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Citation for final published version:

Sandberg, Russell and Thompson, Sharon 2016. The Sharia Law debate: The missing family law context. *Law and Justice* 177 , pp. 181-192.

Publishers page:

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THE SHARIA LAW DEBATE: THE MISSING FAMILY LAW CONTEXT

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Two official enquires and one Private Members Bill are currently grappling with the ever-controversial topic of the operation of sharia tribunals in England and Wales. While these developments are valuable in that there is still a missing evidence base in terms of Sharia tribunals, this narrow focus on Sharia misses the point that a wider reappraisal of family law matters is required. This article contends that the sharia debate points to wider concerns about two areas of family law in particular: the formalities concerning marriage and the privatisation of family justice. It concludes that concerns about sharia tribunals cannot be addressed without paying attention to wider family law developments.

INTRODUCTION

Since Rowan Williams' lecture on 'Civil and Religious Law',² concerns about the application of Sharia law have rarely been far from the news headlines.³ As Bowen has observed, these concerns have focused on Sharia tribunals in particular with other Islamic institutions, such as the existence of mosques, halal certification, and Sharia finance being regarded as examples of 'banal sharia' in that they are not so deeply troubling.⁴ This obsession with Sharia tribunals is currently manifested in two enquiries currently taking place – the Home Office's Independent Review into Sharia and the Commons Home Affairs Committee Inquiry – as well as in the private members Arbitration and Mediation Services (Equality) Bill, which has been repeatedly introduced into the House of Lords by Baroness Cox. The focus of the enquires, in particular, upon data gathering, underscores that a great deal of further research is still required. In recent years, a number of very useful studies have taught us a great deal about how particular tribunals operate and the common experiences of tribunals across

¹ An earlier and shorter version of this article was previously published at <http://blogs.lse.ac.uk/religionpublicsphere/2016/08/how-do-you-solve-a-problem-like-sharia-the-real-issues-raised-by-the-sharia-law-debate/>

² R Williams, 'Civil and Religious Law in England – A Religious Perspective' (2008) 10 *Ecclesiastical Law Journal* 262. See also Lord Phillips of Worth Matravers, 'Equality Before the Law' (2008) 161 *Law and Justice* 75.

³ See R Grillo, *Muslim Families, Politics and the Law* (Ashgate, 2015).

⁴ J Bowen, *On British Islam: Religion, Law, and Everyday Practice in Shari'a Councils* (Princeton University Press, 2016) chapter 11

different faiths.⁵ However, we still lack an understanding of the overall picture. We have no working definition of what we mean by the term ‘Sharia tribunal’ and so unsurprisingly we do not know how many of them exist. We know nothing about the more informal tribunals and know very little about how other religions, ethnic and cultural groups resolve their disputes.⁶ Until further research is completed, it seems premature to frame the social problem in terms of Sharia.

Indeed, the academic research that has taken place has shattered certain media myths about the operation of sharia tribunals. The ‘Social Cohesion and Civil Law’ project conducted at Cardiff University innovated by providing a comparative account of three particular religious tribunals across the Abrahamic faiths.⁷ The Cardiff research showed that the issues raised by sharia tribunals were not unique to Islam. It examined the workings of three religious tribunals in detail: the Catholic National Tribunal for Wales, the London Beth Din and the Sharia council of the Birmingham Central Mosque in the area of marriage and divorce. Two main caveats need to be made concerning the Cardiff data. First, the three case studies cannot be considered to be ‘typical’ or ‘representative’ of Jewish, Christian or Islamic tribunals in general.⁸ There is a multiplicity of religious tribunals within the different communities in terms of the basis of their authority and adherence by those using these tribunals. Different communities within these faiths may have their own religious tribunals ruling on matters relevant to their adherents. Second, it needs to be noted that the empirical investigation consisted mainly of interviews with tribunal personnel meaning the data collected derives from the perspective of the tribunal rather than of the users. Yet, the Cardiff research found that the different religious tribunals studied had much in common in relation to marital disputes in that each of the tribunals firmly recognised and supported the ultimate authority of civil law processes when it came to marriage and divorce and none sought greater ‘recognition’ by the State. All three institutions derived their authority from their religious affiliation, not from the State, and this authority extended only to those who chose to submit

