

COMPARING LEGAL SECULARISM IN FAMILY LAW: IMPACTS ON MUSLIM
WOMEN IN FRANCE AND ENGLAND

by

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ABSTRACT

COMPARING LEGAL SECULARISM IN FAMILY LAW: IMPACTS ON MUSLIM WOMEN IN FRANCE AND ENGLAND

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This thesis serves as a comparative case study of legal secularism in France and England to determine if legal secularism and its conflicts with Muslim family law generate structural violence against Muslim women. This analysis makes use of existing literature as well as in-depth analysis of the historical evolution of both legal systems in terms of its relationship with religion as well as the current capacity of Muslim women in each state to access the protections granted to them under both religious and secular law. It is this lack of access that serves to generate structural violence, the consequences of which are briefly explored in this research. The differences in the French and English systems generate disparate levels of structural violence, primarily due to the greater presence of dual spaces in which Muslim women can operate under both religious and secular law in England in comparison to France.

INTRODUCTION

In the Western European political arena, it is often asserted that Islam is inherently incompatible with the self-proclaimed secular nature of legal and civil administrative infrastructure that characterizes nations such as England and France. While this assertion of irreconcilability is overly broad, it is true that particular elements of Islam's religious dictates can and do come into conflict with existing structures of Western European law. The consequences of these conflicts are felt both by the nation-state and by the individuals who subscribe to these religious practices. Of this population, a particular subset is uniquely impacted. The unique status of Muslim women in Islamic family law, such as the protections granted to women inside of Islamic religious marriages regarding divorce or abandonment, is not recognized by a theoretically secular legal structure. This presents a significant question: namely, does conflict between secularism in the legal realm and Muslim family law serve to generate structural violence against Muslim women?

For the purposes of this research, legal secularism is defined as a state of neutrality regarding religion from the legal decision-making bodies – that is, it implies the inability of judges, juries, or decision-making bodies to base binding legal outcomes

that demonstrate favor towards religion or irreligion.¹ France and England present disparate cases in regard to legal secularism due to the foundational structure of their legal systems. England has no universally defined legal system as England operates under common law, meaning that legal decisions are generally based upon the precedent of prior case law. England does not prescribe to an overarching separation of church and the law, as illustrated by the maintenance of the Anglican Church as the official state church of the nation of England. Many sources contend that England presents a dichotomous interpretation of the modern liberal democracy since despite the status of the Anglican Church as the official state church of England, England remains a religiously pluralistic society in which more relaxed legal attitudes towards religion in the public sphere –although skewed towards Christianity- allow for a diverse presentation of faiths. In contrast, France operates under civil law, in which codified statutes produced by the state serve as legal groundwork. Under French statute, religion is theoretically barred from the legal sphere in terms of serving as a determining or significant factor in the outcome of a legal case.

The Muslim population within both France and England numbers in the millions and continues to grow, constituting a significant portion of the citizenry. A voluntary poll conducted by Institut Montaigne in 2016 revealed that an estimated 5.6% of the French population identifies as Muslim², which paired with a 2016 population of 66,589,768³

¹ This inability is implied rather than explicit as, similar to the separation of church and state in the United States, this term references normative legal behavior within a particular state. Further, it is impossible to regulate the inner thoughts or deliberative process of each individual judge, and thus it cannot be entirely assured that religion does not ever serve as a determining factor in the reaching of judgement.

² "A French Islam Is Possible," Institut Montaigne, September 2016, , <http://www.institutmontaigne.org/ressources/pdfs/publications/a-french-islam-is-possible-summary.pdf>.

implies a Muslim population of 3,729,027, while a 2016 poll by Pew Research Center placed the Muslim population of the entire United Kingdom at 4,130,000.⁴ Among this population, the presence of structural violence can serve as a destabilizing force, encouraging disruptive behavior and preventing a peaceful, cohesive society. Comparing the legal structures of both France and England in regard to their secularity, and the subsequent conflicts that are generated with this particular subset of the religious population, reveals the existence of any such structural violence. The two nations present a unique juxtaposition in terms of the development of their legal system and its modern infrastructure. Thus, exploring conflicts between Muslim family law and state law provides lessons on which systems are more accessible for Muslim women and thus overall more inclusive for diverse populations. It is this lack of access and restrictions on minority religions that demonstrate structural violence, a system in which individuals are prevented from reaching their inherent potential.

However, to conduct a successful comparative analysis between France and England, the lens under which they have been compared must be uniformly defined. This analysis seeks to discover, should it exist, the perpetuation of inequality through the mechanisms of the law which would serve as evidence of what Johan Galtung's 1969 publication *Violence, Peace, and Peace Research* refers to as structural violence. In order to determine if the secular or non-secular nature of the legal systems of France and

³ "France ", The World Bank | Data. Accessed November 17, 2018. <https://data.worldbank.org/country/france?view=chart>.

⁴ "Europe's Growing Muslim Population," Pew Research Center's Religion & Public Life Project, November 29, 2017, , accessed March 31, 2018, <http://www.pewforum.org/2017/11/29/europes-growing-muslim-population/>.

England generate structural violence, one must first grasp the intricacies of Galtung's concept. Structural violence is, in summation, a system in which individuals are prevented in their somatic and mental realizations from realizing their inherent potential due to a particular element of their identity, such as race, gender, ethnicity, religion, or other factors. In this system, the inhibition of these individuals' fully functional operation in society is simply an enforced disparity between reality and potential.⁵

It is important to note that structural violence is not purely manifested through the mechanisms of the state. Rather, structural violence can be created through any system, including that of religion. As Galtung wrote, "...religions have to be analysed in such a way that their social implications are clearly seen."⁶ The very religious institutions this research describes, such as marriage and divorce, can serve to perpetuate violence against Muslim women. For example, the practice of *triple talaq* divorce, an Islamic divorce in which the husband thrice states his intention to divorce his wife and in which the wife has no ability to protest the severance of the marriage, can be argued as a mechanism which perpetuates violence against women. Galtung's conclusion was that both religion and socio-economic factors required an analytical lens, despite the theoretically transcendental nature of religion, and that both may be reflections of even deeper underlying factors.⁷

⁵ Johan Galtung, "Violence, Peace, and Peace Research," *Journal of Peace Research* 6, no. 3 (1969);, p.167-191, doi:10.1177/002234336900600301.

⁶ Johan Galtung, "Religion as a Factor," February 1983, , [https://www.transcend.org/galtung/papers/Religion As a Factor.pdf](https://www.transcend.org/galtung/papers/Religion%20As%20a%20Factor.pdf).

⁷ Galtung, "Religion as a Factor", 2.

Galtung's conception of structural violence falls into six dimensions, all of which tend to manifest in society unless mechanisms are created to prevent their emergence, such as government intervention or strong socio-cultural mandates that emphasize equality and equality of opportunity. According to Galtung, the first of these is physical versus psychological violence, determined by whether the violence is a direct physical act or violence against the mind or spirit. The second is negative versus positive approaches to influence, punishment for misdeeds as decided by the of the uppermost level of society's infrastructural hierarchy or rewards for desired acts as determined by that same power group. Other dimensions are the presence of an object that is negatively affected by the violent act, and the presence of a subject who acts to deliver said violence or violence as resulting from no direct attributable actor. The final two dimensions are that of unintended versus intended violence, and manifest versus latent violence.⁸

It is these latter two characteristics of violence that are particularly of note in terms of an exploration of legal secularism. The concept of intention is inherent within any legal system of the modern age, since the violation of general moral behavior observed in acts of intended violence – be they physical or psychological – is more clearly demarcated in the historical evolution of ethical philosophy. As such, legal systems are designed to highlight intentional acts of violence both in individual cases and in the development of legal infrastructure – overlooking mechanisms necessary to prevent structural violence perpetuated through common or civil law systems. The notion of manifest versus latent violence is of particular importance for Muslim women in both

⁸ Galtung, "Violence, Peace, and Peace Research," p. 168-172.

England and France, as well as for minority groups across the globe. Manifest violence is observable to all parties, but latent violence is an underlying concern of minority and marginalized groups that can more easily go unnoticed by the rest of society.⁹ The potential for the outbreak of physical or psychological violence, including a decrease in the potential achievement of minority group members, has a greater impact on the healthy existence of these groups' members and should be emphasized in any exploration of structural violence against minorities in society.

In practice, structural violence operates primarily through inequality.¹⁰ The determination of existing inequality for particular religious groups in France or England, in any of its six intersecting dimensions, would generate two primary effects. The first of these is a violation of the general ethical framework around which modern humanitarianism and notions of equality are based, a moral quandary that requires redress. The second is the direct impact of this violence on French or English society. Structural violence reduces the capacity of individuals to operate successfully within society, limiting their social and economic potential, and a society with an economically and marginalized portion of the population is more susceptible to economic instability and conflict.¹¹

There are particular elements within Muslim family law that, when in conflict with legal secularism, are more likely to be indicative or generative of structural violence. As stated, women are granted certain protection under Muslim family law in the practices

⁹ Galtung, "Violence, Peace, and Peace Research," p. 172.

¹⁰ Galtung, "Violence, Peace, and Peace Research," p. 175.

¹¹ Galtung, "Violence, Peace, and Peace Research," p. 177.

of marriage and divorce. An inability to access these protections due to the structure of the state legal system is, as determined by this analysis, indicative of structural violence. Examples of instances that provide evidence of this phenomenon are: limitation on legal rights due to marriages not recognized by the state, be they polygamous or having been conducted solely in a religious fashion and without civil registration; inability to pursue religiously obligated payments such as *mahr*¹²; and lack of access to a religious divorce, which can leave women in ‘limping marriages’ that are civilly at an end but remain religiously legitimate and thus prevent the woman from remarrying or seeking financial compensation under Islamic law. For example, although it is a violation of French law for religious figures to perform a religious marriage ceremony for a couple who have not already conducted a civil marriage in line with French legal procedure, there are countless instances when Muslim couples either choose to marry in a religious ceremony prior to their civil registration or choose to marry exclusively under religious law without ever registering their union with the state. In one such instance recounted on a Web exchange, one woman sought advice on seeking a divorce when she was married under religious law but not French law. Although the validity of the religious marriage was also under question due to a lack of witnesses, male guardians, and other requirements under Islamic law, many respondents noted that had the woman also secured a civil marriage

¹² Within Islam, *mahr* is a monetary gift that a husband is obligated to provide to his wife upon their marriage, for which there is no universal set amount.

she would have recourse to seek a divorce and thus have access to financial support or other rights.¹³

The above listed examples, as well as the provided anecdote, are further explored in the historical and modern comparative approaches below as potential evidence of structural violence resulting from legal secularism. The English common law system and French civil law have unique histories, which must be understood in order to compare the access of Muslim women in the 21st century to the protections granted to them under both religious and secular law. It is this lack of access that generates structural violence, the significance of which also mandates further exploration.

¹³ John Richard Bowen, *Can Islam Be French?: Pluralism and Pragmatism in a Secularist State* (Princeton ; Oxford: Princeton University Press, 2012).

EXISTING LITERATURE

This analysis makes use of existing literature as partially expanded upon above and to be explored further below, to fully elaborate the history and structure of the French and English legal systems and specifically their approach to religion within law. With the insights acquired from the evolution of the degree to which legal secularism exists in these nations, one can come to understand the reasons behind their modern infrastructure and the potential for structural violence against Muslim women within them. The theoretical existence of structural violence is then explored through 20th and 21st century legal approaches to Muslim family law, as well as case law from both nations. These cases, while not sufficient in number to produce a fixed conclusion, serve as anecdotal evidence as a potential correlation between legal secularism and structural violence as explored in the theoretical sense.

Muslim Family Law in Context

The analysis of legal secularism in France and England to evaluate the presence of structural violence against Muslim women through the intersection of state legal systems and Muslim family law must fully explore the intricacies of these systems in reference to religion. It must also clearly define Muslim family law and explain the focus on this particular element of the complex realm of sharia law.

There is no single and uniformly accepted legal code that may be defined as sharia. Sharia is, rather, Islamic interpretation of the laws mandated by God as outlined in the Koran and the teachings of Muhammed. It is well-established that there are numerous legal schools and interpretations of the Muslim faith, extending far beyond the divide between Sunni and Shia. Islamic law, and within this body of literature Muslim family law, is among the Sunni denomination divided into four primary legal schools of jurisprudence known as *fiqhs*. These are the Hanafi, Shafi'i, Maliki and Hanbali fiqhs. Among Shia Muslims, there are also three main legal schools of jurisprudence, Athna Asharia, Zaidya and Ismailia. As most Muslims in England and France are of the Sunni denomination, and the Hanafi school of law has the most significant following among the four fiqhs¹⁴, this research detailing Muslim family law's dictates on marriage and divorce focuses primarily on the Hanafi interpretation. Unique or significant divergence among other schools in either the Sunni or Shia schools is also be noted in order to paint a more complete picture of the diversity of interpretation within Muslim family law.

Within Hanafi Sunni Muslim family law, this research focuses on the rules regarding marriage and divorce. Before detailing the established precedents and written laws on marriage and divorce, it is critical to note that within Muslim family law cultural and ethnic norms can often overshadow the theoretical intention of Islamic law.¹⁵ In short, while the described laws should in theory establish a consistent practice for

¹⁴ Warren, Christie S. "The Hanafi School." Oxford Bibliographies. May 28, 2013. Accessed August 31, 2018. <http://www.oxfordbibliographies.com/view/document/obo-9780195390155/obo-9780195390155-0082.xml>.

¹⁵ Shaheen Sardar Ali, Ayesha Shahid, and Mamman Lawan, "An Introduction to Islamic Family Law: A Teaching and Learning Manual," 2010, , accessed June 2018, https://www.heacademy.ac.uk/system/files/introduction_to_islamic_family_law.pdf.

marriage and divorce among Muslims who follow the Hannafi Sunni fiqh, cultural factors can result in differential interpretation of these dictates, the choice to follow only a certain portion of these dictates, or the enforcement of dictates not provided within the Koran or *itijihad*.

Since the inception of Islamic law, and within it Muslim family law, the law has been drawn from five sources: the Koran, the central text of Islam; the *Hadith*, the recorded sayings of Muhammed from which his normative behavior, known as *Sunnah*, is drawn and which Muslims are told to exemplify; *ijma*, a unanimous interpretation of Islamic law by jurists of a particular period; *Qiyas*, analogical reasoning which draws conclusions on a current question or issue based on previous judgment; and *itijihad*, interpretation of sharia on certain issues by mujtahid, considered by many within the schools of law to have closed in the 10th century.¹⁶ Muslim scholar Muhammad al-Shafi, founder of the Shafi school of Islamic jurisprudence, established the four sources of classical Islamic law as the Koran, the Sunnah, qiyas, and ijma, but *itijihad* is also listed above due to its particular relevance to the evolution and modern interpretations of Muslim family law. Whether drawn from four or five sources, material used in Muslim legal decision-making is further divided due to the existence of contradictory or unenforceable texts or prior legal interpretations. There are numerous hadiths, and their legitimacy is determined by Islamic scholars who compare their text with other records of the Prophet's life and sayings to judge if the hadith is reflective of similar behavior and philosophy and if the author is of sufficient repute. In addition, Sunnah is divided into

¹⁶ Ali et al., "An Introduction to Islamic Family Law", p. 16.

three types: *Al-sunnah al-qawliyah*, Muhammad's recorded statements; *Al-sunnah al-filiyah*, Muhammad's recorded actions; and *Al-sunnah al-taqiriyah*, Muhammad's silent approval of the actions of others through his non-interference.¹⁷

A significant focus is granted to marriage within Muslim family law, as it is an aspect of Islamic practice extensively covered in both the Koran and the Hadith. There is a diversion of interpretation among scholars for the reason behind this focus, with one school of thought interpreting the comprehensive nature of Koranic and Hadith texts on marriage as part of codifying the progressive reforms that Islam brought to the Arabian Peninsula in the seventh century regarding the rights and protection of women. The latter group perceives these written instructions as consolidating the existing system of marital customs on the peninsula which had over time transitioned from a matrilineal to a patrilineal system, to the benefit of men.¹⁸ In either case, as with any of the monotheistic religions, marriage provides a system for organized procreation and thus the continuation of said religious practice through childrearing. For this reason, it is a central institution for such religious communities.

