator.⁷³

68 Mansur bin Yunus Al-Bahuti and Idris al-Hanbali, *Kashshaf al-qina' 'an matn al-iqna'* (Beirut: Dar al-Fikr 1982) 309.

69 Cusairi (n 4) 162.

70 *ibid* 163.

71 George Sayen, 'Arbitration, conciliation, and the Islamic legal tradition in Saudi Arabia' (2003) 24 *UPJEL* 228.

72 Cusairi (n 4) 364.

73 *ibid* 163.

In *tahkim*, matters, especially financial arrangements of spouses and their children, are discussed and settled during the arbitration (the second stage of *tahkim*), rather than in the mediation (the first stage of *tahkim*).⁷⁴ This procedure anticipates that the Islamic divorce (*talaq*) can only be pronounced before, and authorized by, a *qadi*, a remedy that highly concerns the presence of the witness.⁷⁵

4.7. An Examination of Islamic Family Mediation and the Turkish Family Mediation System

Although the Turkish legal system provides a basic structure for mediation in different legal matters, it was mentioned in the third chapter that its application in the context of family law is not sufficiently developed. This leads to a scenario in which individuals involved in family disputes may turn to informal, possibly religion-based approaches to resolving conflicts that lack the oversight and enforceability of a formal system.⁷⁶

A comparative analysis of Türkiye's general mediation framework and the historical principles of Islamic family law mediation focuses on identifying common principles and practices that could lead to the development of a more effective and culturally sensitive approach to mediation in Türkiye. By adopting a comparative approach, it can shed light on certain aspects of family mediation that can be modified and incorporated into the future family mediation system compatible with the Turkish legal framework.

4.7.1. Similarities Between Islamic Law and Turkish Legal System in the Field of Family Mediation

There exist certain parallels between the two legal systems with regards to the subject matter, the selection of the arbitrator-mediator, and the conclusion of the arbitration-mediation process. Firstly, in both legal systems, family law primarily serves the purpose of addressing and resolving issues pertaining to marital relationships and conflicts, including divorce proceedings. There is a very extensive

74 Noor Aziah Mohd Awal, 'Sulh as an alternative dispute resolution in Malaysia for Muslim' (2006) 1166.

75 Najma Moosa, 'An Overview of Divorce and Dispute Resolution in Islamic Law' (2004) 4 IFLJ 226.

76 Ekrem Keleş, 'Arbitration Procedure in Resolving Disputes According to Islamic Law,' (Unpublished master's thesis, MU Institute of Social Sciences 1988) 43.

and varied body of literature within the Islamic legal system that explains how to make this decision.

According to Islamic jurisprudence, the rights attributed to God are not subject to arbitration, as individuals lack the jurisdiction to relinquish or negotiate these rights. Hence, within the framework of Islamic jurisprudence, the validity mediation agreement is deemed inapplicable in cases pertaining to public order and offences necessitating the imposition of *hadd* penalties.⁷⁷ The practice of arbitration in Islamic law covers a wide range of areas, from the resolution of marital conflicts concerning the rights of servants to the handling of disputes arising in the field of commercial transactions.⁷⁸ Within the Hanafi madhhab, divorce is recognised as a legitimate entitlement for individuals in the role of servants. Hence, the selection of an arbitrator in this particular case is deemed to be permissible.⁷⁹

Family law disagreements are usually about public good so the parties can't just decide what to do on their own. In addition to deciding on child custody and the nature of their relationship with the child, the parties can also decide on a division of property and monetary and emotional compensation.⁸⁰ This situation makes family therapy much less useful than it could be. So, in order for the family mediation system in our country to provide the benefits that were hoped for⁸¹, it needs to be used in more situations.⁸²

The Code of Civil Procedure (CCP) No. 6100 in Turkish legal system mandates divorce cases in family courts to follow a written trial procedure. During the preliminary examination stage, the judge encourages mediation, providing information on the process and its principles.⁸³ However, the effectiveness of this information in resolving family conflicts is questionable. Once petitions are submitted, the process can become contentious, making parties reluctant to seek

77 *ibid* 43.

78 Şen (n8) 127.

79 İbnü'l Hümâm, *Fethu'l-kadîr*, vol 4, p 318; Ali Haydar Efendi, *Dürerü'l-hukkâm şerhu Mecelleti'l-ahkam* (İstanbul 1330), vol 4, p 805; et-Tarablûsî, *Muînu l-hukkâm*, 25.

80 Mustafa Yildirim, *Arbitration in Islamic and Civil Procedure Law* (Izmir: Izmir Theology Foundation Publications 2002) 113.

81 By expanding its scope beyond traditional family structures, family mediation can contribute to building stronger relationships, fostering understanding, and promoting peaceful conflict resolution across various domains.

82 Abdurrahman Kavasoglu and Tansu Gundogdu, 'Historical Development of Family Mediation and Its Evaluation in Terms of Legislation in Our Country' (2021) 11(2) DUFLJ, 777.

83 The Code of Civil Procedure (CCP) No. 6100, art. 137/I – 140/II.

mediation. The primary objective of family mediation is to facilitate reconciliation without resorting to a contentious legal process. In such cases, factors like hostility, threats, and competition can make it difficult for spouses to disengage from the conflict and move towards reconciliation.⁸⁴

The domain of family law in Islamic legal systems primarily falls under the purview of personal law, with family disputes being recognised as a realm where mediation was generally permissible, albeit with certain exceptions. Nevertheless, in accordance with contemporary legal principles, it is stipulated that matters pertaining to public order, such as domestic violence, are not subject to resolution through the mediation mechanism as prescribed by Islamic law.⁸⁵

In the realm of Islamic law, matters about the rights attributed to God and matters concerning the maintenance of public order are exempt from the purview of mediation processes. Conversely, within the context of Turkish law, there exists a discourse surrounding the appropriateness of including certain matters, such as domestic violence, within the scope of mediation. To enhance the efficacy of solutions in this domain, it is imperative to deliberate on implementing novel regulations and broadening mediation's scope within Turkish law. This should include expanding the application of mediation to encompass issues like domestic violence, currently subject to debate, while carefully considering the necessary safeguards and support systems for such an approach.

Secondly, Islamic and Turkish legal systems share the fundamental goal of resolving marital disputes, particularly those culminating in divorce, to foster harmonious relationships and protect individual rights. However, their approaches and scopes diverge due to historical context, cultural values, and legal frameworks.

The practice of mediation in Islam covers a wide range of conflicts, including marital disputes related to individuals' rights and disputes that arise in the business domain.⁸⁶ It can be employed across various domains, including international law and criminal law within the Islamic framework. In the *Hanafi* sect, divorce is

84 Kavasoglu and Gundogdu (n 82) 782-783.

85 Keleş (n 76) 43.

86 Sen (n8) 126.

regarded as a legitimate right of individuals, and the appointment of a mediator in this matter is considered permissible.⁸⁷

Law No. 6325 on Mediation in Civil Disputes, Article 1/2, states that mediation applies to non-governmental disputes where parties have the autonomy to reach their own decisions. Mediation is not appropriate for resolving disputes that involve accusations of domestic violence. The suitability of mediation for a specific dispute ultimately hinges on the unique circumstances of the case. Turkish legal scholars suggest that direct mediation may be appropriate in cases of domestic violence to prevent further escalation and promote healthier communication between spouses.⁸⁸ However, situations involving recurring acts of violence, substance addiction, or severe psychological disorders may not be conducive to mediation. Family law disputes are public order matters and do not allow parties to make decisions about custody or personal relationships.⁸⁹ To fully realize the potential benefits of family mediation in Türkiye, its scope should be broadened and new regulations specifically tailored to this field should be established, independent of the existing HUAK framework.⁹⁰

Conversely, within the framework of Islamic jurisprudence, Surah Nisa's verse 35 underscores the significance of designating mediators to mediate in marital conflicts.⁹¹ There exists a divergence of perspectives among various legal scholars regarding the appropriate entity responsible for the appointment of mediators. Nevertheless, it is commonly advised that spouses should select mediators from within their own ranks in order to address their issues.⁹² Divergent viewpoints exist among Islamic jurists and commentators regarding the obligatory or permissible nature of appointing arbitrators, with the determination being contingent upon the specific characteristics of the dispute at hand.⁹³

Both legal frameworks typically encourage spouses to select mediators from their own group to resolve family disputes. In this manner, families are afforded the opportunity to address and resolve their issues within a more amicable setting.

87 İbnü'l Hümâm, *Fethu'l-kadîr*; Ali Haydar Efendi (n 79) 4/805.

88 Kavasoglu and Gundogdu (n82) 782-783.

89 ibid 784.

90 ibid 777.

91 en-Nisâ, 4/35.

92 el-Cessâs, *Ahkâmu'l-Kur'an*, 2/238.

93 Sa'dî Ebu Ceyb, *Mevsuatü'l-icmâ' fi'l-fikhi'l-İslâmi*, 218–219; Yıldırım (n 80) 112.

Nevertheless, in contemporary legal frameworks, the mediation process is typically guided by court rulings or facilitated by judges, rather than being solely driven by the voluntary choice of the parties involved.

Lastly, the cessation of mediation in Islamic law encompasses several scenarios, including the mediator's issuance of a conclusive decision, the conclusion of the agreed-upon timeframe, the mediator's dismissal, resignation, demise, or incapacitation, as well as the resolution of the dispute through settlement. Furthermore, the termination of mediation occurs when the mediators endorse the advocacy of one of the spouses, as this action would undermine their impartiality. Decisions rendered subsequent to the conclusion of mediation process are deemed to lack validity.⁹⁴

The termination of arbitrators by the parties prior to rendering a decision is a viable option, as the parties possess the prerogative to revoke their arbitral mandate. Nevertheless, it is imperative to acknowledge that once the decision has been made, it is not feasible to terminate the referees' involvement. Similarly, the parties cannot dismiss the appointed arbitrators, as they assume the role of the judge's deputy upon appointment by the judge.⁹⁵

Mediation ends when the parties reach an agreement, the mediator determines that it is unnecessary for the parties to make additional efforts, one of the parties withdraws from mediation, the parties terminate the mediation by agreement, or it is determined that the dispute is not suitable for mediation, according to the Law on Mediation in Civil Disputes No. 6325.

As a result, in both legal systems, spouses may dismiss or request the dismissal of mediators/arbitrators appointed by the court. The parties may dismiss arbitrators or mediators who have lost their impartiality or who act in favour of the opposing party during the mediation or arbitration process. Accepting the representation of one spouse by the arbitrators terminates the arbitration or gives the other spouse the right to dismiss, because the arbitrators become a party to the case by violating the principle of impartiality.

94 Burhanuddin İbrahim b. Ali b. Ebi'l-Kasım b. Muhammed İbn Ferhun, *Tabsiratü'l-hukkâm fi usûli'l-akdiye ve menâhici'l-ahkâm* (Dâr'ul-Kütübi'l-İlmiyye 1416/1995), 1/78; Akgunduz (n 5) 15/173; Yildirim (n 80) 39/412,413.

95 Muharrem Balci, *Dispute Resolution Methods and Arbitration* (Advisor 1999) 78.

4.7.2. Differences Between Islamic Law and Turkish Legal System in the Field of Family Mediation

This subsection analyzes the divergences between Islamic law principles and the Turkish legal framework as they pertain to the practice of family mediation. The first difference is in the aims of the two legal systems. While both legal systems share the objective of resolving disputes, the arbitration approach in Islamic law places particular emphasis on the restoration of the marital union, whereas contemporary mediation systems prioritise facilitating a healthy and amicable divorce process while minimising the impact on the children involved.⁹⁶ Currently, the fundamental basis of the Turkish family structure revolves around safeguarding and perpetuating familial cohesion, in accordance with the principles of the Islamic faith and legal standards.⁹⁷

The primary objective of family mediation is to establish a communicative setting that mitigates harm for both spouses and children through the prevention of conflict and violent occurrences. In the official judiciary, legal principles are prioritized and emotional issues are kept in the background. However, family mediation offers a less tense and amicable environment, allowing couples to express their emotional needs more effectively. Hence, family mediation, a process aimed at facilitating divorce proceedings, occasionally enables couples to opt for reconciliation instead of separation.⁹⁸

Second difference is mediator qualifications. As previously mentioned, according to Islamic jurists, arbitrators must primarily be chosen from within the family, and if that is not feasible, they may also be selected from among neighbours or other individuals. Traditionally, referees are expected to be male, and the idea of women officiating is still a debated topic. It is understood from the expression "...send an arbitrator from the man's family and an arbitrator from the woman's family..."⁹⁹ in the verse that the primary criterion sought in family arbitrators in Islam

96 Talha Köse and Nimet Beriker, 'Islamic Mediation in Turkey: The Role of Ulema' (2011) 5(2) NCMR 136-161.

97 Ahmet Temel, 'İslam Aile Hukukundaki Arabulucu-Hakemlik Uygulamasının Türkiye'de Aile Arabuluculuğuna Muhtemel Katkıları [Possible Contributions of the Mediator-Arbitrator Practice in Islamic Family Law to Family Mediation in Türkiye]' (2019) 30(2) DT 311.

98 G Yasemin Altun, 'Family Mediation Regulations' (Right to Protection of the Family Symposium, 29-30 April 2019) 499.

99 en-Nisa, 4/35.

is not to have theoretical knowledge and documents, but to have the appropriate qualifications. Islam emphasises reconciliation between spouses, striving to create an environment conducive to harmony. Therefore, the family setting provides the most comfortable space for spouses to discuss their issues, which are often already known by family members, even those considered private between the couple.¹⁰⁰ However, if there are family secrets that the spouses wish to keep confidential from family members, there is no obstacle to appointing a mediator from outside the family.¹⁰¹

Currently, qualified individuals who possess official certifications conduct mediation in Türkiye, and individuals of any gender are eligible to serve as mediators. In Türkiye's draft mediation framework, only lawyers and law graduates can act as mediators. Notably, mediators are generally prohibited from offering legal advice to the parties involved.¹⁰² Article 6/1/1/a of Law No. 4787 on the Establishment, Duties, and Trial Procedures of Family Courts (AMK) allows judges to warn spouses about their obligations and decide on reconciliation if necessary. The judge is only responsible for inviting parties to reconciliation and may refer them to a mediator during the preliminary examination phase.¹⁰³ The judge can refer parties to experts working within the family courts, suggesting that court-related mediation may be possible. However, it should be clarified that judges cannot be mediators and that encouragement for conciliation and mediation should be possible in all disputes.¹⁰⁴

Furthermore, according to Article 2/I/b of the HUAC, mediation is a process that brings the parties together for the resolution of the dispute and enables the parties to produce their own solutions by applying systematic techniques, and at the point where they cannot produce a solution, it is the process carried out in the presence of a neutral and independent third party who has received specialised training.¹⁰⁵ According to this information, it has been argued that family mediation is not family counselling and therefore family counsellors or therapists cannot provide

100 Temel (n 97) 311.

101 Kavasoglu and Gundogdu (n 82) 777.

102 Suha Tanriver, 'Alternative Dispute Resolution Methods and Especially Mediation in the Context of Civil Disputes' (2006) 64(19) JUTBA 166.

103 Kavasoglu and Gundogdu (n 82) 778.

104 *ibid*, 779-780.

105 Akgunduz (n 5) 15/172.

mediation services.¹⁰⁶ Not all practices that provide amicable settlement of family disputes can be described as family mediation. These practices may take the form of family counselling or therapy.¹⁰⁷

Again, in Turkish law, unlike Islamic law, mediators do not have the authority to unite or separate spouses. Such authority belongs only to judges in courts. The duty of the mediators is to provide the spouses in the divorce stage with the necessary information and alternatives in order to overcome this process in a healthy way.¹⁰⁸ The decision belongs to the spouses. The powers of the mediators are limited to the persons they are appointed and the issues that concern them.

4.7.3. Exploring the Influence of Islamic Law on Family Mediation in Turkish Legal System

Today, to ensure a divorce process by the rules set by the Qur'an and the *sunnah* and to control the rights of the spouses, a more functional application is required to legally/officially supervise the "religious divorce" process and to link it to a "legal procedure". In this context, as a measure to limit the number of divorces resulting from the husband's abuse of the "divorce" authority and to prevent impulsive divorces based on non-serious reasons, it is important to officially introduce the "mediation institution/family council" that the Qur'an (4/35) commands Muslims and to ensure that divorces are carried out within the framework of an official/legal procedure that will provide the supervision of the society and the state in the religious divorce process.

The high prevalence of religious marriage (98.2%) in Türkiye underscores the profound influence of Islam on the institution of marriage and family formation within Turkish society.¹⁰⁹ By contracting a religious marriage alongside a civil marriage, couples declare their commitment to Islamic principles. These principles include expectations of marital behaviour, financial provisions such as the *mahr*, and the possible dissolution of the union. As a matter of fact, it is observed in different legal systems that religious marriage, even if it is unofficial, has certain legal consequences. The Divorce (Religious Marriages) Act 2002, which amended the UK

¹⁰⁶ *ibid.*

¹⁰⁷ Kavasoglu and Gundogdu (n 82) 783 - 785.

¹⁰⁸ Kavasoglu and Gundogdu (n 82) 784.

¹⁰⁹ Temel (n 97) 330.

Matrimonial Causes Act 1973, offers a compelling illustration of the intricate interactions that exist between religious and civil divorce procedures. Section 10A was introduced to address situations where individuals remain religiously married despite obtaining a civil divorce. This provision empowers courts to postpone finalising civil divorce until parties meet the requirements of their respective religious laws for dissolution. While not dictating religious divorce proceedings, the amendment recognises the importance of these processes within diverse faith communities.

