Just-ish? An Analysis of Routes to Justice in Family Law Disputes in England and Wales

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Abstract

It is widely documented that the formal family justice system in England and Wales is in crisis. The family courts are plagued by delays and backlogs, whilst parties struggle to secure access to advice and representation due to cuts to public funding. Increasingly, litigants face economic, physical and cultural barriers to courts brought about by rising court fees, reforms to the court system and demographic changes which have resulted in diverse family forms for whom the family courts may have little legitimacy. The first part of this article examines how recent changes to family law and policy in England and Wales have reduced the ease with which parties are able to achieve procedural and substantive justice through the family courts. The second part of the article analyses how forums of dispute resolution which are delivered by non-state actors, but which rely on the state for their authority, have evolved to fill this justice gap and are therefore indicative of a move towards 'weak' legal pluralism in the context of family justice. It is argued that although the family courts are still an important cornerstone of the justice landscape, alternative forums of dispute resolution increasingly play a positive role in enabling disputants to achieve their procedural and substantive goals and this is strengthened by a weak approach to legal pluralism which upholds the autonomy of the parties whilst also ensuring necessary protections and safeguards for vulnerable litigants. The article therefore challenges critics of weak pluralism, who perceive that reliance on state recognition precludes institutions playing an important role outside of the state hierarchy.

Key words*: procedural justice, substantive justice, family law, weak legal pluralism.*

Introduction

It is widely documented that the formal family justice system in England and Wales is in crisis (Amnesty International 2016; Richardson and Speed 2019; The Law Society 2017). The family courts are plagued by delays and backlogs whilst parties struggle to secure access to advice and representation due to cuts to public funding (Amnesty International 2016; Ministry of Justice 2019; Organ and Sigafoos 2018; The Law Society 2017). Increasingly, litigants face economic and physical barriers to accessing the family courts brought about by rising court fees and reforms to the court system which have resulted in reduced staffing and closures to the court estate (Kaganas 2017; Ministry of Justice 2019). At the same time, there has been a general withdrawal by the state in the governance of some family cases on the basis that many family law disputes relate primarily to relationship rather than legal issues which the courts are not equipped to deal with (Hunt et al 2004). Over the last few decades, England has also experienced widescale demographic changes as a result of globalisation and the spread of human rights, resulting in a diverse family forms for whom traditional family law and practice may have little relevance and legitimacy (Gangoli, Bates and Hester 2019; Stack 2006; Sullivan 2010). These changes, it is argued, have reduced the ease with which parties are able to achieve justice through the family courts in England and Wales, and, in many cases, have made them a less appealing and less accessible route to resolving family law disputes. More fundamentally, many of the measures undermine the principles of equality, fairness and accessibility for all, on which formal justice system is predicated (Piche 2017).

The first part of this article sets out an in-depth analysis of the recent changes to the family justice landscape in England and Wales and their impact on access to justice. Whilst the definition of justice is much debated, for the purposes of this discussion it is conceptualised as referring to the procedural and substantive ways through which an outcome is reached. Procedural justice

emphasises that ‘people’s behaviour and their reactions to legal authorities are based to a striking degree on their assessments of the fairness of the process by which legal authorities make decisions and treat members of the public’ (Tyler 2003, 284). Procedural justice is driven by a number of factors including whether decisions are made in a neutral and unbiased way, whether litigants feel treated with dignity and respect, whether they understand how decisions are made and whether they have an opportunity to state their case (Epstein 2002; Lagratta and Bowen 2014). Justice institutions can fail to provide procedural justice, ‘in scope’ (by failing to adjudicate cases within their scope or going beyond their purview), ‘through procedure’ (by using improper means to resolve a conflict), or ‘in outcome’ (by reaching an unjust outcome notwithstanding that they have complied with the appropriate scope and procedure) (Ehrenberg 2003, 189). Proponents of procedural justice highlight a relationship, both positive and negative, between the treatment people receive by justice officials and the trust they confer in justice institutions and their willingness to comply with outcomes (Ibid). In contrast, substantive justice is concerned with the morality, legitimacy and efficacy of legal rules (Lovis-McMohan 2011). This is important because if laws themselves are unfair, the process by which an outcome is reached is largely immaterial. Moreover, as Goodmark argues ‘whether the process can be deemed just may depend in large measure upon what outcome an individual hopes to achieve’ (2015, 712).

The second part of the article analyses how forums of dispute resolution which are delivered by non-state actors but which rely on the state for their authority – notably mediation, arbitration and religious tribunals – have evolved to fill the justice gap created by these changes and are indicative of a move towards ‘weak’ legal pluralism in the context of family justice. This shift, it is argued, has been driven both by the UK government through recent policy initiatives and the justice needs of litigants. Legal institutions can be regarded as ‘weak’ where it is ‘only through the state’s willingness to grant powers to other methods of adjudication that legal pluralism is given

acceptance' (Von Benda-Beckmann and Turner 2018, 262). This can be contrasted against 'deep' pluralism which arises where different legal orders have 'separate and distinct sources of content and legitimacy' (Woodman 1999, 10). This article argues that alternative forums of dispute resolution are capable of playing a positive role in dispute resolution in appropriate cases and may more closely align to participants' procedural and substantive goals. This is supported by a weak approach to pluralism which upholds the parties' autonomy whilst also ensuring necessary protections and safeguards for vulnerable litigants. Challenging critics who argue that weak pluralism is a 'technique of governance' utilised by the state and is therefore not true pluralism (Sezgin 2004, 101), this article makes a unique contribution to the literature by arguing that reliance on state recognition is a positive development for family justice and does not necessarily preclude institutions playing an 'important role in facilitating justice outside of the state hierarchy' (Corrin 2017, 307).

Part 1: Recent changes to the family justice system and their impact on justice

Barriers to the family courts

Over the last decade, a range of cost-saving measures have been implemented by the UK government as part of wide-scale family justice reform. The measures mark a fundamental shift away from post-war policies which regarded access to justice as a fundamental right and which sought to 'ameliorate the variety of barriers that may exist to participation and inclusion in the legal system, as a result of structural disadvantage and the unequal distribution of resources in society' (Mant 2017, 249). In contrast, many of the policies outlined below are illustrative of a shift towards neoliberalism and the 'economisation' of family justice, in which the value of policies are no longer assessed by their effectiveness in promoting equality, fairness and accessibility but by their cost-effectiveness, their contribution to economic growth or reducing the national deficit (Ibid). The impact of this, it is argued, has been to reduce the capacity of the family

courts to facilitate procedural and substantive justice and place increased reliance on alternative methods of adjudication. This follows a wealth of literature which documents that in the developing and developed world, non-state methods of dispute resolution are utilised where there are barriers of entry to the state system (Akers 2016; Janse 2013; M'Cormack 2018; Piche 2013).

Cuts to legal aid

Arguably, the most significant barrier to justice followed the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which came into effect in April 2013. LASPO removed from the scope of legal aid private family law cases except where strict criteria are met regarding domestic violence (including forced marriage and female genital mutilation), child abduction and child abuse (LASPO 2012, Sch 1). The government defended the decision to restrict funding on the basis that 'legal aid is not routinely justified for ancillary relief and children proceedings' (Ministry of Justice 2010, 6). In relation to private law children cases, the government argued that 'the provision of legal aid is creating unnecessary litigation and encouraging long, drawn-out and acrimonious cases' (Ibid, 70). The result was that £350 million was removed from the legal aid budget in 2013, with further annual cuts of approximately £268 million until 2018 (Ministry of Justice and Legal Aid Agency 2014). In the year ending April 2013, legal aid was granted in 925,000 cases. The following year, this fell to 497,000 - a decrease of 46% (LAPG 2017).

The two main difficulties with securing legal aid are providing the necessary gateway evidence to demonstrate that an applicant falls within the required exemption and satisfying the legal aid means test. In relation to gateway evidence for victims of domestic abuse, the initial legal aid regulations contained restrictive forms of acceptable evidence including evidence that a respondent had been arrested, cautioned, bailed or convicted for a domestic abuse offence or a letter from a relevant health professional or a multi-agency risk assessment conference confirming

that the applicant is or has been at risk of harm from the respondent (The Civil Legal Aid (Procedure) Regulations 2012). Controversially, at the onset of the legislation, much of this evidence needed to relate to incidents that took place within the two years prior to the date of the legal aid application. Many victims were unable to meet these requirements due to not reporting the abuse or it taking place outside of the relevant time periods. In addition, the restrictive gateway evidence did not accommodate difficult to evidence forms of domestic abuse such as financial abuse. The consequence was that many victims of domestic abuse were not eligible for legal aid and therefore able to secure the representation they needed in court proceedings (Amnesty International 2016; The Law Society 2017). In February 2016, the Court of Appeal found that the limited evidence requirements prevented survivors of abuse from qualifying for legal aid and were therefore unlawful (*Rights of Women v The Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91). The court described that there was a 'formidable catalogue of areas of domestic violence not reached by a statute whose purpose is to reach just such cases' (Ibid, 44). In April 2016, new regulations were introduced extending the 24-month time limit to 60 months and introducing new forms of acceptable gateway evidence for financial abuse into regulation 33(2) of the Civil Legal Aid (Procedure) (Amendment) Regulations 2016. The regulations were subsequently amended again in January 2018 to remove the time limit on abuse evidence and to broaden the scope of acceptable gateway evidence to include letters from domestic violence support organisations, independent domestic violence advocates and housing support officers (Legal Aid Agency 2018).