As marriage in Islam is a civil contract, usually conducted as an oral contract, there are a set of rules for the organization and enforcement of the contract and a set of rules for conduct following the agreement of both parties, the marriage guardian, and witnesses to the arranged contract. In the Hanbali school, both partners in a marriage

¹⁷ John L. Esposito, *Women in Muslim Family Law* (Syracuse, NY: Syracuse Univ. Press, 1982).

¹⁸ Judith E. Tucker, *Women, Family, and Gender in Islamic Law* (Cambridge: Cambridge University Press, 2008), accessed June 2018, <https://quod-lib-umich-edu.mutex.gmu.edu/cgi/t/text/pageviewer-idx?c=acls;cc=acls;rgn=fulltext;idno=heb30812.0001.001;didno=heb30812.0001.001;view=image;seq=51;node=heb30812.0001.001:5;page=root;size=100>.

have the right to add additional conditions to the marriage contract as long as they do not violate existing Islamic law. The marriage guardian, known as the *wali*, is the individual (usually the father or grandfather) deemed authorized to conclude the marriage contract on behalf of the bride and who often plays a significant role in the arrangement of the contract.¹⁹ Parties are considered eligible to enter into a marriage contract at age nine for females and age 13 for males, the age at which puberty is determined likely to have begun, and the offer must be made and subsequently accepted in front of two male witnesses or with two female witnesses to substitute for a single male witness.²⁰ It is commonly agreed among most Hanafi jurists that consent is required among both parties for the contract to be legitimate, and throughout history consent has considered to be given through either explicitly expressed approval of the marriage, a smile, or silence on the part of the bride.²¹ In recent centuries, explicit approval is more commonly used as the indicator of consent. A notable exception to this consensus is Shafi Islamic jurisprudence, as well as some sects of Shia Muslim family law, under which consent is only required of non-virgin brides and virgin brides may be forced into marriage if the contract is approved by the wali and the witnesses.²² Exceptions also exist under the various schools of Muslim family law that allow for a bride to choose her own groom, as long as the choice is deemed worthy by their families.

It is stated in the text of the Koran that upon her marriage, a woman is guaranteed a dower, known as a mahr, which is directed to be given directly to the bride and not to

²⁰ Esposito, *Women in Muslim Family Law*, p. 17.

²¹ Tucker, *Women, Family, and Gender in Islamic Law*, p. 42.

²² Tucker, *Women, Family, and Gender in Islamic Law*, p. 42.

her male relatives.²³ Under Hanafi jurisprudence the mahr is received in two installments, the first granted upon the conclusion of the marriage contract, with the woman able to refuse consummation if the payment has not yet been received, and the latter received upon the death of her husband or in the case of the husband's repudiation of his wife.²⁴ The amount of the mahr is dependent on numerous factors and values are disputed among the various legal schools. Once the marriage has been entered into, the behavior of the spouses is to be dictated by the doctrines of maintenance, *naqfaqa*, and disobedience, *nushuz*. Under *naqfaqa*, the husband is obligated to provide for his wife predominantly through the provision of food, clothing, shelter, and various other materials deemed to be necessities.²⁵ Disobedience, *nushuz*, is understood by most jurists to be violation of the obligations of a wife to her husband which must be met in order to guarantee her access to maintenance. The first of these obligations is to make herself sexually available to her husband, as well as to obey his wishes in regard to her travel outside the home.²⁶ There are, of course, exceptions to these rules as deemed necessary by jurists, such as the right of a woman to pilgrimage outside the home. As stated, the failure of the woman to fulfill these obligations could restrict her access to maintenance but in the interpretation of some jurists can also result in physical punishment. The failure of the husband to supply his wife with maintenance grants her the right to refuse some of her obligations or in the minds of some jurists, to seek divorce.

²³ Esposito, *Women in Muslim Family Law*, p. 4.

²⁴ Tucker, *Women, Family, and Gender in Islamic Law*, p. 47.

²⁵ Esposito, *Women in Muslim Family Law*, p. 53.

²⁶ Esposito, *Women in Muslim Family Law*, p. 54.

An oft-problematic practice of Muslim family law in the eyes of Western legal systems is that of polygamy. Muhammad himself is recorded as having multiple wives, and the Koran explicitly permits this practice, for it is written: “Should you apprehend that you will not be able to deal fairly with orphans, then marry of other women as may be agreeable to you, two or three, or four; but if you feel you will not deal justly between them, then marry only one . . . that is the best way for you to obviate injustice.”²⁷ However, it is later written in the fourth book of the Koran, the *Sura an-Nisa*, “You cannot keep perfect balance emotionally between your wives, however much you desire it.” (IV: 130).²⁸ Some jurists interpret this latter text as nullifying the prior text permitting polygamy, though there is substantive disagreement among nearly all schools of law on this matter.

A secondary legal matter covered extensively in Muslim family law is that of divorce, usually referred to as *talaq*, which comes from the root word *tallaqa*, meaning the release of one from held obligations.²⁹ Despite the Prophet’s discouragement of divorce, the hadith records him as saying, “Of all the permitted things divorce is the most abominable to God,” there are multiple different kinds of divorce allowed within the Hanafi schools of Muslim family law.³⁰ The first of these is *talaq*, which generally takes two forms, *talaq al-sunnah* and *talaq al-bidah*, the former being *talaq* in line with the Prophet’s teachings as outlined by the *sunnah* and the latter not being in line with his

²⁷ Quran, IV: 3–5

²⁸ J. Rehman, "The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq," *International Journal of Law, Policy and the Family* 21, no. 1 (2007): , doi:10.1093/lawfam/ebi023.

²⁹ Esposito, *Women in Muslim Family Law*, p. 29.

³⁰ Tucker, *Women, Family, and Gender in Islamic Law*, p. 85.

teachings.³¹ The most prominent example of the latter is the triple talaq, in which the husband repudiates his wife three times directly in succession or in a single statement, immediately nullifying the marriage. The triple talaq is outlawed in Shia Islam. The triple talaq is accepted under Hanafi law, but is not in line with the Prophet's teachings that generally encourage the three pronouncements to be spaced out to allow for in-depth consideration and prayer on the undertaking of divorce and is thus considered shameful. Talaq al-sunnah is further divided into two categories, *talaq al-ahsan*, considered the most proper form of divorce, and *talaq al-hasan*. In the former, the husband repudiates his wife in one instance in a period of purity, when she is not menstruating, and then the wife enters a three month waiting period known as *iddah* before she can remarry or until the birth of her child if she is pregnant at the time of divorce.³² The *iddah* is designed to grant extra time for reconciliation, as the husband can choose to return to his wife at any point before the conclusion of her third menstrual cycle since his final pronouncement, and to ensure the wife is cared for throughout her pregnancy.³³ The husband is obligated to continue to pay maintenance during this period, and his obligations may be extended in the case of pregnancy in order to provide for the child. This form of divorce is revocable, and the couple may later choose to reconcile or remarry. In *talaq al-hasan* the husband pronounces his repudiation of his wife three times, in between the wife's menstrual cycles and by abstaining from intercourse with his wife throughout the period. The final pronouncement finalizes the divorce, and at this point the wife enters her *iddah*. This

³¹ Esposito, *Women in Muslim Family Law*, p. 31.

³² Esposito, *Women in Muslim Family Law*, p. 31.

³³ Esposito, *Women in Muslim Family Law*, p. 4.

form of talaq is considered by some of the Hanafi school to be irreversible, although some jurists contend that it may be reversed if the wife has completed her iddah, remarried, divorced her second husband, and again completed her iddah. Second marriages completed simply to allow remarriage to a woman's first husband are considered invalid under Hanafi law.³⁴ Finally, under talaq a husband may choose to delegate to his wife the right to divorce, known as *talaq-al-tafwid*. In all forms of talaq, a husband is obligated to pay the wife any remaining portion of her dower.

Divorce can also be conducted in Muslim family law through judicial annulment of a marriage, through *lian* or *faskh*, which is also known as *tafriq*. Lian refers to mutual oath swearing, used to settle accusations of adultery or other violations of marital obligations. For example, a man may swear an oath that his wife has committed adultery, and in response the wife may swear five oaths that she has not done so. After the swearing of oaths, the husband may choose whether to divorce his wife or to reconcile, but if the couple cannot agree to forgive then the court dissolves the marriage.³⁵ As lying under oath is considered a severe crime before God, it is assumed that both parties undertake the risk of untruthfulness at the risk of punishment by God. Faskh is a mechanism by which a wife could request the annulment of her marriage, the grounds for which vary in each legal school. It is nearly universally accepted among the schools that impotence on the part of the husband provides grounds for annulment, and in the Hanafi school this constitutes the only grounds under which a wife may seek faskh.³⁶ The Maliki

³⁴ Tucker, *Women, Family, and Gender in Islamic Law*, p. 88.

³⁵ Esposito, *Women in Muslim Family Law*, p. 34.

³⁶ Rehman, "The Sharia, Islamic Family Laws and International Human Rights Law".

school of jurisprudence is unique in that grants considerably more power for women to request annulment, including cruelty by the husband or in the case of a husband's disappearance for a period exceeding four years.³⁷ As the husband reserves the right to divorce through talaq, most jurists reserve faskh as a method of divorce by the wife.

Women are also provided with a second mechanism for seeking divorce, as well as an option for divorce by mutual consent. This is known as *khul* or *mubaraah*, with the former beginning with the expression of desire to divorce by the wife and the latter beginning with a mutual expression of desire for divorce. In both cases, under Hanafi law the procedure for this dissolution takes place at a meeting of both parties in which the husband proposes divorce and this proposal is accepted by the wife, upon which the divorce is irrevocable.³⁸ In divorces instigated by the wife, such as *khul*, it is generally agreed upon that the wife is normally obligated to return a portion of, but not more than, her dower. Some jurists also argue that in *khul*, the wife waives her right to maintenance during her iddah. Under Hanafi law, in the case of *mubaraah*, the mutual decision to divorce includes a mutual decision to waive rights to maintenance during idda or reimbursement of any portion of the dower.³⁹ The final form of divorce in Muslim family law is *apostasy*, in that if either spouse leaves Islam, the marriage is considered void.

This brief overview of marriage and divorce is meant to demonstrate the primary principles under which Muslims in England and France may frame their understanding of the institutions of marriage and divorce and not to fully detail the immense intricacies of

³⁷ Esposito, *Women in Muslim Family Law*, p. 35.

³⁸ Esposito, *Women in Muslim Family Law*, p. 31.

³⁹ Tucker, *Women, Family, and Gender in Islamic Law*, p. 98.

Muslim family law. As a centuries-old and continuously developing field, a full exploration of these principles and their interpretations by jurists throughout history and how they are brought into different national legal infrastructures around the world would require the dedication of countless volumes. States that define themselves as Islamic may form their legal systems around a certain interpretation of Islamic law, while other may select certain elements of Islamic law to serve as foundational background to legal interpretation of different realms of the law. The provided information, however, does demonstrate where conflict may arise between Muslim family law and civil legal structures with differential approaches to marriage and divorce, particularly in regard to the rights of women within these institutions. This is further explored below.

Literature Review

A significant body of literature exists that explores the concept of secularism in both France and England, including analytical publications on the legal lens of this concept. The greatest body of literature in this arena, in terms of scope, lies within the exploration of French secularism and its prominent clashes with the religious requirements of certain subsets of the French Muslim population. Foundational publications such as Roger Brubaker's *Citizenship and Nationhood in France and Germany* provide critical insights into the function of laïcité – the French term for the separation of church and state most firmly rooted in the 1905 French law on Separation

of the Churches and State.⁴⁰ This is well-explained and further explored by Michel Troper's article "French Secularism, or Laïcité", as well as numerous other articles and established book sources explaining the overarching legal mechanisms through which religion is kept separate from French civil society – from public educational spaces to the practice of family law.⁴¹

The unique impact of laïcité on French Muslims, and particularly French Muslim women, is also a topic upon which no dearth of analysis has been spent. John Bowen's *Can Islam Be French?* provides an extensive overview of the perspectives regarding why Islam and French secularism come into conflict and the measures that both the French state and French Muslim leaders have taken to attempt to negotiate the space between civil law and sharia. A disproportionate amount of literature on legal secularism in France concentrates on the infamous 'headscarf affair' of the late 20th century.⁴² The controversy surrounding French restrictions on female Muslim attire, such hijabs, burkas, and niqabs⁴³, in the public sphere generated a large number of books, including the book subject to notable public discussion, *The Politics of the Veil*⁴⁴. This was accompanied by numerous publications exploring conflict between sharia requirements for women and French civil law through the lenses of gender politics, feminism, constructivism, and

⁴⁰ Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge, MA: Harvard University Press, 1992).

⁴¹ Michel Troper, "French Secularism, or Laïcité," *Cardozo Law Review* 21 (2000):.

⁴² The 'headscarf affair' refers to a 1989 incident in which French Muslim students were refused entry to a public school for refusing to remove their headscarves, which sparked a nationwide debate on the nature of French secularism and divisions between French notions of feminism and Islamic cultural practices regarding female modesty.

⁴³ These terms refer to different variations on coverings donned by a subset of the female Muslim population.

⁴⁴ Troper, Michel. "French Secularism, or Laïcité." *Cardozo Law Review* 21 (2000): 1267-284.

many others. This concentration on Muslim liberty to don headscarves or other traditional coverings in public spaces, most notably for both teachers and students in schools and for government employees, has been explored from multiple perspectives. Through a significantly sizeable portion of the Western feminist lens, certain authors contend that the Muslim faith-based coverings perpetuate misogynistic ideals that the female body is an object of shame and violates norms of gender equality. Others assert that such extensive attempts to enforce secular public spaces limits the capacity of Muslim women to participate in French civil society and thus integrate into society as a whole. It is the mechanisms of *laïcité*, such publications contend, that have created a de facto segregated society in terms of Muslim female presence in public institutions such as schools, hospitals, and government offices as well as limited economic opportunities through subsequent limitations on employment opportunities and access to public services for women who are unwilling to abandon their religious attire.

In sharp contrast to these earlier analyses, more recent in-depth studies indicate that French Muslim women are less concerned with the repercussions of restrictions on head coverings than with other restrictions of certain traditions associated with Islamic practice. Jennifer Selby's research has contributed to the diversity of this field of research by determining the issues that alter the approach of Muslim women towards the French state. In "French secularism as a 'guarantor' of women's rights? Muslim women and gender politics in a Parisian banlieue", Selby concludes that Muslim women are largely unconcerned with the supposed 'headscarf affair' and more focused on issues such as the availability of halal offerings in public schools and other public spaces. Research such as

Brinda J. Mehta's "Negotiating Arab-Muslim Identity, Contested Citizenship, and Gender Ideologies in the Parisian Housing Projects: Faïza Guène's *Kiffe kiffe demain*" explores French secularism in its largest conceptual sense as a homogenizing force that demarcates differences, beyond just head coverings, as a threat and creates a sense of second-class citizenship in the migrant-dominated French projects. This socio-cultural lens provides insight on translating personal experiences of French Muslim women into a larger narrative of discrimination.

