British-Muslim family law and citizenship

Lisa Pilgram*

Politics and International Studies (POLIS), The Open University, Milton Keynes, UK
(Received 27 January 2012; final version received 11 May 2012)

The Archbishop of Canterbury’s speech on ‘Civil and Religious Law in England’, delivered in 2008, attracted considerable public and academic attention. In the resulting ‘Sharia debate’, traces of (legal) orientalism became especially visible in an essentialist portrayal of ‘Sharia’ as being in opposition to ‘the West’. What is missing in debates conducted at the abstract level of compatibility–incompatibility, East–West, law–religion is an analysis of the actual practices of family law of Muslims in contemporary Britain. People marry, divorce, bring up their children and deal with death by resorting to a variety of norms such as Sharia law, English family law and customary law. Drawing on legal pluralism scholarship and elements of Pierre Bourdieu’s theory of the field, this article challenges the exclusive focus on positivist state law as the sole legal framework within which Western conceptions of citizenship are being imagined. It analyses practices of British-Muslim family law as an incipient ‘legal field’ that is developing a corresponding market of Islamic legal services. The article concludes with a discussion of the connection between citizenship, law and orientalism. It shows British-Muslim family law as a set of new hybrid legal practices of citizenship that counter the effects of orientalism.

Keywords: Muslim family law; English family law; citizenship; orientalism; legal field; legal subjectivity

Muslims in the UK may prefer to conduct their family affairs in accordance with norms other than English law alone (Williams 2008). People marry, divorce, bring up their children and deal with death drawing on their understanding of a variety of norms such as Sharia law, English family law and customary law. This suggests the emergence of a hybrid field of law, a phenomenon referred to as British-Muslim family law, which has created a legal market in its own right. We can now find private practice law firms in the UK selling Islamic legal services, such as Islamic wills and Islamic divorce certificates, offering ‘a way in which [clients] can enjoy and fulfil their Muslim obligation within English law as well, if possible’ (Interview on file with the author).

Not at least since the lecture by Rowan Williams, Archbishop of Canterbury, on ‘Civil and Religious Law in England’ in 2008, questions of Muslim law in the UK have attracted considerable public and academic attention. In the resulting ‘Sharia debate’, traces of orientalism become especially visible in the portrayal of Sharia as the ‘other’ and in an essentialist understanding of ‘Sharia’ as being in opposition to ‘the West’. This perception is not limited to public debate but has found its way into what can be called

*Email: l.m.pilgram@open.ac.uk
legal orientalism and into English Court rooms where mentions have been made of ‘the gulf between our statue law and Sharia law ...’ (Radmacher v Granatino 2009, para 52).

However, this article argues that emerging British-Muslim family law includes practices that belie an essentialist perception of opposition between Sharia and the West, the oriental and the occidental, and the foreign and the native. For British-Muslim family law, these dichotomies are of no use in addressing specific legal needs that arise from the interaction between English law and Muslim law in contemporary Britain.

Owing to a static understanding of English law, certain legal practices, such as British-Muslim family law, have remained outside the realm of citizenship or have even been interpreted as anti-citizenship. This article challenges this assumption. It does so through using the idea of legal pluralism and elements of Bourdieu’s theory of the legal field, which make it possible to challenge the exclusive focus on positivist state law as the sole legal framework within which Western conceptions of citizenship are being imagined. Investigating practices that belie orientalism opens spaces for thinking about hybrid legal subjectivity as part of a reconfigured conception of citizenship.1

The argument unfolds in three stages. First, examples of British-Muslim family law are used to set out the field of inquiry. Second, a discussion of empirical data collected from legal practice reveals how Islamic legal services operate. Third, legal pluralism and elements of Bourdieu’s theory of the legal field are introduced to challenge state-centered understandings of law and to demonstrate how British-Muslim family law has created a legal market and perhaps an incipient legal field. The article concludes with a discussion of the connection between citizenship, law and orientalism to show British-Muslim family law as new practices of citizenship that counter orientalism.

British-Muslim family law

What can be called British-Muslim family law is porous but involves a distinct field of actors, institutions, practices, scripts and discourses within which Muslims in the UK create and maintain themselves as British-Muslim subjects.2 It is an emerging legal field that depends on the development of a legal market drawing on English law as well as Sharia law.3 British-Muslim family law is developing in response to the time- and space-specific needs of people who seek to go through legal processes in the UK as Muslims. It is a collection of hybrid legal practices that are informed by and in turn modify existing norms of English family law, legal culture, personal religious identity, community customs and also norms of Islamic law.4

Sharia is commonly translated as either ‘Islamic law’ or ‘Muslim law’. However, this article will employ both terms to distinguish between two different phenomena. The term Islamic law, on the one hand, refers to the (abstract) idea of an autonomous corpus of rules that can be traced back to principles of right and wrong, which are based on the Qur’an and Sunna and treated as universal. The enactment of Islamic law is Muslim law. The enactment of Islamic law, however, is not to be understood as a one-way process as the practices of Muslim law feed back into norms of Islamic law (Hallaq 1994). Muslim laws are socio-legal practices that occur in any part of the world and therefore do not represent a homogenous system. The term Muslim law focuses on the individuals by whom and for whom Sharia is being interpreted and implemented, and avoids reproducing an image of Sharia as a monolithic legal system. Islamic law plays an important role in the legal field, as it represents an authority, but from a socio-legal perspective, it only exists to the extent that it is enacted by its subjects. Contemporary legal practices in the UK are therefore described as Muslim law.
The distinction I make between Islamic law and Muslim law is of central importance to the definition of hybrid British-Muslim family law. It is important to be able to locate the source of certain norms and practices to trace their interaction with each other that produces British-Muslim family law. Hybridity should not be viewed here simply as a combination of two or more originally ontologically pure elements (nor should we think along the lines of ‘everything is hybrid’). The term refers to the evolution of an identifiable pool of rules and practices occurring as a result of use within and across legal-cultural groups.