The report released by the Presidency of Religious Affairs reveals that 93.2 per cent of participants adhere to religious instructions, demonstrating a robust commitment to Islamic principles within Turkish society.¹¹⁰ This adherence transcends socio-economic distinctions, indicating a widespread prioritisation of religious guidance in deeply personal and family matters. The interaction between religious and civil legal frameworks in marriage and divorce underlines the complexities arising from the interplay between personal beliefs, social norms and state-sanctioned legal systems. It emphasises the need for a nuanced understanding of the cultural and religious contexts that shape individuals' intimate relationships and familial obligations. Indeed, in certain instances, despite the court's approval of the divorce, the husband's assertion that the divorce lacks religious validity can lead to a range of social issues and potentially significant repercussions.¹¹¹ Therefore, the woman may choose to forgo another marriage despite the court's divorce.

The report from the Presidency of Religious Affairs emphasizes the firm commitment to Islamic principles in Turkish society, especially in personal and family issues. It also mentions the possibility of conflicts due to the interaction of religious and civil legal systems. Nevertheless, interviews indicate that integrating Islamic law into secular state systems could help resolve these conflicts and bring advantages to Muslim communities. The interviews in this study showed the benefits of integrating Islamic legal practices into secular states. Interviewers noted advantages such as enhancing social cohesion among Muslim communities in

¹¹⁰ According to the 'Religious Life Survey in Türkiye', conducted by the Presidency of Religious Affairs through a survey applied to 21 thousand 632 people, 87.1% of the participants stated that they raised their children in accordance with Islamic sensitivities; 68.9% stated that their priority in choosing a spouse is religiosity. See DIB, Research on Religious Life in Türkiye 2014, 33.

¹¹¹ Ahmet Temel (n 97) 331.

Türkiye and empowering individuals in personal legal matters. The findings emphasize the potential for Islamic law to supplement current legal systems in secular states, providing opportunities for resolving conflicts, building communities, and empowering individuals. Thus the following comments were made:

Even in secular states like England, where Muslims are a minority, there are benefits to be found in Islamic law practices. These practices are encouraged and supported through the establishment of Islamic arbitration centres, allowing Muslims to find their own solutions in accordance with Islamic Law. Due to this reason, the state's secular structure does not hinder the consideration or utilisation of religious practices in resolving legal issues. (K17)

Islamic law practices in a secular state such as Türkiye have the advantage of fostering social cohesion among Muslim communities. Islamic family mediation offers a comfortable and culturally attuned platform for the resolution of conflicts, promoting a sense of communal belonging and preserving traditional principles. (K11)

Even in a secular state, individuals should possess the independence to determine how they address specific legal matters, especially those related to personal affairs such as marriage or inheritance. The implementation of Islamic law practices can provide individuals with a structured system that is consistent with their religious convictions, thereby fostering a sense of autonomy in managing legal affairs. (K13)

Interviews also revealed that the practice of informal Islamic family mediation in Türkiye could have detrimental consequences for women seeking a legal solution to marital disputes.

While Islamic family mediation is commonly seen as a culturally sensitive alternative for civil court cases, it tends to put women at a disadvantage in reality. Mediators, usually religious individuals with traditional mind-sets, may prioritize maintaining the family structure over protecting women's

rights. This can result in pressure on women to reconcile, even in cases of abuse or inequality. (K20)

For some, the pressure exerted by family members to resolve issues through informal mediation is distressing. Refusal to engage in such processes can lead to serious family disapproval, as in the case of a woman who consulted an *imam* (Bursa), where her family blamed her for the breakdown of the marriage. The informal nature of these mediations, which take place before formal counselling or legal intervention, raises significant concerns that they impede women's access to justice. When informal Islamic family mediation becomes the primary means of resolving marital disputes, the risks of impeding women's access to justice and exacerbating existing power imbalances increase significantly.

The findings from the qualitative interviews conducted as part of this study indicate that a subset of respondents expressed concern regarding the potential implementation of Islamic family mediation practices within the current secular legal framework in Türkiye. Five out of twenty respondents specifically expressed their opinion that implementing these mediation principles, rooted in Islamic jurisprudential traditions, could conflict with Türkiye's commitment to a secular state. As we shall see, the participants argued that the core principles of Islamic family mediation, closely tied to religious beliefs, might conflict with or undermine the secular values currently guiding legal processes and conflict resolution mechanisms in the Turkish legal system. The complex socio-political tensions and sensitivities surrounding any perceived encroachment of religious jurisprudence into the civic legal domain within Türkiye's secular democracy are highlighted by this perspective, even though a minority of respondents expressed it in the following.

Incorporating religious legal principles into conflict resolution runs the risk of establishing a separate legal system alongside a secular framework. This could lead to inconsistencies in legal interpretation and potentially undermine women's ability to navigate their rights within a clear and established system. (K15)

Informal mediation practices that take place before a woman has a chance to obtain legal counsel might lead to agreements that are not fully understood

or within her best interests. Ensuring access to legal representation prior to any mediation process is crucial for informed decision-making and the protection of women's rights. (K5)

Within a patriarchal societal context, power imbalances can significantly influence informal Islamic family mediation processes. Placing a strong emphasis on reconciliation risks pressuring women into returning to unsafe situations. (K4)

Encouraging constructive communication between couples going through the divorce process is important. Integrating the Qur'anic concept of mediation councils and legal procedures for religious divorce could help limit impulsive divorces, protect spousal rights, and provide a culturally resonant platform for marital dispute resolution. Thirteen interviewees revealed that numerous Muslims opt for seeking a resolution to their marital issues with imams or individuals well versed in religious teachings rather than traditional mediation.

However, it's crucial to acknowledge that Islamic family mediation should be an option within a broader family mediation system, not the only option. While many Muslim couples may find comfort and familiarity in an Islamic framework, others may prefer a secular approach. Therefore, a more inclusive system should be established in Türkiye, offering both traditional and Islamic family mediation as choices. This would ensure that all couples have access to a form of mediation that aligns with their values and beliefs. The divorce process becomes more approachable and culturally sensitive for Muslim couples with the inclusion of Islamic family mediation, which is founded on Islamic tradition and jurisprudence. This approach recognises the significance of religious values while safeguarding secular legal frameworks and women's autonomy. By promoting mutual understanding between religious and civic institutions, Türkiye can harmonise traditional practices with modern legal systems, upholding personal beliefs and gender equality..

4.8. Conclusion

In conclusion, Islamic family mediation presents a codified and values-driven framework for dispute resolution, deeply rooted in the Qur'an, *hadiths*, and the extensive scholarly tradition of Islamic jurisprudence. Its emphasis on the mediator's

moral rectitude, religious knowledge, and unwavering commitment to justice highlights the ethical underpinnings of this process. While traditionally focused on marital conflicts, the principles enshrined in Islamic family mediation offer the potential for broader application within diverse family law contexts. These principles may also provide valuable insights for peace building and reconciliation efforts within multifaceted societal settings.

Mediation is a viable option for settling conflicts involving family law in both the Turkish and Islamic legal systems. Nevertheless, their scope and execution differ significantly. Except in cases where the rights of God or public order are directly at stake, Islamic law generally accepts mediation in family matters. If the permitted scope of mediation was to be expanded and, the potential benefits of mediation in both systems would be enhanced. In order to give people and families the best possible options for dealing with legal issues.

CHAPTER V

THE CONCEPT OF FAMILY MEDIATION: SHARIA COUNCILS IN ENGLAND

5.1. Introduction

The latter part of the 20th century witnessed a crucial turning point in the development of English family law.¹ The prevailing adversarial court system faced widespread criticism² for its emotional toll, financial burden, and limited focus on collaborative resolutions. The growing popularity of mediation, previously termed conciliation, offered an alternative dispute resolution (ADR) mechanism emphasizing negotiation outside of the courtroom.³ Parkinson was one of the early proponents of conciliation, and she praised the procedure for the way it included a therapeutic aspect into the process of legal dispute resolution.⁴ The concept of "solutions," as opposed to that of "blame" that was prevalent in court, was the focal point of the conciliation process, and it encouraged the disputing parties to work together.⁵ The following discussion shows that the state sees family mediation as a clear solution to problems between families.

The English legal system exhibits a degree of pluralism, accommodating informal practices alongside its formal structure. Sharia Councils, operating as religious tribunals for Muslim communities, apply Islamic law principles in adjudicating matters.⁶ The interaction between Sharia Councils and the English legal system demonstrates a subtle intricacy. Although there are some instances of formal recognition, such as in family mediation when both parties agree, Sharia principles are mostly applied unofficially.⁷ The interplay between religious norms and the

1 Rebecca Probert, 'Review of The History of 20th-Century Family Law, by Stephen Cretney' (2005) 25(1) OJLS 171.

2 Stephen Cretney, *Principles of Family Law*, (4th edition 1984).

3 Lisa Parkinson, *Conciliation in Separation and Divorce: Finding Common Ground* (Routledge 1986) 6.

4 *ibid.*

5 *ibid.* 67 – 68.

6 İhsan Yılmaz, 'Muslim law in Britain: reflections in the socio-legal sphere and differential legal treatment' (2000) 20(2) JMMA 346.

7 Shona Lester, 'The State and the Operation of Sharia Councils in the United Kingdom' (2015) 17 JRS 3.

secular legal system in contemporary England is a dynamic and multifaceted issue.⁸ This intricate relationship reflects the on going efforts to reconcile traditional beliefs with the evolving principles of modern society.

As outlined in the previous chapter, alternative dispute resolution, particularly mediation, is deeply rooted in Islamic tradition. This chapter delves into the multifaceted landscape of family mediation within the context of Sharia Councils in England. While exploring legal and procedural aspects, the analysis primarily focuses on substantive laws influencing mediation outcomes, including the legal status and enforcement of agreements, consent orders, and the court's discretionary power in considering such contracts. In England, Muslim communities' reliance on informal dispute resolution through Sharia Councils is not merely a choice but often a necessity due to various legal constraints and challenges faced by British Muslims, including family law issues. This chapter examines the underlying circumstances that led to the establishment of Sharia Councils as informal dispute-resolution institutions. It further investigates the processes and procedures employed by these councils in resolving family disputes. The discussion concludes by addressing the complex interplay between Sharia Councils and state legal systems, highlighting areas for potential improvement and collaboration.

5.2. The Emergence of the Concept of Family Mediation in England

Mediation, a dispute resolution method, has been used since the 1930s, initially referred to as 'conciliation' or 'reconciliation'.⁹ From the 1930s to 1971, the terms were used interchangeably in English family law, with the new term mediation being recognized.¹⁰ Nonetheless, as Eekelaar¹¹ has argued, due to term changes and their implementations over the past 50 years, the historical evolution of conciliation and reconciliation¹² in the UK is significantly difficult to pursue. A report acknowledged the following points about the situation:

⁸ *ibid.*

⁹ JM Eekelaar, and R Dingwall, 'The Development of Conciliation in England', in R Dingwall and JM Eekelaar (eds.), *Divorce Mediation and the Legal Process*, (Oxford: Clarendon Press 1988) 3.

¹⁰ Cusairi R, 'The application of Islamic Shari'ah to the Muslim minority living in the UK: a comparative study on family mediation between English law and faith-based med-arb at Shari'ah councils', (PhD Thesis, Glasgow Caledonian University 2013)

¹¹ Eekelaar (n 3) 3.

¹² Conciliation focuses on minimizing conflict during divorce, while reconciliation aims to mend a struggling relationship. Conciliation, therefore, focuses on the practical aspects of separating, while

Conciliation in the area of family dispute has been a comparatively recent development in England and Wales. It is difficult to trace its accurate source merely because the further one investigates into the past the greater the confusion between 'conciliation' and 'reconciliation'.¹³

Lisa Parkinson, a well-known author and pioneer on family mediation, called family mediation "a grassroots initiative"¹⁴ and defined it in 1986 as follows:

Conciliation may be defined as a structured process in which both parties to a dispute meet voluntarily with one or more impartial third parties (conciliators) who help them to explore possibilities of reaching an agreement, without having the power to impose a settlement on them or the responsibility to advise either party individually.¹⁵

In addition to this, she cited the first policy definition of conciliation, which was published by the Committee on One-Parent Families in 1974:

'...assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in a divorce or a separation, by reaching agreements or giving consents or reducing the area of conflict upon custody...arising from the breakdown which calls for a decision on future arrangements.'¹⁶

In the report, Sir Morris Finer QC recommended a peace process and mediation to find amicable solutions and agreements, aiming to resolve disagreements and manage marital dissolution effectively.¹⁷ Sir Morris called for the establishment of an alternative to the use of the family courts in the resolution of the issues that often arise when a relationship comes to an end.¹⁸ Throughout the process, couples were also encouraged to demonstrate responsible behaviour. In

reconciliation seeks to rebuild emotional connections and address the underlying issues that led to the breakdown. Conciliation is often employed when a couple has decided to divorce but wishes to navigate the process in a less adversarial manner, while reconciliation is pursued when the partners still hold love and hope for the relationship. (Eekelar (n 9) 3).

13 University of Newcastle's Conciliation Project Unit's Report to the Lord Chancellor on Costs and Effectiveness of Conciliation in England and Wales, 1989.

14 Parkinson (n 3) 5.

15 *ibid.*

16 Committee on One-Parent Families, Report of the Committee on One-Parent Families: Vol 1 (md 5619, 1974) para 4.288.

17 Marian Roberts, *Mediation in Family Disputes: Principles of Practice* (Routledge 2016) 46.

18 *ibid* 45.

point of fact, Reece highly encourages persons who are contemplating divorce or separation to engage in a style or practice known as responsible divorce.¹⁹

The initial pilot programmes in Bristol and elsewhere played a crucial role in demonstrating the effectiveness of mediation in resolving family disputes, which ultimately led to its wider acceptance and integration into the legal system throughout the late 1970s.²⁰ After two years, the service was expanded to include mediation services for situations involving disagreements over custody and access rights.²¹ Afterwards, service provision swiftly expanded into other regions, and by 1985, mediation was offered in about two-thirds of divorce courts in England and Wales.²² Court-based services are often offered and operated by local probation services as extensions of their welfare responsibility in the court.²³

As of April 2014, attending a Mediation Information and Assessment Meeting (MIAM) now a prerequisite for filing a court application, making it a mandatory requirement for anyone who wants to use the judicial system.²⁴ In an MIAM, a family mediator meets with the parties to discuss alternative options and their advantages over going to court. Attending an MIAM has the goal of ensuring that mediation is looked into as a potential method for resolving the conflict.²⁵ The mandatory requirement to attend a Mediation Information and Assessment Meeting (MIAM) has led to an increased uptake of mediation as a preferred method for resolving disputes, offering an alternative to the traditional court process.²⁶ Couples have the possibility to employ a constructive approach to resolving conflicts within their families thanks to the availability of family mediation.

19 Helen Reece, *Divorcing Responsibly* (Hart Publishing, 2003) 13.

20 Rachael Blakey, *Conceptualisation of Family Mediation: Access to Justice after LASPO* (PhD thesis, Cardiff University 2021) 76.

21 Peter McCarthy et al, 'Family Mediation in Britain: A Comparison of Service Types' (1990) 8 MQ 306.

22 *ibid* 306.

23 *ibid* 307.

24 Family Procedure Rules 2010 (as amended): Following the Children and Families Act 2014, amendments were made to the Family Procedure Rules. Specifically, rule 3.1 (2A) of the Family Procedure Rules 2010 (as amended) now states that unless an exemption applies, a person must attend a MIAM before making an application for certain family court orders. (Becky Hamlyn et al, "Mediation Information and Assessment Meetings (MIAMs) and Mediation in Private Family Law Disputes" (2015)).

25 *ibid* 12.

26 *ibid* 13.

In response to the increasing demand for mediation services and the need for enhanced quality assurance, there has been a growing interest among policymakers, legal professionals, and mediation practitioners in reforming the mediation process.²⁷ This interest is further supported by feedback from users of mediation services, who often highlight areas for improvement. Nevertheless, it seems that efforts to improve family mediation have stalled due to a lack of attention paid to the potential benefits of mediation.²⁸ This topic calls for a much-needed inquiry into the aim and role of modern family mediation in advancing family justice, as the next section attempts to address.

5.3. The Role of Family Mediation in Current English Family Justice

Access to justice is typically addressed in conjunction with legal aid when discussing the civil and family judicial systems that operate within England and Wales. The Bar Council report²⁹ emphasises the crucial correlation between the availability of legal aid and the ability to access justice. The report posits that reductions in financial support for legal aid have created obstacles for individuals in accessing affordable legal representation, impeding their ability to navigate the judicial process proficiently.³⁰ Legal aid frequently promotes access to legal services for persons who cannot afford counsel and representation. There has long been an underlying presumption that having access to the courts equates to having access to justice. Legal aid, according to Marshall, is a "social service meant to improve the citizen's civil right to settle his problems in a court of law."³¹ This adds a procedural component to the provision of legal assistance, emphasizing the need of going to court as the primary means of achieving justice.

Under the initial scheme for legal aid, those individuals who were engaged in litigation and sought representation through a solicitor were the only ones eligible for financing. It was consequently presumed that access to legal representation was necessary for access to both the courts and to the justice. This concept was premised

27 Lisa Parkinson, 'The Place of Mediation in the Family Justice System' (2013) 25 CFLQ 202.

28 Chloe Teagan Smith Duck, A Critical Analysis of Family Law Mediation in England and Wales, (Sheffield Hallam University, master thesis, 2020) 43.

29 The Bar Council, Access denied: The State of the Justice System in England and Wales, 2022.

30 *ibid* 13.