Whilst the amendments have clearly been a positive development, it remains the case that many victims are still not able to secure the necessary evidence. Domestic abuse is an underreported offence and many victims cannot therefore obtain evidence from the police (Office of National Statistics 2019). Research has also highlighted that some organisations are not willing to prepare letters that would allow a victim to secure legal aid, charge fees for preparing letters which are

unaffordable and that victims experience data protection issues when attempting to access evidence from the police (Syposz 2017).

Even if a victim of abuse is able to secure the necessary gateway evidence, they must still satisfy the means test. LASPO introduced significant changes in respect of means testing for legal aid including freezing the financial thresholds, requiring all applicants to have capital under the assessed threshold and increasing the financial contributions which applicants may be required to make towards their legal costs. This has created further barriers to the family courts, with large numbers of people who would have previously been eligible for legal aid now being unable to obtain help (Hirsh 2018). Despite the government's objective that victims of domestic abuse should continue to be eligible for legal aid, research demonstrates that over 40% of victims are no longer able to access public funding (LAPG 2017). Whilst the government have committed to reviewing the legal aid means test, it is unlikely that wide-reaching revisions will be made, in light of the cost-saving objectives.

Parties who no longer qualify for legal aid but who cannot afford to instruct a solicitor on a privately paying basis have no option but to represent themselves in the family courts, should they decide to pursue proceedings (Trinder et al 2014). Court statistics demonstrate that between January and March 2020, neither the applicant nor respondent had representation in 39% of cases, an increase of 25% since the same period in 2013 (Ministry of Justice 2020). Difficulties securing access to advice and representation have been compounded by austerity measures which have de-funded support services and charitable organisations who otherwise may have been well placed to guide litigants through the court process on a pro bono basis (Organ and Sigafoos 2018). It is now common for organisations to provide one-off 'general' advice (often by unqualified volunteers) rather than full representation due to high levels of demand, which may be of limited

assistance (Amnesty International 2016; Organ and Sigafoos 2018). As such, even litigants who do receive some advice are required to handle their cases to a considerable extent without support.

The obstacles that parties without legal representation face are well documented. Potential litigants without access to early legal advice may not have sufficient knowledge of their legal rights to understand they have a case (Sullivan 2010). They may also struggle to identify the key issues in dispute and put forward their strongest legal arguments (Richardson and Speed 2019). In the case of applicants, this can result in cases lacking merit or serial applications (Trinder et al 2014). Litigants in person report experiencing difficulties with following court procedures including feeling unable to prepare and file paperwork, comply with directions, and secure necessary evidence, such as appointing and funding relevant experts (Organ and Sigafoos 2018). These factors invariably impact the participatory nature of family proceedings as litigants may not have sufficient opportunity to be heard and findings/decisions may be reached on the basis of insufficient information.

It follows that the effects of these barriers have led some potential litigants to take no action through the family courts leaving their issues unresolved. A survey of 239 women in the UK found that over half of the respondents took no action in relation to their family law problem because they were not eligible for funding (Rights of Women 2015). Whilst the small scale nature of this study means it cannot claim to be representative of all litigants' experiences, it nonetheless supports the argument that LASPO has, and continues to, discourage not only 'unnecessary' litigation as intended but also necessary litigation (Organ and Sigafoos 2018). This is further supported by court statistics which indicate that the number of court applications has fallen as a result of LASPO, with an overall decrease of 15% in children matters and 10% for financial cases (Hunter 2017).

Rising court fees

Economic barriers to the formal justice system have been exacerbated by rising court fees. Court fees to commence family proceedings typically cost a few hundred pounds. A litigant who wishes to divorce their spouse will incur a court fee of £550 to file a petition, a cost which has increased by 35% from £410 since 2016 (Legislation Scrutiny Committee 2015). This represents over 200% of the actual cost of processing an uncontested divorce, which the Ministry of Justice estimate is £270 (Ibid). Various applications may also need to be made within proceedings which attract separate court fees.

Simply put, court fees are not affordable for all litigants. There are two potential mechanisms which exist to facilitate access to the family courts in relation to costs. The first is through court fees not being charged in proceedings for protective injunctions including non-molestation orders, occupation orders, forced marriage protection orders and female genital mutilation protection orders. This reflects the fact that these proceedings involve a potential victim seeking protection against an alleged perpetrator of abuse and that such conduct is not their fault. Whilst this provision is helpful to some extent, its benefit is limited by virtue of the fact that issues surrounding an abusive relationship can rarely be dealt with by way of an injunctive order alone and ancillary proceedings are usually required (Richardson and Speed 2019). The second mechanism is through the availability of waivers and reductions, known as fee remission. Fee remission is a sliding scale of reductions to court fees based on the income and capital resources of the applicant. However, many applicants will not qualify for assistance despite not having sufficient income to pay the fee.

Court users question the value for money of court fees, and this is increasingly part of their decision making process when deciding whether to start proceedings, particularly amongst those will fewer financial resources (Pereira et al 2014). Research conducted prior to recent fee increases, highlights that parties sought better value from the family courts to justify increases in

fees, both in the efficiency of cases and the quality of information and service they were provided (Ibid). Despite increases taking place, there is little evidence that this investment in the family courts has been met with improved service, as will be considered below.

Reduction in the court estate

The HMCTS Reform Programme started in 2014 with the aim of modernising the court system through increasing the use of technology and reducing the court estate where utilisation rates are low. It has been stated that these measures would facilitate access to justice as the savings could be reinvested into other parts of an overburdened system (Ministry of Justice 2015). To facilitate this, since 2010 approximately 258 court and tribunal closures have taken place with a further 36 expected to close in the foreseeable future (House of Commons Justice Committee 2019). Closures of the court estate effect the ease with which litigants are able to access and experience the family courts. The Justice Committee recommend that 90% of court users should be able to access their nearest court venue and return home 'within the same day' (Ibid). This is a considerable increase from the previous recommendation of 'within one hour' (Ibid).

In relation to family law, there has been further disruption to the court system through the creation of the single family court and the centralised divorce centres in 2014, which have exacerbated difficulties for parties to access local courts or judges with relevant expertise. An example of this can be seen in the 2018 closure of the Durham Civil and Family Justice Centre as the regional North East Divorce Centre, which was moved some 116 miles away to Bradford. Subsequently (and in part as a result of the backlog of cases generated by Covid-19) this has temporarily been moved to Liverpool, a distance of 160 miles from Durham. Whilst it is hoped that any necessary hearings would be heard closer to the petitioner's home, this cannot be guaranteed. Moreover, the changes have broadened the categories of judges who are able to hear family cases to now include employment judges. Some judges may therefore lack the necessary knowledge to adjudicate

family law cases which may result in ‘critical issues or questions being overlooked’ (Kaganas 2014, 156).

Court closures have been mirrored by a reduction in court staff who are available to process paperwork and hear cases. It is reported that the number of full-time staff employed by HMCTS fell from 20,392 in 2010 to 14,269 in 2017 and the number of magistrates has fallen by half (Transform Justice 2018). HMCTS have stated that they will contribute £250 million of the money saved from the closure of courts to the £1 billion which the digital reform is estimated to cost (House of Commons Justice Committee 2019). In family law, there has been a shift towards electronic applications with online divorce proceedings becoming available to the public on 1 May 2018. Further pilots are underway in relation to electronic applications in financial relief, public and private law children proceedings. Whilst electronic submission of documents and hearings taking place via video link may increase the physical accessibility of courts, it will only do so for those who have access to computers and the technical expertise to use them. Further, it is vital that such services are fit for purpose. Whilst on the one hand it has been reported that during the pilot phrase there was a 95% decrease in the number of divorce applications being returned because of mistakes compared to the paper forms, the former President of the Family Division, Sir James Munby, has also reported that video links in ‘too many’ family courts are ‘a disgrace, prone to the links failing and with desperately poor sound and picture quality’, although more financial resources are being invested in this following the Covid-19 outbreak (HMCTS 2018; Munby 2017, 12).

Resourcing difficulties have resulted in a back-log of cases and increased the time taken to resolve matters. Hunt et al’s (2004) study of private children cases identified that 75% of the respondents reported experiencing delays. Delays undermine the parties’ faith in procedural justice by giving the impression that cases are dealt with inefficiently. They also preclude judicial continuity in

many cases, leading parties to lack faith in a judge's understanding of the issues and capacity to reach a fair outcome and adversely affect the parties' mental health (Ibid). Delays have been exacerbated by the increase of litigants in person (Organ and Sigafoos 2018; The Ministry of Justice 2019; Trinder et al 2014). Self-representing litigants are less amenable to out of court negotiations meaning a higher proportion of cases may become protracted, not necessarily through legal complexity (Richardson and Speed 2019). This is because unrepresented litigants often avoid communicating directly with the other party or their representatives due to animosity, distrust and fear, and instead engage in litigation by correspondence (Trinder et al 2014).