⁵ Empirical studies have included S Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce and the Shariah* (Nuffield Foundation, 2001) S Bano *Muslim Women and Shari'ah Councils* (Palgrave, 2012) and the ‘Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts’ Research Project at Cardiff University, funded by the AHRC/ESRC Religion and Society Programme.
<<http://www.law.cf.ac.uk/clr/research/cohesion.html>>

⁶ A Hussain, ‘Legal Pluralism, Religious Conservatism’ in R Sandberg (ed.) *Religion and Legal Pluralism* (Ashgate, 2015) 151.

⁷ The research team was led by Professor Gillian Douglas and also included Professor Norman Doe, Professor Sophie Gilliat-Ray, Dr Russell Sandberg and Asma Khan.

⁸ See J Bowen, *On British Islam: Religion, Law, and Everyday Practice in Shari'a Councils* (Princeton University Press, 2016) chapter 8 for a discussion of the Birmingham sharia council as a ‘variant’.

to them. Adherents made use of the Council in order to obtain licence to remarry within their faith. For believers, being able to remarry within the faith served both to enable them to remain within their faith community and to regularise their position with the religious authorities. All three institutions saw their work as a religious duty. They regarded themselves as providing important mechanisms for the organisation of community affairs and the fulfilment of community need. Parties were free to take their case to another Shariah Council if they were unhappy with the Council's decision.⁹ This was not as a form of appeal but highlighted the phenomenon of 'forum shopping'.¹⁰

The Cardiff project found that, typically, those who approached the religious tribunals were seeking a termination of their religious marriage. Those who were married under English civil law usually had already sought a termination of their civil marriage through the civil law of divorce. All three institutions expected the parties to obtain a civil divorce, if applicable, before seeking a religious termination. It appeared that religious tribunals were carrying out a mediation role. This was particularly true at the Sharia tribunal. Cases presented to the Sharia Council were first dealt with by the Family Support Service. There was a mandatory mediation stage prior to a ruling being given to see if the marriage could be saved. Two members of staff (both part time) were responsible for sifting the material and reaching a conclusion as to whether the case should be put to the Council. Where it was decided that a case should be put to the Council, a report was compiled setting out the basis of the case and three letters would then be sent out at monthly intervals inviting the other party (typically the husband) to appear.¹¹ The case proceeded once the three letters had been sent.¹² The focus

⁹ Other Councils may come back to the original Council to verify any evidence and the Council's original decisions.

¹⁰ When we asked one of our interviewees at the Shariah Council whether this forum shopping concerned them, their response was as follows: 'It doesn't cause problems for me because ultimately the decision is theirs, which is what I say to them, it's up to yourself. ... If they can choose to go with what this mosque is saying and if a mistake has been made then the sin would be on the members who have made that decision with that information.'

¹¹ Where the applicant had had a civil divorce then only one letter would go to the other party as a courtesy. Where there had not been a civil divorce (usually because the marriage was not registered under civil law), the three letters were sent out by recorded delivery to try to ensure that the person had received notice of the proceedings.

¹² Commonly, the husband did not appear. In the hearing itself, the parties could be represented by a solicitor, but this was very rare; more usually, an applicant was represented by a relative (usually male) or would represent herself and might be accompanied by a relative or friend. People other than the parties were occasionally called to give evidence, including children. The Council had not called any expert witnesses to date. If, as was rare, the husband appeared at the hearing, he and the wife were not heard within the Council itself at the same time, but sequentially – so they did not have the opportunity to hear and comment directly, much less cross-examine, on what each other or any witnesses said. Nor were they necessarily informed of what the other might have said or written about them.

was on determining whether the marriage was no longer workable. Proof that the marriage was not workable was based on grounds which, like English civil law, might include fault factors. Where a civil divorce had been obtained, this in itself was taken as proof of irretrievable breakdown; the decision by the Council was sought to provide reassurance that the parties could remarry within their faith. Those who had entered into a civil marriage were expected to have obtained a civil divorce before seeking an Islamic divorce. The Council would not usually grant its divorce until the civil divorce had been obtained. Over half of the cases dealt with by the Council that were studied involved couples who had either not married under English civil law or had married abroad and whose marital status in English law was unclear.¹³