31 Thomas H Marshall and Tom Bottomore, *Citizenship and Social Class* (New York: Cambridge 1950) 10.

on the presence of a qualified legal expert, who was supposed to lessen any barriers to participation in the judicial system (including structural disadvantages, as poverty).³² Lord Reed issued a stern warning that if there was not "unimpeded access" to the courts, the legislation risked becoming minimal "dead letter" and having minimal impact on the multiple justice systems.³³ However, subsequent reforms to legal aid eligibility have drastically reduced access to legal representation, especially in family law matters in England and Wales.³⁴ Unlike Scotland, where legal aid for family law remains more accessible, individuals in England and Wales often face substantial financial barriers to obtaining legal counsel.³⁵ This effectively restricts their access to justice and undermines the core principles upon which the legal aid system was founded.³⁶

In the latter half of the 20th century, the focus of the family law system evolved from being centred on the courts to promoting the self-resolution of disputes.³⁷ The settlement was based on two main arguments: first, that the court effectively sidelined families with first-hand knowledge of the disagreement and second, that the court exacerbated any lingering sentiments of trauma or conflict.³⁸ According to Roberts, lawyers and judges can "impose their construction" of a disagreement on the parties, prioritising their preferred outcome.³⁹ Thereby, policy developed that the relevant parties should settle issues about families themselves. The report titled "Marriage Matters," which was published in 1979, is the oldest example of policy embracing this rhetoric of individual responsibility.⁴⁰ As acknowledged by the Home Office, the family justice system offered assistance to aid married couples and "helped couples address their problems" when divorce was

32 Gwynn Davis, *Partisans and Mediators: The Resolution of Divorce Disputes* (Clarendon Press 1988) 85; Jess Mant, 'Neoliberalism, Family Law and the Cost of Access to Justice' (2017) 39(2) JSWFL 246-249.

33 *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

34 Roberts (n 17) 48.

35 UKC Strategy Review, 2006a.

36 Roberts (n 17) 49.

37 Stephen Michael Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press 2003), 56.; Dominik Lasok, 'The Family Law Reform Act, 1969' (1970) 26 QC 20.

38 Melvin Aron Eisenberg, 'Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking' (1975) 89 HLR 637 - 658.

39 Simon Roberts, *Order and Dispute: An Introduction to Legal Anthropology* (Quid Pro Books 2013) 8-9.

40 Home Office, *Marriage Matters: A Consultative Document by the Working Party on Marriage Guidance* (1979).

required.⁴¹ The Home Office implied that it preferred the parties settle their dispute amicably rather than having a judge rule the case.

Following 1980, a discourse developed around the concept of highlighting the fact that the parties sought to reach an "amicable solution", an agreement with less hostility or bitterness.⁴² In fact, the term 'amicable resolution' was just a more positive synonym for settlement and indicated an assumption that parties would resolve conflicts with minimum state assistance. As said by Mnookin and Kornhauser, the primary purpose of divorce law is to offer a framework for resolving conflicts rather than imposing conclusions.⁴³ As a result, the settlement has gradually risen to the forefront of family law.

In the following period, a policy⁴⁴ was implemented in England and Wales to control how parties should behave when relationships break down, or other family matters arise. Reece's influential study, presented in 2003, gave a comprehensive review of the shift in divorce law from attempting to prevent divorce to managing the end of marriages in a way that encourages parties to have a "well" divorce rather than a "bad" one.⁴⁵ She made the observation that this seemed to offer the parties the authority to regulate their relationships but that despite the rhetoric of freedom, it was actually an opening for the state to 'teach' families responsible behaviour.⁴⁶ Several years prior, Piper made a similar claim regarding responsibility, writing that it was employed "to define socially acceptable behaviour in a setting of fast change."⁴⁷ The growth of the settlement objective is indicative of a trend toward greater personal accountability and, at the same time, stricter government oversight of domestic disputes.⁴⁸

Family mediation, which has recently risen to the forefront regarding access to justice, was initially conceived of as a complement to the existing legal system rather than a substitute for it. This was illustrated by the use of terminology that designated

41 *ibid* para 1.10.

42 Law Commission, *Family Law: The Ground for Divorce* (Law Com No 192, 1990) para 1.6.

43 Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1978) 88 YLJ 950.

44 The Family Procedure Rules 2010.

45 Helen Reece, *Divorcing Responsibly* (Hart Publishing 2003) 127, 146.

46 *ibid* 156-157.

47 Christine Piper, *The Responsible Parent: A Study in Divorce Mediation* (Harvester Wheatsheaf 1993) 7-11.

48 John Dewar, 'The Normal Chaos of Family Law' (1998) 61 MLR 467, 475.

mediation as a type of alternative dispute resolution rather than the traditional court method. Policy-level discussions may also include this statement. The response to the Law Commission's 1990 consultation on whether parties should be obliged to try mediation before the court was concerned that such a proposal would undermine the voluntary nature of mediation and force the parties to settle.⁴⁹ The legal commission asserts that it is crucial that, despite the system's encouragement of alternative dispute resolution procedures, the courts continue to fulfil their mandate of deciding the pertinent issues.⁵⁰

Recent years have seen mediation slowly infiltrating the inner circle of family justice, despite the fact that it was originally designed as an alternative to the court system. In order to maintain the privilege of a private, voluntary, and independent process with adequate safeguards and to ensure that mediation is highly effective, it is argued that it must be kept separate from the court process and its coercive powers.⁵¹ Separating mediation from the courtroom environment is crucial to dispel potential confusion between its collaborative nature and the adversarial litigation processes.⁵² As a direct consequence of this development, family mediation is now the most common choice for resolving private family disputes and gaining access to family justice in England. An extensive inclination towards mediation is indicated by the fact that, as per a government report from December 2023, the mediation voucher scheme has facilitated access to mediation for over 24,000 families.⁵³

The increasing prevalence of mediation in family justice, evidenced by the uptake of the government's mediation voucher scheme, as highlighted by the Ministry of Justice, warrants an exploration of its application within specific cultural and religious frameworks. In the context of English Muslims, Sharia Councils, as noted by the independent review into the application of sharia law in England, play a distinct role in mediating family disputes. Despite operating within the broader legal framework of English law, these councils offer an alternative dispute resolution mechanism rooted in Islamic principles. A comprehensive understanding of family

49 Rachel Blakey et al, 'Prevalence of Conduct Problems and Social Risk Factors in Ethnically Diverse Inner-City Schools' (2021) 21 BMCPH 21.

50 Law Commission (n 14) para 5.34.

51 Roberts (n 17) 60.

52 Kieran McEvoy, Cheryl Lawther, and Luke Moffett, 'Changing the Script: Non-State Armed Groups, Restorative Justice and Reparations' (2022) 14(2) JHRP 457.

53 Family Mediation Council. (2024). Family Mediation Voucher Scheme.

justice in England necessitates a thorough analysis of the role and function of Sharia Councils in accessing family justice for English Muslims.

5.4. Mediation in Accessing Family Justice for English Muslims: The Role and Function of Sharia Councils

In explaining the relevance of family mediation in Sharia Councils for Muslims in Britain, it is useful to mention the importance of Sharia Councils itself in Muslim people's lives more broadly. Due to Sharia's all-encompassing nature as a legal system, Muslims in minority communities face a number of difficult theological questions regarding their everyday lives and their relationships with both other Muslims and non-Muslims. Sharia Councils emerged as a means of enforcing Islamic law and ensuring that Muslims lived according to its dictates. They were set up because of a Sharia requirement that Muslims in a non-Muslim state appoint qualified scholars to adjudicate their legal disputes and conflicts.⁵⁴ The Islamic Sharia Councils' (ISC) primary mission is to apply Islamic Sharia to family law issues for Muslims, but it also has the broader goal of protecting Muslims' religious freedoms and ensuring their continued existence in a non-Muslim country. Shah Kazemi argues that the establishment of the Sharia Council, no matter how small, was necessary in order to ensure that the needs of every person in the Muslim community were, to the greatest extent possible, met in accordance with the standards of Islamic law as correctly interpreted and applied by the most learned scholars who resided there.⁵⁵

Sharia Councils are Islamic religious tribunals that operate concurrently with the country's civil legal system in Britain. They are not recognized as courts by the law, and the decisions they make are not binding on subsequent legal proceedings.⁵⁶ However, many Muslims in Britain opt to resolve disputes and seek guidance on matters related to Islamic law, also known as Sharia, through the use of Sharia

54 Samia Bano, R. K. Thiara, and A. K. Gill, 'Shariah Councils and the Resolution of Matrimonial Disputes' in R. K. Thiara and A. K. Gill (eds), *Violence against Women in South Asian Communities: Issues for Policy and Practice* (2010) 183.

55 *ibid.*

56 BBC News, 'Sharia councils in the UK: what do they do and why do they exist?' <www.bbc.com/news/uk-44448021> accessed on 22 May 2022.

Councils.⁵⁷ Sheikh al-Haddad claims that the number of cases brought before the Sharia Council has more than tripled⁵⁸ in the past three to five years as a result of the increasing prevalence of family breakdowns among Britain's Muslim population.⁵⁹

The establishment of Sharia Councils can be attributed to a variety of different factors. Shah argues that the efforts made by Muslims to establish cultural and religious institutions in England are an important part of the process of rebuilding the "homeland".⁶⁰ He argues that the establishment, development, and governance of Sharia Councils within the Muslim community should be understood as part of on going legal and cultural debates, leading to a blending of legal traditions.⁶¹ Further, English law provides clear paths for separation and divorce, but it may not fully address the complexities of a failing marriage.⁶² At this point, it can be said that the primary function of the Sharia Councils is to enable religious divorce for women whose husbands do not accept divorce. As a result, they provide a service that is beneficial to women by assisting them in terminating their marriages, and the vast majority of the petitions that they receive are from women.

Sharia Councils have attracted criticism for their lack of transparency and potential inconsistencies with domestic law. Critics argue that these councils often function behind closed doors, raising concerns about accountability and fairness in their rulings.⁶³ Additionally, some decisions reached by Sharia Councils, particularly regarding issues like divorce, may contradict established principles of British family law.⁶⁴ This lack of alignment with the formal legal system creates a complex situation, where by couples might navigate rulings that hold weight within their

57 Citizen Advice, Sharia courts in the UK: a brief overview', <www.citizensadvice.org.uk/law-and-courts/courts-and-tribunals/other-courts-and-tribunals/sharia-courts-in-the-uk-a-brief-overview/> accessed on 22 May 2022.

58 Muslim Population in Britain: According to a 2018 report by the Pew Research Centre, Muslims are estimated to be around 4.4 million or 6.3%, of the total population in Britain. [Pew Research Centre (2018)].

59 Divya Talwar. (2012) 'Growing Use of Sharia by UK Muslims', BBC News, <www.bbc.co.uk/news/uk-16522447> accessed 27.03.2023.

60 Prakash Shah, Legal Pluralism in Conflict: Coping with Cultural Diversity in Law (Routledge-Cavendish 2005) 5.

61 *ibid* 6.

62 Refer the Islamic Shari'a Council (ISC) and the Muslim Law (Shari'ah) Council (MLSC) websites. Rehana Parveen, 'A study of Muslim marriage (and divorce) practices in England and Wales: Making a case for reform' (2024) RRLP 107.

63 Shahwiz Shahin, The Islamic Legal and Cultural Influences on Britain's Shari'a Councils (PhD Thesis, School of Advanced Study 2023) 223.

64 *ibid*.

communities but lack enforceability in civil courts. However, there is some evidence of the impact of Sharia Councils on the formal courts. Research by scholars like Uddin⁶⁵ suggests that Sharia Councils can sometimes play a pre-court role, facilitating communication and potentially reducing the burden on the formal legal system. Additionally, some British courts may consider rulings from Sharia Councils as part of wider family disputes, particularly when cultural or religious sensitivities are involved.⁶⁶

Despite the criticisms that have been levelled against them, Sharia Councils in Britain continue to function and provide services to a substantial percentage of the Muslim community. Sharia Councils offer guidance and support to the Muslim community, providing a framework for navigating their cultural and religious practices.

5.4.1. Principles, Role, and Responsibilities of Sharia Councils

Sharia Councils in England are based on legality, religious duty, moral obligation, and social responsibility towards the Muslim community.⁶⁷ Their role involves overseeing the Muslim community and upholding Islamic legal tenets in non-Muslim nations such as England.⁶⁸ Sharia Councils interpret Islamic law according to Muslim needs and provide advice, especially on Muslim family law matters, serving as the Islamic body of authorities.⁶⁹ The mediation of disputes, as well as the issuance of religious divorce certificates for Muslims, are the primary responsibilities of Sharia Councils.⁷⁰ In addition, Ahmed explains that the primary responsibility of the Sharia Councils is also to perform the duties of Islamic judges and to grant "Islamic divorces" to Muslim women who are stuck in harmful marriages.⁷¹ The purpose of granting a religious annulment or divorce is to allow the party to remarry

65 Islam Uddin, 'Islamic Family Law: Imams, Mosques, and Shari'a Councils in the UK' (2020) 8(1) EJIMEL 28.

66 House of Lords (2004) [2003] UKHL 44, A v A (FC).

67 Dr Suhaib Hassan, 'An Introduction to Shari'a', paper presented at Seminar on Shari'a: A Way of Life, 20th July 2008 at TICC London 14-15.

68 Gary Bunt, 'Decision-making concerns in British Islamic environments' (1998) 19 ICMR 103.

69 Sonia Nurin Shah-Kazemi, *Untying the Knot: Muslim Women. Divorce and the Shariah* (the Nuffield Foundation 2001) 9.

70 Bano S, 'Muslim Family Justice and Human Rights: The Experience of British Muslim Women' (2007) 2 JCL 41; John Bowen, 'A Preliminary report on cases and procedures of the Islamic Sharia Council' (12 May 2013) accessed on 5 April 2023.

71 Samer Ahmed, 'Recent Developments: Pluralism in British Islamic Reasoning: The Problem with Recognising Islamic Law in the United Kingdom' (2008) 33 YJIL 493.

in accordance with their religion.⁷² Sharia Councils occasionally provide religious expert opinions (fatwa) or expert reports on matters pertaining to family law and customs,⁷³ with a focus exclusively on Muslim personal law.

Women constitute the majority of clients visiting Sharia Councils as they often seek divorce when their husbands refuse or fail to divorce them unilaterally.⁷⁴ Although independent bodies, Sharia Councils share the common objective of resolving family disputes, especially matrimonial disputes, even in cases where the marriage was not registered in a civil registry or conducted abroad. They strive to restore stability between parties by enforcing legally neutral Islamic solutions free from cultural bias.⁷⁵ Sharia Councils aim to provide adjudication rather than just mediation or arbitration, as most cases reaching them are already at a critical stage or involve divorced parties requiring legal resolution.⁷⁶ Understanding the role of Sharia Councils in adjudication is essential, especially when examining the specific divorce procedures they implement.

5.4.2. Divorce Procedures in Sharia Councils

Even though a divorce may be granted under civil law, many people still consider this method of ending their marriage to be "insufficient."⁷⁷ Sharia Councils come into play at this point to determine whether or not a divorce is permissible from a religious perspective and, in effect, "permit remarriage" to women.⁷⁸ Studies on divorce in Sharia Councils reveal that some women, despite having previously been legally divorced under English law, felt they could only move on with their lives after obtaining a religious divorce.⁷⁹

Although women can obtain a civil divorce, there are reasons why they may still seek a religious divorce, namely that;

72 G Douglas, CN Doe, R Sandberg, S Gilliat-Ray, and A Khan, *Accommodating Religious Divorce in the Secular State: A Case Study Analysis* (2013).

73 Bano (n 70) 5.

74 *ibid* 34.

75 İhsan Yılmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralism in England, Turkey and Pakistan* (Ashgate Publishing Limited 2005) 62.

76 Cusairi (n 10) 230.

77 Rehana Parveen, 'Do Sharia Councils Meet the Needs of Muslim Women?' in *Gender and Justice in Family Law Disputes: Women, Mediation, and Religious Arbitration* (2017) 3.

78 G Douglas et al (n 72) 8.

79 Uddin (n 65) 29.

- a) Research indicates that women, even those who do not identify as deeply religious, consider religious divorce as an important aspect of fulfilling their religious obligations and upholding their moral beliefs.⁸⁰
- b) For some women, getting a religious divorce is a way to finally put an end to their marriages and establish clear "boundaries" with their ex-husbands.
- c) The affirmation offered by a group of *imams* can help to allay any guilt that women might experience for dissolving the marriage.
- d) Muslim women sometimes prefer religious divorce procedures over civil court systems, as civil courts can be intimidating and unfamiliar while Sharia Councils are more familiar and comfortable.⁸¹

Therefore, even though Sharia processes have garnered widespread public criticism, many women who use them believe that they serve important purposes.⁸²

Sharia Councils adheres to a defined procedure, which allows for some latitude room in terms of execution, and maintains a file containing the procedure as well as any relevant documentation.⁸³ This process is depicted in Appendix A. When the wife⁸⁴ files a divorce petition with the ISC, the commission will send up to three letters⁸⁵ to the husband before initiating the divorce proceeding.⁸⁶

80 Julie Macfarlane, *Understanding Trends in American Muslim Divorce and Marriage: A Discussion Guide for Families and Communities* (Institute for Social Policy and Understanding 2012) 33; R Parveen (n 62) 147; Walker, Tanya. *Shari'a councils and Muslim women in Britain: Rethinking the role of power and authority*, (Brill 2016) 22.

81 Robin Griffith-Jones (ed), *Islam and English Law: Rights, Responsibilities and the Place of Shari'a* (Cambridge University Press 2013) 395; Walker (n 80) 81.

82 Cusairi (n 10) 233.

83 John R Bowen, *On British Islam: Religion, Law, and Everyday Practice in Sharia Councils* (2016) 61.

84 The process is indeed the standard procedure when a wife initiates a divorce through khul'a at Islamic Sharia Council. However, it's important to note that the process is slightly different when a husband initiates a divorce (talaq). In this case, the council typically requires the husband to attend mediation sessions and may attempt mediation before proceeding with the divorce.