An under-resourced system is also less able to put individualised interventions in place to protect the needs of litigants. In cases where language barriers may preclude proper engagement in proceedings for example, litigants require access to good quality and independent interpreters, which are not always available. Specialised interventions may also be required in cases where domestic abuse is alleged. Recent studies have highlighted that family courts provide a forum for abusive and controlling behaviours to continue, because victims may have to face their perpetrator directly during hearings (Birchall and Choudhry 2018; Thiara and Harrison 2016). In addition, they may be expected to cross-examine their abuser or be cross-examined by them, as this practice is not yet prohibited in the family courts. There have been some developments in the substantive law to discourage this practice (see Practice Direction 12J Family Procedure Rules 2010 which advises that 'the judge should be prepared where necessary and appropriate to conduct the questioning of the witnesses on behalf of the parties') however until the Domestic Abuse Bill 2019-2021 is finally implemented, the current guidance is best practice rather than a statutory provision. Unsurprisingly, victims of domestic abuse report finding the experience of being cross-examined by their alleged abuser traumatising (Birchall and Choudhry 2018; Coy et al 2012, 2015).

Moreover, research indicates that special measures (such as separate waiting areas or staggered start/departure times) are often not available because of a lack of space within the court building or because poor quality technology does not allow victims to give evidence from a separate location or behind a partition (Trinder et al 2014). Almost half of the legal professionals surveyed by Coy et al (2012, 2015) reported that special measures were not advertised for vulnerable court users and some judges refused the use of special measures. For these victims, the family courts can be a traumatising and unsafe space. This situation should, to some extent, be improved by the introduction of Part 3A and Practice Direction 3AA to the Family Procedure Rules 2010 which permits the option of ordering appropriate measures to address any difficulties the parties may face giving evidence by reason of being vulnerable. Whilst this is a step in the right direction, stronger protection in the form of statutory protection is necessary to remove any element of judicial discretion.

Culturally diverse family forms

The measures outlined above have taken place at a time where family forms and dynamics are changing in England and Wales as a result of globalisation, increased migration and the spread of human rights (Stark 2006). Sir James Munby (2018) recognised that families in the UK take countless forms, driven by religious secularism and pluralism and the increasing number of transnational families. In this context, disputants may have loyalties to 'multiple often conflicting normative frameworks including religious personal laws and the practice of cultural customs' (Corradi and Desmet 2015, 226; Parashar 2013). The existence of religious and personal laws indicate that many diasporic communities are already governed by legal pluralism because 'unofficial laws find ways to survive in an alien milieu whether official law recognises the reality or not' (Yilmaz 2005, 49). Personal and religious laws may sit uncomfortably within the formal legal system which is premised on the 'separation of the public and private spheres and does not recognise systems of non state-regulated law for different communities' (Bano 2007, 5). Religious

laws are treated as ‘ethnic customs’ by the state which undermines the central role they play in many diasporic communities (Ibid, 6). As the examples below illustrate, there are tensions between the desirability of state regulation of normative orders (particularly for vulnerable parties) and the need for alternative forums of dispute resolution which prioritise parties’ preferences for disputes to be handled in accordance with religious laws.

At one end of the spectrum, there are areas of family law which state law does not currently regulate. An example which aptly illustrates this point is the regulation of Islamic nikah ceremonies, which are conducted in England or Wales but do not comply with the requirements of the Marriage Act 1949. In such cases, state laws do not recognise a nikah as creating a legally valid marriage and the parties may effectively be treated as cohabitees by the state (O’Sullivan 2017). Family law does not regulate the relationship breakdown between unmarried cohabitants and the family courts cannot make a determination about the distribution of financial assets. Instead, as this article will examine, the parties have recourse to sharia councils, which were established primarily to deal with the issue of religious-only marriages (Vora 2020). There are a variety of reasons why Muslim couples choose not to enter into a civil ceremony and the rationale underpinning these decisions raises important questions about the desirability of state regulation of Muslim marriages. In Akhtar’s (2018) study, respondents commonly identified that a civil marriage did not represent a ‘real’ marriage given its entirely non-religious focus. Others did not believe that the state should be involved in private matters relating to marriage. The majority of respondents considered that sharia laws provided sufficient protection in respect of marriage formation and dissolution, despite not being recognised by the state. They did not necessarily wish to see religious law formally codified and given recognition by the state and were accepting that in other aspects of life, living in a secular country required them to live by the ‘law of the land’. For these respondents, a nikah ceremony could therefore be seen to provide the participants ‘the opportunity to remember, reaffirm and recommit to traditions and beliefs from their inherited

culture' or more simply, to prioritise religious personal laws (Vora 2020, 149). For these parties, it is arguably appropriate that they have recourse to a forum which is able to adjudicate issues arising from their relationship breakdown according to religious personal laws. This reflects Parveen's observations that 'it would seem incongruous that… entry into a marriage is, at the very least, imbued with some personal religious dynamic involving a connection to God, if exit out of it does not carry some religious significance also' (2017, 40). This approach is further supported by evidence that family law practitioners have attempted to terminate religious divorces in a manner which is ineffective because they lack the requisite knowledge of religious laws and practice or they have used religious divorces as a bargaining tool in child arrangement negotiations which potentially places women at risk of agreeing to unsuitable contact proposals (Bano 2008; Shah-Kazemi 2001).

Whilst this approach upholds the parties' autonomy, other scholars have highlighted that the decision to enter into a religious-only marriage is not always a reflection of those parties' decisions and determinations about state law as against religious law and for some parties will be the result of a lack of understanding about the legal protection that a nikah ceremony provides or the imbalance of power within relationships which makes negotiations about entering into a civil marriage difficult (O'Sullivan 2017; Vora 2020). This has led to various proposals for reforming the current law. Many of these suggestions focus on the importance of ensuring that Muslim couples are granted state protection. The Siddiqui Report (2018) for example, suggested changes to the Marriage Act 1949 to ensure civil marriages are conducted prior to or at the same time as a Nikah ceremony. In light of Akhtar's (2018) findings, this proposal is problematic given that many Muslims do not accept the state's legitimacy in regulating marriage formation. In contrast, others have demonstrated more of a commitment to deep pluralism by proposing that Nikah ceremonies should be given the same legal recognition as marriages conducted in accordance with the Church of England, Judaism and The Society of Friends (Quakers) who are already permitted within the

Marriage Act 1949 to determine and apply their own laws relating to the formation of marriage (Shah 2013). Alternatively, Eekelaar (2013) argues that if any ceremony, such as a nikah ceremony, is acceptable within the religion concerned, that ought to be considered sufficient to give rise to a legal marriage. Although these final two proposals give greater credence to religious authorities, they would still lead to the state recognition (and therefore regulation) of religious marriages, which is clearly against the wishes of some Muslims. Potentially, a better solution would be to reform laws relating to cohabitation (another area which is not regulated by family law) to ensure that those who do wish to seek state support in the event of a relationship breakdown are able to access an appropriate remedy but those who wish to negotiate their own paths outside of the state have recourse to suitable forums.

At the other end of the spectrum, there have been various legislative attempts to utilise state law as a political tool to challenge normative orders. Many theorists support such an approach on the basis that 'practices that go on the name of custom can be inhumane' (Parashar 2013, 15; Dhagamwar 2003). Bano recognises that the state is most likely to intervene when personal laws are 'deemed unreasonable', 'clash with the principles of English laws' or are incompatible with human rights obligations under international law (2007, 6). In such cases, state intervention is necessary to remedy the 'lack of space in the English system for appropriate solutions to dilemmas facing people' (Warraich 2001, 11). An example of the government seeking to challenge normative orders through state legislation is the introduction of Forced Marriage Protection Orders (through the Forced Marriage (Civil Protection) Act 2007) in 2008 to protect individuals from being forced into marriage or to protect someone who has already been forced into marriage. In July 2014 similar provisions were made for potential victims of female genital mutilation (FGM), through the Serious Crime Act 2015. These measures have been met with some success, indicating that they were a welcomed intervention. In 2018 alone, 469 applications for forced marriage and FGM protection orders were granted (Ministry of Justice and National Statistics

2017). Whilst the desirability of state regulation in this context has not necessarily been challenged, the method by which the state have created a 'space within the existing framework' has received criticism for failing to take into account the gendered natures of these crimes or the structural power imbalances which exist in many communities and allow harmful practices against women to thrive (Anitha and Gill 2009). Women and girls in honour-based communities, for example, may fear taking their cases to the family courts because of practices which sustain patriarchy and shame women if they resolve 'private' family issues in a forum outside of the community (Siddiqui 2018). Laws without effective implementation mechanisms are not therefore a sufficient deterrent, particularly in light of reduced public funding and resources for specialised support services who support women in abusive situations (Anitha and Gill 2009).

The next part of this article examines the extent to which plural legal systems have evolved to fill the justice gap created by the above changes and analyses whether forums of dispute resolution delivered by non-state actors are capable of facilitating procedural and substantive justice for family law disputants.