The body of literature regarding secularism in the English legal context is far less extensive than that of France, in all likelihood due to the less expansive nature of legal secularism itself in England. England does not prescribe to an overarching separation of church and state, most notably in the maintenance of the Anglican Church as the official state church of the nation of England. As described in *Multiculturalism, Muslims and Citizenship: A European Approach*, England is one of the most secular states in Western Europe in terms of worship, religious affiliation, and theistic belief, despite their possession of a state religion and the state funding of religious public education. Yet, this does not indicate a lack of academic interest in the continued intersection of state and religion, particularly the Muslim faith.

Sources specifically discussing legal approaches to Islam in English civil society are far less prevalent than in the French context, as the lack of restrictions on religious expression in the public sphere mean that less conflict is generated regarding religion in one's daily life, such as the ability to maintain religious dress in the public sphere. Although England does allow schools to dictate their own dress code, including bans on

religious expressions such as the hijab, niqab, or burka, the existence of state-funded religious schools does provide alternatives for religious students. That is not to say that literature on the topic is non-existent, as a significant amount of time has been dedicated to the consideration of sharia in the practice of English law by British politicians consumed by the ever-controversial debate over immigration policy and the ability of the state to force integration through legal infrastructure. The complexity of intersecting legal systems, including the integration of the laws of the Church of England, within the body of English law merely means that this literature is less focused on secularism than on the perpetuation of ‘English values’ in terms of the Judeo-Christian tradition as the perceived norm for English culture among authors.

As asserted by Russell Sandberg in “Islam and English Law” in *Law & Justice: The Christian Law Review*, there are multiple accommodations within the British legal system that allow religious groups to exempt themselves from certain legal requirements, such as exemptions from food preparation regulations that allow for licensed Muslim butchers to follow Islamic methods of food preparation and the allowance of sharia-compliant loans by Islamic banks.⁴⁵ Analyses of this legal flexibility document that even in the 21st century, English law has evolved to grant new protections to religious groups and individuals and limit the enforcement of secularism in the public sphere and legal interpretation. Discussions unique to family law and approaches to marriage and divorce in English law do, by nature of the gendered elements of these practices, include some mention of how Muslim women are impacted by English legal infrastructure’s contrasts

⁴⁵ Russell Sandberg, "Islam and English Law," *Law and Justice*, no. 164 (2010): , doi:10.1017/cbo9781139128834.

to Islamic law – such as the nonexistence of unilateral divorces in English law. However, these mentions are of a vastly reduced nature in comparison to the French case, with the exception of the extensive work of academician and research John Bowen on Muslim women and English law.

The primary focus of the intersection of Islamic identity and English law, also heavily emphasized in literature in the French case, is the presence of religious symbols and practices in English schools. Publications such as Moti Gokulsing's "Without Prejudice: An Exploration of Religious Diversity, Secularism and Citizenship in England (with Particular Reference to the State Funding of Muslim Faith Schools and Multiculturalism)" use a socio-cultural approach to evaluate the degrees of English secularism in the public sphere and, in this particular instance, the author determines that state funding of faith schools is not in service of secularism and citizenship in schools.⁴⁶ In summary, English faith schools can receive significant state funding, while in France this form of educational funding is not practiced – except in rare instances. The focus on educational systems reveals an underlying belief that education is the formative system for French or English citizenship, and that schools ensure a shared national identity that engenders a positive relationship with the state and its socio-cultural norms.

Although literature exists which evaluates the effects of secularism in France and England as a part of state policy and law, the primary focus of these analyses has been the impact on social and economic integration or assimilation of migrants. For literature

⁴⁶ K. Moti Gokulsing, "Without Prejudice: An Exploration of Religious Diversity, Secularism and Citizenship in England1(with Particular Reference to the State Funding of Muslim Faith Schools and Multiculturalism)," *Journal of Education Policy* 21, no. 4 (2006): , doi:10.1080/02680930600731914.

concentrated specifically on Muslim women, there is an incapacity among a large portion of literature to move beyond the topic of Muslim headscarves, burqas, or other coverings. This research is not the first to decry the fetishization of Muslim headscarves in public spaces as regulated by government policy, and the vast disservice this focus on outward physical female appearances does to the numerous other ways in which Muslim women interact with the state and its secular systems. Jennifer Selby's *Questioning French Secularism: Gender Politics and Islam in a Parisian Suburb* is a more elaborated exploration of the experiences of Muslim women in Petit Nanterre which uses a multi-year ethnographic study approach to determine the ways in which the French secular model frames Muslim women's agency as a challenge to the routine functioning of the French state, moving far beyond their outward garments.⁴⁷ However, there has yet to be an analytical case comparison of French and English legal secularism through the lens of structural violence.⁴⁸ In an increasingly globalized and diversified society, the presence of structural violence against religious minorities can generate conflict that, if not addressed, will prevent functional operation of society and likely perpetuate further conflict. The legal infrastructure of a society serves as an operational framework for public life, which has repercussions for an individual's private existence. This research dually addresses the

⁴⁷ Jennifer A. Selby, "Questioning French Secularism: Gender Politics and Islam in a Parisian Suburb," *Journal of Church and State* 56, no. 1 (2014): , doi:10.1093/jcs/cst114.

⁴⁸ That is not to assert that there is no existing literature that details structural violence against Muslim women in Western Europe or the mechanisms through which Muslim women in Western Europe demonstrate their religious beliefs inside the structure of secular societies. This is a substantial body of literature, examples of which include: Christina Scharf's "Disarticulating feminism: Individualization, neoliberalism and the othering of 'Muslim women'", Sirma Bilge's "Beyond Subordination vs. Resistance: An Intersectional Approach to the Agency of Veiled Muslim Women", Ruba Salih's "Muslim women, fragmented secularism and the construction of interconnected 'publics' in Italy", Claire Dwyer's "Negotiating diasporic identities: Young British south Asian Muslim Women".

historical evolution of law toward religion, including how certain events may have contributed to the creation of structural violence, and compares the two cases of French civil law and English common law in order to draw conclusions about structural violence against Muslim women as resulting from legal systems.

THE RELEVANCE OF HISTORY

Tracing the evolution of the law's relationship with religion in England and France is critical to understanding the 20th and 21st centuries' example of potential structural violence. By marking the particular historical events which created such infrastructure, one is able to contemplate why England possesses a more flexible space in which religious minorities can operate and why France's historical conflict between church and state have has created a stricter demarcation between the two. This enables a comparative analysis of these different spaces in order to discover any existing structural violence, specifically for Muslim women attempting to navigate the intersection of family law in Islam and civil law.

The History of English Law's Integration with Religion

As England operates under common law, it cannot be proclaimed as possessing a universally defined legal system, but rather an infrastructure where legal decisions are predominantly based upon the precedent of prior case law. England does not prescribe to an overarching separation of church and state as seen in France, most notably in the maintenance of the Anglican Church as the official state church of the nation of England, and the development of its common law system is indisputably steeped in the influences of the Christian church's preminent presence throughout its post-conversion history.

Therefore, in order to fully explain the development of the English legal system's approach to Muslim family law, one must trace the historical development of its legal infrastructure in regards to religion with particular focus on the case law that would come to serve as the precedents upon which modern legal determinations regarding religious matters are based.

The formation of the English common law tradition dates back to the Norman Conquest in 1066, after which the Norman kings and their later medieval successors sought new methods for consolidating their legal authority over land and citizenry, which they did through the declaration of royal orders known as writs.⁴⁹ A writ was, and in the modern English common law system continues in a limited manner to function as, an order of the sovereign authority mandating a particular course of action or lack thereof from an individual or party in response to a particular issue or need. Beyond addressing matters such as required redress for crimes such as homicide or property theft, they were also used to command action from or generally address religious figures and to grant privileges to particular churches. Writs were most extensively used during the reign of Henry II, for whom writs formed the framework of his legal reforms and some of which would remain in use until 1832.⁵⁰ During this formative period of English common law, ecclesiastical courts established by William the Conqueror operated alongside the law of royal decree under the supervision of English bishops in order to administer the

⁴⁹ Geoffrey C. Hazard, "The Early Evolution of the Common Law Writs: A Sketch," *The American Journal of Legal History* 6, no. 2 (1962): , doi:10.2307/844149.

⁵⁰ Mark Hagger, "Early English Laws Project," *Early English Laws: Women and Law in the Anglo-Saxon Period*, accessed July 2018, <http://www.earlyenglishlaws.ac.uk/reference/essays/writs/>.

application and development of canon law.⁵¹ It has been asserted that these religious courts were the earliest such mechanism in England that resembled a court of law in the modern understanding.⁵² These courts operated separately from their secular counterparts that would form throughout subsequent centuries and enforced the aforementioned canon law in reference to church property, ecclesiastical disciplinary hearings, and the obligations of church members.⁵³ Ecclesiastical courts also retained criminal jurisdiction of the laity, including for heresy, adultery, incest, fornication, simony, and other crimes until the reigns of the Tudor and Stuart monarchies transitioned much of this jurisdiction to the secular legal realm.⁵⁴ As these courts operated under the law and values of the Catholic Church, they were considered to be more flexible than the system of writs and afforded greater protection to vulnerable parties addressed within biblical texts, such as widows, orphans, and the impoverished. It should be noted that the juristic literature of this period was to some degree influenced by Roman law, both in terms of ecclesiastical canon and the creation of royal writs and decrees.⁵⁵ This period is important to note, as it serves as the root establishment of religion as integrated within English law, even as this infrastructure continued to evolve.

⁵¹ Augusto Zimmerman, "Christianity and the Common Law: Rediscovering the Christian Roots of the English Legal System," *The University of Notre Dame Australia Law Review* 16 (December 2014): , accessed July 2018, https://heinonline-org.mutex.gmu.edu/HOL/Page?collection=journals&handle=hein.journals/undauslr16&id=191&men_tab=srchresults.

⁵² Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan* (S.I.: Routledge, 2016).

⁵³ Zimmerman, "Christianity and the Common Law", p. 153

⁵⁴ Noel S. Cox, "The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England," *Rutgers Journal of Law & Religion* 3 (2002): , doi:10.2139/ssrn.420022.

⁵⁵ Heinrich Brunner, *Sources of the Law of England: An Historical Introduction to the Study of English Law*, trans. W. Hastie (Edinburgh, 1888), , accessed 2018, <http://galenet.galegroup.com.mutex.gmu.edu/servlet/MOML?af=RN&ae=F100620008&srchtp=a&ste=14>.

The desire for greater flexibility on the part of secular courts would manifest in further legal reform, as in instances where the elaborate interwoven structure of writs proved too rigid to provide justice to a party and said party could appeal directly to the king for redress. To manage these appeals, the king began to informally delegate responsibility for these appeals to his Lord Chancellor, a system which would be formalized in 1349 as the court of equity.⁵⁶ This court would later come to be known as the Court of Chancery, due to the role of Lord Chancellor, and could draw upon multiple sources of law, including natural law, to reach legal decisions instead of relying solely on the precedent of prior royal decree or writ. Alongside these ecclesiastical courts and courts of equity, local-level courts emerged to adjudicate smaller cases under the guidance of local customary law, creating a multi-tiered and multi-jurisdictional court system all underneath the primary sovereignty of the monarch. The minutes of the transactions and decisions of these courts were kept as official records in order to establish judicial acts as precedent while reports were transcribed by state-funded reporters, until the end of the reign of King Henry VIII, when voluntary reporters took over the task. These third-party reports served not to establish judicial acts but as literary sketches of judicial decisions to make the relevant points of view in the legal decision-making process of a case evident to the public.⁵⁷ It is the judicial acts drawn from official records that would come to constitute the common law, and many acts of early English

⁵⁶ *THE COMMON LAW AND CIVIL LAW TRADITIONS*, PDF, Berkeley: The Regents of the University of California, The Robbins Religious and Civil Law Collection, School of Law (Boalt Hall), University of California at Berkeley.

⁵⁷ Brunner, *Sources of the Law of England*, p. 23-24

history have survived into the modern day through the maintenance of records within the individual court systems.

A brief break with the supremacy of the sovereign and that of the papacy in Italy over the legal dominion of England would occur during the early 13th century during the reign of John II, whose disputes with Pope Innocent III would result in his brief excommunication, prior to John's concessions to the papacy which would contribute to the discontent among English noblemen that resulted in the forced signing of the Magna Carta. This document briefly limited the power of the monarch, although it would soon be annulled by Pope Innocent III in a reassertion of the union of the English Crown with the Catholic Church and their dominance over the nation and its infrastructure. This mutual control over the English populace would continue until the next significant shift in church state relations under King Henry VIII. Important to note in this same period is the transition of the group of noblemen and high-ranking religious figures known as the Great Council that served as advisors to the monarch into the Parliament of England, which evolved separately from its Scottish counterpart until their union in the 18th century. The role of religious figures in this parliamentary structure emphasizes the fully integrated nature of the church and the lawmaking structures of medieval England.

The Creation of a Wholly English Church and Law

In a later power struggle between the English crown and the papacy, in this instance shaped by the refusal of Pope Clement VII to grant King Henry VIII an annulment of his marriage to Catherine of Aragon in order to facilitate his marriage to

Anne Boleyn, the role of true ruler of the English church and its congregations would again be contested. As a result of the blockage of his annulment, Henry VIII and his advisor Thomas Cromwell garnered support for the creation of separate, wholly English church under the rule of the monarchy. The 1534 Act of Supremacy established Henry VIII as the ‘Supreme Head’ of the Church of England and formally established said church by law as an entity to be governed by rules and laws created by the church itself, the state, and often by the two entities in collaboration due to their interwoven nature.⁵⁸ The full integration of the monarchy with a new, wholly English religion is perhaps the most critical evolution in the timeline of English law and religion, as detailed in its subsequent effects. The fusion of church and state became more extensive through the Church of England’s newfound linkage to the English legislature and judiciary, as the monarch as Supreme Head had the right to appoint bishops, a set number of whom were required to serve in the House of Lords, and the ecclesiastical courts became linked to the state through the Church’s established status.⁵⁹ From this point forward, the state did not recognize any ecclesiastical law outside Anglican law, with the later exception of the Presbyterian Church in Scotland, granting the Church of England the unique right to marshal over select jurisdictional arenas – a privilege not granted to any other religious

⁵⁸ Russel Sandberg and Norman Doe, "DIRITTO E ORDINAMENTO DELLE CHIESA D'INGHILTERRA E DELLA COMUNIONE ANGLICANA (STUDI SUL) („Order and Canon Law of the Church of England and Anglican Communion“),” Centre for Law and Religion, Cardiff Law School (UK): , [https://orca.cf.ac.uk/78299/1/Sandberg and Doe_ Order and Canon Law of the Church of England.pdf](https://orca.cf.ac.uk/78299/1/Sandberg%20and%20Doe_Order%20and%20Canon%20Law%20of%20the%20Church%20of%20England.pdf).

⁵⁹ Sandberg, “DIRITTO E ORDINAMENTO DELLE CHIESA D'INGHILTERRA E DELLA COMUNIONE ANGLICANA (STUDI SUL)”, p. 1.

group.⁶⁰ Further, while judges of Church courts continued to be appointed by the Church hierarchy, they were not religious figures, but rather laymen selected from within practitioners of the ecclesiastical law bar – and ultimately accountable to the monarch as the head of the Church of England.⁶¹ The Act of Supremacy divested the Catholic Church of most of its legal jurisdiction, including relief for the poor, education, and most critically, commerce. To fill this jurisdictional void, Henry VIII created new ‘prerogative’ courts including the Court of Star Chamber, the High Court of Admiralty, and the Court of Requests, while requiring ecclesiastical courts to become part of the Church of England and establishing the Privy Council as the highest ranking of these courts.⁶² With this jurisdictional shift a ban was also introduced on the teaching of Catholic canon at English universities at Oxford and Cambridge, a law which also applied to the Anglican Church unless it was “contrariant or repugnant to the law, statutes or custom” of the country or the King’s wishes.⁶³ The joint church-state status would also create a system under which certain rights were distributed by the church, through an individual’s membership in an Anglican congregation, such as marriage or burial. Although the Act of Supremacy was briefly annulled by Henry VIII’s Catholic daughter Mary, it was revived by her sister and successor Elizabeth I. Elizabeth I would restore some of the jurisdiction power of religious courts, although they remained tied to the Church of England and thus to the state.