For Wives (Khul'a): The council sends up to three letters to the husband before proceeding.

For Husbands (Talaq): The council focuses on mediation before proceeding, and there may not be the same number of letters sent to the wife.

85 The first letter is a formal notification of the divorce petition and informs the husband of the date, time, and location of the initial hearing. The second letter is a reminder of the hearing and warns the husband that if he fails to appear, the divorce will proceed in his absence. The third and final letter is a summons that orders the husband to appear in court on a specific date to answer the divorce petition. If the husband ignores all three letters, the ISC will issue a default judgment granting the divorce to the wife. (Bowen (n 83) 71).

86 Bowen (n 83) 71.

The next step is to conduct interviews with both parties, though in most cases this is done individually.⁸⁷ The ISC, however, necessitates the initiation of a civil divorce proceeding prior to the start of any divorce proceedings if the marriage was registered in the UK or conducted overseas. In addition, a document signed by two witnesses attesting to the fact that the couple has been separated (i.e., has not had sex) for one year is required⁸⁸, which is a shorter separation period than the two or five years required by civil law if the divorce is disputed.⁸⁹

The duration between case filing and a decision depends on several factors, including the parties' responses, reconciliation efforts, and the husband's cooperation.⁹⁰ Delays in cases were typically not the fault of the Sharia Councils, but rather the result of the cases' inherent complexity and the parties' unwillingness to cooperate.⁹¹ The Sharia Council's delay stems from the Council's commitment to ensuring a genuine separation and recognizing the potential harm divorce can inflict on children, while scholars aim to balance the benefits and drawbacks.⁹²

According to Bowen's research, the length of time it takes to finalize a *khul'*, as divorce, increases with the number of disputable issues, such as a wife's claims, the presence of children, or the return of marital property.⁹³ In addition, it is possible for these cases to drag on for a longer period of time due to a variety of factors, such as when the husband responds to the accusations made by the wife and the council must decide whose position is more persuasive.⁹⁴ The council may also try to give the couple time to reconcile their issues. The divorce proceedings may also be held up if the council requests a meeting with one of the parties but is unable to do so because of the parties' physical separation, postponements, or refusals to attend the meeting.⁹⁵ In cases of divorce in which the husband delays the conclusion of the case in this way, family mediation may be able to help speed up the process and ensure that the women and children will not continue to be victims of the divorce process.

87 *ibid.*

88 *ibid* 72.

89 *ibid* 73.

90 Bowen (n 83) 74.

91 Samia Bano, *Muslim Women and Shari'ah Councils: Transcending the Boundaries of Community and Law* (Palgrave Macmillan 2012) 119.

92 *ibid.*

93 Bowen (n 83) 62.

94 Cusairi (n 10) 251.

95 *ibid.*

However, it is a common misconception in public debates that Muslim couples, and women in particular, will only seek the services of Sharia Councils in the event that the divorce is contested.⁹⁶ In spite of the fact that women seeking a religious divorce that is contested by their husbands make up the vast majority of Sharia Council users, some research suggests that couples that have mutually agreed to a divorce or where the husband initiated the divorce may still choose to have it finalized by a Sharia Council.⁹⁷ Yilmaz states that even if a woman were divorced under civil law, if she hasn't also obtained a religious divorce, the community would see remarriage as adultery.⁹⁸ Therefore, a civil divorce is ineffective in this context as neither party can remarry until the religious divorce occurs.⁹⁹ In cases like these, the Sharia Council may be referred to as attesting authority,¹⁰⁰ because the council merely witnesses the divorce and certifies it as legal, usually by providing written proof of it. This is because a religious certificate is typically required for a woman who intends to remarry according to Islamic law in a mosque in the United Kingdom or in a country that is predominantly Muslim. The requirement for a religious divorce certificate, predominantly for women intending to remarry according to Islamic law, stems from various interpretations of Islamic jurisprudence and cultural practices.¹⁰¹ In Islamic law, a divorced woman observes a waiting period (*iddah*) before she can remarry to ascertain paternity if pregnancy occurs.¹⁰² The certificate often serves as proof of this completion. The Muslim community holds the Sharia Council in high regard for its attesting authority because it guarantees that divorces follow Islamic precepts and regulations.

5.4.3. The Role of the Muslim Arbitration Tribunal

The Muslim Arbitration Tribunal (MAT), under the Arbitration Act 1996, is an alternative dispute resolution service for Muslims in England, offering a non-judicial

96 Mohamed M Keshavjee, *Islam, Sharia & Alternative Dispute Resolution: Mechanisms for Legal Redress in the Muslim Community* (London: I.B. Tauris 2013) 72.

97 Bowen (n 83) 88.

98 İhsan Yilmaz, 'Law as Chameleon: The Question of Incorporation of Muslim Personal Law into English Law' (2001) 21(2) JMMA 299.

99 *ibid* 302.

100 Bowen (n 83) 89.

101 Ahmad Alfin Afadi, 'Analysis of Modern Women's Iddah and Ihdad from the *Fuqaha* Perspective' (2023) 1(1) PICESH 134.

102 *ibid*.

alternative to the courts.¹⁰³ Sheikh Faiz-ul-Aqtab Siddiqi, a British Muslim scholar, a barrister in English and Welsh law, and principal of the Hijaz College Islamic University in Nuneaton (Warwickshire), founded the Muslim Arbitration Tribunal in 2007. He said the following:

We believe in the co-existence of both English law and personal religious laws. We believe that the law of the land in which we live is binding upon each citizen, and we are not attempting to impose Sharia upon anyone. Sharia does however have its place in this society where it is our personal and religious law.¹⁰⁴

According to the findings of some studies, there may be as many as eighty-five councils in Britain that apply sharia law.¹⁰⁵ First and foremost among these are the courts that are organised under the umbrella of the Muslim Arbitration Tribunal (MAT), which, in accordance with the Arbitration Act of 1996, issues decisions that are legally binding.¹⁰⁶ MAT's process is more formal than that of other councils, but it otherwise follows the same procedures as other Sharia Councils.¹⁰⁷

The Muslim Arbitration Tribunal (MAT) and its use of arbitration are now officially recognised, as evidenced by the fact that in 2009, the Charity Commission for England and Wales asked the MAT to assist in mediating disagreements regarding the administration of mosques.¹⁰⁸ The primary reason for administering the MAT is to enable Muslims in the UK to seek arbitration as an alternative dispute resolution instead of using the traditional courts and other tribunals. MAT will operate within the ADR framework of England and Wales, this does not prevent or impede MAT from ensuring that all determinations reached by it are by one of the recognised Schools of Islamic Law. MAT will therefore, for the first time, offer the Muslim community a real and true opportunity to settle disputes by Islamic Law with the knowledge that the outcome as determined by MAT will be binding and enforceable within the English jurisdiction.¹⁰⁹

103 Bano (n 91) 15.

104 Values and Equalities of MAT, <www.matribunal.com/values.html> accessed on 29 March 2023.

105 Denis MacEoin, *Sharia Law Or'one Law for All?* (Civitas Book Publisher 2009).

106 Arbitration Act, 1996, c.23, (46) (Eng.).

107 Walker (n 80) 45.

108 Bowen (n 83) 414.

109 MAT (2008b) 'Forced Marriages'.

The tribunals are designed to provide a Sharia-compliant alternative to the secular court system. The process of resolving disputes is considered by many as an optimal means to enable the parties involved in arbitration to settle their disputes in accordance with English law, while also satisfying any obligations under Islamic law.¹¹⁰ In addition, the MAT can only handle religious divorces, marriages, and family disputes because the parties involved to the authority of the tribunal solely based on sharia law in the MAT voluntarily agree.¹¹¹

The Muslim Arbitration Tribunal functions as an arbitration tribunal and not as a court.¹¹² The authority of MAT is not backed by enforcement mechanisms; however, the determinations made by MAT can be enforced through the English county or high courts.¹¹³ Consequently, it is imperative that the determinations rendered by these arbitration entities adhere to the tenets of English law, as failure to do so would result in non-enforcement by the judiciary under the auspices of sovereign authority.

There must be at least two members on the MAT, one of whom is an expert in Islamic law and the other a barrister licenced to practise in England or Wales.¹¹⁴ The fact that it includes both Islamic scholars and lawyers in English law demonstrates that arbitration procedures are fully compatible with both sharia and the civil laws of the United Kingdom.

The importance of the "Muslim community" in helping individuals work through their personal issues is emphasised extensively in the MAT report on forced marriage.

Third parties can refer to the Judges of MAT if they discover that a forced or coerced marriage has taken place... to deal with the intricacies of community issues. MAT is the appropriate forum where the Muslim Community can actually solve the problems of the Muslim Community. The closest and greatest understanding of the issues of the Muslim Community lies within the Muslim Community itself. MAT provides an environment,

110 Bano (n 40) 242.

111 MAT (n 109).

112 R Blackett, 'The status of "religious courts" in English law', (2009) DDDIAND 13.

113 *ibid*.

114 MAT (n 109).

which will give British Muslims the confidence to come forward to utilise the process to its fullest potential.¹¹⁵

In addition, the report suggests a community-led approach to address the issue of forced marriage, with a particular focus on safeguarding British nationals who are subjected to forced marriage.

The British citizen sponsoring a foreign spouse to settle in the UK will be invited by voluntary submission, to give an oral deposition to the Judges of MAT, satisfying them that the marriage he/she entered into was neither forced nor coerced. The British citizen will not be forced to give this voluntary deposition as a legal requirement. The voluntary deposition, if successful would result in a written declaration from the Judges of MAT, that they were satisfied that the marriage entered into was without any force or coercion. The British citizen can then use this declaration to support the application of the foreign spouse to settle in the UK. If however, the foreign spouse fails to produce such a declaration from MAT or any other appropriate evidence, then it would be open for the ECO at the entry clearance point, to draw such inferences deemed appropriate as to the status of the marriage.¹¹⁶

According to MAT, the voluntary submission of individuals is a crucial element in addressing the issue of forced marriages involving foreign spouses.¹¹⁷ Therefore, MAT suggests that a court based within the community would be better equipped to handle the complexities of the matter, as the community is likely to resist state intervention.¹¹⁸

Interested divorcing parties in MAT must submit a written request to a court to obtain a hearing, and this request must detail the "grounds and reasons in support of that ground" for a case.¹¹⁹ In addition to stating whether or not they have authorised representation, parties must include a document and witness list, as well as any prior decisions pertinent to the issue at hand.¹²⁰ In the process of coming to a verdict, the

115 MAT (2008c) 'Alternative Methods of Dispute Resolution'.

116 MAT (n 109).

117 Emanuele Odorisio, 'The Muslim Arbitration Tribunal (MAT)' (2020) 11, CLR 81.

118 *ibid.*

119 MAT (n 109) R. 2(1).

120 MAT (n 109) R. 2(1)(e)-(d).

Tribunal may consider but is not bound by any previous decision of the Tribunal while 'taking into account the Laws of England and Wales in addition to the recognised Schools of Islamic Sacred Law'.¹²¹ MAT does not have an appeals process, but parties can go to the High Court of the United Kingdom for a judicial review.¹²²

The effectiveness of MAT is due to two factors. First, by using arbitration, parties can effectively apply religious rules through the arbitration award given by the MAT. The 1996 Arbitration Act governs this and has a fully binding effect, unlike a decision made by a state judge who must apply state law and not religious law.¹²³ This allows parties to request the application of Sharia law from the MAT and also obtain civil legal recognition for its decisions. This aspect is highlighted on the MAT's institutional website, where they operate within the legal framework of England and Wales to ensure that any decision made by the MAT can be enforced through existing means of enforcement.¹²⁴ Secondly, the preference for extra-judicial dispute resolution mechanisms like arbitration is a part of Islamic culture.¹²⁵

As a result, MAT resolves disputes in a way that legitimately harmonises British and Islamic legal traditions by including representatives from both British and Islamic law, strictly adhering to the Act's requirements, and providing a chance for some judicial review. In addition to this, the organisation has rigid and specific procedural guidelines that must be followed to establish jurisdiction.¹²⁶ Consequently, in the same way the Muslim Council of Britain (MCB) does, the MAT provides the British government with the opportunity, by way of an organisation that acts as an intermediary, to pursue a coherent national policy regarding Muslim immigrants.

121 MAT (n 109) R. 1.

122 MAT (n 109) R. 23.

123 Yvonne Prief, 'Muslim Legal Practice in the United Kingdom: The Muslim Arbitration Tribunal' in *Legal Pluralism in Muslim Contexts* (Brill 2019) 80.

124 MAT (n 109).

125 Prief (n 123) 17.

126 Christopher R Lepore, 'Asserting State Sovereignty over National Communities of Islam in the United States and Britain: Sharia Courts as a Tool of Muslim Accommodation and Integration' (2012) 11, *WUGSLR* 680.

5.4.4. Family Mediation Procedures in Sharia Councils

After explaining the overall structure and functioning of Muslim Arbitration Tribunals (MATs) in the context of British legal pluralism, their purpose in reconciling British and Islamic legal traditions, and their interaction with government policies regarding Muslim communities, it is now necessary to thoroughly analyse the specific procedural methods used in family mediation within Sharia Councils. These procedures, although based on Islamic jurisprudence, are closely connected to and affected by the socio-legal environment of the United Kingdom, requiring a detailed examination of their practical implementation and consequences.

Samia Bano's research has identified three distinct forms of informal family mediation within Muslim families in Britain.¹²⁷ These can be classified as the involvement of immediate and extended family members, the participation of local community members and family friends, and the recommendation from an *imam*, typically at the local mosque.¹²⁸ The data analysis showed that individuals managing marital conflict followed an intricate and frequently changing procedure. This procedure included fulfilling social, familial, and cultural expectations as well as discussing and agreeing upon the conditions for a potential compromise.¹²⁹

According to Islamic law, the legal separation of a couple can be accomplished in one of several ways. Sharia Councils have settled Islamic family law disputes in numerous cases. The initial contact and application stage (*talaq*¹³⁰ and *khul'*¹³¹), the investigation stage, the mediation and reconciliation stage, and the certificate issuance stage are the four procedural stages that councils Sharia Councils have adopted as a means of providing clarity to the process that is followed at the Sharia Councils.¹³²

127 Bano, (n 91).

128 *ibid* 196.

129 *ibid* 196.

130 Talaq is the husband's right to unilaterally dissolve the marriage by declaring to his wife that he is divorcing her.

131 Khul' is an agreed-upon divorce by giving some money (usually part of bridal gift) to her husband to save a wife from marriage.

132 Samia Bano, *Complexity, Difference and 'Muslim Personal Law': Rethinking the Relationship between Shari'ah Councils and South Asian Muslim Women in Britain* (PhD thesis, University of Warwick 2004) 133.

In contrast to the rulings that MAT hands down, the decisions of the Sharia Council do not have any binding authority by the Arbitration Act.¹³³ A divorce decree issued by the Council annuls an Islamic marriage to which it only applies and has no bearing on the status of any concurrent civil contract (one that is acknowledged as legally binding under UK Law); applicants are advised to seek assistance in this area from the UK legal system. Instead, the ISC provides mediation services that give the parties a non-binding interpretation of Sharia law related to divorce and other civil disputes.¹³⁴

The scholars of the Sharia Councils will ask the couple to attend an interview or meeting with them during the third stage of the divorce proceedings. Counselling sessions and mediation are two distinct key processes carried out at Sharia Councils. Both of these processes are important. The Sharia Councils accept mediation as one of the core features. This feature is also embodied in the principles of the Sharia Councils as a religious obligation and a moral duty to protect the integrity of the Muslim family.¹³⁵ In other words, in addition to issuing religious divorce certificates, Sharia Councils also offer services in the areas of mediation and reconciliation. Badawi describes the procedure followed in Sharia assemblies as follows:

We (Sharia scholars) decided to investigate how we could deal with this issue in a way that would resolve the dispute without violating Sharia or the law. We (Sharia scholars) decided that calling the two parties in front of us to negotiate the issue was the best option.¹³⁶

In Sharia Councils, mediation primarily consists of an investigation into the parties' possibility to come to an amicable agreement with one another.¹³⁷ Numerous scholars have emphasized both the conciliatory nature of Islamic family law as well as the necessity of mediation.¹³⁸ The stage of mediation is indeed of the utmost significance and is an essential component of the proceedings of the Sharia Councils,

133 'How the ISC Works: Validity of the Council's Divorce Certificate', Islamic Sharia Council <http://www.islamic-sharia.org/how-it-works/how-the-isc-works-6.html> accessed on 28 March 2023.

134 *ibid*.

135 R. Arshad, *Islamic Family Law* (Sweet & Maxwell, 2010) 35.

136 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* (Grey Seal, 1995) 78.

137 Samia Bano, R K Thiara, and A K Gill, 'Shariah Councils and the Resolution of Matrimonial Disputes' in *Violence Against Women in South Asian Communities: Issues for Policy and Practice* (2010) 192.

138 For instance, Badawi (n 136), Bano (n 91).

encompassing three processes: an investigation of the case, the acquisition of information, and an attempt at reconciliation.¹³⁹ However, it's important to acknowledge that there are numerous Sharia Councils operating in Britain, and variations in their specific procedures and approaches to mediation do exist. Some councils may adhere more strictly to traditional interpretations of Islamic law, while others may incorporate contemporary approaches to conflict resolution. Furthermore, the level of formality and the qualifications of those conducting the mediation can also differ between councils. In light of this fact, a husband seeking a divorce from his wife is required to participate in a mediation meeting.¹⁴⁰ When filing for divorce with the Sharia Councils, both parties must participate in a mediation session with a Sharia scholar before the case can move forward.¹⁴¹ Almost every council in England provides mediation as a means of resolving family disputes or facilitating divorce, and they all do so in accordance with the principles of Islamic law.¹⁴² Bowen acknowledges that "this procedural rule is similar to that which is followed in a civil divorce" in Britain, which, in practice, may similarly lengthen the process of getting a divorce.¹⁴³

The process of resolving marital disputes or negotiating divorce applications predominantly employs the arbitration method, based on the labelling of the room as the "Arbitration Room."¹⁴⁴ According to researchers, the Sharia Councils often employ both mediation and *tahkim*, which may overlap or occur simultaneously.¹⁴⁵ This is done to reach a resolution when negotiations between the parties have reached a stalemate.¹⁴⁶ The process, which is consistent with Islamic law, will typically begin with mediation as an initial attempt at reconciliation. If mediation is unsuccessful, the process will proceed to arbitration as the next step.