How are these hybrid legal norms created? British-Muslim family law today pervades a broad field, involving a range of actors, institutions, practices, scripts and discourses. A particularly interesting instance of legal hybridisation is that of a number of Sharia Councils (institutions providing legal rulings and advice for Muslims) that claim to derive their rulings not from one particular Islamic school of thought, as would be the case traditionally, but from all four Sunni schools, including minority interpretations. By so doing, they claim, they are able to achieve the most equitable outcome in each case regardless of the dominant school of thought in the person’s home country. This allows for more flexibility when dealing with new issues that may arise for Muslims in Britain. Similarly, a recent report by the University of Cardiff (Douglas et al. 2011, p. 40) states that the Sharia Council of Birmingham takes the fact that a civil divorce has been obtained as a proof of irretrievable breakdown of a marriage. If the couple was married civilly, a civil divorce would be expected by the Council before granting an Islamic divorce. What is happening here is that the Islamic legal procedure recognises English civil law as material proof for a valid Islamic divorce, or even as an additional requirement for proceeding with a divorce. Here we find a hybrid interplay that would not exist in this form outside Britain today. However, it is important to stress that this cannot be considered as an established practice among all institutions in Britain. For some scholars, a civil divorce is the proof of marital breakdown only if the divorce is initiated by the husband, as classical Islamic law requires a wife seeking divorce to either obtain the husband’s agreement or to ask an Islamic judge to grant her divorce in the absence of such consent.

Similarly, in courts in England, judges engage with some Muslim legal norms such as those covering prenuptial agreements. Under English law, prenuptial agreements may be persuasive in court but, unlike in most other European jurisdictions, they are not a binding contract. In Radmacher v Granatino (2009), the Court of Appeal acknowledged the validity of a prenuptial agreement between a German heiress and her French husband but, at the same time, explicitly maintained that prenuptial agreements drawn up according to Sharia law cannot be enforced: ‘The gulf between our statute law and Sharia law is wide indeed . . . para 52 . . . This is not to apply foreign law, nor is it to give effect to a contract foreign to English tradition.’ Muslim prenuptial agreements are regularly brought before English courts in divorce cases involving Muslim parties. The courts’ judges address Islamic legal issues in very different ways. In Ali v Ali (2000, unreported), the judge granted Mrs Ali £30,000 instead of £30,001 as prescribed in their Islamic marriage contract. By giving her £1 less, the judge gave weight to but did not apply Muslim law. He asserted the application of English law, through the English law on equity, with its strong notions of justice and fairness (Menski 2002, p. 8).

Statutory law, too, responds in various ways to the diversification of the religious landscape in Britain and the changing social contexts of family law. Landmark examples from statutory and case law demonstrate how English law has reacted to these changes in an ad hoc manner; amending statutes, granting exceptions or refusing to do so. Since 1753, marriage concessions have been made to Jews and Quakers and they remain exempt from
the rules regarding marriage solemnisation under the 1949 Marriage Act. For example, they
do not have to celebrate the marriage in a registered building or during daytime. Although
not in the area of family law, the Finance Act 2003 opened the way for Islamic finance.
Finally, the Divorce (Religious Marriages) Act 2002 makes it possible for judges to request
that a couple divorce religiously before a civil divorce is granted. The law was introduced in
response to the problem of ‘chained wives’, or aguna, in Jewish communities. Aguna are
women who have received a civil divorce but cannot remarry as they are still regarded as
married within their community because their husbands did not divorce them religiously.
This Act currently applies only to persons of Jewish faith. However, the wording remains
open and could potentially include other religious groups.\footnote{9}

Muslim family law has similarly been influenced by the time- and place-specific issues
of Muslims living in the UK. Turner (2011) refers to online fatwa forums where binding
Islamic legal opinions are being published that explicitly respond to questions arising
from situations in countries where Muslims are in minority. In addition, experts of fiqh al
aqalliyyat (Islamic legal rules for minorities) have emerged, establishing a distinct area of
legal scholarship.\footnote{10}

Finally, solicitors registered in the UK increasingly offer Islamic legal services as part
of their portfolio. These services include the issuing of Muslim divorce certificates or the
drawing up of wills that satisfy Muslim as well as English legal requirements. To cater for
their clients’ demands, they provide hybridised strategies and technologies which bridge
supposedly incompatible forms of law. These strategies and technologies are in turn
received, interpreted and implemented by their clients. Thus, all legal subjects engaged in
this field of law – clients, solicitors and scholars – construct and are constructed by its
norms. It is particularly illustrative of British-Muslim family law that these solicitors enter
the legal market on their own terms. The fact that they gain added value (remuneration as
well as recognition as experts) by offering both English family law and Islamic legal
services can be seen as a reflection of how British Muslims have to navigate between
different legal fields when arranging their private lives.