Part 2: Pluralist legal systems in the family justice landscape

Mediation

As part of the shift towards neoliberalism, the government sought to encourage people to take greater personal responsibility for their problems by utilising 'alternative sources of help, advice or routes to resolution' (Ministry of Justice 2010, 16). The proposals for the legal aid reforms stated that 'it would be in the best interest of those involved in private law family cases which do not involve domestic violence to take a more direct role in their resolution… keeping court proceedings to the minimum necessary' (Ibid, 43). Litigation was perceived as inappropriate owing to the fact that many family disputes are primarily about conflicts within relationships which the courts are not equipped to deal with. The Executive Summary of the Family Justice

Review referred to the fact that 'the state cannot fix fractured relationships or create a balanced, inclusive family life after separation where this was not the case before separation' (Norgrove 2011, 4.1). Barlow argues that against this backdrop, the promotion of mediation with its focus on 'family privacy, cooperation and couple empowerment' and its rejection of an 'adversarial stance' and 'expensive paternalism' should 'come as no surprise' (2017, 203-204). The government's rationale for supporting mediation therefore draws on Edwards' assertion that 'alternative dispute resolution processes are allowed and often encouraged because the state deems them useful for addressing real and perceived inefficiencies and injustices of traditional court systems' (1986, 668).

Mediation as evidence of legal pluralism

The first incentive which the government adopted to facilitate a change in parties' engagement with mediation was retaining legal aid for mediation (where the parties are financially eligible) despite making sweeping cuts across family law more generally. Barlow argues that by 'withdrawing legal aid for (prior) legal advice (as well as representation at court) and making mediation the only legally aided out of court dispute resolution option, those who could not pay were effectively given the stark choice of mediating an agreement or representing themselves in court' (2017, 204). This, it was argued, compromised the voluntary nature of mediation and positioned it not as a parallel legal forum, but in many cases, the only viable option. Barlow describes that 'mediation was therefore likely to become a Hobson's choice for many, a constraint which in itself often militates against a successful mediated outcome' (2017, 205). Secondly, and more fundamentally for voluntary participation in mediation, the government gave mediation information and assessment meetings (MIAMs) statutory footing through section 10 of the Children and Families Act 2014. Since 22 April 2014, all parties wishing to issue financial relief proceedings or an application under the Children Act 1989 must first attend a MIAM unless they

fall within one of the stated exemptions under the Family Procedure Rules 2010. The purpose of a MIAM is to provide information about mediation, assess the parties for legal aid and determine their suitability for mediation (Morris 2013). However, the expectation that mediators should be able to accommodate a large volume of family cases in order to ease the burden on the family courts has placed pressure on mediators not to 'screen out unsuitable cases' through the MIAM process, due to a lack of alternatives (Barlow 2017). The Family Mediation Council (FMC) survey demonstrates that 97% of cases were assessed as suitable for mediation (2019). Therefore, whilst the government stopped short of making mediation mandatory in family cases, it was anticipated that MIAMs, together with financial incentives to mediate, would be a precursor to the majority of parties then attending mediation (Barlow 2017).

In contrast to government expectations, however, rates of attendance at MIAMs currently stand at a third of pre-LASPO levels whilst mediation starts have experienced a 50% drop since LASPO (Ministry of Justice 2019). This is largely attributed to the fact that wider cuts to family legal aid resulted in many disputants being unaware of the requirement to attend a MIAM by reducing their engagement with solicitors who are most likely to encourage mediation (Richardson and Speed 2019). Prior to LASPO, over 80% of referrals to publicly funded MIAMs were made by solicitors holding a legal aid contract whereas immediately following LASPO, this dropped to less than 10% (Ministry of Justice and the Legal Aid Agency 2017). Potential applicants may also feel that there is little point in attending a MIAM because there is no compulsion for the respondent to do the same. In many instances, MIAMs have become a 'tick box' exercise which enables an application to be made to court. Barlow therefore argues that 'LASPO has failed to change the culture of family dispute resolution' (2017, 206) and has led to parallel systems of dispute resolution (i.e. the family court and mediation), despite the government's intention that measures were aimed to curtail the choice of options available.

Mediation in the family context can be seen as an example of 'weak' pluralism because despite allowing non-state actors to adjudicate the mediation process, the government have sought to retain a high degree of control through the provision of public funding, compulsory MIAMs and ensuring that decisions made by the parties in mediation can only be made legally binding where they are approved by a judge in the family courts. Swenson refers to this as 'complementary' legal pluralism because 'the state has effectively outsourced alternative forums… or at least tactically licensed dispute venues' (2018, 445). But what about the laws that are drawn on in the mediation process? Are these dictated by the state? This has given rise to a conflict amongst theorists as to whether the parties do, or should, have complete freedom regarding the scope of the relevant laws which govern their dispute or whether mediation should be regarded as a continuation of the formal justice system in which only state laws should apply. On the one hand, unlike in arbitration, mediating parties are not required to confine themselves to one particular governing law and the principles guiding the mediation and choice of law do not have to be formally stated. This gives greater freedom for parties to rely on religious and/or personal laws in addition to or as an alternative to state laws. Whilst many mediators (particularly those accredited by the FMC) are qualified lawyers, they are not practicing in this capacity in their role as a mediator and instead their role typically involves providing impartial information to assist the parties in reaching a resolution, which may not necessarily be supported by the state law (Hitchings and Miles 2016). This has led theorists such as Stevenson (2015) to argue that the parties' autonomy should be respected in facilitating them to reach a settlement on their own terms. However, there are some exceptions to the principle that the substantive law which governs mediation is entirely separate from state law. In children cases, for example, mediators who are accredited by the FMC are required to have regard to the welfare of the child, mirroring the statutory provision under section 1 of the Children Act 1989. Moreover, many clients will not wish to rely on religious or personal laws throughout mediation and will align their settlement proposals to an outcome that may be

reached by the family courts. Challenging the idea that mediators are 'neutral', they can support disputants either by flagging up problematic issues with settlement proposals or by more explicitly highlighting where proposals are inequitable (Hitchings and Miles 2016). In addition, the FMC Code of Practice states that 'if the parties consent' the mediator may inform them that the resolution that they are considering falls outside the parameters which a court might approve or order (2018, 6.2). Hitchings and Miles have raised concerns about settlements based on anything other than the application of state laws. They argue…

> The achievement of a settlement with which both parties are content might be regarded as a sufficient goal – what the parties' legal rights might be is neither here nor there if both are content. But in a society governed by law… we should be concerned that parties who have what is, on one level, a *legal* dispute should have at least a basic understanding of what the law would suggest as an appropriate settlement outcome or range of outcomes. Otherwise, the autonomy apparently exercised in mediation devolves into a somewhat limited, formal autonomy only, and the supposed freedom of choice being exercised somewhat empty (2016, 176).

This argument is particularly credible in light of the fact that many parties no longer have access to legal advice which was previously used 'to good collaborative effect' to support parties undertaking mediation (Barlow 2017, 205). This also impacts cases where the complete separation of mediation from the formal justice system could allow one party to abuse power imbalances which renders one party vulnerable to an outcome that is not supported by state laws – a criticism which is frequently levied at unaccredited mediation delivered by religious tribunals (Reiss 2009; Wilson 2010). Diduck (2014) argues that the potential for a party's human rights to be undermined

by separating state laws from the outcome has implications both on 'the attainment of individual justice between the parties' and 'for the damage it does to the socially valuable norms expressed in family law' (quoted in Hitchings and Miles 2016, 177). However, in England and Wales there are safeguards in place to protect against this, not least that mediation is discouraged in cases where domestic abuse is alleged. Moreover, as mediated agreements are not legally binding, the parties still have recourse to a family court (based on the application of state laws) if the agreement places one party at a disadvantage and they wish to challenge this. In the event the parties do submit a consent order to the court to make the agreement legally binding, the ultimate decision about the fairness of the agreement will be for a family court judge to decide.

Can mediation facilitate procedural and substantive justice?

One of the main claims made by the government is that mediation is, in many cases, more cost effective than family court adjudication (Ministry of Justice 2010). In part, this has been achieved by the continued provision of legal aid for those with fewer financial resources. Legal aid for mediation is not dependent on the parties satisfying an exemption relating to domestic abuse or child abuse and therefore has a broader applicability in mediation than it does for court proceedings. However, the parties must still satisfy the legal aid means test outlined above and will not therefore be available to all. In cases where one party is eligible for public funding, the government will also fund the first mediation session for both parties. Following this, the party who is eligible for legal aid will continue to receive funding for their share of the mediation session whilst the non-eligible party will be required to pay privately for their share. To ensure that parties are still able to receive some legal advice in relation to their dispute (a concern referred to above) the government also introduced the Help with Family Mediation scheme. This applies where one of the parties is eligible for legal aid and funds a solicitor to provide legal advice in relation to the agreement and to prepare a consent order reflecting the basis of the agreement which can then be

submitted to the court for approval. The benefit of this scheme is that it enables mediated agreements to be made legally binding thereby reducing the prospect of parties rescinding on the agreements, which may result in further court intervention. There have, however, been difficulties reported with the Help for Family mediation scheme. Hunter notes that the low fees offered to solicitors to provide advice and prepare the consent order (£150 for legal advice and £200 to prepare the consent order) is insufficient to adequately compensate solicitors for their time spent and 'the level of risk assumed in reviewing agreements and seeking orders in a context of limited information' (2017, 198). As a result, the scheme has resulted in fewer than anticipated applications (Family Mediation Task Force 2014). Nonetheless, the government has refused proposals to increase fees which would lead to improved solicitor engagement with the scheme (Hunter 2017). In the small number of cases where the parties are both eligible for legal aid funding, are able to reach an agreement and receive assistance from a solicitor with formalising the agreement, there are clear benefits of mediation compared to the family courts.