⁶⁰ Lasia Bloß, *European Law of Religion – Organizational and Institutional Analysis of National Systems and Their Implications for the Future European Integration Process*, The Jean Monnet Program, New York University School of Law, 2003.

⁶¹ Cox, “The Influence of the Common Law”, p. 8

⁶² Zimmermann, “Christianity and the Common Law”, p. 155

⁶³ Sandberg, “DIRITTO E ORDINAMENTO DELLE CHIESA D’INGHILTERRA E DELLA COMUNIONE ANGLICANA (STUDI SUL)”, p. 2

The English Civil War, also known as the Puritan Revolution, began in 1642 between the monarchy under Charles I and the Parliament over conflict in Ireland, and would come to alter the trajectory of the fused church-state legal infrastructure.⁶⁴ The revolution established common law as dominant to the Court of Chancery and dissolved all other prerogative courts. That is not to say that the dissolution of these courts was a secular shift, as the Puritan government firmly believed that common law should operate under the commands of Biblical text as interpreted by their particular denomination. The English Revolution was by nature a religiously-motivated revolution, in opposition to the French Revolution – a movement fully opposed by the French religious infrastructure and marked by a strict secularist philosophy. In a 1649 case, the judge declared that “the law of England is the law of God” and “the law of God is the law of England”, a clear affirmation of the union between the Church of England and the legal decision-making mechanisms of English courts.⁶⁵ Although Charles II would return to the throne in 1660, bringing with him the return of the Anglican Church of England, discontent over the execution of Charles I, the maintenance of a standing army, and the radical nature of the Puritan policy, a secondary revolution known as the Glorious Revolution would occur in 1688.⁶⁶ This brief revolution would result in the Bill of Rights and Toleration Act of 1689, which together granted freedom of worship and basic civil rights to nonconforming Protestant sects.

⁶⁴ Peter Ackroyd, *Civil War* (London: Pan Books, 2015).

⁶⁵ Zimmermann, “Christianity and the Common Law”, p. 162

⁶⁶ History.com Editors, "English Civil Wars," History.com, August 21, 2009, , accessed 2018, <https://www.history.com/topics/british-history/english-civil-wars>.

During this and subsequent centuries, a number of notable legal decisions established precedent under the common law system that granted unique legal statuses or exemption to certain religious groups. These statutes exemplify the piecemeal nature of the legal approach to religious needs under the English legal system, which allows for the addressing of needs unique to members of particular theological ideologies but also grants advantages to religious groups with longer historical ties to the country and those with greater capacity to seek legal redress in historical England, particularly to religious groups of the Judeo-Christian tradition. For example, the 1753 Marriage Act requires all marriages to be conducted by a minister in a parish church or chapel of the Church of England in order to be legally valid. However, under the act, the marriage rites of Jewish and Quaker couples are exempt from these location requirements as well as the requirement of the presence of a state official, as long as the marriage ceremony is conducted in accordance with Jewish or Society of Friends traditions.⁶⁷ This exemption is unique to these two religious minorities, and all non-conformist religious traditions, including Catholics, were bound by the requirement to conduct marriage ceremonies in an Anglican church to assure their legal validity. Non-conformists and Catholics were granted the right to marry within their own houses of worship in 1836, but unlike Jews and Quakers, were still required to abide by the other mandates of the 1753 Marriage Act.⁶⁸

⁶⁷ Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States*, p. 52

⁶⁸ "The Law of Marriage," UK Parliament, , accessed 2018, <https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/lawofmarriage-/>.

The Decline of Religious Courts

The 19th century in England constituted a period of legal transition in terms of ideological approach to lawmaking and the supremacy of certain forms of law over others. Throughout this century Roman law and canon law continued to be applicable in the Court of Chivalry, the Admiral Court, the University Courts, and the Curiae Christianitatis – the ecclesiastical courts.⁶⁹ While the English Reformation had previously limited the jurisdiction of the church, ecclesiastical courts had continued to exercise significant influence over the lives of the laity. In the mid-19th century, however, these courts had a major portion of their jurisdiction removed.⁷⁰ Towards the latter end of the 19th century, the supremacy of common law began to be called into question.⁷¹ Codification of legal statutes as seen in other countries, with some evidence of its usage in England beginning in the 16th century, became popular in order to consolidate the multitude of statutes particularly regarding criminal and procedural law and increase the use of statutes over common law procedures for judicial decision-making.⁷²

The Judicial Committee of the Privy Council had replaced the Court of Delegates in 1833, which served as court consisting of both lay judges, civilians, and lords spiritual which heard appeals that prior to the Act of Supremacy would have been assigned to papal delegates. The 20th century saw the decline of the Judicial Committee of the Privy Council, as the Council lost the authority to adjudicate any case involving questions of

⁶⁹ Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States*, p. 47

⁷⁰ Zimmermann, "Christianity and the Common Law", p. 155

⁷¹ The English court system also experienced consolidation in this period. The Supreme Court of Judicature Act of 1873 replaced the numerous tribunals with a single Supreme Court of Judicature, while outside legislation eliminated the Court of Chancery as a separate body in order to fuse the previously separate entities of common law practice and the assurance of equity.

⁷² Brunner, *Sources of the Law of England*, p. 46

Church doctrine, ritual, or ceremonial.⁷³ This role would be overtaken by the Court for Ecclesiastical Causes Reserved beginning in 1963. That same year would also see the elimination of all remaining criminal jurisdiction over lay people held by ecclesiastical courts, leaving them with only the jurisdiction of Church doctrine and ritual, Church property, the power to discipline their own clergy, and to decide civil disputes centered on ecclesiastical matters.⁷⁴ This decline in jurisdictional authority for the Church of England demarcates the 20th century's transition toward a concentration of legal power among the secular authorities of the English state that is reflected in its modern infrastructure. That is not to assert that this infrastructure is devoid of religious presence, or to negate the heavy influence of the Christian faith on the formulation of English law through the principle of natural law and Judeo-Christian concepts of morality as interpreted through Biblical text.

The Continued Influence of Religion on the State

Unlike France, the English state, and within it the English legal system, cannot, and does not, purport to be a wholly secular infrastructure. In its modern structure, there are certain state posts whose appointment is dependent on the religious affiliation of the candidate. These include the position of ministers of religion, who are no longer excluded from the House of Commons, the Lords Spiritual in the House of Lords, who are granted their legislative standing based on their position in a religious hierarchy, and the monarch, who in order to retain the crown must be in communion with the Church of

⁷³ Cox, "The Influence of the Common Law p. 7

⁷⁴ Cox, "The Influence of the Common Law, p. 21-22

England.⁷⁵ The canon law of the Church of England is part of the law of England, even if it is not a part of the common law. Meanwhile, ecclesiastical courts continue to operate parallel to the secular state courts – which are secular in the sense they are not run by religious authorities and do not operate solely under religious guidelines. Even these courts must consider religion within their decision-making process, such as through the Children Act of 1989, which requires that local authorities give credence to a child’s ethnic, racial, religious background when deciding matters regarding the future of a child under consideration.⁷⁶

Both France and England have historical ties to the Christian church which have shaped the evolution of their state infrastructure and legal systems, through indirect ideological influence as well as direct interaction with the state, but these ties are most explicit in the English case. As detailed in the historical evolution of religion and English law, the English common law system and its canonical counterparts create a complex system in which religion is directly woven into the fabric of the legal system and there exists a more flexible space for religion inside structurally secular courtrooms. Although unlike France, England does not publicly finance the maintenance of churches or other religious structures, the continued role of the Church of England as the official state religion creates a direct tie between governmental and religious matters that manifests in a unique approach to the intersection of religious and secular law. While this structure creates a privileged position for the Anglican religion, the aforementioned flexibility also

⁷⁵ Bloß, *European Law of Religion*, p. 54

⁷⁶ Children Act 1989, Her Majesty's Government of the United Kingdom of Great Britain and Northern Ireland § 41-108(10-12) (National Archives UK).

allows for the creation of space in which other religious groups may assert unique rights or legal statuses based on their beliefs, as exemplified by the exceptions granted to Jews and Quakers regarding legally-recognized marriage ceremonies.

The History of Religion in French Law

Modern French legal secularism has four predominant factors: a lack of an official state religion, freedom to worship, freedom of thought, and the absence of religion in state-provided law.⁷⁷ The development of these core aspects of secularism in the French legal system, which would only later take on the uniquely French label and mannerisms of *laïcité*, is most commonly understood have its most concrete origins in the aftermath of the French Wars of Religion that dominated the latter half of the sixteenth century. From 1562 to 1598, the Valois monarchy engaged in violent conflict with both the protestant Huguenots and radical Catholic groups. The French monarchy, far weaker than those that would follow across the continent in the seventeenth and eighteenth centuries, was unable to contain the religious fervor of the emergent Protestant minority and the larger Catholic community fearful of this embryonic religious force, each further empowered by conflict between different royal houses competing for the French throne with mirroring religious alliances. Within these wars, the infamous St. Bartholomew's Day Massacre of 1572 would come to mark what is considered the most noted act of religious violence in early

⁷⁷ Blandine Chelini-Pont, "Legal Secularism in France Today: Between Two Paths," JAMES CONTR- ERAS, ROSA MARIA DE CODES. TRENDS OF SECULARISM IN A PLURALISTIC WORLD, 2013, , accessed 2018.

modern Europe.⁷⁸ It was not until Henry of Navarre secured a tenuous peace and the passage of the Edict of Nantes that the wars came to an end, concluding a period which continues to shape the country's approach to religion. Religious conflict over the nature of the French state's religious identity, and the death and destruction with which it was associated, lingers in the French consciousness and this period remains a historical reminder of the justification behind a state free from a specific religious identity.

The further significance of this specific conflict is that this marks the first instance of the French state, in this case in its monarchical form, establishing itself as a force superior to that of the Catholic Church. It did so not as a secular actor, but as its own legitimate religious force under the principle of *cujus regio, ejus religio*, leaving the monarch as the propagator of religious values to his people.⁷⁹ The characteristic of a central authority defining Gallicanism was henceforth endemic to French legal development, although the authoritative interpretation of the values of Gallicanism would evolve in the coming centuries along anticlerical lines until culminating in the formative period of the French Revolution.

In the revolutionary period of the late eighteenth century, this anticlericalism operated predominantly along the lines of opposition to religious figures and movements perceived as extreme or radical, as well as those during the revolution who would stand in the way of the republican wave. The latter largely consisted of the French Catholic

⁷⁸ Allan A. Tulchin, "Ending the French Wars of Religion," *The American Historical Review* 120, no. 5 (December 2015): , accessed 2018, doi:<https://doi-org.mutex.gmu.edu/10.1093/ahr/120.5.1696>.

⁷⁹ Raphael Liogier, "Laicite on the Edge in France: Between the Theory of Church-State Separation and the Praxis of State-Church Confusion," *Maquarie Law Journal* 9, no. 25 (2009): , <http://classic.austlii.edu.au/au/journals/MqLawJl/2009/3.html>.

faith base, who benefited from the traditional ties between the monarchy and Catholic institutions and opposed greater regulation of and interference in church affairs propagated by the revolutionary platform. The French Catholic Church would be a specific target of revolutionary reforms. For example, the Jesuits were targeted by anticlerical sentiment due to the perception that they sought to exercise excessive control over French youth.⁸⁰ The Catholic Church had also furthered anticlericalism among the laity by attempting to address its financial woes by increasing the traditional taxes and tithe of ten percent of income to an unrealistic one-third, and post-1757 began sentencing any printers or authors who blasphemed or discredited religion with death. Revolutionary reforms would therefore reflect the anticlerical desire to dismantle the institutional domination of the church over public law and order.

The Declaration of the Rights of Man makes only brief reference to religion in its treatise on the existence of the inalienable rights of man, stating within Article 10, “No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.”⁸¹ In this manner the Declaration of the Rights of Man made evident the growing French commitment to ultimate state dominance over the rights of religious practice, evolving from the faint echoes of this sentiment in the Edict of Nantes, as religion freedom is guaranteed only under the conditions that it remain undistruptive to the functions of a

⁸⁰ Jean Bauberot "Secularism and French Religious Liberty: A Sociological and Historical View." Brigham Young University Law Review 2003, no. 2 (2003): 451-464. <https://search-proquest-com.mutex.gmu.edu/docview/194362796?accountid=14541>.

⁸¹ "Declaration of the Rights of Man - 1789," The Avalon Project - Documents in Law, History, and Diplomacy, , accessed 2018, http://avalon.law.yale.edu/18th_century/rightsof.asp.

stable public order. The French Revolution, however, was not a full culmination of anticlericalism or the most significant turning point towards a greater separation of church and state – and as a result, law. The Constituent Assembly's 1790 "The Civil Constitution of the Clergy" organized the church into geographic districts for administrative purposes while providing for a state salary for Roman Catholic clergy, and the Constitution of 1791 enshrined freedom of religion while asserting public control over religious property, funding, and the appointment of priests by the church members instead of the church hierarchy.⁸² Thus instead of the secularist modern enshrined by the modern French state, the French Revolution created a public order in which the state was the architect and puppeteer of religious matters. Even as, in centuries to follow, the state's influence over religious affairs waxed and waned, this legacy of state control over– and thus forced interaction and negotiation with – religion remains evident.

The entrenchment of the state in religious affairs was partially reversed under the 19th century rule of Napoleon. His Concordat of 1801, drafted and declared in conjunction with Pope Pius VII, established the Catholic Church as the majority religion of France and restored some of the prior status and powers of the church.⁸³ To reassert his personal authority and satiate the vengeful appetites of some of his supporters who opposed the 1801 Concordat, Napoleon would limit the prior year's decree with the Concordat of 1802, the so-called Organic Articles. The Organic Articles granted the political head of France the authority to appoint Catholic bishops under the guidance of

⁸² Troper, "French Secularism, or Laicite", p. 9

⁸³ Lewis Rayapen and Gordon Anderson, "Napoleon and the Church," *International Social Science Review* 66, no. 3 (Summer 1991): , <https://www-jstor-org.mutex.gmu.edu/stable/41882000>.

the pope, returned those churches and temples nationalized by the National Assembly of the revolution for use by their respective religious organizations, and established a state salary for the three recognized religions of Catholicism, Protestant Christianity, and Judaism.⁸⁴ Although the remaining duration of Napoleon's rule would feature alternating contentions with the Catholic Church, the system established by the early nineteenth century Concordats would remain the overarching structure of the French national approach to religion in state and legal affairs.

Post-Napoleonic France and the Enlightenment: The Roots of Laïcité

The next period of French legal development in terms of religion would prove to be the most formative in terms of setting the course for the establishment of laïcité. Following the end of Napoleonic rule in France, public debate in France began to center on conflict between the rise of Enlightenment humanism and the ultramonitism⁸⁵ of the conservative faction of French Catholicism.⁸⁶ This debate is reflected in the partially contradictory juridical guidance of the Charter of 1814, whose articles state both that “each and everyone is free to profess his religion with an equal liberty and obtain the same protection for his form of worship” and “Nevertheless, the Roman Catholic Apostolic Religion remains the religion of the State”.⁸⁷ Meanwhile, the utopian ideals of the Enlightenment rose from the prior century to infiltrate French academia and

⁸⁴ Troper, “French Secularism, or Laïcité”, p. 10

⁸⁵ Ultramonitism refers a political belief among a portion of the clergy that prioritizes the powers and interests of the papacy.