\textbf{Islamic legal services}

UK registered solicitors who offer Islamic legal services, respond to their clients’ demands
by developing specialised strategies and technologies which bridge the gap between
different forms of law. These strategies and technologies are in turn implemented in
particular ways by their clients and therefore play an important part in constituting the
British-Muslim subject (in law). Islamic legal services offered by solicitors represent a
special case of hybrid British-Muslim family law as they explicitly draw on (and to a
certain extent combine) Muslim and English laws. In the following section, interview
excerpts from legal practice in a private law firm provide an illustration of the
phenomenon.

Muslim solicitors require Islamic and English legal knowledge. This would usually
entail a UK law degree and qualification to practice as solicitor together with additional
academic qualifications in Islamic law from a university either in or outside the UK.
Solicitors see themselves as different from Muslim scholars, who have the authority to
decide upon substantial religious matters, and in certain cases issue a fatwa. Interviews
suggest that solicitors perceive their role as implementing standard procedures of Islamic
law, which is similar to their position in English law. As the solicitor I spoke to said, ‘what
distinguishes solicitors’ legal services from other [Islamic service] providers is, I think,
that it gives peace of mind. They [clients] feel that going to a solicitor is binding even if we
say it is not. But they get that peace of mind. It depends on what the client is looking for.... It depends on individual priorities’.

The law firm offers Islamic divorces by giving *talaq* certificates (for divorce initiated by the husband) and issuing *khul’* requests (for divorce initiated by the woman). Solicitors might also conduct mediation as part of the procedure rather than initiating divorce straight away. There have been no cases of Islamic commercial services at this practice so far. The firm’s main activity in Islamic legal services is the drafting of Islamic wills. The law firm, however, does not offer Islamic commercial services at this practice.

While Islamic divorces are similar to the services offered by Sharia Councils, the wills are ‘more legal’. These particular wills are English legal documents with the distribution element of the estate being Islamic. Although qualified will writers can also draft wills, under English law only solicitors are allowed to give advice on tax planning. Dependents or relatives are able to dispute provisions of a will before English courts but, so far, Islamic wills have not been challenged. However, the solicitor concedes that there is a possibility of a successful challenge because women receive a smaller part than men according to Islamic legal rules, which say that a daughter’s share is half that of a son’s. ‘If challenged it would be interesting because this is unequal isn’t it? The court would look at it as an individual will, not as an Islamic will [the fact that the document was drafted under the heading of Islamic will is irrelevant under English law] but the daughter could argue it’s not justified for her to get less. This would engage in Islamic law, or affect the ruling under Islamic law’.

An interesting case concerned a client who had converted to Islam but whose family did not do so and were therefore non-Muslim. To him, drafting an Islamic will was of central importance to his faith. However, the solicitor informed him that in Islamic law Muslims cannot make bequests to non-Muslims. Undeterred, the client left a gift of £50,000 to his cat and also asked for the flat he was sharing with his mother to be declared as a gift to her. He was told that this was not Islamic but he requested this clause to be included regardless. The solicitor followed his request and explained, ‘as some people are very strict, they’d only do fully Islamic wills. . . . As for me, I feel I advised them that this is the Islamic issue and then, even though they know it’s wrong, they still want to go ahead with it, then that’s their responsibility. It’s not for me to judge if really what you’re doing is Islamic or not. Because I think they are old enough to make their own decisions’. The solicitor therefore drafted an Islamic will stating that a Muslim is making a bequest to a non-Muslim, which would not have been possible in a jurisdiction applying Islamic law. The very fact that British-Muslim family law is a hybrid allows for this. Under English law, wills can be drafted rather flexibly, allowing for the distribution element to be Islamic. An Islamic will which does not entirely follow the Islamic distribution element would not be valid in a jurisdiction based on Islamic legal principles but can still be enforceable under English state law. This gives considerable room to navigate personal needs between various legal demands.

‘As solicitors, what we can offer them is a way in which they can enjoy and fulfil their Muslim obligation within English law as well, if possible’. One of the clients, whose wife had left him, did not want to divorce her by Islamic *talaq* but wanted his wife to divorce him by *khul’*. He took advice from a Muslim solicitor because, as he said, ‘an English solicitor would not understand that necessarily.’ On reflection, the solicitor thinks ‘clients feel more at ease because they know that this person [the Muslim solicitor] knows what they’re talking about.’ To issue an Islamic divorce certificate, one does not have to be a
solicitor. ‘The reason they come to us is that we are Muslim and also that we are solicitors. It’s almost as if, if we do it, it makes it legal, not technically legal because it’s not binding in law. We say to our clients that these things don’t mean anything under English law. But the people who come for Islamic divorces come for their own peace of mind and satisfaction, knowing they have something in hand and have given it to the other person’.

In one case, a client sought to get an Islamic certificate stating that he had divorced his wife by uttering *talaq*. The husband wanted the Islamic certificate to be posted to her family to clarify matters as he did not feel married anymore. He had no intention of sharing a common life with his, by then estranged, wife. Yet, due to pressure from his family, he had briefly resumed to living with her just after the uttering of the divorce and within the Islamically prescribed waiting period of three months that needs to pass for a *talaq* to be valid. He argued, however, that his return to the marital home was irrelevant to his intention to divorce his wife and that they had no sexual relations during this period. Because of the complicated nature of this case, the solicitor suggested that he should seek the advice of a local *shaikh* (learned Muslim scholar) who had the necessary religious authority to determine whether the Islamic divorce was valid. The client refused to do so as according to his faith, the divorce had been completed. He was thus issued with an Islamic divorce, a *talaq* certificate. In the accompanying letter however, the solicitor decided to include a clause that would give the wife the opportunity to dispute the *talaq* within 10 days of receipt of the letter – which she never did.