In cases where the parties do not satisfy the legal aid means test, they will be required to fund the sessions themselves. The 2019 FMC survey indicated that there is a great variance in the hourly rates charged by mediators, with the average cost being £140 per hour. As with the issue of funding a legal representative, it is not simply the case that someone who is not eligible for legal aid can afford mediation services, where there is no guarantee that an agreement will be reached. The FMC survey (2019) indicates that the average cost for both parties to attend mediation is £1,641. The extent to which this is cheaper than court proceedings will depend on a number of factors including whether the parties would receive fee remission, pay privately for legal representation and how many sessions are required to reach an agreement.

Mediation is also purported to be a timelier process than proceedings through the family courts. In line with the adage that 'justice delayed is justice denied', mediation may therefore be viewed

by the parties as procedurally advantageous. In contrast to the family courts which are frequently operating beyond their capacity, there has been a steady increase in mediation services in part because of the expected uptake in family mediation following LASPO (Hunter 2017). Following LASPO, the market was 'at least saturated, if not flooded with suppliers' (Ibid, 194). Whilst some of these suppliers have since gone out of business following the reduction in mediation, mediation sessions can usually be organised promptly at a time that is convenient for the parties. Whether a case is resolved more quickly than the courts will depend on whether an agreement is reached during mediation, which is by no means guaranteed. Statistics from the 2019 FMC survey indicate that mediation sessions are typically 90 minutes in length (as opposed to court hearings which can take days if not weeks) and that in 2019, agreements were reached in the vast majority (over 70%) of cases. Whilst the data does not examine how many sessions were required to resolve disputes, other studies have suggested this is typically within a single or a few sessions (Wojkowska 2006). Presumably, by this point the mediator will gauge whether the parties are too far apart in their views for the sessions to be conducive to a resolution. However, for those 30% of cases where the dispute is left unresolved, the parties may subsequently decide to make an application to court and face further delays. In such cases, unless the parties have managed to narrow the issues, mediation is likely to be viewed as drawing out the length of time to secure an outcome.

Mediators seek to promote procedural justice by affording both parties equal time to put forward their case and by treating the parties with respect. Waldman and Ojelabi argue that many mediation Codes of Conduct view that 'if sufficient attention is paid to process, the resulting agreement will be substantively fair' (2016, 413). However, they note a paradox in that mediators are encouraged to remain neutral which precludes them having an interest in a fair outcome, whilst at the same time they are expected to prevent substantive injustices. Moreover, they recognise that in many jurisdictions, mediators are non-lawyers who lack the necessary expertise to assess substantive justice. In England and Wales, the provisions considered in the previous section which

allow a mediator to provide the parties with some guidance about the substantive fairness and workability of the proposed agreement will be beneficial to protect against substantive unfairness, assuming they have an appropriate knowledge of the law. The extent of the mediator's involvement in the process and the parties' ability to meet their objectives is also likely to be driven by the type of mediation entered into. The two dominant types of mediation in England and Wales are settlement-seeking mediation and transformative mediation (Hitchings and Miles 2016). Outside of mediation regulated by the FMC, mediation can also have reconciliatory aims which is particularly common in religious tribunals. Settlement-seeking mediation requires the parties to 'put aside their emotions' and focus on reaching an outcome which both parties are amenable to, although there may be some compromise (Ibid). This method is more closely aligned to the outcome focussed nature of court proceedings. Hitchings and Miles note that the 'parties' emotional readiness is a key factor to achieving a settlement and not all parties will be in the right place emotionally' (2016, 180). In contrast, transformative mediation seeks to change the parties' interaction and approach to conflict and is likely to require more therapeutic intervention from the mediator. Transformative mediation bears a resemblance to restorative justice which is practiced outside of the criminal justice system. Stevenson has noted that there is increasing pressure on parties entering into mediation to 'achieve a settlement as a measure of success' because of the government's objectives to ease the burden on the family courts, particularly for parties who are in receipt of legal aid (2015, 716). As such, publicly funded clients whose substantive aims are primarily transformative, may instead be shoehorned into a settlement-seeking process which does not align with their aims.

A related issue is that the government focus on mediation has increased the scope of cases which mediation is now expected to deal with. Barlow notes that cases following LASPO typically exhibit 'higher conflict levels and/or more complex problems such as partners with mental health issues, drug and alcohol abuse or where there were significant power imbalances between the

parties' (2017, 205). This, together with pressure on mediators not to screen out 'unsuitable' cases, has led to an increase in cases which prior to LASPO would not have been mediated. Given the current legal climate, however, it is possible that mediation may in some instances be a safer and more compassionate alternative to the court in cases where there are power imbalances despite it being best practice that they should not be able to assist in such disputes. Firstly, the vast majority of mediators (over 80%) report receiving face-to-face training in conducting mediation where there has been domestic abuse in the family and 90% feel confident facilitating mediation in domestic abuse cases (FMC Survey 2019). Secondly, procedural safeguards can be put in place to protect victims throughout the mediation process. The parties can be seen separately ('shuttle mediation'), thereby reducing pressure on the vulnerable party to reach an agreement and the prospect of dispute resolution being used as a tool to perpetuate abusive conduct. Arrangements can be made for the parties to arrive and leave at separate points. This can be contrasted to the position in court proceedings which has been outlined above. It is a misconception that vulnerable parties are not encouraged to settle their disputes if their cases are adjudicated through the courts (Barnett 2015). Thirdly, unlike in the family courts, which often do not have the dual capacity to provide both legal and psychological interventions, mediators can (especially for privately paying clients) sometimes offer therapeutic services alongside settlement seeking (Davis 2006). Within the criminal justice system, therapeutic forms of intervention which share common features with mediation, such as restorative justice, have proved successful in both allowing victims of abuse to secure a more tailored range of outcomes than through the legal process and enabling victims to play an active role in their recovery (McGlynn, Westmarland and Godden 2012). However, there are limitations of mediation, not least that mediators are unable to remove a perpetrator from the family home and as the agreements reached have no legal effect, criminal sanctions cannot be pursued if they are breached. In these cases, it is vital that disputants have access to protective injunctions through the family courts. This leads Davis to conclude that 'mediation is an

appropriate means to resolve domestic violence cases only if it does so effectively and in accordance with notions of even handedness and fairness to both parties' (2006, 253).

Arbitration

Arbitration is a less popular forum of alternative dispute resolution for resolving family law matters. Whilst arbitration has flourished in England and Wales for centuries, the scope of family law arbitration has only developed over the last few decades led by pressure on the court system and a number of Judgments which have established that in family cases greater weight is to be given to the parties' autonomy (Dalling 2013; *Radmacher v Granatino* [2010] UKSC 42). Another noticeable change in the family law arena is the cultural shift towards greater transparency in the courts and more family cases being conducted in an open court which has resulted in a greater demand for a method of dispute resolution which is both legally binding and offers the parties' privacy. Whilst arbitration is not expected to deal with a high volume of cases in the same way as mediation, recent developments in family arbitration can also be linked to LASPO. Kennett (2016) recognises that the development of arbitration cannot be separated from its social, cultural and political context, regardless of the fact that arbitrating parties typically have adequate financial resources and so are less affected by LASPO. She notes 'a common thread in the story of the development of arbitration for the resolution of family law disputes is the overburdening or breakdown of the judicial system. In that sense, there is a state interest in relieving the courts of as much of their family dispute resolution function as is compatible with the requirements of public policy' (Ibid, 4). In 2012, just before the introduction of LASPO, the Institute of Family Law Arbitrators (IFLA) launched the Family Law Arbitration Financial Scheme to provide arbitration for financial and property disputes in family cases. Subsequently, in 2016, the IFLA launched the Family Law Arbitration Children Scheme. Arbitration has a more restricted scope than mediation in that there are certain children disputes which it cannot adjudicate (notably child

abduction and prohibited steps orders) and because it is prohibitively expensive for the vast majority of disputants.

Arbitration as evidence of legal pluralism

Paulsson (2010) argues that there are a number of competing propositions regarding arbitration as a form of legal pluralism. Some theorists reject the conceptualisation of arbitration as evidence of pluralism on the basis that it 'lives or dies according to the law of the place of arbitration' (referred to as the 'territorial approach') (Ibid, 2). This can be seen to some extent in family law arbitration in England and Wales because practitioners operating under the IFLA scheme rules must adhere to the mandatory provision that the governing law must be that of England and Wales, thereby limiting the parties' autonomy (Article 3 of the IFLA Arbitration Rules). However, not all family law arbitration is practiced under the IFLA rules. For example, owing to section 46(1)(b) of the Arbitration Act 1996 which permits parties to rely on certain normative orders to govern their dispute, some religious tribunals now operate as arbitration tribunals. A number of court Judgments have supported this, including *Musawi v RE International* [2008] 1 Lloyd's Rep 326 where the court accepted the use of Sharia law as the choice of arbitrating law. Accordingly, the territorial approach does not fully reflect the position in England and Wales. Nor can it be said that arbitration is an entirely 'autonomous legal order' given that state law (the Arbitration Act 1996) sets out the procedural provisions which must be adhered to in the arbitration process regardless of the substantive laws or normative orders which are applied during the arbitral process. Moreover, there are circumstances in which the courts are willing to intervene to challenge an arbitral award. Section 68 of the Arbitration Act 1996 states that an award or determination may be challenged if there has been a serious irregularity that has caused or will cause substantial injustice. In addition, under section 69, an arbitration agreement can be appealed

on a point of law although the parties can agree to contract out of this section. These important safeguards apply both to cases practiced under the IFLA schemes and by religious tribunals.