The mediation process includes gathering evidence and information, examining and questioning the claims of the parties, examining the reasons for the breakdown

139 Cusairi (n 10) 261.

140 Badawi (n 136) 78.

141 Samia Bano, 'In pursuit of religious and legal diversity: A response to the Archbishop of Canterbury and the "Sharia Debate" in Britain' (2018) 10(3) ELJ 299.

142 Gary Bunt (1998) 'Decision-making concerns in British Islamic environments' (1998) 9(1) ICMR 106.

143 Bowen (n 83).

144 Cusairi (n 10) 253.

145 Rafidah Mohamad Cusairi and Zahraa Mahdi, 'Procedure of Issuing Religious Divorce and Resolving Matrimonial Disputes at Sharī'ah Councils in the UK.' (2018) 32(1) ALQ 3.

146 *ibid*.

of the marriage, encouraging the couple to communicate with each other, and attempting to reconcile the couple if possible.¹⁴⁷ The Sharia Councils can carry out the mediation process at either its main headquarters or at one of its regional offices, with the assistance of either its representatives or its scholars. It is expected that all parties will attend either a joint meeting or a separate meeting, depending on the legal capacity of the husband (like who resides over sea). In other words, depending on the needs of the clients and their agreement, a mediation session can be held in a private session or in a group setting. In some cases, the meeting between the parties in a mediation proceeding under Islamic law may be held separately or with only one party present, either due to violence or one party's refusal to cooperate.¹⁴⁸ Additionally, the Sharia Councils may offer a teleconference session when the case involves violence and police involvement.¹⁴⁹

The mediation process may require more than one session, but that is up to the parties involved and their willingness to work together. If neither side is willing to participate in mediation or reconciliation, the ISC will give the couple time to cool off and asking them to come back later.¹⁵⁰

When comparing British family mediation to mediation practiced in Sharia Councils (SC), it is recognized that they differ in facilitating, evaluative, transformative and narrative aspects, placing different values on how active the mediator is in substantive resolution of a dispute and how the mediator conducts the mediation session. The process of English family mediation is governed by four principles: voluntariness, recognition that mediation is appropriate, privacy (except in situations in which there is a risk of harming a child or a vulnerable adult), impartiality, and decision-making that rests with the parties.¹⁵¹ The process of Islamic family mediation is not homogenous, and the religious scholar plays a very different role and influences decisions and outcomes to bring about reconciliation. While Islamic mediation shares core values with English mediation principles like fairness, voluntariness, privacy, and adaptability, its expression and application of these principles may differ, drawing primarily from Islamic jurisprudence and

147 Bano (n 132) 291.

148 Cusairi and Mahdi (n 145) 17.

149 Cusairi and Mahdi, 17.

150 *ibid* 18.

151 Parkinson (n 27) 201.

tradition rather than secular legal frameworks.¹⁵² The Qur'an and the *sunna* serve as the foundation for Islamic mediation, and experienced religious scholars are in charge of facilitating the process. Although the government promotes the use of an adversarial approach in family law cases, mediation and arbitration are still the preferred forms of alternative dispute resolution (ADR).¹⁵³

In addition, in terms of the connection between Islamic mediation at Shariah Councils and the court proceeding, it is important to note that the Islamic mediation process makes a sizeable contribution toward assisting in the preservation of marriages that have the potential to be preserved. The mediators may be able to prevent the decree nisi from becoming absolute and bring the parties together if the civil divorce was finalized recently and the man has not remarried.¹⁵⁴ Though Shariah Councils demand evidence of a civil divorce (such as a decree nisi) before they are willing to process a divorce application, the time period between the proclamation of a decree nisi and the proclamation of a decree absolute is one in which the marriage can be saved.

Despite the fact that many Sharia mediation proceedings take place without the involvement of English civil law, the community-based system is widely praised for its contribution to "preserving minority cultures and community values."¹⁵⁵ Mediation and arbitration tribunals may appeal to many Muslim immigrants who are unfamiliar with the formalities and strictness of English legal proceedings.¹⁵⁶ According to Abdal-Haqq, a major advantage of community-based dispute resolution systems, such as the Sharia Councils in England, is that they give power to the local people in creating and implementing Islamic law, rather than leaving it to distant and centralized authorities dominated by professional jurists and scholars.

5.4.4.1. Sharia Council Decisions: Recognition as Lawful and Binding

152 *ibid*; Shaheen Sardar Ali, 'Authority and Authenticity: Shari'a Council, Muslim Women's Rights and the English Courts' [2013] 25 CFLQ 112).

153 Parkinson (n 27) 201.

154 Zaki Badawi, 'Muslim justice in a secular state', in Michael King (ed.), *God's law versus state law: The Construction of an Islamic Identity in Western Europe* (Grey Seal 1995) 77-78.

155 Caryn Litt Wolfe, 'Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts' (2006) 75 FLR 427 - 441.

156 Lee Ann Bambach, 'The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent' 2010 25 JLR 379.

We turn now to the legitimacy and the ability to implement Sharia Council rulings. The preceding section discussed the procedures typically followed by Sharia Councils when divorce cases are brought before them. The legitimacy of the Sharia Councils' rulings in the cases will be analysed in light of the contentious issues at stake.

Religious divorce does not actually benefit the parties, even though it gives them a religious foundation from which to obtain the community's endorsement of their divorce status.¹⁵⁷ In the event that a couple has both a civil and religious marriage, a religious divorce (such as *talaq*, *khul'*, or *faskh*) only ends the religious marriage and does not affect the civil marriage in any way. The divorce certificate issued by religious divorce does not affect the legal standing of any pre-existing civil contract recognised by English law.¹⁵⁸ Attempts to dissolve a civil marriage through means other than the English civil courts are considered extrajudicial and therefore invalid under English law.¹⁵⁹ The ISC makes it clear that in order to legally dissolve their civil marriage, Muslim couples that have entered into civil marriages must apply for a divorce in a civil court.¹⁶⁰

A religious divorce, even though it is not recognised by English civil law, still permits both parties—especially women—to remarry provided they have already obtained an English civil divorce, if applicable. Muslims view decisions made by Sharia Councils as binding, as it is seen as a responsibility to abide by the rulings of the Council. Bano explains this by saying that the idea of "self-governing" or privatised Sharia Councils is based on the fact that all Muslims have duties and responsibilities to follow the Sharia and, in turn, the rulings of Sharia Councils.¹⁶¹

Reiss considers the fact that a decision is not legally binding to be an advantage, despite the widespread belief that such a decision would have a detrimental impact on Muslims.¹⁶² She contends that since these decisions are not legally binding, decisions can be made in accordance with Muslim tradition and law.

157 Cusairi (n 10) 285.

158 Sardar Ali (n 152) 132.

159 Hajj Ahmad Thomson, 'Accommodating the Islamic Dissolution of Marriage Law within English law', Seminar Proceedings on Dissolution of Marriage, 10th September 2006 at The Islamic Cultural Centre, London, 1,26-27.

160 <<http://www.islamic-sharia.org/2.html>> accessed on 24 March 2023.

161 Bano (n 54) 1895.

162 Maria Reiss, 'The Materialization of Legal Pluralism in Britain: Why Shari'a Council Decisions Should be Non-Binding' (2009) 26 AJICL 768-769.

It also helps to resolve recurring issues arising from differences between Muslim and British cultures, such as in cases of 'limping' marriages, where one spouse is unable to fulfil their marital obligations due to a physical or mental disability. Additionally, non-binding decisions release the losing party from being bound by the decision.¹⁶³

Muslim parties give religious or moral weight to decisions taken by Sharia Councils.¹⁶⁴ Such decisions may give the impression that they are not legally binding for either party due to the absence of a formal legal definition.¹⁶⁵ On the other hand, with regard to the religious divorce certificate, it has been argued that this document does not need to be formally recognised or enforced by the state's legal system.¹⁶⁶ The marriage is dissolved as a result of this decision, regardless of whether it is recognised or upheld by English law, as it only affects the religious component of marriage.

However, the Sharia Councils are aware of the fact that the outcome of mediation in terms of child custody and financial settlements can be appealed in the civil courts if any of the parties are dissatisfied with the outcome of the mediation.¹⁶⁷ When it comes to issues of child support and property distribution, the court takes a clear stance. Even agreements signed under the supervision of a lawyer are reviewed to ensure they are in the child's best interests, whether they were negotiated by a state professional mediator or a religious scholar from the Sharia Councils.¹⁶⁸ Thus, Bowen concludes, it is highly improbable that English courts would recognise financial and child-care arrangements made in accordance with Islamic law that "they did not consider to be fair."¹⁶⁹

One more significant issue is the manner in which the law of England recognises a valid act performed in accordance with Islamic law. The courts have also addressed family law disputes that involve the use of religious scholars at Sharia Councils as expert witnesses. Bowen provides a comprehensive analysis of the

163 Bruce Harris, Rowen Planterose and Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (4th edn, Wiley-Blackwell 2007) 272-273.

164 Bano (n 91) 120.

165 Raffia Arshad, *Islamic Family Law*, (Sweet & Maxwell 2010) 193.

166 Douglas and others (n 72) 95.

167 Arshad (n 165) 34.

168 *ibid.*

169 R Bowen 'The Uddin Case and the Legal Status of the Mahr in England' (2012) 26(3) *IJLPF* 239.

decisions made by the civil courts in Uddin.¹⁷⁰ This is an appellate case that was heard by the Court of Appeal, where a previous judgement from the Central London County Court is being challenged. Mr. Uddin, the father of the husband, filed an appeal concerning his daughter-in-law, Ms. Choudhury, the wife. The Court of Appeal has heard an appeal from a Central London County Court judgement regarding a £25,000 wedding gift case involving a *nikah* and a deferred *mahr*. The marriage was arranged but did not work out, and the groom requested the Islamic Sharia Council in Leyton to dissolve the *nikah*. The husband agreed to this procedure on condition that the wife return both jewellery and the portion of the *mahr* already paid to her. The wife denied receiving any *mahr*. In 2004, the Sharia Council dissolved the marriage, but the ISC's records show no stipulations regarding jewellery or *mahr*. questions about religious divorce, the legality of a *nikah* ceremony, and the admissibility of a witness from a British Sharia Council all came up during the Uddin case. At the centre of this legal dispute was the dissolution of a religious marriage that the parties' families had arranged. The marriage was conducted according to religious customs but lacked legal registration. After that, the disagreement centred on how much *mahr* (dower)¹⁷¹ the bride had kept for herself after the marriage had ended in failure. Bowen examines that In the UK, for instance, the legal status of *mahr* payments has been a point of contention in many divorce cases involving Muslim couples and the *mahr* is ruled as an independent contractual obligation not depending on the 'nature of divorce' as suggested by the Sharia Councils.¹⁷² Bowen's analysis also highlighted the fact that the judge in the Uddin case did not give sufficient consideration to the nature of the *mahr* payment and its status under Islamic law.¹⁷³ The legal anthropologist Roger Ballard has criticized the judgement,

That both the trial judge and a Lord Justice of Appeal should have been prepared to recognize the enforceability of a *nikah namah* contract in English Law can only be regarded as welcome: one step forward. But as a result of being presented with unreliable evidence, the learned Judge has

170 John R. Bowen, 'How Could English Courts Recognize Shariah?' (2009) 7 USITLJ 411 – 435.

171 This refers to the payment from the husband or his family to the wife.

172 Bowen (n 169) 239.

173 *ibid*.

introduced a new precedent into English Law: namely that Muslim brides are entitled to retain their mahr and/or their dowries, regardless of the circumstances in which the marriage breaks down. That certainly makes a nasty pitfall for those who assume that English law is beginning to accept the legitimacy of the principles of Sharia when agreements have explicitly been arrived at in those terms.¹⁷⁴

Clearly, the Uddin case highlights the complexity of issues surrounding the legal status of Islamic issues in the UK.

In short, even in cases where the parties voluntarily choose to use the Islamic law method of resolving the disputes, decisions made by Sharia Councils regarding divorce or disagreements regarding finances and children are not enforceable in English civil courts due to the informal nature of these bodies and their non-binding status.¹⁷⁵ Enforcement would entirely depend on the parties' cooperation motivated by moral and religious obligations given the current legal obstacles.¹⁷⁶ Uddin's study suggests that the English legal system should promote a more accommodating approach towards other religious practices, such as Islamic dispute resolution.¹⁷⁷ Consistent recognition of Islamic law principles in marriage and divorce could pave the way for acknowledging and enforcing rulings by Sharia Councils.¹⁷⁸ However, courts and the legal system remain unprepared to accept such processes provided by religious institutions like Sharia Councils.¹⁷⁹

5.4.5. The Effect of Islamic Family Mediation on Family Justice in Sharia Councils

Sharia Councils are responsible for the development of procedures that are distinguished by distinct cultural and religious norms. It is through these procedures that a new form of 'Muslim family justice' is coming into existence.¹⁸⁰ Sharia Councils become a source of controversy in the UK legal system due to their

174 Prakash Shah, 'In Pursuit of the pagans: Muslim law in the English context' (2012) 9 RWP 59.

175 Bano (n 91) 120.

176 Ahmad Thomson, 'Accommodating the Islamic Dissolution of Marriage Law within English Law', seminar paper on Dissolution of Marriage, 10th September 2006, organised by The Islamic Shari'a Council 33.

177 Bowen (n 169) 425.

178 Cusairi (n 10) 291.

179 *ibid* 291.

180 Bano (n 91) 41.

potential to undermine human rights and equality laws.¹⁸¹ However, they have also been seen by some as a valuable tool for accessing family justice, particularly for Muslim communities who may feel more comfortable seeking the resolution of family disputes within a faith-based framework.¹⁸² This consideration often arises when cultural and religious sensitivities are at stake. For instance, a Sharia Council's judgment on property division, following Islamic inheritance principles, could be considered during a divorce settlement, especially if both parties consent.¹⁸³ The landmark case of *A v A*¹⁸⁴ exemplifies this approach. For many Muslims, particularly those who are more religiously observant, Sharia Councils offer a way to access justice that is consistent with their faith and cultural traditions.¹⁸⁵ This can help to build trust in the justice system and promote social cohesion.

Even though the primary role of the ISC is to mediate disputes and contribute access to family justice, it has been criticized on a few different issues. A common criticism of Sharia Councils is the lack of gender balance in their panels, with a disproportionate number of male mediators.¹⁸⁶ The inclusion of women in mediation-arbitration or even regular council meetings is often limited or absent.¹⁸⁷ This gender imbalance raises concerns about the fair representation and consideration of women's viewpoints and experiences within the dispute resolution process.¹⁸⁸ The Sharia Council headquarters employs one female counsellor, along with two male counsellors for each referral.¹⁸⁹

The Sharia Council's potential efficacy in addressing family disputes may be compromised by the absence of women in permanent positions as mediators, arbitrators, and counsellors.¹⁹⁰ This lack of gender diversity raises concerns about the equitable representation and consideration of women's perspectives and experiences,

181 Bowen (n 170) 411 - 412.

182 Nuzhat Begum, 'The role of Sharia councils in accessing justice: A case study of the United Kingdom' (2019) 39(2) JMMA 247.

183 Bowen (n 170) 412.

184 House of Lords 2004.

185 Inclusive Mosque Initiative. (2017). Submission to the Home Affairs Select Committee inquiry into Sharia councils in the UK. <www.inclusivemosqueinitiative.org/wp-content/uploads/2017/01/IMI-HASC-Submission.pdf> accessed on 25 April 2023.

186 Bano (n 91) 5.

187 *ibid.*

188 Samia Bano, 'An Exploratory Study of Shari'ah Councils in England with Respect to Family Law, exploratory study' (2012) UR 6.

189 Bano (n 91) 277.

190 *ibid.*

potentially undermining the fairness and impartiality of the dispute-resolution process.¹⁹¹ The Islamic scholars discuss that Islamic law does not prohibit Muslim women from assuming roles as mediators in family disputes.¹⁹² Considering that women comprise the majority of ISC's clientele, it is requisite that the organization hires a greater number of female mediators, arbitrators, and counsellors, not only at its headquarters but also at its regional offices. This is because, the researchers argue, that women may feel more comfortable disclosing personal and private matters with a female mediator-arbitrator and that the appointment of female religious scholars would help improve the process and give greater importance to women's role in resolving family disputes.¹⁹³ Indeed, various councils are working on solutions to this problem at present. Muslim women can now serve as religious scholars for the Birmingham Sharia Councils (BSC) and the Muslim Court of Arbitration (MAT), issuing Muslim divorce papers and resolving family law disputes from a religious perspective.¹⁹⁴

In addition, Bano criticises the Sharia Councils themselves, arguing that they fail to provide adequate justice for Muslim women within the English legal framework.