What is interesting in this case is, first, that the solicitor chose a waiting period of 10 days for the other party to respond to the letter, which is not based on an Islamic legal provision but which is in fact the standard deadline of response in legal practice in the UK. Second, the fact that the client wanted a divorce certificate in writing, although the Islamic divorce had been completed by pronouncing it, is evidence of the growing influence of the bureaucratic practice of formalisation in writing as Muslim law and practice are changing in time and place. Third, the solicitor was able to add an additional safeguard to the standard procedure of an Islamic divorce case by resorting to English legal practice; introducing a clause in the letter accompanying the divorce certificate allowed the wife the possibility of disputing the *talaq*. Standard *talaq* procedures would have been out of question due to the unusual nature of the case, and because it was not possible to obtain material proof that the marriage was not consummated after the uttering of *talaq*. As a Muslim, the lawyer felt obliged to take every possible step to make sure the wife knew about her husband’s decision to divorce her. The reason for the solicitor’s creative intervention was the practical need to find a ‘reasonable’ (in the sense of meeting religious, ethical and professional-practical concerns) solution that allowed the client to find ‘peace of mind’ without conflicting with the solicitor’s ethical-religious obligations. ‘Because I am Muslim myself, we believe that we have to answer for everything, your actions, etc. So I don’t want to go around pronouncing somebody’s divorce when technically they are not divorced’.

Understanding legal fields

In a Weberian sense, law is limited to the rules enforced by the state and is therefore inextricably linked to the sovereignty of the state over a certain territory (Turner 2011, p. 154). However, legal pluralism offers insights that enable ‘law’ to be detected outside the state realm, acknowledging that sources of law can be more than standard textbooks and the judicial reasoning of judges in English courts. According to sovereign state law,
This would be impossible, but legal pluralism ‘implies some degree of political devolution and the relaxation of state sovereignty’ (Turner 2011, p. 154).

This is important because other normative systems have a substantial effect on the behaviour of individuals, in some cases more than state law. Intriguing though this is the claim of legal pluralism that law (as normativity) is everywhere and not only in what is properly called ‘the law’ by its professionals may be problematic. An approach which focuses on the fact that law has many voices and which limits itself to the description of the multitude of these voices is in fact depoliticising the law and obscuring the power relations inherent in the social world that forms the context out of which the law is necessarily created. Bourdieu (1987) maintains that the law is intimately linked with material and ‘symbolic power’ existing in the social world, as the legal field is created out of (historical) struggles in the political field. By definition, a social basis of the legal field – ‘the historical conditions that emerge from struggles within the political field, the field of power’ – must exist for a relatively autonomous legal universe to emerge and, ‘through the logic of its own specific functioning, to produce and reproduce a juridical corpus relatively independent of exterior constraint’ (Bourdieu 1987, p. 815).

Bourdieu brings to the debate around British-Muslim family law a definition of ‘law’ as a ‘legal field’ within society which is different to the legal pluralist theory, and which distinguishes law from other normative orders such as what is commonly termed religion, custom and mores. In turn, a legal pluralist perspective introduces interesting and productive challenges to Bourdieu’s theory, as most of the examples he mentions come from France and his language suggests that when speaking of the legal field, he is thinking of the state law and its professionals. Bourdieu falls victim to a certain methodological nationalism, equating the nation-state with society and does not consider a situation where there is more than one legal field in a nation (Wimmer and Glick Schiller 2003). However, his analysis is not limited to any particular legal system either. His work describes the legal field as an area of clearly structured, socially constructed and constructing practices.

Studying the functioning of the legal field entails looking beyond the (self-referential) viewpoint of the legal professionals themselves and their understanding of the law, to include an inquiry into the mechanisms by which our understanding of law (that of legal professionals as well as others) is formed, sustained and propagated, as well as a description of the material social effects of the practices of legal professionals. This insight into how law, not as an ideal but as a social construction and social conception, is being formed, changed and sustained provides an essential framework for understanding how British-Muslim family law is established through British-Muslim contemporary practices and the development of a corresponding market. An analysis of the legal field in that sense can demonstrate that these practices are justifiably be called ‘law’ rather than customary or religious practice.

British-Muslim family law consolidates a clearly recognisable set of practices and discourses as well as corpuses of text; it designates its own specialists and distinguishes itself from other specialisations and non-legal fields. The following illustrations outline the characteristics that qualify British-Muslim family law to be interpreted as an incipient legal field. First, the fact that the legal field is not autonomous but embedded in the social world becomes evident when we consider that questions of Muslim family law have arisen only after Britain changed demographically to include an increasing number of persons of Muslim faith.

Second, Muslim legal practices are becoming increasingly institutionalised. A prime example is the establishment of the Muslim Arbitration Tribunal working within the English legal framework under the Arbitration Act 1996 with predefined procedural rules.
accessible on their website and hierarchical structures in settling disputes. A Civitas report (MacEoin 2009, p. 69) states that there are at least 85 Sharia Councils, with 13 tribunals operating within the network of the Islamic Sharia Council, a registered charity based in Leyton. In addition, there are three Sharia Councils run by the Association of Muslim Lawyers.