This article contends that the issues that arose in the Cardiff findings point to the need for a wider reappraisal of family law matters in two distinct areas: the formalities concerning marriage privatisation of family justice and the formalities concerning marriage. This may suggest that the sharia tribunal controversy is not only the result of sociological changes concerning the position of religion in society,¹⁴ but is also in part symptomatic of a wider ill-ease concerning the role of the State in relation to family justice matters.

MARRIAGE FORMALITIES

There is now much uncertainty as to which personal relationships the law should recognise. Controversies rage about whether rights should be afforded to unmarried cohabitants and whether divorce should be based on fault. Recent reforms have been ad hoc. Marriage has been extended to same sex couples but significant exceptions have been carved out allowing religious groups to apply the older heterosexual definition of marriage.¹⁵ And differences between marriages and civil partnerships have been maintained without clear explanation.¹⁶ The need to modernise the law on marriage and divorce is underscored by the recent work by the Law Commission underlining the need to revisit the current law on the formalities

¹³ Recognition of an overseas marriage depends on capacity and domicile, and some marriages (e.g. potentially polygamous) might not have been recognized as valid.

¹⁴ On which see R Sandberg, *Religion, Law and Society* (Cambridge University Press, 2014).

¹⁵ See further e.g., J Garcia Oliva and H Hall, 'Same-Sex Marriage: An Inevitable Challenge to Religious Liberty and Establishment?' (2014) 3 *Oxford Journal of Law and Religion* 25 and R Ahdar, 'Same-Sex Marriage: Exemptions for Celebrants and Religious Freedom' Tensions' in W C Durham Jr and D Thayer (eds.) *Religion and Equality: Law in Conflict* (Routledge, 2016) 91.

¹⁶ See, e.g., R Sandberg, 'The Right to Discriminate' (2011) 13 *Ecclesiastical Law Journal* 157.

required for marriage.¹⁷ The Cardiff research provides a further impetus for reform in this area. In line with other research,¹⁸ it was found that over half of the cases dealt with by the Sharia Council studied involved couples who had either not married under English civil law or had married abroad and whose marital status in English law was unclear.¹⁹ Such litigants have very limited remedies under English civil law and often did not realise that this was the case: they assumed that their religious marriage had legal effect under State law. The Cardiff research called for greater awareness and education concerning the requirements of marriage law, explaining the procedural requirements for a civil law marriage and the rights that are accrued as a result of marriage.

However, this is needed not only in relation to religious tribunals. Those who have a religious marriage but are not married under civil law have the same legal status as other cohabiting couples. Unmarried cohabitants also often assume that they have more legal rights than they do. Currently, England and Wales has no legislative provision that specifically provides unmarried cohabitants with financial relief in the event of the ending of a relationship that has generated economic disadvantage, and so couples dividing assets in this situation must instead navigate complex trust law principles that depend on direct financial contribution. The Family Law (Scotland) Act 2006 provides that a former cohabitant can apply for compensation if she or he has suffered economic disadvantage, and his or her partner has experienced economic advantage, both directly as a result of the cohabitation.²⁰ The Law Commission advocated reform similar to the legislation introduced in Scotland in its report to Government in 2007²¹ and these proposals have received public support from Lady Hale²² and Resolution (an organisation of family lawyers in England and Wales). In addition, two private members' Bills have been debated in the House of Lords: Lord Lester's Cohabitation Bill in 2009 and Lord Marks' Cohabitation Rights Bill (first introduced in 2013 and after parliament was prorogued twice, reintroduced in June 2015). The problem of the non-registration of Islamic marriages is, therefore, related to the problem of the prevalence of the myth of 'common law marriage'. It follows that there is a need for general reform as to

¹⁷ Law Commission, *Getting Married: A Scoping Paper* (Law Com, 17 December 2015). On which see C Barton, 'Weddings: The Law Commission's "Scoping" Paper' [2016] *Family Law* 719.