⁸⁶ Jennifer A. Selby, “French Secularism as a ‘guarantor’ of Womens Rights? Muslim Women and Gender Politics in a Parisianbanlieue,” *Culture and Religion* 12, no. 4 (2011): , accessed 2018, doi:10.1080/14755610.2011.633536.

⁸⁷ Liogier, “Laïcité on the Edge in France”, p. 30

philosophy, enshrining the values of individual thought, liberty, and devotion to progress in the minds of the non-Catholic public and the Catholic Church's more moderate patrons. These ideals had become central to notions of French identity during the French Revolution, but in the nineteenth century conflict between these ideals and the hierarchical nature of organized religion would reach a head – just as the lingering remnants of the French monarchy so too fell victim to the progressive ideals of equality and representative government. Republican anticlericalism would emerge victorious alongside democracy.⁸⁸

The penultimate civil construction of secular democracy and anticlericalism took the form of a 1905 statute, referred to as the Separation of Churches and State Act 1905 or the 1905 Act. The law was originally drafted by republicans after the French defeat in the Franco-Prussian War and the birth of the Third Republic in 1870.⁸⁹ It is of note that the phrase 'separation of church and state' is not found in any of the statute's contents, merely in its title. However, the statute is largely considered as the root of modern French secularism, as it in theory regulated RESTRICTED religious practice to the private sphere and further established the French state as an independent regulator of religious matters as they pertain to public law and order. The 1905 Act affirmed the freedom of conscience in France and ended the state recognition of any religion, and with it state funding of religious institutions or clergy-member salaries through the subsequently dismantled Ministry for Religious Budget.

⁸⁸ Bauberot "Secularism and French Religious Liberty", p. 461.

⁸⁹ Yolande Jansen, "French Secularism in the Light of the History of the Politics of Assimilation," *Constellations* 16, no. 4 (2009): , accessed 2018, doi:10.1111/j.1467-8675.2009.00563.x.

Technical legal analysis, however, makes evident that the 1905 Act only outlawed inscription of credits that subsidize religious services by churches and that the state may continue to fund non-discriminatory public services of a non-religious nature that take place in a religious setting, the payment of religious figures or groups for providing public services such as national religious ceremonies, and the direct administration by public collectives of religious services if those services are in the interest of ensuring religious freedom.⁹⁰ Houses of worship predating 1905 also remained public property and continue to be financially maintained using state funds. Further, under this law, religious associations may apply for tax exempt status on the grounds that they exist solely for the practice of religious worship. Through an administrative system of review, tax-exempt status is granted only if the applicant is endorsed by the Conseil d'État as a group that takes part in religious activities and allows for state evaluation and intervention in religious matters. Strict regulations on what constitutes worship mean that operations including the running of educational programs, appointment of a board president, or publication can serve as grounds for rejection, but religious groups may create a detached organization that is registered separately as a cultural organization to provide such services.⁹¹

There are further aspects that prevent a literalist interpretation of the statute title 'Separation of Churches and State Act'. As the regions of Alsace and the Moselle were under German control during the law's passage, after their return as French sovereign

⁹⁰ Jacques Robert, "Religious Liberty and French Secularism," *BYU Law Review* 2003, no. 2 (May 1, 2003): , accessed 2018, <https://digitalcommons.law.byu.edu/lawreview/vol2003/iss2/8>.

⁹¹ Bloß, *European Law of Religion*, p. 22

territory in 1918 to the current year, the Catholic Church has continued to play a direct role in the administration of public schools and the state funds the wages of clergy of the three religions recognized under the Concordat of 1801 (Catholicism, Protestantism, and Judaism) and appoints regional bishops.⁹² Additionally, the Catholic Church refused to observe the stipulations of the 1905 Act, necessitating the passage of the Public Practice of Religions Act 1907 (1907 Act), which grants the Catholic Church power to “assure the continuity of the public exercise of worship” under a different 1901 act with less restrictive stipulations on religious associations.⁹³ The major Catholic holy days, including but not limited to Christmas, Pentacost, and Ascension, are also national holidays and French public schools continue to serve fish on Fridays despite the relaxation of the ban on the consumption of meat on Fridays by the Vatican.⁹⁴ These exemptions from the theoretical ban of religious practice and custom from the public sphere demonstrate the impact of Christian sociocultural ties to the evolution of the French state on its implementation of secularism beginning in the 20th century.

Following World War II, France observed the first official inclusion of the concept of laïcité in a legal capacity in the French Constitution of 1946, which marked the onset of the Fourth French Republic.⁹⁵ It reads:

*“La France est une République indivisible, laïque, démocratique et sociale.”*⁹⁶

⁹² Troper, “French Secularism, or Laicite”, p. 14

⁹³ Liogier, “Laicite on the Edge in France”, p. 31-32

⁹⁴ Todd Shepard, “ALGERIAN NATIONALISM, ZIONISM, AND FRENCH LAÏCITÉ: A HISTORY OF ETHNORELIGIOUS NATIONALISMS AND DECOLONIZATION.” *International Journal of Middle East Studies* 45, no. 3 (2013): 445–67. doi:10.1017/S0020743813000421.

⁹⁵ Elizabeth Turner, *Laïcité in Contemporary France: Analyzing the Implementation and Retention of Religious Programming on Publically Supported Television*, Master's thesis, Columbia University, 2017, , <https://doi.org/10.7916/D8SF37RJ>.

As France attempted to reassert its national identity following Nazi occupation and Vichy collaboration, the state utilized laïcité as a mechanism to define French identity and citizenship among its populace. As in centuries prior, French nationalism was defined by a central authority that used participation in public institutions such as schools to enshrine ‘French’ values among all citizens in order to create a cohesive identity, an identity which in theory would have been diluted by religious institutions that would seek to assert the dominance of their own values if granted operative space in the public sphere. This inclusion would carry over into Article 2 the French Constitution of 1958 that marked the fifth, and current, French Republic established by Charles de Gaulle.

Responses to Muslim Migration

With an influx of Muslim migrants in the latter half of the 21st century, it became evident that the French secular system provided more representative infrastructure such as national religious bodies and organizations for the nation’s Christian and Jewish population than for the rapidly growing Islamic citizenry. Large umbrella bodies existed for Christians and Jews that consulted with the French government regarding the unique needs of their communities, including the *Conseil Représentatif des Institutions juives de France* established in 1944, the Protestant Federation of France, and the Conference of Bishops of France. Aware of this disparity, the government under Prime Minister Raymond Barre established in 1980 the Consultative Commission for French Muslims (*Commission Consultative des Français Musulmans*) to facilitate Muslim integration by

⁹⁶ Constitution de 1946, IVe République, Article 1.

managing proposals for improvement in the living conditions of French Muslims while furthering respect for Muslim religious tradition.⁹⁷ This would come to be replaced by the Council for Reflection on French Islam (CORFI) created under the guidance of Pierre Joxe in 1990, which consisted of members deemed ‘intuitu personae’⁹⁸, and was intended to advise the state on issues encountered regarding Islam and to encourage the creation of a representative infrastructure of Muslims in France.⁹⁹ A third attempt was made to create such a body by then Minister of the Interior Nicolas Sarkozy in 2003 in the form of the *Conseil français de culte musulman* (French Council for the Muslim Religion) as a nationally recognized representative body that serves as the state’s interlocutor on Islam in order to represent the interests of French Muslims and facilitate their integration.¹⁰⁰ This would be the same year that conservative French president Jacques Chirac ordered the Stasi Commission report on laïcité, officially the *La Commission de réflexion sur l’application du principe de laïcité dans la République*. The Stasi Commission report, named after head of the commission Bernard Stasi, outlined the evolution of contemporary challenges facing French laïcité and the need for new approaches to address them. It was in line with the recommendations of the report that the French National Assembly passed a 2004 law stating, “Art. L. 141-5-1. – In public elementary schools, middle schools and high schools, the donning of signs or dresses by which the students ostensibly [ostensiblement] manifest a religious adherence are banned. The

⁹⁷ Liogier, "Laïcité on the Edge in France", p. 35

⁹⁸ A latin phrase translated as ‘because of the person’ or ‘in consideration of the person’, in this context referencing individuals selected based on their personal connections with and qualifications regarding the French Muslim community.

⁹⁹ Robert, "Religious Liberty and French Secularism," p. 637

¹⁰⁰ Murat Akan, "Laïcité and Multiculturalism: The Stasi Report In Context," *The British Journal of Sociology* 60, no. 2 (2009): , accessed 2018, Wiley Online Library.

school regulation reminds that a dialogue with the student precedes the start of a disciplinary procedure.”¹⁰¹ A 2009 decision of the Constitutional Council further reaffirmed France’s commitment to its secularist policies, by reaffirming the value of the constitutional ranking of the principle of laïcité.¹⁰²

Many historical analyses of the evolution of French secularism dedicate significant material and time to the October 1989 incident in which a French schoolmaster refused to allow three female Muslim students to attend class due to their headscarves, on the grounds that the garment violated French secularism. This instance sparked a national debate on the role of Islam in a theoretically secular state that has carried on for decades, culminating in a plethora of academic, philosophical, and legal analyses of the headscarf and French secularism, including the referenced Stasi Commission report. However, this hyper-focus on the outward manifestation of religious belief in a small subset of French Muslims is largely a reflection of a global cultural obsession with control of the female form and obvious differences in physical appearance. This obsession serves as an opportunity to manifest a societal ‘other’, and has longstanding links to discrimination against non-White French migrants and their descendants. The concentration on the choice of some French Muslim women to cover themselves to varying degrees does a disservice to the larger implications of a theoretically political religion operating inside a theoretically secular society by making a simple distinction between members of French religions who can be immediately

¹⁰¹ (Adopted on 3 March 2004). *Projet de Loi: encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*. Sénate 66.

¹⁰² Chelini-Pont, "Legal Secularism in France Today", p. 2

identified by their clothing choices and those who fully assimilate to Western norms of dress. This problematic analytical perspective is particularly concentrated on the French case, far more than in analyses of English Islam. For this reason, academia must expand their analysis of French secularism to explore the capacity of the laic French civil law system to address the needs of Muslim women, beyond their attire.

Larger overarching historical analysis of the relationship between religion and the French state describes how and why the characteristics of modern French secularism evolved, manifesting a *laïcité* in which particular religions are considered through their public visibility to be a challenge to the law and order established by the French nationalist identity as defined by the state. The current status of French law's approach to Islam, and within it Muslim family law, evolved through a power struggle between the state and religious institutions to define the confines of French nationhood and identity, from which the state would emerge victorious. A historical focus on the 'dangers' of Catholicism to the dominance of Gallicism has evolved to a sociable, if unequal, relationship between Christian institutions and the French state. The influx of Muslim immigration beginning in the 20th century, however, has been interpreted in some aspects by the state as representing a new French populace possessing certain value sets in opposition state-proclaimed values such as gender equality. The ties of Muslim migration to French colonialism and the fusing of foreign cultures with French citizenship or residency served to blur the lines of these notions, creating a pushback specifically focused on attempting to suppress the most evident of differences between French Muslims and these constructed notions of French culture and identity. Perceiving a

potential threat to the aforementioned workable peace, the purpose of laïcité, the state's secularist policy began to adapt to include a heavy focus on creation of institutions and law to facilitate, and enforce, both assimilation and integration of Islamic practice to fit within pre-existing definitions of French identity.

In a strictly legal sense, although it still retains many characteristics of its long-standing relationship with Catholicism and to a lesser degree Protestant Christianity, France in theory places the law of the state as fully superior to and outside the operation of religious law. Although exceptions to French state secularist policy exist for specific religions and regions, religious law is largely not allowed to enter a courtroom as a matter of evidence or argument in the legal determination of a case result. The French separation of church and state is not literalist, as it allows for interaction between the state and religion or religious actors, but its approach to Islamic law for French citizens in the civil legal context is more stark than certain other Western European states. Though it is a complex system, French civil law is by comparison to other countries uniquely clear in this regard.

LEGAL SECULARISM IN ENGLAND

The Evolution of Islam in England

As in the French case, the historical presence of Muslims in England is acknowledged as established fact. The discovery of currency attributable to King Offa of Mercia that bears Islamic text, dated 794 A.D., suggests that the ties between the native population of England and Islam is particularly extensive.¹⁰³ The statistically significant presence of Muslims in England can be dated to the 18th century, during which conversion to Islam became popular among the English upper classes and when Muslim ship-workers took up residence in English port towns after being recruited to work for the East India Company. In a second similarity with that of France, the evolution of this growth is marked by colonial and economic motivations. British holdings in Southeast Asia, the Caribbean, and Africa resulted in a dual migratory relationship as British citizens relocated to colonial holdings to explore economic opportunities while colonial populations were imported to fill labor demands both as slaves and as paid laborers. The influx of slave labor would have lingering impact on the presence of the Muslim religion in England. Historical evidence also indicates that the extensive British trade industry

¹⁰³ "Early Arab and Muslims," Migration and Ethnic History, , accessed 2018, https://www.manchester.gov.uk/directory_record/212556/early_arab_and_muslims/category/1373/view_all_records.

brought Arab and African traders to reside in England, resulting in over 400 Arab trading houses by 1890 in Manchester alone.¹⁰⁴

A second increase in Muslim migration, particularly from Yemen, occurred in the 19th century after the construction of the Suez Canal caused an uptick in global trade that mandated an increase in imported labor.¹⁰⁵ In the 1960's, there was an surge in immigration of South Asian Muslims, adding to an existing population of Indian Muslims who migrated to England for educational and economic opportunities during the British Raj.¹⁰⁶ This decade and the decade that followed also saw Muslim migrants from East Africa from former British colonial holdings, while the 70's and 80's saw an increase in immigration from Bangladesh, and the 90's an increase in Muslim refugees and asylum seekers from the Middle East and Eastern Europe.¹⁰⁷ Between 2010 and 2016, the United Kingdom took in 40,000 Muslim refugees and 690,000 Muslim migrants.¹⁰⁸ Reliable data is not available specifically for England, but the Muslim population in the United Kingdom (U.K.) as a whole was estimated to be 4,130,000.¹⁰⁹ Non-governmental estimates are used here as the last governmental census in England was conducted in 2011, since which significant demographic shifts have occurred within the U.K.'s population due to significant migrant and refugee flows from the Middle East and vast swaths of the African continent.

¹⁰⁴ Early Arab and Muslims, " Migration and Ethnic History.

¹⁰⁵ "Religions - Islam: History of Islam in the UK," BBC, September 07, 2009, , accessed 2018, http://www.bbc.co.uk/religion/religions/islam/history/uk_1.shtml.

¹⁰⁶ Tahir Abbas, "Islam and Muslims in the UK," proceedings of Islamic Studies in Europe, U.K., October 2010, , accessed 2018, <https://www.thebritishacademy.ac.uk/sites/default/files/08-Abbas.pdf>.

¹⁰⁷ Abbas, "Islam and Muslims in the UK", 20.