Third, the division between professionals and laypersons is especially clear in state law where an established path of professional accreditation (through university degrees and recognised legal practice) ensures control over the number of professionals and distinguishes them clearly from lay people. In British-Muslim family law, boundaries between professionals and laypersons are being negotiated intensely over pressing issues regarding the authority to issue Islamic decrees in Sharia Councils in Britain, or in online fatwa forums. This is exemplified by a quote from Shaikh (Dr) Haitham Al-Haddad: explaining that marriage dissolution can be performed by a person only ‘once being recognised as an Islamic judge ... However, the judge has to be appointed either by the leader of the Muslims, or by the Muslim community, or at least recognized as being an Islamic judge by the vast majority of the Muslim community. Merely being an imam neither suffices nor authorises him to dissolve marriages’ (Al-Haddad 2011, emphasis in original). This quote can be read as an expression of the present struggle over authority to determine the law in the field of British-Muslim family law. Clearly, there must be many imams who are claiming this authority since Al-Haddad is addressing them in his statement.

Fourth, to strengthen their authority, Muslim scholars in the UK cite both British legal professional qualifications as well as Islamic qualifications. Returning to the above example, Haitham Al-Haddad, a prominent Muslim scholar, chooses the title of ‘Shaikh (Dr)’ combining academic and Islamic religious titles. British educated and qualified solicitors, holding degrees in Islamic Law from Western universities, offer legal services in established private practice law firms. Last but not the least, scholars regularly cited on matters of Sharia in Britain in the media are often senior academics in top-ranking UK universities.

Legal fields function, change and sustain themselves internally through establishing a logic of practice of those involved. Bourdieu provides insights beyond and in extension to legal pluralism scholarship in the following sense. Analysing Muslim family law in Britain as a legal field shows that this field also has a corresponding market of professional legal services. It allows us to see that this market and the field associated with it have their own logic – the logic of practice implicated in the interaction of Muslim and English family law. This is precisely what is missing in debates conducted at the abstract level of compatibility–incompatibility, East–West and law–religion, which produce hypothetical paradoxes that are paradoxical only because ‘East’, ‘West’, ‘Islam’, ‘the secular’ and other comparable terms are employed in their essentialist meanings. In contrast, the logic of the British-Muslim legal field is such that its hybridity makes perfect sense to actors who are either providing or buying services available on its market.

Muslim legal practices as citizenship after orientalism?

Is it possible to understand the development of British-Muslim family law as a new practice of citizenship that counters orientalism? This is a challenging endeavour, because these practices do not conform to an already established understanding of what citizenship practices are, and might therefore not be recognisable as citizenship at first sight. Crucially, the dominant understanding of citizenship relies heavily on an orientalist idea that the
citizen – as a civic subject independent of clan, family and religion – is an exclusively occidental phenomenon. Through a discourse of orientalism, the occidental subject is posited against the oriental subject. ‘Orientalism involves dividing the world into two “civilizational” blocs, one having rationalized and secularized and hence modernized, the other having remained “irrational”, religious and traditional’ (Isin 2005, p. 33). An investigation of citizenship after orientalism, therefore, entails investigating Muslim legal practices without having to take recourse to ontological categories of occident–orient, native–foreign, modern—traditional, etc.

There is an interesting relationship between the three notions of citizenship, law and orientalism which is best addressed by first unpacking the relation between law and orientalism. The ontological categories of orient and occident not only structure the dominant understanding of citizenship but equally our understanding of law, and they produce an effect best described as ‘legal orientalism’. By legal orientalism we describe a perspective in which the ideal of modern state law, as founded on universal and secular principles, is superior to other forms of normativity. It also imagines and produces a divide between the occident and the orient along the lines of law, where on the one hand Western civilisation is characterised by its ability to bring into being rational secular law as autonomous from religion, tradition, culture, politics, family, etc., and on the other hand non-Western civilisations lack the indigenous ability to develop ‘law’. Ruskola (2002, p. 193) defines legal orientalism as ‘the ways in which “the Orient” – as well as “the West” – have been produced through the rhetoric of law.’ The dominant concept of ‘law’ in the common sense among the general public, jurists and social scientists, equates to official state law. It follows that this concept of law represents the benchmark against which all other normativities must be measured. This implicit equation of ‘law’ proper with official state law, becomes visible in the language of scholars when they differentiate between law and other forms of normativity by compelling opponents of pure ‘law’ to carry qualifying adjectives such as ‘non-state’ law, ‘religious’ law, ‘unofficial’ law or by terming them ‘custom’, ‘mores’, etc.

There is a long history of interest in Sharia in European scholarship. We are often given an impression of Sharia, which is unable to convince us that the world described in its image is the only attainable one in which a sane person would want to live. According to this line of thinking, Sharia remains inferior to occidental law because on the one hand, it is too rigid, as it is based on religious principles that cannot be challenged by the individual and are therefore anti-democratic, and on the other hand because it is too unpredictable, as it is not based on a secular positivist notion of law, something Weber called Kadijustiz. If played according to its rules, the orientalist game can never be won.