On the basis that family law arbitration falls somewhere between these two approaches, by potentially giving effect to diverse legal and normative orders whilst simultaneously relying on the state for its legitimacy, arbitration can be understood as 'horizontal weak' pluralism (Reiss 2009). It is 'weak' rather than 'deep' pluralism owing to the safeguards provided in state legislation – the Arbitration Act 1996. However, because the decisions have the same effect as those made by the family courts, and are not ordinarily hierarchically arranged, the decisions have 'horizontal' effect. This can be contrasted to mediation which is 'vertical weak pluralism' because decisions of mediators have less authority than those made by the family court. Developing this further, Swenson (2018) recognises that because of its close relationship with the state, arbitration can also be described as 'complementary legal pluralism'. He notes that arbitration agreements 'facilitate the evasion of state law and legal process, but the extent of circumvention depends on the policy preferences of state officials. In all instances, these processes are integrated into, and fall under the ultimate regulatory purview of, the state, exist at its pleasure, and largely depend on state courts for enforcement' (Ibid, 445). Swenson (2018) argues that complementary forms of dispute resolution are often allowed to practice because they are seen to uphold the requirement for the rule of law and principles of legal certainty. Moreover, there are benefits to the government in this approach, not least that the state has an interest in ensuring that financial settlements 'do not impose welfare responsibilities on the state' and that arrangements on separation or divorce are 'adequate to limit damage to individual family members to relieve it of the costs of caring for such individuals and to prevent wider harmful impact on society' (Kennett 2016, 5).

Can arbitration facilitate procedural and substantive justice?

As a form of alternative dispute resolution, arbitration seeks to prioritise the parties' autonomy more so than any other out of court practice. In commercial law, for example, the parties are free to select the choice of law governing the dispute together with the arbitrator who will adjudicate and the rules guiding the process (Weixia 2018). In family law proceedings, however, there are a number of important restrictions which reduce the parties' autonomy. Firstly, as highlighted above, it is a mandatory principle under IFLA that arbitration must be conducted in accordance with the laws of England and Wales. Whilst this has been justified as a result of the 'sensitivity of family law issues' and may promote compliance with human rights norms, it may marginalise mainstream arbitration for those who would prefer their personal religious laws to govern the dispute, who instead may seek recourse from a religious tribunal operating as an arbitration tribunal (Kennett 2016). Moreover, it does not adequately address the needs of transnational families who wish for the state laws of a foreign jurisdiction to govern their dispute. Given that family law arbitration in England and Wales is in its infancy, it is possible that further developments to accommodate international laws may be adopted in time. Secondly, Kennett (2016) acknowledges that more stipulations may be placed on the choice of family law arbitrator than in a commercial context, including the qualifications held by the arbitrator, the number of years of professional practice in family law, and the levels of dispute resolution training. The IFLA guidelines state that in court proceedings, 'there is no guarantee that the appointed judge will have specialist knowledge or experience in resolving disputes concerning children nor be conversant with the often highly complex financial arrangements the parties are seeking to unravel… a family arbitrator is an experienced family lawyer who specialises in financial and/or children disputes' (ifla.org.uk). Accordingly, whilst such restrictions reduce the autonomy of the parties, they also ensure that arbitrators possess the necessary skills to adjudicate family disputes. Furthermore, there are still some procedural areas of arbitration where parties have much greater control over the proceedings than in family court hearings. This includes deciding whether the process is dealt with on papers,

via telephone or through face-to-face hearings, whether issues are determined sequentially or all at once and whether experts are appointed to provide evidence.

Family law arbitration can also be distinguished from other forms of arbitration on the basis that the parties may lack familiarity with the law and legal processes and so 'should be provided with guarantees that their dispute is being handled in a correct and professional manner' (Kennett 2016, 13). As a result, there are a number of safeguards to ensure that the procedure is fair, including that the process is regulated by the IFLA scheme rules which attempt to protect one party from gaining an advantage over the other. Practice Guidance issued by the judiciary on 26 July 2018 provides that the physical and emotional safety of any children concerned must be prioritised in handling the dispute and by taking appropriate care not to make an order that will put the child concerned or the parties at avoidable future risk. Kennett (2016) argues that this places an indirect obligation on arbitrators to ensure that any determination is in accordance with a child's best interests, mirroring the provision in the Children Act 1989. Moreover, prior to commencing the arbitration process, the parties are required to complete a safeguarding questionnaire. Paragraph 5.1 and 5.2 of Practice Direction 12B to the Family Procedure Rules 2010 states that arbitration is unlikely to be appropriate in situations involving domestic violence, drug and/or alcohol misuse and mental illness. Kennett highlights that in practice however, power imbalances are often considered 'less problematic owing to the quasi-judicial role of the arbitrator and the possibility of legal representation of the parties' (2016, 13). Furthermore, the courts are able to intervene in arbitration proceedings to exercise powers not available to an arbitrator, such as granting a protective injunction.

Procedural safeguards are particularly important owing to the finality of arbitration proceedings. By and large, the courts have been willing to approve and uphold arbitration agreements in family proceedings. In the case of *S v S* [2014] EWHC 7, Sir James Munby stated at para 19, 'where the

parties have bound themselves… to accept an arbitral award of the kind provided for by the IFLA Scheme, this generates, as it seems to me, a single magnetic factor of determinative importance'. Moreover, in cases where one of the parties wishes to challenge the arbitrator's determination, he noted that an application should be made to the court but that the court would adopt 'an appropriately robust approach' (Ibid, 25).

In contrast to mediation, arbitration is not intended to deal with a high volume of cases. This is in no small part attributed to the costs involved in arbitration. Legal aid is not available for arbitration proceedings and the default position is that each party will pay half of the costs of the arbitration, which will vary based on whether hearings are dealt with on paper or in person but are likely to significantly exceed family court fees. In addition, the parties may incur venue hire costs and experts' fees (which are usually borne equally) and will be responsible the costs of their own legal representatives. The IFLA guidelines state that legal representation is strongly recommended owing to the binding nature of arbitration proceedings (ifla.org.uk). Mirroring the statutory provisions under the Family Procedure Rules 2010 the arbitrator has discretion to order a party to pay the costs incurred by another party if they display unreasonable conduct however orders of this likely to be rare given the voluntary nature of the proceedings. Accordingly, arbitration is reserved for those with the financial means to fund a case. The costs involved in arbitration mean that resolutions are often reached more speedily than through the court process. In contrast to family court proceedings, the parties are not required to attend a MIAM and arbitration meetings can be dealt with at the convenience of the parties. Given that the parties are legally represented, arbitration does not experience many of the delays that are common in the courts. Meetings can be listed at short notice to deal with any issues which may arise during the proceedings. This has the potential to make the process less acrimonious, regardless of the fact that arbitration is not necessarily a conciliatory process. The costs involved also justify the parties having greater control over the venue where arbitration is held. Arbitration can take place at a location which is

both physically accessible to the parties and guarantees the parties' privacy – a feature which is particularly important in high profile cases.

Religious tribunals

Religious tribunals are common across many major world faiths however in England and Wales they are most prevalent in Judaism (through the Beth Din) and in Islam (through sharia councils) (Hofri-Winogradow 2010). This analysis will primarily focus on the operation of sharia councils due to the paucity of literature on service users' experiences of the Beth Din. Religious tribunals are popular ecclesiastical mechanisms for administering religious family law, conducting mediation, granting religious divorces and producing expert opinions on religious law for the family courts (Douglas 2011). Both institutions have a long standing in England and Wales. Whilst Batei Din have been well established for over 100 years, the first sharia council was reported in the 1980s although prior to this Islamic family law was typically dealt with on an informal basis by Imams within mosques (Bano 2007). It is estimated there are between 30 and 85 sharia councils operating in England and Wales and there is a Beth Din in most major cities across England (The Siddiqui Report 2018). Both organisations are structured so as to reflect the variety of religious traditions within each faith, although they are organised differently. Whilst there are separate Batei Din for the major Jewish movements, each sharia council comprises different schools of thought in Islam and panel members from diverse diasporic communities. This latter approach has the potential to affect internal power struggles and differences in accepted practices, interpretations of religious law and the substantive rulings that are reached (Bano 2007). Moreover, there is no guarantee that the demographic makeup of each council will be representative of the local communities that it serves (Ibid).