¹⁰⁸ "Europe's Growing Muslim Population," Pew Research Center's Religion & Public Life Project

¹⁰⁹ "Europe's Growing Muslim Population," Pew Research Center's Religion & Public Life Project

Current System

In its modern operations, English law positively recognizes Muslim family law in four primary ways.¹¹⁰ Religious law may be entered in a case as part of the facts of a case and can be brought into the courtroom by expert witnesses on behalf of either party. Secondly, state laws can give effect to provisions of Islamic law. The Arbitration Act of 1966 grants parties the right to use an outside mediator to resolve disputes under mutually agreed upon provisions which are then enforced by civil courts under certain conditions to ensure a fair and equitable process. Although operating outside the Arbitration Act of 1996, Islamic councils— including the estimated 80 sharia councils operating in England – also merit discussion, as they provide an extrajudicial mechanism for Muslim women to seek religious recognition of civil divorces or marriages. Lastly, private international law – the body of law concerning matters between private individuals which cross English national borders – can grant validity to Islamic-based legal provisions of foreign states as applicable to those with English citizenship or residency.¹¹¹ English law also negatively recognizes¹¹² religious law in that religious laws can operate whenever it does not conflict with English law or where English law does not have exclusive jurisdiction. It is critical to acknowledge the growing role of registered English solicitors in this field, as an increasing number of solicitors now offer Islamic legal services as part of their portfolio,

¹¹⁰ Russell Sandberg, "Islam and English Law," *Law and Justice*, no. 164 (2010): , doi:10.1017/cbo9781139128834.

¹¹¹ Sandberg, "Islam and English Law," , p.5

¹¹² Negative recognition refers to instances where Islam or religions generally are not addressed by English law, but have certain abilities or right due simply to the fact that the right is not specifically barred by law.

in an attempt to appeal to customers requiring assistance in navigating the above intersections of Muslim family law and English law. English law, as a common law system, approaches religion in a disjointed manner. Exceptions are granted to specific religious groups to certain laws as the issues arise, instead of being part of overarching or comprehensive religious exemptions. This necessitates a thorough understanding both of the general elements that recognize religion in English law and the complex system of exemptions to these rules.

Although religion may not serve as the primary underlying justification for a legal decision in an English court, religious law may be entered as facts of a case or brought forth by an expert witness for either party. A notable example of this practice is the case of *Alhaji Mohammed v Knott*, which involved the marriage of Nigerian Muslim man to a Nigerian Muslim girl of 13, after which the couple moved to England. When the marriage was reported under the Children and Young Persons Act 1933 it was brought before an English magistrate, who allowed for expert testimony that explained that the marriage was legal under Muslim family law. The expert, Professor Noel Coulson, provided affidavits and oral testimony in multiple English courts on Islamic law and custom, and in this case was subsequently credited by Judge David Pearl with providing the case magistrates with the information which would lead to the verification of the marriage's legality after an appeal to the Divisional Court.¹¹³ Specifically, the court magistrates reported, "There is no minimum age for the marriage of a girl, but Mr. Coulson

¹¹³ David Pearl, "The Application of Islamic Law in the English Courts," Cornell University Middle East and Islamic Studies Collection, accessed 2018, <https://middleeast.library.cornell.edu/content/application-islamic-law-english-courts>.

emphasized that it is unlawful for the bridegroom to live under the same roof or consummate the marriage until there are decisive indications of pubertal maturity in the bride. It is conclusively presumed under Muslim law that a girl cannot attain puberty below the age of 9 and has attained it at the age of 15. Muslim law permits polygamy and a man may have 4 wives. Divorce is by mutual consent, or for any reason and at any time at the instance of the husband."¹¹⁴ Although the marriage was eventually negated, its initial interpretation as valid under English law due to Professor Coulson's testimony regarding the religious laws and customs of Nigerian Muslims demonstrates the greater flexibility of the English court system towards the role of Muslim family law in legal decision-making processes. Greater flexibility, in theory, grants Muslim individuals greater access to protections or rights granted to them under Muslim family law by allowing courts to consider the individual's religious belief or desires in state legal decision-making bodies.

English state law can also give effect to provisions of Islamic law, similar to its historical actions to grant unique rights to religious minorities such as Quakers and Jews. For example, the Finance Act of 2003 opened an avenue to certain elements of Islamic finance and the Welfare of Animals (Slaughter or Killing) Regulations 1995 provide exemptions for Islamic methods of animal slaughter for those holding a relevant license.¹¹⁵ Specifically in the realm of family law, the Divorce (Religious Marriages) Act 2002 allows judges to request that parties secure a religious divorce prior to the granting of a civil divorce, a law designed to resolve the issue of 'chained wives' in Jewish

¹¹⁴ Pearl, "The Application of Islamic Law in the English Courts"

¹¹⁵ Sandberg, "Islam and English Law," p. 6

communities where women were granted a civil divorce but remained unable to remarry as their religious community still regarded them as married to their husbands, as the husband had not granted them a religious divorce.¹¹⁶ Although this law is framed within the Jewish faith context, multiple scholars have noted upon its potential application is Islamic divorce cases due to the relatively open nature of its text and the capacity for reform of the scope of the law.¹¹⁷ The existence of the aforementioned statutes also presents evidence of further opportunity for English legal reforms which would address the unique needs of Muslim women under Muslim family law, just as historical laws evolved to address unresolved issues regarding religious minorities as they arose.

Under English law, the Arbitration Act of 1996 allows citizens to seek judgment from an outside decision-making body, with judgment to be enforced by English civil courts. This act can be used to inject religious law into civil proceedings, as one of its key provisions allows judgment to be made under the auspices of a form of law of than that of the English state. Section 46 of the Act states that parties may resolve their dispute ‘in accordance with other considerations’ instead of ‘in accordance with law’, which is widely understood to allow individuals to agree to resolve disputes under religious law as a form of ‘other considerations’.¹¹⁸ This includes the Muslim Arbitration Tribunal (MAT) established in 2007, a body operates under English and Welsh law while reaching decisions in line with the teachings of one of the recognized schools of Islamic law,

¹¹⁶ Lisa Pilgram, "British-Muslim Family Law and Citizenship," *Citizenship Studies* 16, no. 5-6 (August 30, 2012): , doi:<https://doi.org/10.1080/13621025.2012.698506>.

¹¹⁷ Pilgram, "British-Muslim Family Law and Citizenship," p.772

¹¹⁸ Sandberg, "Islam and English Law," p. 10-11

including the four majority schools and including minority schools.¹¹⁹ The MAT establishes its jurisdiction as all civil and personal religious matters, with the exclusion of civil divorces (religious divorces are covered by the MAT), child custody, and criminal matters.¹²⁰ While a significant number of sharia councils do not operate under the confines of the Arbitration Act of 1996, the MAT was designed directly within this context. Further, sharia councils – institutions created to give legal advice and guidance to British Muslims – were not originally created to analyze decisions under English and Welsh law, but rather to deal directly with matters of Islamic law, making the MAT a unique institution.

The Arbitration Act of 1996, however, does contain limitations for the application of religious law by English courts as determined by outside arbiters. Under section 1 of the act, English courts will not enforce a judgment derived under the act if it is required by public policy not to do so – as in cases where the agreement was reached under duress or if one or both parties are minors.¹²¹ Further, the selected arbitrator or arbitrating body is directed to act fairly and impartially towards both parties and adopt operational procedures in accordance with their dictated duties under the Act, as any deemed irregularities can be seen as granting secular courts the authority to vary, nullify, or otherwise consider the decision reached.¹²² There are instances where English courts have refused to enforce the decision of a sharia council under one or more of these auspices,

¹¹⁹ Pilgram, "British-Muslim Family Law and Citizenship," p. 771

¹²⁰ Sandberg, "Islam and English Law," . 14

¹²¹ Sandberg, "Islam and English Law," p. 8

¹²² United Kingdom of Great Britain and Northern Ireland, UK Parliament, 1996 C.23, Arbitration Act 1996, Powers of the Court in Relation to Award, , accessed 2018, <https://www.legislation.gov.uk/ukpga/1996/23/contents>.

including the decision in *A-Midani vs. Al-Midani* as decided by the Islamic Shari'a Council of London (ISC).¹²³ The decision was rejected on the grounds that two of the parties affected by the ISC's judgement were not present at the conducted hearings.¹²⁴

Extrajudicial Muslim legal bodies outside the confines of the Arbitration Act of 1996 can also act in complement to the operations of English civil courts. The most notable body is that of the sharia council, institutions created to give legal advice and guidance to British Muslims that, uniquely, claim to derive their judgments from all four primary Sunni schools of law with the inclusions of minority interpretations.¹²⁵ Although the decisions of some sharia councils have been granted recognition under the Arbitration Act, many councils do not operate under the umbrella of the Act by following its dictates and applying for recognition and thus their decisions are not legally enforceable by the English state and instead rely on the stated commitment of parties to abide by the judgment reached. Dozens such councils exist across England, and the Islamic Sharia Council established in 1982 serves as an example of the operations of one of the most well-known of these institutions. Members consist of representatives of multiple major Sunni Islamic centers across the U.K., with some centers adhering to differing schools of thought within the Sunni denomination. A majority of the disputes overseen by the Council are matrimonial in nature and predominantly feature petitions by women for divorce from their husbands, as the Council's stated legal opinion on English civil divorces is that such divorces will only be granted recognition as an Islamic divorce if

¹²³ Sandberg, "Islam and English Law," p. 13.

¹²⁴ Jane Calderwood Norton, *The Freedom of Religious Organizations*. Oxford: Oxford University Press, 2016.

¹²⁵ Pilgram, "British-Muslim Family Law and Citizenship," p. 771

initiated by or agreed to in writing by the husband.¹²⁶ Therefore women seeking religious recognition of their civil divorce must seek judgement from the council for a religious divorce under the Islamic practice of *khul*. A 2018 independent review conducted by the Secretary of State for the Home Department stated that over 90% of all matters considered by sharia councils are divorces sought by Muslim women. By 2004, a study indicates that the Council had already overseen more than 8,000 cases of marital disputes.¹²⁷

Under the umbrella of the hybrid system created with sharia councils and other Islamic institutions under the Arbitration Act of 1996, it is critical to mention the increasing presence of Islamic legal services offered by law firms and registered solicitors. Law firms offering these services create a hybrid of English and Islamic law and must have staff possessing both a U.K law degree as well as a degree or other educational qualification in Islamic law.¹²⁸ While these services may attempt to address client needs under both systems of law, Islamic legal services provided by solicitors do not necessarily have standing under English law. Clients seeking an Islamic divorce or aid in determining the terms of mahr may receive this Islamic legal advice from solicitors, but unless they pursue parallel civil filings with an English court – the divorce or dower are not necessarily recognized as legally valid by the state. In this way, solicitors can function similarly to sharia councils, serving clients seeking only the

¹²⁶ Bustami Mohamed Khir, "The Right of Women to No-fault Divorce in Islam and Its Application by British Muslims," *Islam and Christian-Muslim Relations* 17, no. 3 (2006): , accessed 2018, doi:10.1080/09596410600794970.

¹²⁷ Khir, "The Right of Women to No-fault Divorce in Islam", p. 304

¹²⁸ Pilgram, "British-Muslim Family Law and Citizenship," p. 772

religious resolution of their legal needs. Their duality, however, means that clients can address matters of family law under both religious and English jurisdictions from a single source. This represents a critical avenue of access to the English legal system for observant Muslim women, although as with sharia councils there remains the issue of the particular school or schools of thought under which the solicitor interprets Islamic law and its cohesion with the beliefs of those clients who seek out their services.

Muslim family law also enters the English legal system through private international law. The most frequent occasion for the use of private international law in England is in marriage-related matters, particularly in regard to marriage ceremonies conducted in foreign countries. The analysis of foreign law in English courts through private international law requires English courts to classify in which category of English law this particular matter would fall. In approaching Muslim family law, English courts primarily make this determination through the lens of *lex fori*: qualification in terms of the court's legal system.¹²⁹ For certain aspects of Muslim family law, this becomes particularly complex. Concepts of dower or mahr, or the talaq triple-repudiation, are not aspects of English law and thus require a more nuanced analysis. Once categorized, the court must determine whether or not the foreign law is in line with its qualification in the English system. For example, in cases of recognition of marriages conducted abroad, English private international law applies the same rule of thumb as the Arbitration Act of

¹²⁹ Lene Løvda, *Private International Law, Muslim Laws and Gender Equality: The Adjudication of Mahr in Scandinavian, English and French Courts*, Master's thesis, University of Oslo, 2008, , <http://urn.nb.no/URN:NBN:no-21885>.

1996, namely whether or not the recognition complies with public policy and the conscience of the court.¹³⁰

A typical example of this method of determination is found in the English approach to polygamous marriages among Muslim couples. Generally, the United Kingdom as a whole operates under the rule that a marriage's validity is governed by the laws of the nation in which the actual marriage ceremony is conducted.¹³¹ For polygamous marriages conducted abroad, if polygamy is illegal in the country where the marriage was celebrated, it would qualify as bigamy under both legal systems and be rendered void.¹³² If a polygamous marriage is conducted in England or conducted abroad by an individual domiciled in England, then and the marriage would not be recognized.¹³³ However, if a polygamous marriage is celebrated in a country where polygamy is recognized, by a couple domiciled in that country, then English private international law would recognize the validity of that marriage – under certain conditions. If the couple's domicile changes through full immigration to England, then only one of the husband's marriages would be recognized under English law.¹³⁴ In short, the court must determine the primary domicile of the couple, and thus whether private international law is applicable or whether it has been negated by immigration.

The use of private international law to navigate conflict between Muslim family law as implemented by foreign states and English law is a well-established and useful

¹³⁰ Sandberg, "Islam and English Law," p. 16

¹³¹ Peter Stone, *The Conflict of Laws* (London: Longman, 1995).

¹³² Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States*, p. 349

¹³³ A polygamous marriage conducted in England would be purely of a religious nature, as polygamous civil ceremonies cannot be conducted – resulting in its lack of legal recognition.

¹³⁴ Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States*, p. 349

practice. Instances of Muslim family law considered under private international law, however, also present a philosophical issue in terms of the narrative it creates surrounding Islam in England. If sharia, and Muslim family law as a component of sharia, are categorized as ‘foreign’ law, it may be interpreted by England’s Muslim population that their religion is considered by the state to be incompatible with an English identity. This is a topic which requires further exploration, as managing the utility of private international law while encouraging an open and pluralistic society that engenders a supportive integrated environment for all religious minorities serves to ensure that all citizens have equal access to the protections of the English legal system.

The English legal system’s recognition of Muslim family law through the above mechanisms, as well as potential for Muslim family law to operate where not prevented by English law or where English law lacks sole jurisdiction, are evidence of multiple legal mechanisms through which Muslim women can seek complementary legal services. Whether pursuing dual marriage or divorce under civil and religious law by employing a law firm offering Islamic legal services, or seeking a separate religious marriage or divorce from Islamic institutions such as sharia councils in addition to a separate civil process, Muslim women can resolve the issue of English law’s non-recognition of extra-judicial religious marriages or divorces. Nearly every divorce case brought before a sharia council at the behest of a women has resulted in the granting of a divorce, and some councils even have female panel members.¹³⁵ That is not to say that the English

¹³⁵ Mona Siddiqui, comp., *The Independent Review into the Application of Sharia Law in England and Wales*, issue brief, Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, February 2018, ,

legal system does not present an additional burden on Muslim women, as the necessity of navigating dual legal systems is not placed upon all English women. Overall, it mitigates but does not completely absolve unequal access to protection under English law for Muslim women in matters that fall under Muslim family law. Further, extrajudicial institutions like sharia councils have minimal regulation and thus operate under certain problematic mechanisms, including lengthy proceedings, inconsistency across the multitude of councils, and the fact that a majority of councils do not have female members.¹³⁶

The impact of this adaptive common law approach to Muslim family law on Muslim women can be partially evaluated through statistics on English Muslims' views on integration and the English system. Polls on this subject rarely aggregate their data based on gender and fluctuate significantly based on the year and the organization conducting the poll, which reduces one's ability to draw a direct connection between the above legal system and the provided statistics, but a potential correlation exists. A 2007 poll by the center-right think tank Policy Exchange found that 59% of Muslims would prefer to live under British law, compared with 28% who would prefer to live under Sharia law, and that within this arena 37% of 16 to 24-year-olds prefer Sharia compared with 17% of over-55s.¹³⁷ A 2016 survey found that 93% of surveyed self-identified Muslims reported that they felt they belonged in Britain and more than half reported they

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678473/6.4152_HO_CPGF_Report_into_Sharia_Law_in_the_UK_PRINT.pdf.