Today, traces of legal orientalism become evident in the Sharia debate in the UK. We often come across a portrayal of Sharia as the ‘other’ and an essentialist understanding of ‘Sharia’ and ‘the West’ (see Barbero this issue). It feeds into a discourse of ontological difference and creates, by default, irresolvable questions. In the book Shari’a in the West (Ahdar and Aroney 2010, p. 12), the editors state that ‘the accommodation of Shari’a in the West would seem to be a litmus test – possibly the litmus test – of whether anything more than a modus vivendi between these two forms of life is going to be possible.’ By rendering the problem as one of searching for compatibility between ‘two different forms of life’, we foreclose the answer. If we start with the underlying assumption that these two forms of life are ontologically different from each other, they can never be more than a modus vivendi. However, a perspective focusing on practices, would argue that practices of law are what sustain the legal field more than self-referential exegesis of abstract ideas.
of law. From this perspective, the modus vivendi becomes the litmus test, the field where hybrid legal practices and subjectivities may evolve.

The controversy around Muslim law in Britain can be traced back in parts to the fact that current debates are dominated by an orientalist notion that being in favour of Sharia law in the UK means opposition to secularity, modernity and democratic values. Claims for the accommodation of, or even serious engagement with, Sharia law are perceived as conservative at best, if not non-progressive or anti-citizenship. Another contributing factor to the controversy might be that there is a key relationship between Muslim family law, gender and sexuality. The idea that Sharia is non-progressive and anti-citizenship is also linked to an image of Sharia as anti-gender equality (see Sabsay in this issue). At this point, it is necessary to note that family law is a very specific and sensitive domain of law. The stakes are high when it comes to amending family law in (multicultural) societies because it deals with the intimate relations of the subjects involved, which are also closely linked to questions of personal and national identity. The question of according to which conventions we marry, divorce, bring up children and deal with inheritance is, therefore, more than a simple matter of applying the correct rules. Family law is arguably a mirror of present social values and mores while at the same time influencing and shaping gender roles in a normative way.

To complicate matters further, there is a tendency of the dominant group to universalise their own practices (through for example family law). However, ‘the shaping of practices through juridical formalization can succeed only to the extent that legal organization gives explicit form to a tendency already immanent within those practices’ (Bourdieu 1987, p. 848). In other words, family law is crucial to the normalisation of dominant gender and sexual relations and conducts. At the same time, existing tendencies in gender and sexual relations act as a starting point or basis for normative visions of the family, and thus for legal formalisation and naturalisation. The discourse around Muslim family law serves as a playing field within which collective identity, self-image and normalised gender roles are being negotiated by subjects and institutions. To further unpack the relationship between citizenship, law and orientalism, let us explore the particular relation between citizenship and orientalism. We need to understand that ‘for orientalizing discourses the ostensible ontological difference between the Occident and the Orient can be directly attributed to citizenship understood as a contractual arrangement amongst unencumbered and sovereign citizens, associated with each other and capable of acting collectively’ (Isin 2005, p. 34). How then does the development of British-Muslim family law counter the orientalist expectation that the oriental subject remains subservient to his or her religion, clan and custom? On the one hand for purist Islamic legal scholars, who maintain that secular state law is ontologically different and inferior to Islamic law, a civil divorce in the UK, for example, will not matter. On the other hand, from a positivist law perspective, an Islamic divorce is not legally relevant either. In hybrid Muslim legal practice, however, both aspects of divorce fulfil different functions: a civil divorce may be needed to secure state benefits, financial security and protection, while a Muslim divorce can ensure acceptance within the community, securing certain financial support, and psychological well-being. The two complement each other in the service of British-Muslim family law because both legal fields have an impact on the material circumstances of Muslims in contemporary Britain. Hybrid British-Muslim family law practically bypasses any dichotomies, such as oriental–occidental and foreign–native, in the sense that it has no use for them when responding to particular legal needs that arise out of an interaction between English and Muslim law at the subject level.
Muslim legal practices are different from other practices of citizenship due to the special relation between law and citizenship. The particular importance of law to citizenship (and vice versa) is visible already when we look at standard definitions of citizenship, where citizenship is concerned with the rights-bearing subject, its corresponding obligations and the belonging of the subject to a (nation) state. Occidental theories of citizenship depend on a rational civic subject, a sovereign and unencumbered citizen, with the (indigenous) ability to produce rational law. The ordering principle of citizens in society, as sovereign individuals, detached from clan or religion, becomes secular universalist state law. Citizenship and law are therefore two interdependent concepts. Out of this relationship arises the image of the virtuous, law-abiding citizen. Law is therefore a crucial element in the constitution of the modern Western subject, of the citizen. Law and citizenship are mutually constitutive in the sense that in established notions of citizenship, they signify the relationship between the rights-bearing subject and his or her corresponding obligations. Law is like the membrane that connects the rights of the citizen population with its derivative obligations, and holds together all the rules and regulations that arise from derivatives of derivatives.

In this conception of citizenship, (state) law is therefore the connecting tissue among citizens and between citizens and the state. It also structures the complex net of rights and obligations that arise from the most basic characteristic of the citizen, namely, the right to have rights. In the case of British-Muslim family law, we can extend our frame of analysis to a legal pluralist perspective in which the field of British-Muslim family law develops and flourishes through an interaction of Muslim and English laws. The practices and subjectivities of the actors in British-Muslim family law both determine and are determined by the institutions, processes and workings of this legal field. Similar to the standard theories of citizenship described above, Muslim legal subjects not only create hybrid laws, they also agree to obey them, embracing English as well as Muslim laws. Practices of Muslim family law engage a new subjectivity of obligation to follow the laws set out therein. People are conducting themselves seeking advice, buying services and selling services. This is constituting legal subjects who are, on the one hand, entitled to receive these services, indeed expect to receive these services and, on the other hand, now feel obligated and ‘responsibilised’ by the judgement that they render. That creates new kinds of hybrid legal subjects. This is the dual role British-Muslim family law plays in the formation of hybrid legal subjects: not only the substance of the law but even the subject implicated in the legal field is hybrid.