Religious tribunals as evidence of legal pluralism

Yilmaz (2001) describes a number of conditions which give rise to alternative forums of dispute resolution within Islam, many of which have been alluded to earlier in this article. These include a preference for resolving disputes privately within Muslim tradition, communities not recognising the authority and legitimacy of state laws to the same extent as religious laws, and the failure of the state to recognise religious laws as a plural legal order. Yilmaz (2001) therefore positions the emergence of sharia councils within a discourse of custom, preference for religious law and state failings to create a space for personal laws. In contrast, in Judaism, greater space has been made for Jewish religious laws by the state in England and Wales, which may reduce the scope of, and reliance on, religious adjudication. Jewish marriages receive special protection under the Marriage Act 1949, meaning that they are not required to comply with the same formalities as many other faiths and therefore have greater religious and legal autonomy in marriage formation. Further, if one of the parties seeks to prevent the religious divorce, section 10A of the Matrimonial Causes Act 1973 allows either party to apply to the family courts to prevent the decree absolute being given until steps have been taken to dissolve the marriage in accordance with Jewish law, a provision which is not available to other faiths. It is also possible to include a 'get clause' within a consent order requiring the parties to cooperate with the Beth Din to ensure the completion of the Get. Fried (2004) argues that notwithstanding the availability of the family courts, there are religious obligations on Jews to utilise religious forums for their disputes. She argues that 'a central principle of halacha is that disputes between Jews should be adjudicated in duly-constituted rabbinical courts' (Ibid, 637). Moreover, choosing a secular court despite the availability of a Jewish court is seen to undermine the authority of religious laws and legal systems, and creates an inference 'that the Ben Din lacks either the capability or sophistication to adjudicate an issue according to halach' (Ibid). It is therefore presented as a religious and moral duty for Jewish disputants to seek religious, rather than legal, adjudication.

Scholars argue that religious tribunals are illustrative of 'weak' legal pluralism in the sense that there is 'one ultimate sovereign law with varying subcategories of law which function in a quasi-autonomous fashion' (Reiss 2009; Yilmaz 2005, 16). The recognition of religious tribunals as 'semi-autonomous' draws on the work of Moore who describes that a semi-autonomous social field…

> Can generate rules and customs and symbols internally but is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance (1978, 720).

Bano argues that sharia councils fit within this conceptualisation of semi-autonomous social fields because they 'place very little demands on the state and the councils remain autonomous but also recognise the power of the state' (2007, 12). Nonetheless, Bano (2007) also acknowledges that some Islamic scholars have sought complete autonomy from the state through the recognition of sharia law as an alternate system to state laws. Whilst attempts to achieve this deep level of legal pluralism continue to be rejected by the state, sharia councils have, to some extent, achieved their aims by practising as arbitration tribunals. Batei Din can also be considered as a semi-autonomous institution. However, unlike sharia councils there is greater interface with the state through the provision of matrimonial legislation specifically aimed at Jewish couples which simultaneously grants the Jewish faith increased autonomy (in marriage formation) and protection (through the Matrimonial Causes Act 1973). Arguably, this has led to Batei Din demonstrating lower levels of resistance to state involvement.

There are, however, important operational differences between the Beth Din and Sharia councils, which impact they extent to which they are legally pluralist and, more importantly, have implications for the state and those who use religious tribunals. These distinctions principally relate to the enforceability of decisions. In relation to the Beth Din, decisions made in the resolution of family matters are recognised as religiously and morally binding but the parties are able to take their case to the family courts for a Judgment according to state laws. This reflects the concept of 'consensual compact' or, more simply, that the powers of a religious body are derived from the agreement of its members (Sandberg 2011). This recognises that the state and religions institutions retain their own jurisdiction and the state will only intervene to enforce the laws of a religious organisation where there is a financial or policy reason doing so (Douglas 2011). Following Reiss this can be seen as 'vertical weak pluralism' because legal systems are 'hierarchically arranged' with the decisions of the Beth Din occupying a lower level of authority than decisions made by the state (2009, 762).

In contrast, since 2008, some sharia councils have begun practicing under the Arbitration Act 1996 which allows disputes adjudicated outside the formal courts to be recognised subject to public policy, a procedural irregularity or the arbitrator failing to conduct the proceedings fairly and impartially (sections 33 and 68 of the Arbitration Act 1996). Reiss (2009) argues that by reframing sharia councils as arbitration tribunals, sharia law has inadvertently been incorporated alongside state laws. Moreover, it allows decisions of sharia councils to be legally binding and precludes further recourse to the state courts insofar as procedural requirements are satisfied. Reiss considers that sharia councils which operate as binding arbitration tribunals take the form of 'horizontal weak pluralism', following the rationale explored above (Ibid, 762). Whilst Reiss (2009) does not take issue with the use of sharia councils operating in a manner similar to Beth Din – in fact, she recognises benefits of non-binding adjudication over secular courts in saving costs, time and

preserving the relationship between the parties – she raises concerns about the binding nature of sharia court decisions, given they do not represent the values of 'British laws' and have a poor judicial record in their treatment of women. Whilst this approach can be criticised for failing to account for the autonomy of the parties in selecting the choice of law regulating the dispute, and for essentialising Britishness, it nonetheless raises important question about the extent to which religious tribunals can facilitate justice for their services users.

Can religious tribunals facilitate procedural and substantive justice?

The vast majority of applicants to religious tribunals are women (Bano 2007; Parveen 2017; Shah-Kazemi 2001). This is not a coincidence but is reflective of substantive religious laws and practices which treat women and men unequally and result in women usually being unable to secure a religious divorce without recourse to tribunals (Reiss 2009; Wilson 2010). In Judaism, for example, the right to apply for a religious divorce is reserved solely reserved for the husband. Section 10A of the Matrimonial Causes Act 1973 may be of limited effect where the husband is not concerned about securing a civil divorce. In such circumstances, a female spouse may turn to the Beth Din for pressure to be applied to the husband to agree to a Get which may or may not prove successful. Likewise, within Islam, whilst the male spouse is able to unilaterally declare a talaq in order to divorce his wife, if he does not consent to his wife also having this right, she will need to apply to a sharia council for a religious ruling about the divorce. This can be achieved through a khula (divorce by agreement at the initiation of the wife) or a faskh (divorce based on the fault of the husband).

Research has consistently demonstrated that women's substantive goal in using religious tribunals is to secure a religious divorce (Bano 2008; Parveen 2017; Shah-Kazemi 2001). There are a number of reasons why a religious divorce is important to women. In the same sense that a religious marriage allows adherents to demonstrate a commitment to their faith, a religious divorce is of

‘personal and spiritual significance, thus enabling women to move on with their lives whilst maintaining their connection with God’ (Parveen 2017, 40). In some branches of Judaism, securing a religious divorce is of particular importance for future generations because a wife who has not secured a Get is prohibited, along with any children born to her, from (re)marrying within the Jewish faith. In Parveen’s (2017) study of sharia councils, none of the women felt that a civil divorce alone would be sufficient for them to consider themselves divorced. Over 80% of the respondents in Akhtar’s study highlighted that a local imam would be their first point of call for seeking advice about ending a marriage, indicating that their ‘religious obligations came first, before considering their formal obligations before the state’ (2013, 285). More recent studies have also highlighted that barriers to the family courts play a role in women’s motivations to secure a religious divorce. The Siddiqui Report (2018) identified that the higher costs of a civil divorce (if this is available) and the perception that it is quicker to secure a religious divorce lead some women to instead utilise tribunal services.

The fact that women display a preference for securing a religious divorce but must engage the services of a tribunal to do so (if agreement is not forthcoming) raises an important question about whether women are coerced into utilising religious tribunals. Wilson (2010) argues that the absence of other options is a form of coercion in and of itself. However, a number of recent studies have sought to challenge this notion. Shah-Kazemi (2001) observed that many women use sharia councils as an expression of their religious identity. Her study highlighted that women’s diasporic backgrounds play a key role in the way in which they seek to use councils and therefore the rationale for engaging is not uniform. In Akhtar’s (2013) study, 75% of the respondents felt that Islamic law either governed or played a significant role in their lives and would therefore prefer to utilise sharia councils above the family courts (on the hypothetical basis that they were able to deal with religious divorces) because they lacked trust in Judge’s understanding of religious law. These findings align with Parveen who recognised the existence of sharia councils as a ‘matter of religious freedom for

some Muslims', even for those who recognised the inherently patriarchal nature of the tribunals (2017, 42). Bano (2008) paints a slightly more complex picture. She observed that whilst many women accepted the authority of sharia councils in cases where they were the applicants (i.e. in religious divorce cases), they were more likely to challenge their jurisdiction in ancillary proceedings, such as those relating to child arrangements. In cases where the civil courts remain an option to women, it is therefore vital that they are aware of all options so that an informed decision can be made about which justice process to engage with. This requires transparency from tribunals about the extent of their authority and particularly whether they are acting in the capacity of an arbitration tribunal which may preclude further recourse to the family courts.