¹³⁶ Siddiqui, comp., *The Independent Review into the Application of Sharia Law in England and Wales*, p. 16

¹³⁷ "UK | British Muslims Poll: Key Points," BBC News, January 29, 2007, , accessed 2018, <http://news.bbc.co.uk/2/hi/6309983.stm>.

felt this “very strongly”. It is of note that respondents largely identified as British, instead of English, Welsh, or Scottish.¹³⁸ This demonstrates that a majority of English Muslims identify with their nation, although this trend appears to be lower among younger Muslims. Identification with the English state as well their Muslim identity is potentially indicative of relative cohesion between Muslim women’s ability to feel both Muslim and part of English society, including its civil legal structure, and consequently that said legal structure does not serve as an isolating force.

¹³⁸ A Review of Survey Research on Muslims in Britain, report, Social Research Institute, Ipsos MORI (Ipsos MORI).

LEGAL SECULARISM IN FRANCE

The above historical analyses paint a picture of how and why France evolved from a nation torn by conflict of the state's dominant religion to one in which the state serves as secular in name but tied to the Christian nature of its roots as well as legally superior to any and all religious institutions. In the English case, the historical evolution of the integration of religion into the law of the state from the use of writs to the continued presence of religious officials within governmental bodies demonstrates how English law remains more flexible to the consideration of religion within state courts and other legal decision-making bodies. The end-result of these histories are systems in which Muslim women must now operate, and in which a lack of access to religious law within state law can generate structural violence for those women who embrace religious law. The degree to which such structural violence is generated in the current legal systems of both states requires further analysis specifically in the context of Muslim family law.

Evolution of Islam in France

Muslim individuals have resided in the region that constitutes modern-day France since prior to medieval times, but the oldest physical evidence of historical ties between France and Islam are found in its various foreign territorial holdings, the first of which

was the mosque of Tsingoni built in 1538.¹³⁹ Significant French colonial holdings in the Middle East and Northern Africa, French West Africa, and Equatorial Africa, most notably that of Algeria, created a formalized relationship with the various branches of Islam and their institutions and created an opportunity for mutual migration exchange between the regions. The importance of the inextricable link between colonialism and Islam in France is unquestionable. It is through colonialism that this relationship was most notably strengthened, but such an evolution has created lasting effects on French Islam. The power dynamic of the French colonizer versus its Muslim subjects generated a societal hierarchy that is still evident in 21st century France, in which many French Muslims are viewed as outsiders or identified more with their state of origin than the French state in which they reside.

Migration of Muslim individuals to France would experience a surge beginning in the late 19th century that expanded through the mid-20th century as a result of a French demand for imported labor. The deficit of male-based labor supply following World War I and World War II, as well as the severing of Algeria's colonial status and transition to a politically independent state in 1964, resulted in the creation of a French Muslim population of primarily male Muslims from Northern Africa. The alteration of immigration legislation to allow for family reunification migration in the 1970's would later shift the gender dynamics of this population, while Muslim migration also increased from West African nations. In the 21st century, significant migration and refugee flows from other African nations and conflict-stricken states in the Middle East further

¹³⁹ Anne-Laure Zwilling, "A Century of Mosques in France: Building Religious Pluralism," *International Review of Sociology* 25, no. 2 (2015): , doi:10.1080/03906701.2015.1039272.

diversified the Muslim population of France. Between 2010 and 2016, 530,000 Muslim migrants moved to France alongside 100,000 Muslim refugees.¹⁴⁰

These population shifts were marked by significant Islamophobic ethnocentrism among nationalist French political parties as well as portions of the general population. This is exemplified by the ‘murderous summers’ between 1973 and 1983 when a sharp uptake in violence against North African residents in France claimed the lives of an estimated 50 men and children. In response, the notable Beur Movement and later organizations such as SOS Racisme responded to anti-immigrant violence and discriminatory policies among state mechanisms such as the police, resulting in French government intervention to attempt to address the concerns of the nation’s growing Muslim population and ensure greater economic support and security measures to increase universal public safety. It is critical to acknowledge the existence of such anti-immigration and Islamophobic sentiment in any exploration of potential structural violence, as a significant discriminatory perspective regarding a subset of the population, be it conscious or subconscious can play a role in the formation of policy and state infrastructure which perpetuates structural violence. This is not intended to draw a correlation between laïcité and Islamophobia, merely to note that this period of the history of Islam in France was marked by particularly intense xenophobic conflict that shapes the perspectives of both Muslim and non-Muslim citizens in France.

¹⁴⁰ Europe's Growing Muslim Population," Pew Research Center's Religion & Public Life Project

Current System

France's legal infrastructure creates limited space in which Muslim family law can enter into French courts or other forms of legal adjudication that exist in the 21st century along growing anti-immigrant xenophobia among right wing groups and politicians, a phenomenon also evident in modern English politics as demonstrated by an undercurrent of anti-immigrant sentiment and Islamophobia within the Brexit movement.¹⁴¹ The rise of Islamophobia, a relatively recently coined term, has since the terrorist attacks of 9/11 experienced a surge among Western societies, a trend that is beyond the scope of this analysis but that has been detailed by many researchers and journalists.¹⁴²

The theoretical separation of church and state prevents the entry of religious law into the legal decision-making process of civil courts, even as the French state must increasingly confront the intersection of the two entities as the country's Muslim population continues to grow. For example, as in English law, French civil courts do not recognize the declaration of talaq or other extrajudicial forms of divorce for individuals domiciled in France.¹⁴³ In the early 21st century, the Cour de Cassation, the final court of appeal in France for both civil and criminal cases, ruled on multiple cases regarding talaq divorces between French Muslim couples. In these instances, the couples were residing in France and entered into marital separation after the husband traveled abroad to obtain an

¹⁴¹ Annabelle Timsit, "'Things Could Get Very Ugly' Following Europe's Refugee Crisis," *The Atlantic*, October 2017, , accessed 2018, <https://www.theatlantic.com/international/archive/2017/10/qa-sasha-polakow-suransky-immigration-europe/543537/>.

¹⁴² Nicolas Lebourg, "Islamophobia in France." *Occasion*, 2016. <https://halshs.archives-ouvertes.fr/halshs-01696784/document>.

¹⁴³ Extrajudicial divorce in this context is meant to indicate divorce not in line with French law, as defined predominantly by the 1975 Act on Divorce and the 2000 Act on Ancillary Relief.

Islamic divorce under talaq, the grounds of which was appealed to French courts by the wife. The Cour de Cassation has repeatedly rejected the validity of these divorces under French law, stating in a 2009 judgment of this nature: "...whereas the decision of a foreign court taking note of a unilateral repudiation by the husband without giving any legal effect to the eventual opposition of the wife and denying the competent authority [i.e., the Moroccan judge] of any power other than the power to handle the financial consequences of the breaking of the matrimonial bond is contrary to the principle of equality of the spouses during dissolution of the marriage, as stated in article 5 of Protocol No. VII of November 22, 1984, to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, which France has agreed to guarantee to any person under its jurisdiction, and, therefore, contrary to international law."¹⁴⁴

This precedent in theory serves to protect French Muslim women from unilateral divorces, which is contrary to Western notions of gender equality that France purports to observe. Unlike the English system, however, there is minimal space for Muslim women to seek a religious divorce on their own initiative. The nonexistence of sharia councils¹⁴⁵ in France or Muslim arbitration institutions such as the Muslim Arbitration Tribunal prevents the creation of a dual legal space where Muslim women can seek a religious divorce to complement their civil divorce and thus prevent the 'limping marriages' which

¹⁴⁴ Nicole Atwill, "France: Supreme Court Denies Recognition of an Islamic Divorce in France," *Global Legal Monitor*, December 03, 2009, , accessed 2018, <http://www.loc.gov/law/foreign-news/article/france-supreme-court-denies-recognition-of-an-islamic-divorce-in-france/>.

¹⁴⁵ Sharia councils are bodies that providing legal decisions or guidance based on Islamic law, in Western European states such as the United Kingdom these serve as informal structures that provide Muslims with Islamic legal services and assistance.

leaves their marriage recognized as valid within their religious community despite their civil divorce, preventing them from remarrying religiously. While sharia councils can be formed, as religious organizations have the right to form voluntary associations, they do not exist in the same space as English sharia councils and lack the level of influence such institutions across the English Channel can accumulate. Thus, while Muslim women in France are assured of the non-recognition of talaq divorce, they have limited options to pursue a religious divorce within their community. The only opportunity to do so would be through an appeal to their local imam or other religious authority under the practice of faskh, khul or mubaraah – the Islamic methods of divorce which involve the request for divorce either at the initiative of the wife or through mutual decision of both parties. However, this method leaves women at the mercy of local religious leaders with varying levels of education and knowledge of Muslim family law.

That is not to assert that French courts have never before considered Muslim family law. The predominant method through which Muslim family law enters French civil courts is through private international law, in instances regarding the marriage or divorce of individuals domiciled outside France at the time of marriage who are not French citizens at the time of the divorce. Private international law, though relatively nebulous in its definition, is generally used to refer to the resolution of legal matters between private individuals which crosses national borders to involve foreign law – to be contrasted with the public international law exemplified by organizations such as the United Nations. Private international law in France is not contained in a single codification. Rather, it is based upon conflict of law rules contained within various civil,

commercial, and consumer codes deriving predominantly from case law, as well as from community instruments of secondary legislation.¹⁴⁶¹⁴⁷ Private international law is a critical element of this analysis, as French practice requires courts to apply the law of the country in which a resident holds citizenship when considering matters of family law, injecting Muslim family law into matters concerning French legal consideration of cases involving Muslim non-citizens. As in England, the French approach to private international law regarding the qualification of foreign law is *lex fori* – qualification in terms of the court’s legal system. If the concept as understood in the applicable foreign law does not exist in French law, general French legal practice is to use French legal categories as a basis but expand their scope until the matter falls underneath a particular legal category.¹⁴⁸ For example, although the practice of mahr is not recognized under French law, the categorization of pre-marital contractual agreements can be expanded to include the practice of mahr, mandatory payments made by the groom within a Muslim marriage.

There are two notable examples of this practice of private international law in French courts, one which concluded in the Court of Appeals and one of which was further reviewed by the Court of Cassation. Both cases regarded the adjudication of property regimes based upon of the prior distribution of mahr in divorces between individuals. In the first of these cases, a husband unable to divorce his first wife due to the dictates of his religious community therefore contracted marriage a subsequent

¹⁴⁶ "Applicable Law - France," European Commission - European Judicial Network, April 12, 2008, , accessed 2018, http://ec.europa.eu/civiljustice/applicable_law/applicable_law_fra_en.htm.

¹⁴⁷ Secondary legislation refers to laws that delegate authority to other governmental bodies or agencies, other than the body issuing primary legislation – such the French Parliament.

¹⁴⁸ Løvdal, Private International Law, Muslim Laws and Gender Equality, p. 46

woman in Lebanon, as Lebanese law allowed him to take a second wife. The second wife was of Polish origin, but under the general practice of French courts, the distribution of mahr was judged as a sign that both parties had agreed to the property regime of separate estates known as *Le régime de séparation de biens*, assumed by French courts to be the prevailing Muslim rule of property division following divorce.¹⁴⁹ Under the regime of separate estates, each spouse's assets are considered individually owned and are separated upon divorce. In contrast, under French law, all assets possessed prior to marriage are retained by their original owners unless otherwise agreed upon, while all assets acquired during marriage or after separation are considered jointly owned and thus subject to division under the regime of *Le régime de communauté universelle*. A second similar case involving mahr was deliberated in the late 20th century regarding a couple married in the former French colony of Karikal who changed residency to France and later divorced under that residential status. The husband contended that as the Indian marriage contract contained a clause on mahr the property regime of the divorce should be designated as that of separate estates, and following multiple appeals the final judgment was in his favor.¹⁵⁰

Private international law and bilateral agreements with predominantly Muslim states also come into play regarding the practice of polygamy among foreign citizens residing in France. In a practice again shared with England, France does not recognize polygamous marriages conducted in France and the practice of polygamy can serve as a

¹⁴⁹ Løvdal, *Private International Law, Muslim Laws and Gender Equality*, p.77.

¹⁵⁰ Løvdal, *Private International Law, Muslim Laws and Gender Equality*, p.78.

barrier to foreign nationals who wish to acquire French citizenship.¹⁵¹ Thus polygamous marriages, even among citizens of states which allow polygamy, are not recognized by the French state and secondary wives can be refused social security benefits, alimony, or other marital benefits on the ground of their invalid union under the perspective of civil courts. This lack of recognition is complicated by a limited set of exemptions for legal recognition of polygamy. For polygamous marriages conducted among foreign nationals in states which recognize the practice, French private international law upholds limited legal validity of the marriage as long as the marriage is not considered to violate French public order – and the Cour de Cassation has repeatedly declared that the practice of polygamy does not constitute a prima facie violation of public order in the context of receiving certain financial benefits. For example, a second wife can apply for health insurance benefits if she registers as a dependent of her husband, even if the marriage is not recognized by French law.¹⁵²

The fact that dual legal spaces are limited primarily to those who were non-citizens at the time of marriage means that France's legal system grants minimal capacity for Muslim women to navigate the intersection of civil and Muslim family law. The impact of these restrictions is undoubtedly to complicate matters of family law for Muslim women, even in instances as described above where mechanisms intended to ensure gender equality can endanger the capacity of women to pursue legal options

¹⁵¹ Dalia Perkumienė, "The Institution of Marriage in the Canon and Lithuanian Civil Law with Regard to the International Relations" (PhD diss., University of Ghent, 2014), , accessed 2018, <https://docplayer.net/81235580-Faculty-of-law-institute-for-private-international-law-by-dalia-perkumiene.html>.

¹⁵² Perkumienė, "The Institution of Marriage in the Canon", p. 193

regarding marriage and divorce. Those limited institutions created to represent the interests of French Muslims, which could potentially bring forth such issues to the French state or work with local Muslim institutions to create alternative mechanisms to reduce their impact, are largely impotent. Nicolas Sarkozy's French Council of the Muslim Faith, meant to serve as a national representative body of French Islam and the needs of French Muslims, is rendered obsolete through its failure to engage with the majority of French Muslims or engender trust in its capacity to serve the above functions. A 2016 survey found that less than a third of French Muslims were aware that the Council existed, and that the leadership of the Council favors the interests of those with connections to Algeria, Morocco, Turkey, Saudi Arabia, and Qatar – alienating those French Muslims with other origins.¹⁵³

As with the English case, statistics exist through which to evaluate the attitude of French Muslims toward the French state. A 2011 Gallup poll found that 56% of French Muslims believe that Western societies respect Muslims.¹⁵⁴ A 2016 poll by Institut français d'opinion publique, a polling and market research firm, found that 29% of French Muslim respondents believed that Islamic code and sharia are more important than the laws of the French republic.¹⁵⁵ A Brookings Institute publication on "Being Muslim in France" quotes a 2005 U.S. State Department poll which indicated that 68% of self-declared Muslims had confidence in local government, 65% in the national government,

¹⁵³ Karina Piser, "A New Plan to Create an 'Islam of France'," *The Atlantic*, March 29, 2018, , accessed 2018, <https://www.theatlantic.com/international/archive/2018/03/islam-france-macron/556604/>.