In this way, legal practices that have remained outside citizenship because of a static conception of English law, are being placed within a reconfigured concept of citizenship that accommodates a British-Muslim legal subjectivity. British-Muslim family law actually creates legal subjectivity in the sense that its subjects become legally represented and legally bound. It is an incipient legal field that implicates them as British-Muslim subjects and binds them to hybrid rules. In other words, British-Muslim family law eases the birth of a particular hybrid subjectivity; practicing British-Muslim family law as solicitors, clients, scholars and judges enables subjects to constitute themselves as British Muslims. British Muslims therefore are practicing a new form of subjectivity, which conveys a form of belonging that counters orientalist images of Sharia and English law as being fundamentally different and mutually exclusive.
Acknowledgements
The research leading to these results is framed in the project Oecumene: citizenship after orientalism, funded by the European Research Council under the European Union’s Seventh Framework Programme (FP7/2007-2013)/ERC grant agreement no. 249379. I would like to thank Professor Engin Isin and all my colleagues from the Oecumene research group for their invaluable comments and feedback.

Notes
1. It is not the intention of this article to promote the idea that Islamic law is naturally more suitable for ordering family law matters among Muslim citizens, or in fact that this is necessarily desired by those citizens. Neither is its purpose to evaluate the possible benefits and pitfalls of including certain Muslim legal norms into the English legal system.
2. For the purpose of this article, ‘scripts’ are written sources, encompassing corpus of laws, legal opinions, textbooks, scholarly treatises as well as procedural documents and forms, etc.
3. The analysis in this article is limited to the law of England and Wales (in short ‘English law’). However, I use the term ‘British-Muslim family law’ to describe the phenomenon I investigate as it is prevalent in England, Wales, Northern Ireland and Scotland.
4. Classical Islamic jurisprudence defines Islamic legal sources as the following: (1) Sharia, the principal source of Islamic law, which is the text of the Qur’an and examples of the life of the Prophet (Sunna); (2) Islamic legal jurisprudence and study (fiqh), which is the reflection and opinion, deduced through strict methodology, by Islamic scholars and jurists concerning what they believe the Sharia to require of Muslims in a particular time and space.
5. For a detailed description of the legal status of religious laws and courts in England and Wales, see Douglas et al. (2011) Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts.
6. The Muslim Arbitration Tribunal, the Islamic Sharia Council and the Birmingham Sharia Council claim to do so (see Douglas et al. 2011, pp. 28–29). This eclectic approach is a modern phenomenon of Takhayyur, according to Yilmaz (2001, fn. 61). The four main Sunni schools of thought, or madhab, are Hanafi, Maliki, Shafi’i and Hanbali.
7. Shaikh Haitham Al-Haddad, a leading cleric, says ‘... I would like to affirm that the divorce issued by the civil court in response to the wife’s request is neither a valid divorce nor legitimate marriage dissolution’. Thanks to Ralph Grillo for pointing to this interesting quote (email on file with author).
8. Radmacher v Granatino (2009), para 52–53.
9. ‘(1) This section applies if a decree of divorce has been granted but not made absolute and the parties to the marriage concerned—
   (a) were married in accordance with—
      (i) the usages of the Jews, or
      (ii) any other prescribed religious usages; and
   (b) must co-operate if the marriage is to be dissolved in accordance with those usages.’
Divorce (Religious Marriages) Act 2002, section 1(1).
10. ‘Fiqh al-Aqalliyyat (the fiqh, or jurisprudence, of Muslim minorities) is a legal doctrine introduced in the 1990s by two prominent Muslim religious figures, Shaykh Dr Taha Jabir alAlwani of Virginia, and Shaykh Dr. Yusuf al-Qaradawi of Qatar’ (Fishman, p. 1).
11. The drafting of wills is not commonly subsumed under the category of family law. However, as inheritance is an important moment in the life cycle of an individual and is closely linked to familial relationships, Islamic wills are considered part of British-Muslim family law.
12. Will writer is a professional qualification which can be obtained in the UK and which is not limited to legal professionals.
13. A divorce by khul’ requires the wife to give up her claim to the dowry, an amount of money paid to the divorced or widowed wife, specified in the marriage contract. However, there have been no indications that in this case financial considerations played a role in the client’s decision to pursue khul’ divorce.
14. In Islamic law, divorce can be initiated by the husband by pronouncing the phrase talaq, or a word of equal meaning (Nasir 1986).
15. The usage and concept of the legal field is admittedly minimalist. This article does not engage with the concept of various forms of capital and how these forms of capital bring about the legal field. This is future work I intend to pursue.

16. For further reading on legal pluralism, see Griffith (1986), Engle Merry (1988), Chiba (1989), Dalberg-Larsen (2000), Shah (2005) and Grillo et al. (2009).

17. ‘The Islamic Sharia Council is a registered charity and its constitution empowers it to preside over cases where either party has been living permanently in this country and at least one of the parties has made an application, requesting the Council’s judgment’ (Islamic Sharia Council, http://www.islamic-sharia.org).