The extent to which women are able to meet their substantive goals through religious tribunals will vary from case to case. In religious divorce cases, for example, a woman's ability to secure a Get will depend on her husband's receptiveness to this pressure. In relation to sharia councils, Bano argues that securing a divorce is by no means 'the guaranteed nor the inexorable outcome' (2008, 297) owing in part to the tensions between women's objectives to divorce and the sharia councils' focus on reconciliation. However, other studies have suggested that many women are able to achieve this aim in their interactions with councils, albeit concerns have been raised about the procedural means through which this is secured. Parveen (2007) interviewed 17 women and found that all but one (who chose to withdraw her case) were able to secure a religious divorce. Similarly, the findings of the government-commissioned Siddiqui Report observed that 'divorces were very rarely refused' (2018, 16). Importantly, as decisions of tribunals are 'religious rulings', councils are expected to provide a justification for their decision in a similar manner to secular court Judgments (Parveen 2017). Shah-Kazemi (2001) noted that this provides a site of resistance for some women who are able to effectively challenge unfavourable positions adopted by tribunals. Women are able to do this because of their familiarity with religious laws, something which they may not be able to achieve as litigants in the family courts. Similarly, Parveen (2017) observed that if women do not

agree with the council's decision, they either find evidence to support their preferred ruling or engage the services of an alternative council. This allows an element of 'forum shopping' that is not available in the family courts. In many cases, women will therefore play an active role in determinations made by tribunals.

But what if decisions reached through religious tribunals are fundamentally at odds with women's human rights or, in applicable cases, the decisions which might have been reached through the family courts? A number of solutions have been posited to address this concern. At one end of the spectrum, some theorists have advocated a ban of religious tribunals owing to their incompatibility with Western values. This argument is generally dismissed on the basis that banning tribunals will not remove a need for them given that family courts are not able to grant religious divorces and will increase the number of women who remain in unhappy and potentially unsafe marriages (Parveen 2017). As such, banning tribunals are likely to drive them further under the radar which may have negative implications for women's rights. In contrast, Wilson (2010) argues that better protection for women within minority communities could be achieved through inclusion of their religious laws within state laws, to promote consistency and human rights legislation. However, this approach is problematic in assuming homogeneity amongst religious groups and practices which renders them amenable to codification. Moreover, many religious laws cannot simply be included in state laws in a manner that is consistent with Western human rights laws. At the other end of the spectrum, Raday (2003) recognises that consent to religious practices should be accepted even if it disadvantages a party. Whilst this approach seeks to recognise women's autonomy in using religious tribunals it does little to protect vulnerable women from harm, particularly in cases where there are concerns about the validity of a parties' consent. A sensible middle ground which seeks to balance women's autonomy and protection can be found in Parveen's suggestion that 'the aim should be to find a balance between enabling freedom of choice for Muslims to enter and leave a relationship in a manner which accords with their faith and providing the protection of the state for

vulnerable women or women who wish to access state mechanisms and state law' (2017, 168). This would involve restricting the scope of religious tribunals to areas which state law does not regulate (i.e. in the context of Islam, marriage formation and dissolution) whilst ensuring the availability and accessibility of remedies for women in areas where state law does have an interest (i.e. children and financial remedies). This proposition lends support from Parveen's (2017) study which identified that women were more inclined to accept the decisions of the family courts in disputes concerning finances and children as opposed to marriage disputes. Only a minority of women expressed a preference for these disputes to be regulated by a sharia council because, regardless of whether this was to their detriment, they had 'faith that the application of God's true law is justice' (Ibid, 243).

From a procedural justice perspective, however, women also seek a closer relationship between sharia councils and civil courts in marriage disputes. This reflects that women who have been through both a sharia council process and a civil divorce, often report having a 'better' experience with the family courts due to them demonstrating greater professionalism and efficiency (Ibid). Most of the respondents in Parveen's (2017) study felt that it would be less confusing to combine the religious and civil divorce process whilst other respondents felt that greater cooperation between the two institutions would lead to a greater awareness of what the other is doing and would prevent male spouses from giving inconsistent evidence in different forums. Greater cooperation could also reduce the time taken to dispose of cases. It is not unusual for cases in sharia councils to take between two to three years to reach a resolution – which may lead to higher rates of attrition than if the process was dealt with promptly (Shah-Kazemi 2001). This is largely attributed to the amount of time dedicated to exploring the possibility of reconciliation and because sharia councils experience similar resourcing issues to the family courts. However, given that this would impose an additional administrative burden on the family courts, it seems unlikely the government would

encourage the court service to develop a relationship with sharia councils, regardless of the procedural benefits this may yield.

A further procedural concern relates to the failure of sharia councils to safeguard women both through an emphasis on reconciliation and in cases where domestic abuse is alleged. In contrast to the Beth Din, where the parties will be encouraged to seek counselling if they are not sure they wish to secure a divorce, sharia councils oblige the parties to undertake meetings with the principle aim of reconciliation (Douglas 2011). This is clearly against the wishes of some women who view it as an unnecessary and inappropriate procedural requirement (Bano 2008; Parveen 2017). For some women, this practice places a disproportionate level of pressure on vulnerable women to remain in unhappy relationships. Moreover, it has been recognised as creating a space for some husbands to justify their behaviour and facilitate better substantive outcomes for themselves (Bano 2008). Data suggests that sharia councils remain willing to hold meetings where women raise objections or where allegations of abuse are made, and worse still, where civil orders relating to domestic abuse are in place which are likely to be breached by face-to-face meetings (Bano 2008, 2017; Parveen 2017). This process is particularly concerning in light of the fact that tribunals are comprised of all male scholars and in the overwhelming majority of cases, women do not have the benefit of representation (legal or otherwise) throughout the meetings (Parveen 2017; The Siddiqui Report 2018). Perceptions of reconciliation meetings are not entirely negative, however, demonstrating that their impact on procedural justice will not be the same for all Muslim women. For some women, particularly those where there was not an imbalance of power, these meetings provide a helpful forum for women to genuinely rule out the possibility of reconciliation (Bano 2008). Others report that this process provides male spouses an opportunity to understand and come to terms with the divorce and is therefore worthwhile (Ibid).

The problematic nature of reconciliation meetings have led many theorists to consider the ways in which practices could be improved in this area. One approach would be to give women a choice about the decision to engage in reconciliation meetings thereby preserving the option for those who wish to explore reconciliation. Another option would be for sharia councils to collect data on their success rates of effecting reconciliations, so they can assess whether this requirement achieves any real benefit (Parveen 2017). Going further, the Siddiqui Report (2018) recommended that sharia councils should be subject to either external regulation (over and above the procedural safeguards outlined in the Arbitration Act 1996) to promote consistency, transparency and accountability in reconciliation practices. The idea of regulation, however, remains controversial as opponents regard this as the state sanctioning councils and giving legitimacy to a legal system which has a poor record of treating women. A number of practical safeguards could also minimise the level of distress experienced by women. Drawing on the mediation model, 'shuttle meetings' would reduce the need for women to come into contact with their husbands through the reconciliation process. Women must also be supported to bring informal or formal support to these meetings. Finally, sharia councils should also explore the possibility of appointing female members to ensure that women are represented on panels.

Concluding thoughts

The changes to the formal justice landscape examined in part one of this article have had profound consequences on the ability of disputants to achieve procedural and substantive justice through the family courts and have invariably made them a less appealing and less accessible forum for resolving disputes. This, it has been argued, has brought about a need to reconceptualise the family justice landscape as a pluralist legal order, by moving beyond an understanding of state based adjudication (i.e. the family courts) as the only route for resolving disputes and recognising the contribution that alternative forums of dispute resolution make in meeting the procedural and

substantive aims of disputants. In some instances, the UK government has been the driving force behind pluralist initiatives, as evidenced by policies aimed at incentivising mediation and in their acceptance that religious tribunals can act as arbitration tribunals. Although mediation uptake has been lower than anticipated, this is not necessarily a reflection of its capacity to meet the needs of disputants, but is both the product of wider cost-saving policies which have adversely impacted the accessibility of mediation (albeit to a lesser extent than the family courts) and an unrealistic expectation that litigants would change their approach to dispute resolution instantaneously following the introduction of LASPO. In other instances, however, the development of legal pluralism in family law has been driven by the needs of litigants. The development of family law arbitration over the last decade for example, reflects a desire on the part of some disputants for a private dispute resolution process which prioritises a speedy resolution and the autonomy of the parties. Likewise, religious tribunals have increased in scope and authority over the last few decades to give effect to parties' preferences for relying on religious laws and to provide a remedy which the state is unable to offer. All of the forums of alternative dispute resolution considered throughout this article can be regarded as 'weak' pluralism as it is only through the state's willingness to grant powers to other methods of adjudication that legal pluralism is given acceptance. As the analysis in part two of this article has examined however, reliance on state recognition does not necessarily preclude institutions playing an important role in delivering justice, outside of the state hierarchy. Moreover, there is some evidence that state support for alternative methods of dispute resolution may enhance the ability of these forums to meet the procedural and substantive justice aims of disputants, through the provision of public funding, ensuring compliance with human rights norms and by providing recourse to the family courts for enforcement of orders or in instances of procedural irregularities. Weak pluralism can therefore be seen to provide a balance between respecting the parties' autonomy and providing procedural and substantive protections, which deeper levels of pluralism might not achieve. Going forward, state policy must therefore seek to

recognise the benefits of weak pluralism and work to reduce the limitations of both state and non-state systems to better facilitate justice for all.

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