My main concern is whether the participation of British Muslim women in this process of privatised dispute resolution that I call 'Muslim family justice' leads to a violation of human rights. For example are Muslim women compelled to use these fora to resolve matrimonial disputes? Is there evidence of injustice being administered under the 'shadow' of state law? Does this form of Muslim family justice curtail the women's citizenship rights and undermine the notion of equality before the law? I argue that a better understanding of this process of unofficial dispute resolution can challenge the binary oppositions of multiculturalism versus feminism,

191 Bano (n 91) 111.

192 For example, Shamsuddīn Muhammad bin al-Khatīb al-Sharbīnī, *Mughnī al-Muhtāj ila Ma'rifah Ma'āni Alfāz al-Minhāj* (Beirut: Dār el-Ma'rifah 1997), 261 - 345, and 501-502; Hanafis see Al-Kāsānī, *Badāi' Al-Ṣanāi' fi Tartīb Sharāi'* (Beirut: Dār al-Kutub al-'Ilmiyyah 1986), 3; Muhammad Sa'īd Ramadān Al-Būtī, *Qadāyā Fiqhiyyah Muāsirah* (Damascus: Dār al-Fārābī 2006), 176; Wahbah Al-Zuhayli, *al-Fiqh al-Islāmī wa Adillatuhu* (Damascus: Dār al-Fikr 1985), 482-483, 757.

193 Cusairi and Mahdi (n 145) 27.

194 *ibid.*

secular versus religious practice, and universalism versus cultural relativism.¹⁹⁵

Despite these criticisms, some argue that Sharia Councils can be a useful supplement to the mainstream legal system, particularly for those who may face barriers to accessing justice through traditional means.¹⁹⁶ Sharia Councils offer a culturally familiar environment for resolving disputes, which can be less intimidating for certain Muslim communities, especially recent immigrants or those unfamiliar with the English legal system.¹⁹⁷ These councils provide a space where individuals can settle disagreements on Islamic principles and values, fostering a sense of understanding and cultural sensitivity within the community.¹⁹⁸ Sharia Councils offer a valuable resource for Muslim families seeking to resolve disputes, especially those concerning marriage, inheritance, and divorce.¹⁹⁹ Bano argues that by operating within Islamic principles, these councils offer a culturally sensitive avenue, fostering greater accessibility and understanding for Muslims seeking legal resolutions.²⁰⁰ Additionally, Malik suggests Sharia Councils can alleviate the burden on the formal legal system by resolving disputes through mediation and arbitration, contributing to broader access to justice.²⁰¹ Consequently, the Sharia Councils' mediation process greatly helps the civil court proceedings to achieve their ultimate goals and Muslim families' access to family justice.

5.4.5.1. Collaboration with Expert Mediators, Legal Counsel, and State Family Agencies

In divorce cases in Sharia Councils, the check and balance pathway provided by mediators and lawyers has aided in accelerating the divorce procedure in both the civil court and the Sharia Councils. In other words, mediators, possessing expertise in Islamic jurisprudence and English law, facilitate communication and negotiation

195 Bano (n 70) 40.

196 Women's Aid. (2018). Sharia law and women's human rights. <www.womensaid.org.uk/sharia-law-and-womens-human-rights/> accessed on 24 April 2023.

197 Bano (n 91) 199.

198 *ibid.*

199 Elham Manea, 'Women and Shari'a Law: The Impact of Soft Legal Pluralism in the UK' in *The Sharia Inquiry, Religious Practice and Muslim Family Law in Britain* (Routledge 2023) 29.

200 Bano (n 91) 201.

201 Maleiha Malik, 'Faith and the State of Jurisprudence' in *Faith in Law: Essays in Legal Theory* (2000) 132.

between spouses, aiming for amicable resolutions.²⁰² Case studies by Rafidah demonstrate a high level of cooperation and coordination between Sharia Councils and other government institutions, including solicitors, mediators, and other organizations dedicated to the safety of women.²⁰³ Also, she added that in one case presented to the Sharia Council, a letter from the party's attorney included a reference to the need to consult a religious institution before proceeding with a civil divorce.²⁰⁴

You may wish to seek a pronouncement by religious authorities before taking legal step to end your marriage. This may be in the form of a get, then annulment, a *talaq*, or similar. The timetable for obtaining a religious divorce is very important.²⁰⁵

Section 10A of the Matrimonial Causes Act 1973 is an important provision that ensures religious freedom and prevents conflicts between civil and religious laws in divorce proceedings.²⁰⁶ It applies to various religious marriages, including Muslim marriages, and reflects the English legal system's recognition of the importance of religious institutions in resolving family matters. This requirement emphasizes the importance of collaboration between the legal system and these organizations and accessing seamlessly family justice for the protection of customers, especially women. In some cases, parties may be advised to respond through their solicitor to verify that civil divorce proceedings have commenced.²⁰⁷ This strategy shows how the law has changed in three important ways: the state now recognizes that Islamic religious institutions are an important part of Muslim communities and that their cooperation is required to access justice for client; section 10A of the MCA 1973²⁰⁸ makes it statutory that these institutions must be consulted when handling cases involving Muslim clients; and the importance of religious divorce is acknowledged.²⁰⁹

202 Keshavjee (n 96) 165.

203 Cusairi (n 10) 263.

204 *ibid.*

205 *ibid.*

206 Divorce (Religious Marriage) Act 2002, ch. 27; Ahmed (n 43) 495.

207 Bowen (n 169) 434.

208 Divorce (Religious Marriage) Act 2002, ch 27.

209 Cusairi (n 10) 264.

According to a 2018 report, "A Review of the Application of Sharia Law in England and Wales"²¹⁰ by the Ministry of Justice, which explored the various ways Islamic law is applied in the UK legal system, including in the context of family law and divorce, many Muslims in the UK states that she chooses to abide by Sharia law when it comes to divorce matters and that the need to meet these needs is increasingly recognized in the legal community. The report also highlights the cooperative relationship between law courts and Sharia Councils when resolving disputes regarding Islamic divorce.

Overall, it seems that there is a growing recognition within the UK legal system of the importance of working collaboratively with Sharia Councils and Islamic institutions to provide effective and equitable solutions for clients seeking a religious divorce.

5.5. Theoretical Considerations and Gender Critique about Sharia Councils

Sharia Councils offer a familiar and culturally sensitive environment for Muslim couples navigating family disputes, as discussed in the above section two. This concept aligns with the growing emphasis on alternative dispute resolution (ADR) procedures. However, critics raise concerns about potential gender bias inherent in some interpretations of Sharia law. Sharia Councils are accused of limiting women's rights, with family law disputes resolved in favour of more literal interpretations, raising concerns about fairness.

The non-recognition of Muslim marriages (*nikah*) in England under civil law creates significant legal vulnerabilities for Muslim women, especially in cases of marital breakdown. A 2016 independent review by then Home Secretary Theresa May revealed that many Muslim couples do not register their *nikah*²¹¹ under civil law, denying them access to legal remedies for the division of marital assets and financial support upon divorce.²¹² *Nikah*-only marriages leave women without legal recourse for equitable asset division, causing economic hardship and insecurity.²¹³

210 The independent review into the application of sharia law in England and Wales, 2018.

211 This mean is Muslim marriage.

212 Fouzia Azzouz, Muslim Marriage and Divorce Practices in Britain: Avenues for Regulation (PhD thesis, University of Bristol 2022) 167.

213 *ibid* 168.

Sharia Councils, tasked with resolving marital disputes within Muslim communities, raise concerns due to their lack of accountability and transparency.²¹⁴

A foundational aspect of feminist criticism of ADR, including mediation through Sharia Councils, concerns the fairness and equity of the agreements reached. On the other hand, feminist academics²¹⁵ assert that family law statutes and practises implicitly discriminate against women. Irving and Benjamin²¹⁶ assert that the adversarial system is inherently biased towards patriarchy, with male judges and lawyers often promoting solutions that align with stereotypically masculine traits such as conflict, competition, and winning. This approach tends to render women passive and dependent observers in their divorce cases.²¹⁷

Bano's research found that women frequently turn to solicitors for civil marriage dissolutions, encountering challenges with confidentiality, delays, and limited understanding of Muslim family law principles and religious divorce certificates in English courts.²¹⁸ This raises questions about the suitability of solicitors to provide accurate legal advice on Muslim marriage and divorce. The study also found that many solicitors were unaware of the validity of Islamic marriages in English law, leading to misunderstandings when a civil law divorce was required.²¹⁹ This underscores the importance of solicitors being adequately trained to provide legal advice on the validity of transnational marriages, religious unions in England, and the enforceability of *nikah* contracts within English law.²²⁰ An emerging body of legal practitioners now specialises (for instance the solicitor Aina Khan and the barrister Ahmad Thompson) in conflicts-of-law scenarios generated by Islamic law and English legal principles in national and international contexts.²²¹

Given these challenges, the government should ensure that Sharia Council decisions do not lead to unfairness and should strengthen laws to protect the rights of

214 *ibid.*

215 see Alison Diduck and Katherine O'Donovan (eds), *Feminist Perspectives on Family Law* (Abingdon: Routledge-Cavendish 2006).

216 Howard H. Irving and Michael Benjamin, *Family Mediation: Contemporary Issues* (Sage Publications 1995) 203.

217 *ibid.*

218 Bano (n 91) 221.

219 *ibid.*

220 Shah Kazemi (n 69) 53.

221 Bano (n 91) 223.

women in religious communities.²²² In public discourse, Sharia Councils have been criticized²²³ for allegedly discriminating against women and establishing an illegitimate alternative legal system. Abused Muslim women, for instance, need to be accorded, equality and human rights rather than being rendered vulnerable to further abuse by patriarchal religious power, as the prominent black and minority women's organization Southall Black Sisters argues. This is because the alternative would be for these women to be subject to further abuse at the hands of patriarchal religious authority.²²⁴

There have been several private member's bills introduced in the House of Lords that aim to stop Sharia Councils from discriminating against women, using coercion to enforce their decisions, and claiming that their decisions have the force of law.²²⁵ In 2016, the Home Affairs Committee of the House of Commons began investigating the functioning of Sharia Councils in Britain, but the investigation was halted after the 2017 general election. That same year, the Home Office launched an independent review of the implementation of Sharia Law. This review delivered its findings in February 2018, although women's human rights organizations largely ignored it because they were dissatisfied with the terms of reference and appointments of advisers.²²⁶ The review uncovered both positive and negative practices carried out by Sharia Councils. The negative practices included discrimination against women as well as a failure to protect women and children from being abused.²²⁷ Most participants advocated for the creation of a state agency to promulgate and oversee the implementation of a practice code for Sharia Councils.²²⁸ However, the government quickly dismissed this suggestion because it would give Sharia Councils more authority and lend credence to the idea that there is

222 Lousia Perreau, 'Gender Equality at the Test of Sharia Councils in the UK' (2020) 2(1) YG 68.

223 e.g. Walker (n 80); Jemma Wilson, 'The Sharia Debate in Britain: Sharia Councils and the Oppression of Muslim Women' (2010) 1 ASLR 46; Sardar Ali (n 152).

224 Southall Black Sisters, 'Further supplementary written evidence submitted by Southall Black Sisters' to Home Affairs Committee Sharia Councils Inquiry, <www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/inquiries/parliament-2015/inquiry6/publications> accessed on 4 January 2023.

225 Arbitration and Mediation Services (Equality) Bill 2016–17. For discussion, see R. Grillo, *Muslim Families, Politics and the Law: A Legal Industry in Multicultural Britain* (Farnham: Ashgate 2015), 48.

226 Home Office, *Independent Review into Sharia Law*, Annex C.

227 *ibid* 15–16.

228 *ibid* 19–22.

a parallel legal system. It also stated that Sharia Councils should follow existing legislation that safeguards women's rights and prohibits discriminatory practices.²²⁹

In this discussion, it would be unfair to ignore Muslim women's voices by assuming that their consent is invalid if they have had ample opportunity to voice their disagreement.²³⁰ When women voluntarily choose to utilise Sharia Councils, it is not the duty of the secular government to prohibit them on the grounds of gender-based discrimination.²³¹ Women who opt to utilise Sharia Councils are likely to do so because they desire to lead a religiously oriented life in alignment with Islamic customs.²³² They perceive Islamic mediation as more suitable for their specific situations, particularly family law matters. Formalising Sharia Councils would enhance the provision of justice for Muslim women by enabling them to resolve conflicts according to Islamic law if they so desired. This would be achieved through state regulation that safeguards against any coercion into religious mediation and ensures that consent is freely given.

5.6. Exploring Sharia Councils as Illustrations of Islamic Family Mediation Practices

Sharia Councils, as discussed in Chapter Five, play a role in resolving disputes and issues within the Muslim community, such as Islamic marriage and divorce, mediation, and judicial deliberation.²³³ In cultural and religious contexts, tensions arise due to differing perceptions regarding the significance of religious divorce for Muslim women. While civil divorce is legally recognized and often prioritized in secular legal systems, Muslim women frequently hold religious divorce in equal or even higher esteem.²³⁴ Academic studies²³⁵ provide evidence that despite potential legal and social challenges, Muslim women actively seek religious divorce as well as

229 Secretary of State for the Home Department, 'Written statement on faith practices', Hansard HC, 1 February 2018, col. 30WS.

230 MC Nussbaum, *Women and Human Development: The Capabilities Approach* (CUP, Cambridge 2000) 227.

231 Martin Rosendal Ehlers, 'Framing Secular Women's Rights in Contemporary Britain and Beyond: Challenges and Implications' (2017) 1 THE 79.

232 *ibid.*

233 Perreau (n 222) 68.

234 Julie Macfarlane, *Islamic Divorce in North America: A Shari'a Path in a Secular Society* (Oxford University Press 2012) 143.

235 Fazlul Haq Meryaniwal 'Muslim Women Seeking Divorce: An Analysis on Socio-Religious Practice' (2021) (IV)1 JSTS 1; Esther Van Eijk, 'Khul' Divorce in the Netherlands: Dutch Muslim Women Seeking Religious Divorce' (2019) 26(2) ILS 36.

civil divorce due to its profound impact on their lives. Certain women pursue religious divorce due to their religious beliefs, whereas others have pragmatic motives, such as remarriage or repatriation to their countries of origin.²³⁶

The interviews findings showed that there are serious objections and disputes about the use of Islamic family mediation, in order to improve women's access to justice in Türkiye within the framework of Sharia Councils in England especially when it comes to divorce matters. The interviewees' main worry was the potential for Muslim women to experience discrimination in Islamic legal systems that handle divorce cases. There are allegations that accepting Sharia Councils into the English legal system could lead to gender bias that marginalizes women in divorce cases.²³⁷ The interviewees also expressed concerns about the lack of transparency and accountability within Islamic family mediation processes, which could further disadvantage women seeking justice as the following show:

The fact that the decisions of the Sharia Councils, which are the official documents that will form the basis of the divorce process, are based on Sharia and are far from the control of state mechanisms raises questions about the transparency of the process. Moreover, we do not know how a sharia-based system can benefit women's rights and women's freedom of divorce. (K15)

Power dynamics in traditional family structures and interpretations of Islamic law can disadvantage women. In opaque mediation settings, women's voices may not be equally heard, risking inadequate protection of their rights. Lack of accountability can leave women with few options if they perceive unfairness in the mediation process. (K19)

Furthermore, interviewees voiced apprehensions regarding the stringent implementation of Sharia regulations about divorce, including those regulating child custody and alimony, which could potentially put women at a disadvantage that was deemed unacceptable by the majority community.

Sharia regulations frequently favour men's rights in divorce cases, resulting in more advantageous financial support outcomes. This can leave women in

236 Perreau (n 222) 66.

237 Bano (n 91) 101.

vulnerable positions, particularly if they rely on their spouses for financial support or have children to look after. (K5)

Six of the interviewees also acknowledged the possibility of reinforcing repressive or retrograde aspects within these establishments, which could have significant implications for the freedoms and entitlements of women who are seeking divorce.

Islamic law, when interpreted with fairness and expertise, has the potential to ensure justice and equality for women. However, it's important to recognize concerns that some Sharia Councils might unintentionally prioritize local customs that restrict women's rights, rather than reflecting the core principles of Islam. (K3)

We are deeply concerned about the absence of transparency and government oversight that enable Sharia Councils to enforce discriminatory interpretations in divorce cases. The presence of parallel legal systems based on Sharia raises concerns about the potential impact on women's rights and their ability to seek divorce. (K5)

The introduction of family mediation institutions similar to Sharia Councils in Türkiye could potentially lead to societal resistance from a segment of the population (estimated at around 35%) who hold concerns about a perceived rise in the influence of religious law in the legal system. Furthermore, anxieties exist that women who utilise these mediation centres might encounter increased discrimination from these same groups later in court proceedings, due to a perception that they bypassed the formal legal system initially. (K7)

Seven interviewees expressed concerns that Sharia Councils might erode the principle of equality before the law and marginalize women and other vulnerable groups within the Muslim community. Conversely, thirteen interviewees stressed the importance of religious freedom and the need for alternative dispute-resolution mechanisms to address the needs of a diverse society. While recognizing the concerns of those who believe Sharia Councils may undermine legal equality and

disproportionately impact vulnerable groups, it's crucial to acknowledge that many Muslims see these councils as offering valuable services, particularly within their communities. The interviewees who supported Sharia Councils emphasized their role in resolving disputes amicably, providing spiritual guidance, and promoting social cohesion. They argued that these councils can function, as valuable complements to the existing legal system, serving communities that might feel alienated or underserved by traditional courts.

On the other hand, it can be argued that the operation of family mediation within English Sharia Councils holds the potential to provide insightful lessons for improving women's access to justice in Türkiye. Interviewees in Türkiye emphasized the significance of Sharia mediation in resolving family disputes, arguing that it is a religiously sensitive approach that empowers women to voice concerns and achieve positive outcomes. They advocated for women's freedom to choose Sharia mediation, stating that banning it would violate religious freedom. They suggested that with proper regulation, Sharia Councils could improve women's access to justice, enabling fair decisions based on Islamic law.