18. A variety of professional legal authorities have been created in the history of Islamic law such as the Islamic jurist, the mufti and to a lesser extent qadi (Hallaq 2003, pp. 244–250).

19. See fn. 21.

20. ‘In the liberal democracies of Europe and North America, the legal system is understood to be based on universal and secular principles, affording the same rights to all citizens and rejecting any formal differentiation on cultural or religious grounds. The rules of official family law are far from neutral, however, and define a culturally specific set of minimum requirements and expectations for family formation and behavior’ (Laquer Estin 2009, pp. 451–542).

21. Admittedly, Shari’a in the West (2010) focuses mainly on constitutional legal questions. Nevertheless, it may produce essentialist readings of Islam, Christianity, ‘the religious’ and ‘the secular’ because in some contributions these terms are being employed in a static understanding.

22. Although it is important to be aware of the gender aspect in the debates around British-Muslim family law, this cannot be the focus of this article due to limitations of space.

23. This is not to say that in all cases people choose to marry and divorce both civilly and religiously. There is evidence of Muslim marriages not being registered civilly (Shah-Kazemi 2001).

References

Ahdar, R. and Aroney, N., eds, 2010. Shari’a in the West. Oxford: Oxford University Press.

Al-Haddad, H., 2011. Fatwa: A civil divorce is not a valid Islamic divorce. Available from: http://www.islam21c.com/islamic-law/912-fatwa-a-civil-divorce-is-not-a-valid-islamic-divorce [Accessed 18 January 2011].

Barbero, I., 2012. Orientalising citizenship: the legitimation of immigration regimes in the European Union. Citizenship studies, 16 (5–6), 751–768.

Bourdieu, P., 1987. The force of law: toward a sociology of the juridical field (translation by Richard Terdman). Hastings law journal, 38, 805–853.

Chiba, M., 1989. Legal pluralism: toward a general theory through Japanese legal culture. Tokyo: Tokai University Press.

Dalberg-Larsen, J., 2000. The unity of law, an illusion? On the legal pluralism in theory and practice. Berlin: Galda Wilch.

Divorce (Religious Marriages) Act 2002.

Douglas, G., Doe, N., Gilliat-Ray, S., Sandberg, R. and Khan, A., 2011. Social cohesion and civil law: marriage, divorce and religious courts. (Report of a Research Study funded by the AHRC). Cardiff: Cardiff Law School.

Engle Merry, S., 1988. Legal pluralism. Law & society review, 22 (5), 869–896.

Finance Act 2003.

Fishman, S., 2006. Fiqh al-Aqalliyyat: a legal theory for Muslim minorities. (Research monographs on the Muslim world, Series No 1, Paper No. 2). Washington: Center on Islam, Democracy, and the Future of the Muslim World, Hudson Institute.

Griffith, J., 1986. What is legal pluralism? Journal of legal pluralism & unofficial law, 1 (1), 1–55.

Grillo, R., Ballard, R., Ferrari, A., Hoekema, A.J., Maussen, M. and Shah, P., 2009. Legal practice and cultural diversity. Aldershot: Ashgate.

Hallaq, W.B., 1994. From fatwās to furū’: growth and change in Islamic substantive law. Islamic law and society, 1 (1), 29–65.

Hallaq, W.B., 2003. Juristic authority versus state power: the legal crisis of modern Islam. Journal of law and religion, 19 (2), 243–258.
Isin, E.F., 2005. Citizenship after orientalism: Ottoman citizenship. In: F. Keyman and A. Icduygu, eds. Citizenship in a global world: European questions and Turkish experiences. UK: Routledge, 31–51.

Laquer Estin, A., 2009. Unofficial family law. Iowa law review, 94 (2), 449–480.

MacEoin, D., 2009. Sharia Law or ‘One Law for All’?. Civitas: Institute for the Study of Civil Society London. Available from: http://www.civitas.org.uk/pdf/ShariaLawOrOneLawForAll.pdf [Accessed 18 January 2011].

Menski, W., 2002. Immigration and multiculturalism in Britain: new issues in research and policy (lecture delivered at Osaka University of Foreign Studies) [online]. Available from: http://www.casas.org.uk/papers/pdfpapers/osakalecture.pdf [Accessed 18 January 2011].

Nasir, J.J., 1986. The Islamic law of personal status. London: Graham and Trotman.

Ruskola, T., 2002. Legal orientalism. Michigan law review, 101 (1), 179–234.

Sabsay, L., 2012. The emergence of the other sexual citizen: orientalism and the modernisation of sexuality. Citizenship studies, 16 (5–6), 605–623.

Shah, P., 2005. Legal pluralism in conflict: coping with cultural difference in law. London: Routledge.

Shah-Kazemi, S.N., 2001. Untying the knot: Muslim women, divorce and the Shariah. London: The Nuffield Foundation.

Turner, B., 2011. Religion and modern society: citizenship, secularisation and the state. Cambridge: Cambridge University Press.

Williams, R., 2008. Civil and religious law in England – a religious perspective. Ecclesiastical law journal, 10 (3), 262–282.

Wimmer, A. and Glick Schiller, N., 2003. Methodological nationalism, the social sciences, and the study of migration: an essay in historical epistemology. International migration review, 37 (3), 576–610.

Yilmaz, I., 2001. Law as chameleon: the question of incorporation of Muslim personal law into English law. Journal of muslim minority affairs, 21 (2), 297–312.