¹⁵⁴ "Islamophobia: Understanding Anti-Muslim Sentiment in the West," Gallup, <https://news.gallup.com/poll/157082/islamophobia-understanding-anti-muslim-sentiment-west.aspx>.

¹⁵⁵ Astrid Wendlandt, "Just under 30 Percent of French Muslims Reject Secular Laws: Poll," *Reuters*, September 18, 2016, , accessed 2018, <https://www.reuters.com/article/us-france-muslims-idUSKCN1100ET>.

and 56% in the French judicial system.¹⁵⁶ Also stated in the analysis of English legal system, these statistics merely demonstrate a potential correlation between structural violence manifested through the French legal system's secularist approach and are by no means evidence of a direct causal relationship. The low levels of confidence in the French judicial system, with nearly half of those French Muslim polled reporting a lack of confidence, seems to demonstrate that conflict exists between the French legal system and the needs of French Muslims. The theoretical and anecdotal analysis above presents the possibility that a portion of this conflict is rooted in the lack of legal spaces for Muslim family law in the French legal system that could assist French Muslim women in navigating both systems either simultaneously or in conjunction with institutions that are qualified to assist in such matters.

¹⁵⁶ Jonathan Laurence and Justin Vaïsse, *Integrating Islam: Political and Religious Challenges in Contemporary France* (Washington, D.C.: Brookings Institution Press, 2006).

A COMPARATIVE ANALYSIS

The modern approaches of the French and English legal systems to Muslim family law draw disparate lines regarding the inclusion of religion in civil courts. The English historical intersection of Christian canon with state law has created a blended system, where despite the theoretically secular nature of the courts, religious tradition and practice have multiple avenues into the judicial process – through both positive and negative recognition of Muslim family law. Private international law, the Arbitration Act of 1996, the capacity of religious law to be entered as facts of a case, the ability of state laws to give effect to provisions of Islamic law, and Islamic councils are all evidence of this increasingly dual space in which Muslim women can operate. There also remains the provision of either dual or extrajudicial Islamic services by registered solicitors, as well as the fact that Muslim family law is free to operate in any space where the state does not hold exclusive jurisdiction or where it does not conflict with state law. In contrast, the primary method through which Muslim family enters French courts is that of private international law. This is a stark distinction, as private international law only applies to non-citizens residing in either France or England. Muslims native to or who have acquired citizenship in either state cannot apply under private international law for the jurisdiction of their case to be that of Islamic law, or that of a state which applies its own

particular brand of Islamic law through the state. Thus, French Muslims have largely no opportunity to bring Muslim family law into judicial decision-making.

As described in the history of religion and law in France, as of the 20th century France has attempted to portray itself as strictly under the guidance of *laïcité*. As a result, the creation of mosques or local Islamic institutions, such as those to train imams, has been conducted under the financial sponsorship of foreign states, such as Morocco and Saudi Arabia. Yet within the last few decades, there have been multiple attempts to create a ‘French Islam’ outside of the influences of foreign states, as demonstrated by the attempts to create a national body of Islam beginning with the *Commission Consultative des Français Musulman* and most recently through Nicolas Sarkozy’s *Conseil français de culte musulman*. And yet, these attempts by the French state to increase integration through the creation of a uniquely French Islam have failed to create a space where dual identity is fully possible – especially in the legal realm. As scholar Oliver Roy, a professor at the European University Institute in Florence, states, “The state can’t interfere in the management of religion or in theological questions. Yet, for 30 years, French governments have tried to do just that. The whole project is a profound contradiction.”¹⁵⁷ This sharp contrast with the greater adaptability of English secularism forces the core question of the comparative analysis, do either of these systems generate structural violence towards Muslim women?

As a result of this analysis, I have concluded that French legal secularism does generate a significant degree of structural violence towards Muslim women. The inability

¹⁵⁷ Karina Piser, "A New Plan to Create an 'Islam of France'." *The Atlantic*, March 29, 2018. Accessed September 2018.

of the French civil legal system to address the unique needs of Muslim women regarding marriage and divorce creates a disadvantage based on the religion and gender of this sector of the French population. That is not to contend that this violence is a result of a cognizant effort by the French state to limit the legal operable space for this population, but rather that the evolution of laïcité has been marked by effort to increase secularizing by attempting to ‘other’ Islam as a result of the growing Muslim population and perceived threats to the unity of French identity. Using Galtung’s own terminology, French legal secularism creates latent, unintended structural violence as well as immediate structural violence for Muslim women barred from certain spaces by their donning of Islamic coverings. Islam, for a certain subset of believers, cannot be subsumed beneath the French identity without violating the principles some hold central to the expression of their faith – be it through their manner of dress or through a belief in the ultimate supremacy of the law of God over that of any man-made institution. Without an effort by the state to more directly communicate with local Muslim communities regarding their wants and needs connected to this conflict, the French state will continue to disadvantage women seeking redress of their unique religious needs connected to marriage or divorce. In practice, this state policy towards Muslim family law legitimizes a cultural hierarchy of religious beliefs, in which Islam is perceived as incompatible with French society.

The English approach, while undoubtedly flawed, does not significantly constitute structural violence. The adaptability of the English system, most notably in the granting of exceptions to particular religious groups such as those given to Jews and Quakers

regarding civil recognition of marriages, is based upon recognition of need following an appeal to the English state for relief. This mechanism for reform holds potential for the creation of unique exemptions for matters of family law for Muslim women, which would allow them to maintain the protections granted to them under Muslim family law while ensuring that the interpretation of Muslim family law is not unduly influenced by fundamentalist values that would undermine universalist notions of gender equality before the law. This system exists in a limited sense, through the Arbitration Act of 1996 and the operations of the MAT and Islamic councils, but further codification of these systems and regulation of the arbitration bodies to address the gender issues discussed above in the full analysis of these institutions is required. Additionally, it does place an additional burden of Muslim women to navigate two legal systems, even if this is simplified in some instances through the existence of dual spaces. I would contend that this does manifest structural violence, but in a more limited sense than that of France.

This conclusion is likely not a surprise to many readers. A review of existing literature provides countless differing conclusions from a wide variety of research lenses about the effects of French legal secularism, with many of them declaring the French system of *laïcité* to be damaging either to French Muslim integration or socio-economic health. These analyses, however, fail to incorporate the critical impact of structural violence manifested through the civil legal system. One must consider the significance of these findings, both in terms of its general ethical violations as well as the impact of structural violence on the overall health of the state in question. An institutional structure that disadvantages certain groups based on their religion and gender is arguably contrary

to the generally accepted principles of equality and justice. Although ethics is by nature a field of inconclusive determinations, European states have since the 21st century attempted to establish commonly agreed upon statutes to protect individual rights and liberties within an ethical framework. For this specific issue, Article 9 of the European Convention on Human Rights has particular application. The article as written has two primary conventions:

1. “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”
2. “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”¹⁵⁸

Interpretation of this convention in the context of Muslim family law in France is not simple and contains several contradictions. Unlike other major religions in France with longer-standing historical ties to the evolution of its unique brand of secularism, Islam has not undergone a transition from a religion of the law into a religion that can more readily isolate itself to the private sphere. As a contrast, Jewish law enshrines the dictum that “the law is the law of the land”, a caveat which has allowed the European

¹⁵⁸ Jean-François Renucci, "Article 9 of the European Convention on Human Rights: Freedom of Thought, Conscience and Religion," Human Rights Files 20 (2005): , accessed 2018, [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-20\(2005\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-20(2005).pdf).

Jewish population to survive as a minority religion by allowing Jews to accept the supremacy of civil law over their own religious dictates.¹⁵⁹ Christianity, meanwhile, in its modern iteration is structured around general principles as drawn from Biblical texts, rather than an established set of rules and judicial interpretations as in the Islamic case. The ethics of mandating adaptation by a religion in order to exist in a state is a larger debate, but it remains true that these changes affect how Islam operates in French society. While the first listed dictate of Article 9 would support the right to practice one's religion, which in the case of Islam would include the dictates of Muslim family law, the second seems to support the French argument that legal secularism is intended to support public safety, health, and morals by preventing the implementation of perceived legal gender inequality under certain Islamic interpretations. The question is thus whether it is ethical to provide legal recognition of any degree to religious institutions that may on occasion violate certain Western notions of gender equality, or to perpetuate a lack of access to dual systems of civil and Muslim family law which prevents Muslim women from addressing both their civil legal needs and religious legal needs in cases of marriage or divorce. The example of the English case as analyzed in this research provides evidence that it is possible to create such institutions, although much remains to be improved in order to ensure their improved functioning and equitable decision-making, without sacrificing the ultimate supremacy of the civil secular legal structure. As such, it remains clear that structural violence as a moral issue in this context can be addressed using different tools, tools which France has failed to utilize.

¹⁵⁹ Samuel Atlas, "DINA D'MALCHUTA DELIMITED." Hebrew Union College Annual 46 (1975): 269-88. <http://www.jstor.org/stable/23506875>.

Beyond the philosophical question legal secularism poses regarding the ethics of its approach to Muslim family law, the determination of structural violence draws important conclusions regarding negative impact on French society as a whole. Inequitable access to the legal system's protections for women pursuing marriage or divorce through the nature of religious requirements for Muslim women does violence to the socio-economic standing of these women, as well as the inclusiveness of national culture – which further perpetuates the aforementioned socio-economic damage. For women able to secure a French civil divorce, but unable to secure a religious divorce through their local mosque or other Islamic legal authority, there are deep impacts on both their financial and social health. Without state recognition of the dower, a Muslim woman divorced only in the eyes of the state is unable to secure any remaining quantity of her dower through application to state courts. Further, she will be unable to remarry religiously, forcing her to either remain unmarried or to violate social norms by engaging in a solely civil marriage – which could not only result in social ostracization but also constitute an unacceptable violation of her own personal beliefs. On the opposite end, women who prioritize an Islamic marriage ceremony at the exclusion of a civil ceremony are not recognized as a spouse under French law and thus upon divorce do not have the capacity to pursue civil legal avenues for alimony or other compensation. Either of these instances are damaging to the socio-economic health of Muslim women, and result from legal secularism's failure to consider Muslim family law in any substantive manner.

Inability to navigate the civil legal system without encountering conflict with Muslim family law which disadvantages Muslim women, such as the inability to pursue a

religious divorce on the grounds of the ‘limping marriage’ phenomenon as described above, may also be perceived by Muslim women as discrimination. A 2015 study using structural equation modeling of Muslims in the United States based upon a diverse community sample determined that discrimination serves as a predictive indicator for higher levels of depression in Muslims (N=265).¹⁶⁰ A study published that same year by Maliepaard, Gijsberts & Phalet regarding Muslim communities in the Netherlands found that Muslims in established communities who reported higher perceived discrimination were more likely to attend mosque services on a regular basis and identify more strongly with their religious identity, potentially indicative of correlation between perceived discrimination and stronger socio-cultural divides between Muslims and non-Muslims in Western European states.¹⁶¹ In terms of conflict between Muslim family law and state law this may have parallel repercussions, for if religious individuals feel forced to choose between operating within a religious legal framework and a secular legal framework due a lack of dual spaces, they may withdraw from secular legal spaces altogether – putting themselves and their communities at risk due to the inability to access legal protections provided exclusively by the state such as criminal prosecutions for victims of criminal activity. As described within this body of research only 56% of French Muslims express

¹⁶⁰ David R. Hodge, Tarek Zidan, and Altaf Husain, "Modeling the Relationships between Discrimination, Depression, Substance Use, and Spirituality with Muslims in the United States," *Social Work Research* 39, no. 4 (2015): , doi:10.1093/swr/svv025.

¹⁶¹ Rakhshanda Saleem et al., "The Effects of Structural Violence on the Well-being of Marginalized Communities in the United States," *Journal of Pedagogy, Pluralism and Practice* 8, no. 1 (Fall 2016): , <https://digitalcommons.lesley.edu/cgi/viewcontent.cgi?article=1048&context=jppp>.

confidence in the French judicial system, an unfortunate potential symbol of perceived inability or unwillingness to address Muslim needs – a form of discrimination.¹⁶²

These results of structural violence generate a feedback loop, as Muslim women experiencing economic violence as well as depression or withdrawal from French public society as a result of perceived discrimination can further Islamophobic stereotypes that French Muslim communities are an economic drain on the state and are unwilling to integrate through participation in public spaces. The pervasive sentiment of Islamophobia in the French public sphere drives unemployment among the French Muslim population and consequently, higher poverty rates. Muslims candidates for job openings in France are 2.5 less likely to be called back for that job based upon a name or residential information that implies they are Muslim.¹⁶³ According to France's National Institute of Statistics and Economics, in 2014 unemployment rates for France's immigrant population was 17.4%, around 80% higher than the unemployment rate for non-immigrants.¹⁶⁴ This economic discrimination deepens the aforementioned economic effect of structural violence, as well as the 'othering' of Islam through the perpetuation of stereotypes regarding French Muslims that in reality are a result of discrimination but serve in practice serve to perpetuate it.

¹⁶² Laurence et al., *Integrating Islam*, p. 47

¹⁶³ Bellomy, Charlotte. "Islamophobia in the French Workplace." Pulitzer Center. October 23, 2015. Accessed November 11, 2015.

¹⁶⁴ "Number of Unemployed and Unemployment Rate of Immigrants and Non-immigrants by Sex and Age in 2014." Insee: Institut National De La Statistique Et Des Etudes Economiques. 2015. Accessed November 11, 2015. http://www.insee.fr/fr/themes/tableau.asp?reg_id=0&ref_id=NATnon03346.

Conclusion

These demonstrable effects of structural violence as generated by the French legal system's secularized approach to matters of Muslim family law are evidence both of the potential of law to generate violence as well as the need for the French state to address these issues beyond their attempts to generate a uniquely French Muslim identity without creating dual spaces in critical parts of the public sphere, such as courtrooms. The public and private impact of this violence damages both Muslim women and society as a whole, preventing the realization of full potential among the entirety of the populace and impeding social and economic growth. Legal structural violence in a Western democratized state is, as in the French case, likely to be latent and unintentional, making it difficult for the privileged majority to recognize it as violence and therefore reducing the likelihood that it will be addressed through reform. It is this hidden nature that makes legal structural violence so dangerous, as an unidentified undercurrent perpetuating the disadvantaging of subsets of the population will continue to prevent substantive peacebuilding in democratized states that would lead to greater equality in all forms. Often perceived as the defining system for public ethics and order, it is critical to acknowledge that legal systems can contribute to structural violence and thus to societal conflict and instability. As with any institutions created by humanity, the law is inherently prone to flaw and should be treated with the same careful review and analysis as all mechanisms of the state intended to ensure equitable treatment and access of a state's citizens and residents.

It is far from reasonable to suggest that an overhaul of the French or English legal systems should be taken in order mitigate structural violence, both in terms of feasibility and the unavoidable truth that whatever changes made may not reduce or may even serve to increase structural violence. Rather, it is only through incremental demonstrable shifts towards increasingly open and dual spaces that Muslim women can be freed from the restrictions that define structural violence. The improvement of existing English mechanisms such as sharia councils, and the creation of such bodies in the French case, would be an example of such a change. Additionally, the provision of training for those in the legal profession through increased access to courses on Muslim family law through legal educational institutions would create greater cultural awareness among legal professionals and allow them to better serve Muslim female clients by attempting to pursue legal action in line with the individual's religious beliefs and preferences. Overall, the continued adaptation and improvement of the existing mechanisms to create dual spaces in Western states would reduce the impact of structural violence on Muslim women and ensure they receive access to the protections guaranteed to them under the dictates of both religious and secular law.

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