The way I see it, if these women have been properly informed of all their options and rights and they still want to use the Sharia Councils, especially in matters such as family disputes and divorces, then the government should not stop them. As long as controls are in place to make sure that they are not forced to do so against their will, I do not think it is right to ban this religious mediation. That would be going against their religious freedom. If we take the practical aspects of the Sharia Councils as a model and regulate them properly, it can actually help women to make fair decisions according to Islamic law. It can also make women's access to justice more effective. (K2)

While Sharia Councils may not be directly replicable here, we're interested in England's models for ensuring transparency and their mechanisms for guaranteeing alignment between religiously informed mediation outcomes and secular legal standards. (K16)

The family mediation services offered in our Sharia Councils promote the Islamic principles of consultation, forgiveness and fair dispute resolution. We have found many examples where this process has empowered women to raise concerns and achieve positive outcomes. (K6)

The example of Islamic family mediation within Sharia Councils in England offers several notable benefits. Firstly, by providing a platform that is both familiar and religiously sensitive, Muslim families can seek solutions in line with their religious beliefs. This has the potential to increase legal recourse for individuals who favour Islamic principles as a guiding framework. In addition, due to their expertise in family matters and deep understanding of Islamic law, Sharia Councils can expedite and enhance conflict resolution. (K10)

The legal training of the officials providing family mediation services in Sharia Councils is very important in terms of providing qualified family mediation services. In Islamic family mediation centres that can be established in our country, it would be useful to have personnel who have received legal training in this way. In this respect, Sharia Councils can be taken as a role model. (K14)

Eleven interviewees referred to the lack of professional family mediation for Family and Religious Guidance services. They argued that establishing professional and recognised Islamic family mediation centres, similar to the Sharia Councils in England, would increase public confidence and encourage wider use of these services. One interviewee believed that the availability of official outcomes from such centres would increase the attractiveness and accessibility of Islamic mediation to those seeking solutions compatible with their religious beliefs.

The services provided by the Diyanet's family and religious guidance offices do not have an official conclusion. The fact that Sharia Councils are also official Islamic family mediation centres rightly increases the level of preference of people. The existence of Islamic family mediation centres in our country, where official results can be obtained in this way, will increase

the desire to apply to these centres and will encourage people because it is a service approved by the state. (K12)

While recognizing the potential benefits of Islamic family mediation in Sharia Council, one interviewee expressed concern regarding protecting women's rights. This individual highlighted the need to prevent the inadvertent reinforcement of discriminatory practices under the guise of religious tradition. They proposed that careful consideration be given to balancing cultural sensitivity and the confidentiality of Islamic family mediation with the imperative of safeguarding women's rights and preventing any form of coercion or discrimination.

My recent research revealed high levels of satisfaction among women who have utilised Sharia mediation services; many expressed appreciation for the cultural sensitivity and confidentiality of the process. However, we must be careful to ensure that women's rights are fully protected and that discriminatory practices are not inadvertently reinforced under the guise of religious tradition. (K18)

These positive viewpoints indicate two main benefits to implementing Sharia Councils. First, such centres could offer an alternative path for divorce resolution, potentially easing the strain on the Turkish court system. This could lead to faster resolutions, saving women both the emotional toll and the financial burdens often associated with prolonged legal battles. Secondly, the integration of Islamic principles into a mediation framework could offer a culturally resonant form of dispute resolution, appealing to some Muslim women who might feel more comfortable navigating divorce proceedings within a familiar religious context.

The results of the interviews indicate that there are differing viewpoints regarding the significance of family mediation in Sharia Councils in Türkiye. Five interviewees raised concerns about structures resembling Sharia Councils, citing potential discrimination. Two interviewees acknowledged the issue's complexity, highlighting both positive and negative aspects, and refrained from making definitive judgments. One interviewee, an Islamic scholar, emphasized the importance of distinguishing between genuine Islamic dispute resolution and Sharia Councils that may impose discriminatory practices. They stressed the need for clear legal frameworks to ensure fairness and transparency in all dispute resolution processes.

Another interviewee, a community leader, acknowledged the potential for misuse but argued that Sharia Councils could provide valuable services for Muslim communities, particularly in areas where access to mainstream legal services is limited. However, they cautioned against allowing these structures to operate outside the existing legal framework and without appropriate oversight.

Thirteen interviewers underscored the potential of Sharia Councils in addressing the specific needs of women within the Turkish context. These interviewers emphasise the significance of incorporating legal safeguards to safeguard women's rights and promote transparency in mediation processes. In general, stakeholders acknowledge the significance of family mediation within Sharia Councils as a mechanism for improving women's ability to obtain justice in Türkiye. Advocates argue that family mediation offers women a space where they can voice their concerns and negotiate solutions within a culturally sensitive framework. However, it is important to note that ongoing assessment and improvement are necessary to effectively tackle emerging obstacles and uphold fundamental rights.

5.7. Conclusion

As stated by Bowen and Douglas, the procedure for obtaining a divorce at the Sharia Councils is indistinguishable from the divorce proceedings in the civil court, including mediation participation. They found that the process of obtaining a divorce at Sharia Councils is nearly identical to that of the civil court, including arbitration and mediation. However, there are some key differences. Mediation is a crucial tool in English law for improving communication and achieving mutual agreement between spouses after a marriage breakdown. In contrast, in Sharia Councils, mediation is a step in the dispute resolution process aimed at reconciling the marriage relationship before a marriage is dissolved. The role and qualifications of a mediator differ between English law and Islamic law. In Islamic mediation, a third party is purposely appointed with responsibilities to save the marriage, educate the oppressor and return the right to the oppressed. This is not possible without the third party's involvement, as mediation in English law does not have such responsibilities. This is due to the different functions of mediation in the two systems.

Guided by the indicators in Table 3, the interview findings regarding the potential role of Sharia Councils as a model for Islamic family mediation in Türkiye reveal a multifaceted landscape. Participants shared optimism and concerns about setting up Sharia Council-inspired mediation centres. They noted the potential benefits of improving access to justice, especially for women looking for culturally sensitive and religiously rooted solutions to family conflicts, citing the perceived success of Islamic mediation.

CHAPTER VI

CONCLUSION

At the beginning of the research, it was mentioned that access to justice involves challenges in reaching the courts due to economic factors (e.g. lawyer fees, court expenses, limited legal support) and social obstacles (e.g. illiteracy, lack of understanding of rights, language barriers, distrust in the legal system). This encompasses removing institutional hurdles like intricate legal procedures and ineffective enforcement and guaranteeing fair access to justice irrespective of race, language, religion, gender, class, age, ethnicity, or disability. The concept of access to justice has evolved since its emergence in the 1960s to address varying needs and emerging challenges. While not explicitly labelled as "access to justice" in many international instruments today, it is a crucial aspect of human rights law, encompassed within provisions like the right to a fair trial, effective legal protection, and equality before the law. Despite this, the exploration of this concept in legal and social science spheres, and even among the general public, remains inadequate in Türkiye, as discussed in chapter 3.

Given the complexities and sensitivities surrounding family matters, equipping access to family justice is paramount to protecting the rights and well-being of all family members, especially the most vulnerable. Marriage and family are essential components of societies, crucial for individuals, recognized as valid, and safeguarded by legal systems and religions. The institution of family, existing since ancient times, has remained closely linked with religion. Recent years have seen a rise in divorce rates and threats to the sanctity of marriage and family, prompting intensified efforts to preserve and uphold these vital structures.

Mediation is a process where disputing parties, often separating or divorcing couples, work with an impartial mediator to find mutually agreeable solutions to their conflicts. Family mediation is a voluntary process where parties make their own decisions in their best interests, with the mediator being impartial and neutral to the outcome. It has procedural flexibility and maintains confidentiality. Mediation is considered the best possible means of resolution for family disputes, as it acknowledges the emotional and personal relationships involved and the impact of

the conflict on family members, especially women. The capacity of disputing parties is well deliberated, and the mediator's attributes, such as personal qualities and knowledge of the matter in dispute, contribute to the success or failure of the process.

Mediation is a widely recognized soft method in England for managing marital disputes, a tradition deeply rooted in Islamic tradition. Even secular states in the world, the majority of which are Muslims, as well as the UK, where Muslims are the minority, take advantage of Islamic law practices and even encourage them to produce their solutions by Islamic Law by establishing arbitration centres. The Muslim community, particularly the Sharia Councils, for marital and familial disputes and religious divorce, uses it. This study demonstrates that mediation significantly contributes to the effectiveness and success of dispute resolution processes. The mediation framework is client-based, ensuring confidentiality, voluntary, and autonomous processes. The task is delegated to a highly qualified mediator who complies with the requirements, ensuring a confidential, voluntary, and autonomous process. The mediator's profile is tailored to meet the high expectations placed on the process.

Sharia Councils, operating within the framework of Islamic principles, prioritize reconciliation and preservation of family unity. This approach, while culturally relevant for many Muslim women, can sometimes overshadow individual rights and needs. The voluntary nature of mediation and the emphasis on confidentiality might create an environment where women feel pressured to compromise, particularly in situations involving power imbalances or cultural expectations.

Sharia Councils study mediation as part of the procedure for issuance of religious divorce. Religious scholars play an active role in mediation, enquiring about reasons for divorce, finding problems between spouses, advising and educating them about their duties, and admonishing the wrong party. If reconciliation fails, they assist spouses in the negotiation process, as happens at state mediation bodies. Moreover, while intended to be impartial, the mediator's role can be influenced by personal biases or interpretations of religious texts. This potential subjectivity raises concerns about the fairness and equity of outcomes for women, especially in matters of divorce, child custody, or financial settlements.

The Muslim community generally accepts the credibility of religious scholars to mediate and adjudicate cases. However, not all Muslims have the level of knowledge of religious scholars, particularly in matters of Islamic jurisprudence. Therefore, the mediation and negotiation process must be in compliance with Sharia, emphasizing the importance of the presence of scholars.

In Türkiye, religious counselling practices are mostly carried out in 'Family Guidance and Guidance Offices' affiliated with mufti offices. Answers and solutions are offered from religious sources according to the questions and problems of the people who apply here. In these offices, in addition to religious solutions to domestic problems, religious interpretations are offered on all matters concerning human life, and referrals are made to relevant institutions in cases requiring different areas of expertise. People can apply to these offices to learn how religion views the problems they experience and what advice they offer. Expert preachers work in these offices. By providing psychology and psychological counselling training to the experts working here, counsellors who have expertise in the field of religious psychological counselling can be trained.

Given the wide range of family issues, including conflicts between spouses, it is essential to draw upon various disciplines such as sociology, psychology, law, and religion. These fields possess theoretical knowledge and experts who can offer effective solutions to address family-related problems. However, in today's world where family problems are increasing exponentially, it is seen that religious references are not used sufficiently or not taken into consideration at all in solving these problems. In Türkiye, the majority of the population is Muslim underscores the significance of the family as a sacred institution in society. The prevalent preference for religious marriage further emphasizes the importance of incorporating religious elements in addressing issues related to families. Therefore, it is not possible for the search for solutions that ignore religious references to be sufficiently successful in solving problems related to the family.

This thesis has established that Islamic family mediation can provide greater access to justice for women in a pluralistic society like Türkiye. It has also critically examined the practicalities of implementation, including the scope, form, and potential challenges associated with such a system. The research conducted for this

thesis indicates that Islamic family mediation, particularly within the context of Sharia Councils in England, presents a nuanced approach to resolving family disputes, especially for Muslim women in Türkiye. While mediation offers a less adversarial alternative to court proceedings, its effectiveness in ensuring women's access to justice is complex and context-dependent.

Therefore, while Islamic family mediation and Sharia Councils offer a culturally sensitive avenue for dispute resolution, it is crucial to critically assess their impact on women's access to justice in Türkiye. Further research is needed to explore the experiences of women who have utilized these services and investigate potential safeguards and reforms that could enhance the fairness and effectiveness of Islamic family mediation in ensuring equitable outcomes for all parties involved.

The interview findings highlight the crucial role of religious counselling in addressing family disputes within Turkish society. However, the existing framework, primarily focused on religious interpretations and advice, may not always fully cater to the diverse needs and complexities of modern family issues.

The Sharia Council model in England offers a compelling alternative approach. While acknowledging its limitations and criticisms, this model demonstrates the potential benefits of incorporating cultural and religious sensitivity into mediation processes. The emphasis on voluntary participation, reconciliation, and the involvement of religious experts resonates with the values of many Turkish Muslims, potentially offering a more accessible and effective pathway to dispute resolution.

While Sharia Councils do not actively discourage the utilization of state law avenues, they concurrently promote alternative dispute resolution methods that adhere to Islamic norms and values. While recognising the agency of women who opt for unofficial mediation rooted in Muslim personal law, it is imperative to acknowledge the potential influence of entrenched gender hierarchies inherent within such frameworks. Even when chosen freely, these processes may still limit women's ability to exercise their legal rights and achieve equitable outcomes fully. Supporting women's agencies requires access to information and resources that empower them to make informed choices about the avenues they pursue for resolving marital grievances.

This highlights the importance and appropriateness of incorporating religious practices and traditions into family mediation in Türkiye. As the example of Sharia Councils in England demonstrates, such an approach does not inherently conflict with the secular nature of the state. In fact, it can offer a culturally relevant and effective means of addressing the complex needs and concerns of individuals seeking family justice, particularly women.

Based on these findings, this thesis proposes a reimagined family mediation model for Türkiye. This strategy might include merging elements of the Sharia Council model, like its proficiency in Islamic law and principles, with the existing system's set infrastructure and procedural frameworks. This could lead to the creation of a more thorough and culturally attuned system, catering to the varied requirements of the community while maintaining justice and fairness principles. Furthermore, adapting elements of the Sharia Council model, such as culturally sensitive mediation practices and the involvement of religious experts could enhance the relevance and effectiveness of mediation for Muslim families in Türkiye.

However, implementing such a model requires careful consideration of potential challenges. Maintaining women's rights, addressing concerns about the enforceability of decisions, and guaranteeing the impartiality and neutrality of mediators continue to be of utmost importance. By addressing these challenges head-on, Türkiye can pave the way for a more equitable and effective family mediation system that truly empowers all individuals, especially women, to seek and obtain justice within their families.

This research underscores the potential for transforming family mediation in Türkiye by leveraging existing religious counselling practices and drawing inspiration from the Sharia Council model. By integrating psychological expertise, cultural sensitivity, and voluntary participation, a more comprehensive and effective framework can be established, ensuring that all members of society, regardless of gender or background, have access to fair and just dispute resolution mechanisms within their families. The Sharia Council operates in a space that is interwoven with local communities and state law. It navigates the delicate balance between adhering to Islamic principles, responding to the needs of its community, and respecting the legal framework of the state.

While the Sharia Council showcases religious institutions' potential in addressing community needs, its operational constraints highlight the need for creating more comprehensive and state-endorsed structures, similar to those suggested in Türkiye. As can be seen from the interviews, the Family and Religious Guidance offices are inadequate in providing women with access to justice because they do not provide systematic and state-recognised Islamic family mediation. This deficiency, coupled with the growing desire within certain communities for religiously informed dispute resolution, creates a fertile ground for the emergence of alternative structures. While the current legal framework acknowledges the importance of religious considerations in family matters, it falls short of providing a formal and accessible platform for Islamic family mediation. The absence of such a platform leaves individuals, particularly women, vulnerable to informal, and often inequitable, arrangements that may not align with the principles of Islamic law. The establishment of Sharia Councils, or similar structures, could potentially offer a solution by providing a legitimate and recognized space for resolving family disputes through the lens of Islamic principles and values. This would empower women to access justice and navigate complex family situations with the guidance of qualified Islamic scholars and mediators, ensuring a fair and just resolution based on Islamic principles.

This thesis highlights the importance of a nuanced understanding of Islamic family mediation in Türkiye. Recognizing both its potential benefits and limitations, policymakers and practitioners can strive to create a more inclusive and equitable system for resolving family disputes. This system should uphold women's rights and interests while respecting their cultural and religious values.

The study revealed that while Türkiye's family mediation system has made strides in promoting access to justice, significant gender-based barriers persist. These barriers are deeply rooted in both legal and sociocultural contexts, hindering women's ability to fully participate in and benefit from the justice system. The research identified discriminatory institutional practices, ingrained social norms, and women's negative perceptions of the justice system as key factors contributing to this inequity.

Conversely, the English Sharia Council model, despite its contentious nature, has demonstrated a capacity to offer accessible and culturally relevant dispute resolution mechanisms for Muslim communities. The councils' emphasis on mediation, reconciliation, and voluntary participation aligns with Islamic legal principles and provides an alternative pathway to formal court proceedings. Importantly, this model highlights the potential for integrating religious and cultural considerations into family mediation, promoting a more inclusive and equitable approach.

This research argues that by carefully adapting elements of the English Shari'a Council model, Türkiye's family mediation system could be significantly enhanced. Specifically, incorporating principles such as cultural sensitivity, voluntary participation, and the involvement of religious experts could address the unique needs and concerns of Muslim women in Türkiye. Additionally, promoting greater awareness and understanding of mediation processes, coupled with increased access to legal aid and support services, could empower women to actively engage in family dispute resolution.

In conclusion, this doctoral thesis underscores the importance of a nuanced and context-specific approach to enhancing family justice in Türkiye. By drawing on the strengths of the existing Turkish system and the English Sharia Council model, a more inclusive, equitable, and culturally relevant family mediation framework can be envisioned. This, in turn, could significantly improve women's access to justice and promote a more just and harmonious society.

Suggestions and Recommendations

In light of the findings of this thesis, several recommendations emerge to enhance the effectiveness of Islamic family mediation in Türkiye and ensure equitable access to justice for women, drawing inspiration from the practices of Sharia Councils in England:

1- Diversify and Professionalize Mediators: The qualifications and expertise of mediators should be expanded to include individuals from diverse backgrounds and professions, ensuring a broader understanding of contemporary societal issues and fostering trust among disputing parties. Broadening the range of mediators to

encompass varied backgrounds and professions may result in enhanced creativity in solutions and a more profound comprehension of the intricacies of resolving disputes. By uniting people with diverse perspectives and experiences, mediators can guide parties through delicate matters with empathy and cultural awareness. This inclusive method not only improves mediation results but also fosters fairness and inclusiveness in the process. Incorporating multidisciplinary expertise by recruiting mediators from various professional backgrounds such as law, psychology, social work, and religious studies will provide a holistic approach to Islamic mediation. Additionally, continuous training and development programs should be established to enhance their mediation skills, cultural sensitivity, and knowledge of relevant legal frameworks. Diversified and professionally trained mediators can address the complex and varied nature of family disputes more effectively, providing a relevant and empathetic approach. An expansion like this has the potential to build trust between those in disagreement, guarantee fair access to dispute resolution procedures, and encourage creative solutions that tackle Türkiye's changing societal environment.

2- Increase Public Awareness and Acceptance: Efforts should be made to raise awareness within the community about the importance of Islamic family mediation and its potential to resolve conflicts amicably. This could involve educational campaigns, workshops, and community outreach programs that highlight the benefits of mediation and encourage couples to seek its services early in the dispute-resolution process. Moreover, forming alliances with religious and community figures can promote Islamic family mediation as a culturally suitable and efficient means of dispute resolution. Through cooperation, these influential individuals can debunk misunderstandings and stereotypes associated with mediation in the community. This joint effort can offer assistance and direction to women requiring mediation assistance, ultimately cultivating a more tranquil and unified society.

3- Strengthen Institutional Support and Collaboration: To guarantee the efficiency and availability of mediation services, the organization overseeing alternative dispute resolution, such as *tahkim* (arbitration), ought to be directly linked to the judiciary, as proposed in interviews by the Family and Religious Guidance Offices. Also, with proper training and pilot projects, these offices hold the potential

to develop into functioning Islamic family mediation units. Therefore, it is recommended that the capacity of Family and Religious Guidance Offices be strengthened and Islamic family mediation be institutionalised to improve women's access to justice. This would facilitate collaboration between the courts and mediation services, streamline procedures, and enhance the overall efficacy of the process. Moreover, the supervision and direction of the judiciary would enhance the credibility and professionalism of mediation services, building greater trust among disputants. This suggested institutional integration carries substantial potential to improve access to justice and support a more efficient and effective resolution framework in the realm of Islamic family mediation in Türkiye.

4- Adapt and Reform Mediation Practices: The existing provisions and procedures related to family mediation should be reviewed and revised to better address the needs of contemporary families and marriages in conflict. This could involve revisiting the mandatory requirement for attending reconciliation sessions, exploring the incorporation of innovative mediation techniques from other jurisdictions, and developing specialized mechanisms to address issues such as child custody and financial settlements. Also, as stated by the officials of women's organizations in the interviews, women's organizations were not informed about the changes to be made regarding mediation and their opinions were not taken into consideration. However, the participation of these organizations, which women turn to in their quest for justice, in the decisions taken on mediation policy and practice, will ensure that grassroots needs are voiced and healthier solutions are offered, thus facilitating women's access to justice. Information and communication efforts should include collaboration with both civil society and Family and Religious Guidance Offices in areas visited by poor women with limited access to mediation service information. Mediation centers should go beyond the court premises and should be established locally, taking into account that they should also include persons competent in Islamic family mediation, which will increase women's opportunities to access justice.

5- Prioritize Early Intervention and Reconciliation: Mediation services should be promoted as an early intervention tool, encouraging couples to seek assistance before conflicts escalate. This could involve integrating mediation services with pre-

marital counselling programs, providing accessible and affordable mediation services, and prioritizing reconciliation efforts where feasible, while always safeguarding the rights and interests of women. Additionally, reconciliation within mediation can enhance relationships by emphasizing emotional healing and mutual understanding. Trained mediators can utilize reconciliation techniques and offer follow-up sessions to support this process.

Given the scholarly consensus that family mediation necessitates a distinct approach from other mediation types, it is recommended that a separate and independent law be enacted to govern family mediation, diverging from the existing Law No. 6325. This dedicated legislation should specifically address the unique dynamics and complexities inherent in family disputes, recognizing the significant influence of religious and cultural factors in this context. Furthermore, drawing on the insights gleaned from the study of Sharia Councils in England, the proposed legislation should incorporate provisions that safeguard the rights of all parties involved, particularly women, ensuring equitable access to justice and fair outcomes in family mediation processes.

Furthermore, the interview results shed light on the intricate nature of Islamic family mediation in Türkiye, revealing the complexities associated with the factors outlined in Table 3. Participants' varied viewpoints regarding the potential implications of establishing Islamic mediation centers span from optimism regarding enhanced justice accessibility for women to concerns regarding compliance with the secular legal system, highlighting the multifaceted aspect of the issue. The perceived efficacy of Islamic mediation, attributed to its respect for cultural nuances and religious foundation, underscores the promise of this method in addressing the distinct requirements of women and marginalized communities seeking justice in family matters. The strong alignment of Islamic family mediation with Turkish cultural and societal expectations, stemming from the longstanding reliance on religious figures for guidance in familial issues, further underscores its potential significance within the Turkish context. Nonetheless, the findings also emphasize the necessity for careful examination of legal reforms and adjustments to ensure the safeguarding of individual rights and the alignment of Islamic mediation practices with Türkiye's secular legal structure. The varying levels of awareness among

participants regarding the initiatives of the Presidency of Religious Affairs indicate the need for further research to comprehensively grasp the influence of these initiatives on advancing women's access to justice. By implementing these recommendations, Türkiye can strengthen its Islamic family mediation system, ensuring that it serves as an effective and equitable avenue for resolving family disputes, upholding the principles of Islamic law, and protecting the rights and well-being of women.

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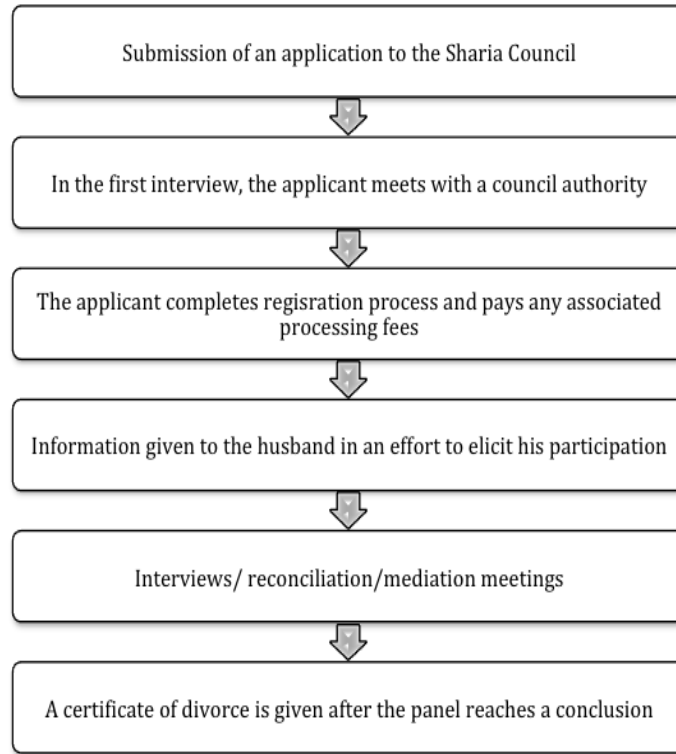
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APPENDIX A

Description of Islamic Divorce Process In UK Sharia Councils¹



¹ ibid 109; Samia Bano, 'An Exploratory Study of Sharia Councils in England With Respect to Family Law' (Centre for Islamic and Middle Eastern Law, University of Reading 2012) 20.

APPENDIX B

PARTICIPANT INFORMATION SHEET

Title of Research Project

Islamic Family Mediation and Women's Access to Justice in Türkiye: Assessing the Applicability of the England Sharia Council Model

My name is Busra Gulsah Gokce and I am a PhD student in the Department of Law at the University of Essex. I would like to invite you to take part in a research study. Before you decide whether or not to take part, it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully.

What is the purpose of this study?

This research is the final phase of my dissertation in PhD in Law at the University of Essex. The objective of my research is to identify Islamic Mediation can enhance family justice in Türkiye. In this study, the Islamic Family Law med-arb model is being studied as an alternative dispute resolution model, and it will be argued that this model that should be soon integrated into family mediation in Türkiye. Furthermore, this study aims to examine the applicability in Türkiye of the system applied to Muslims in England, by taking the example of Sharia Councils and Muslim Arbitration Tribunals in England.

Why have I been invited to participate?

You are being invited to participate in this study due to your involvement with researching if Islamic family mediation system, in the role of a lawyers, lecturers, as part of a family mediation committee or otherwise directly involved with family mediation system.

Do I have to take part?

It is up to you to decide whether or not you wish to take part in this research study. If you do decide to take part you will be asked to provide written consent. You are free to

withdraw at any time, without giving a reason. Withdrawal will have no impact on your marks, assessments or future studies.

You can stop the interview at any time and you do not need to answer any questions that.

You do not wish to answer. If you decide to withdraw from the study, you can do so at any time by contacting the named individual responsible for this study (details provided below). Any data you have provided up to the point of withdrawal will be handled according to our data management procedures, which will be explained in the informed consent process.

It is important to note that there may be limitations on your right to withdraw, depending on the nature of the study. For instance, if data is collected anonymously, we may not be able to identify your specific data for withdrawal purposes. Additionally, data may be anonymized within a specified timeframe, limiting our ability to remove your information if you choose to withdraw at a later stage.

What will happen to me if I take part?

If you are happy to take part and are satisfied with the explanations from the research team, you will be asked to confirm you agree to take part in the study (a consent form). You can choose how you would like to take part. You can either answer the questions by meeting video calling (zoom/skype), or I will call you and ask you the questions over the phone at a time that suits you. The interview will take about 30-40 minutes of your time.

If you decide to have an interview, we will ask permission to tape the interview. This is purely as a means of testing to make sure that all the interviewers are working in the same way during the study. The tape of the interview will not be labelled with any personal information such as your name or date of birth, and it will be listened to only supervisor (if necessary) and me. You can say no if you don't want to be taped. If you agree to be taped, you can ask for the tape to be destroyed, at any time after the interview.

What are the possible disadvantages and risks of taking part?

Participating in the research is not anticipated to cause you any disadvantages or discomfort. The potential physical and/or psychological harm or distress will be the same as any experienced in everyday life.

What are the possible benefits of taking part?

We hope that you will enjoy talking to us. Your contribution is going to help others. Results will be shared with participants in order to inform their professional work.

What information will be collected?

First of all, the data will be obtained through an interview with a certain which you are. At the time of writing, you will be completely anonymous.

Will my information be kept confidential?

All the information that we collect about you during the course of the research will be kept strictly confidential. You will not be able to be identified or identifiable in any reports or publications. Your institution will also not be identified or identifiable. Any data collected about you in the interview will be stored online in a form protected by other relevant security processes and technologies.

Data collected may be shared in an anonymised form to allow reuse by the research team and other third parties. These anonymised data will not allow any individuals or their institutions to be identified or identifiable.

How data is collected, handled, stored and destroyed will comply with the Data Protection Act 1998. Any information included in any reports will be anonymised. Your interview data will be held in accordance with the Data Protection Act. The information you provide will be used for research purposes and your personal data will be processed in accordance with current data protection legislation and the University's notification lodged at the Information Commissioner's Office. Your personal data will be treated in the strictest confidence and will not be disclosed to any unauthorised third parties.

a. Interview recordings

The digital recording of your interview will be deleted as soon as there is an authoritative written transcript of your interview.

b. Interview transcripts and contact details.

Also, our meeting with participants will be password protected so that other intruders cannot attend.

Interview data will be held and used on an anonymous basis, with no mention of your name, but we will refer to the group of which you are a member.

Your personal and contact details will be stored separately from your interview transcript and may be retained for up to 3 years.

If you request it, you will be supplied with a copy of your interview transcript so that you can comment on and edit it as you see fit (please give your email below).

Third parties will not be allowed access to interview tapes and transcripts except as required by law or in the event that something disclosed during the interview causes concerns about possible harm to you or to someone else.

Also, our meeting with participants will be password protected so that other intruders cannot attend.

What is the legal basis for using the data and who is the Data Controller?

I'm obliged to comply with the requirements established by the data protection principles when collecting and processing personal data for research purposes.

The Data Controller will be the University of Essex and the contact will be Sara Stock, University Information Assurance Manager (dpo@essex.ac.uk).

What should I do if I want to take part?

If you want to participate, please contact me and we will arrange the interview at a convenient time for you.

What will happen to the results of the research study?

Results of the research will be published in my PhD thesis. You will not be identified in any report or publication. Your institution will not be identified in any report or publication. If you wish to be given a copy of any reports resulting from the research, please ask us to put you on our circulation list.

Who is funding the research?

The project is a partnership involving Turkish Education Ministry and University of Essex.

Who has reviewed the study?

This project has been ethically approved by the Information School's ethics review procedure and subsequently endorsed by the ethics procedures of University of Essex. The University of Essex's Research Ethics Committee monitors the application and delivery of the University's Ethics Review Procedure across the University.

Concerns and Complaints

If you have any concerns about any aspect of the study or you have a complaint, in the first instance please contact the principal investigator of the project, Busra Gulsah

Gokce, using the contact details below. If are still concerned, you think your complaint has not been addressed to your satisfaction or you feel that you cannot approach the principal investigator, please contact the departmental Director of Research in the department responsible for this project, [name and e-mail address]. If you are still not satisfied, please contact the University's Research Governance and Planning Manager, Sarah Manning-Press (e-mail sarahm@essex.ac.uk). Please include the ERAMS reference, which can be found at the foot of this page.

Name of the Researcher/Research Team Members

Researcher Busra Gulsah Gokce, School of Law, Colchester Campus, University of Essex, UK. Tel: +44 (0) 7930 157237, email: bg19618@essex.ac.uk

Dr Sarah Maranlou, School of Law, Colchester Campus, University of Essex, UK. Tel: +44 (0) 1206 87375, email: s.maranlou@essex.ac.uk

Prof Donald Nicolson, School of Law, School of Law, Colchester Campus, University of Essex, UK. Tel: +44 (0) 1206 873973, email: dn17405@essex.a.c.uk

Please ask if there is anything you do not understand or if you would like more information.



**Participant Consent form for Research Project: ISLAMIC FAMILY
MEDIATION AND WOMEN'S ACCESS TO JUSTICE IN TÜRKİYE: THE
CASE OF SHARIA COUNCILS IN ENGLAND**

Dear participant,

This research is being carried out by Busra Gulsah GOKCE under the supervision of Dr Sahar MARANLOU and Prof Donald NICOLSON.

We are investigating whether Islamic Mediation can enhance family justice in Türkiye. In this study, the Islamic Family Law med-arb model is being studied as an alternative dispute resolution model, and it will be argued that this model should be soon integrated into family mediation in Türkiye. Furthermore, this study aims to examine the applicability in Türkiye of the system applied to Muslims in England, by taking the example of Sharia Councils and Muslim Arbitration Tribunals in England.

The answers, which you provide, will be recorded through notes taken by the interviewer/audio recording/video recording (delete as appropriate).

All information collected will be kept securely and will only be accessible by my supervisor and myself.

Data will be anonymised and if data, which you provide, is used in any publications or reports then a participant number or pseudonym will be used and identifying details will be removed. A list may be kept linking participant numbers or pseudonyms to names, but this will be kept securely and will only be accessible by

myself and my supervisor. A copy of the information, which we record about you, but not other participants, will be provided, free of charge, on request.

You are free to withdraw from the study at any time, without giving reasons and without penalty, even after the data have been collected. However, if publications or reports have already been disseminated based on this data, these cannot be withdrawn.

We would be very grateful for your participation in this study. If you need to contact us in future, please contact me bg19618@essex.ac.uk or Dr Sahar Maranlou (s.maranlou@essex.ac.uk) and Prof Donald Nicolson (dn17405@essex.ac.uk). You can also contact us in writing at: EBS, University of Essex, Colchester CO4 3SQ.

Yours,

Busra Gulsah Gokce

<u>Statement of Consent</u>	<u>Please initial each box</u>
<ul style="list-style-type: none">I agree to participate in the research project “ISLAMIC FAMILY MEDIATION AND WOMEN'S ACCESS TO JUSTICE IN TÜRKİYE: THE CASE OF SHARIA COUNCILS IN ENGLAND”, being carried out by <i>Busra Gulsah Gokce</i>.	<input type="checkbox"/>
<ul style="list-style-type: none">This agreement has been given voluntarily and without coercion.	<input type="checkbox"/>
<ul style="list-style-type: none">I agree to make interview via video calling (e.g. zoom/skype) and face to face.	<input type="checkbox"/>

<ul style="list-style-type: none"> • I agree to the interview being audio recorded. 	<input type="checkbox"/>
<ul style="list-style-type: none"> • I have been given full information about the study and contact details of the researcher(s). 	<input type="checkbox"/>
<ul style="list-style-type: none"> • I understand that the identifiable data provided will be securely stored and accessible only to the members of the research team directly involved in the project, and that confidentiality will be maintained. 	<input type="checkbox"/>
<ul style="list-style-type: none"> • I have had the opportunity to ask questions about the research and my participation in it. 	<input type="checkbox"/>
<ul style="list-style-type: none"> • I confirm that have read and understand the information provided above. 	<input type="checkbox"/>

Participant Name

Date

Participant Signature

Researcher Name

Date

Researcher Signature