¹⁸ S Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce and the Shariah* (Nuffield Foundation, 2001) and S Bano *Muslim Women and Shari'ah Councils* (Palgrave, 2012).

¹⁹ Recognition of an overseas marriage depends on capacity and domicile and some marriages (e.g. potentially polygamous) might not have been recognized as valid.

²⁰ Section 28(3)

²¹ *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307).

²² *Gow v Grant* [2012] UKSC 29.

the current law on the formalities required for marriage and the legal protection of unmarried cohabitants.

PRIVATISATION OF FAMILY JUSTICE

There is now much uncertainty as to what the proper role of the State should be in terms of dealing with family disputes. The severe cuts to legal aid for family law disputes as a result of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 have reduced the legal assistance available in family law disputes, with the effect that people increasingly represent themselves or seek solutions out of court.²³ The rollback of the welfare state in an age of austerity has seen the resolution (or in many cases, failed resolution) of family disputes pushed further into the private sphere, and further away from judicial intervention. The use of religious tribunals needs to be seen as part of a wider trend of what Douglas has referred to as ‘the general de-juridification of family matters and the drive to encourage alternative dispute resolution’.²⁴ As Douglas pointed out, it is strange that the only type of private mediation that appears to be controversial is that offered by religious tribunals. She argued that ‘it would be both hypocritical and paradoxical to single out religious groups and religious tribunals to be barred from assisting their adherents from obtaining the remedies that the State’s legal system is no longer prepared to provide for them’.²⁵ There is a need for research that compares the operation of religious tribunals with other forms of alternative dispute resolution.

Moreover, given that the Legal Aid, Sentencing and Punishment of Offenders Act 2012 has meant that fewer people are aware of mediation and are so likely to make ill-informed deals or rely on even more informal modes of dispute resolution, further research is desperately needed into the legal, quasi-legal and non-legal means of solving family disputes. Concerns about gender equality are likely to not only apply to religious forms of alternative dispute resolution. The gender biases across different legal and quasi-legal systems need attention. Assumptions that individuals are equally free to reach mutually beneficial agreements can be especially harmful to women because research shows that economic dependencies created by unpaid work in the home (which is still disproportionately undertaken by women) is not

²³See, further, e.g., L Trinder and R Hunter, ‘Access to Justice? Litigants in Person before and after LASPO’ [2015] *Family Law* 535; E Hitchings and J Miles, ‘Mediation, Financial Remedies, Information Provision and Legal Advice: The Post-LASPO Conundrum’ (2016) 38(2) *Journal of Social Welfare and Family Law* 175..

²⁴G Douglas, ‘Who Regulates Marriage? The Case of Religious Marriage and Divorce’ in R Sandberg (ed.) *Religion and Legal Pluralism* (Ashgate, 2015) 53, 61.

²⁵Ibid 64.

appropriately addressed in private agreements.²⁶ There may be a need to revisit the regulation of mediation and alternative dispute resolution but the need for such reform is not constrained only to sharia tribunals.

CONCLUSION

It is clear, therefore, that the operation of sharia tribunals underlines a number of general trends in family law where research and / or reform are desperately needed. This has been almost entirely ignored in the debate so far. Yet, the matters raised above are truly pressing. Current laws concerning the formalities of marriage and the lack of legal protection for unmarried cohabitants are woefully inadequate in the twenty-first century. And the reduction of legal aid has meant that the justice system is likely to have significant consequences for separating couples and the role of State in terms of dealing with family disputes. There are other ways in which the operation of religious tribunals needs to be placed within the context of wider changes in family law. This is true, for example, of the law relating to prenuptial agreements ('prenups').²⁷ Following the UK Supreme Court decision in *Radmacher v Granatino*²⁸ in which it was held that 'the court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement',²⁹ the lower courts have said that:

'At the heart of that significant change, is the need to recognise the weight that should now be given to autonomy, and thus to the choices made by the parties to a marriage. ... The new respect to be given to individual autonomy means that the fact of an agreement can alter what is a fair result and so found a different award to the one that would otherwise have been made'.³⁰

This 'new respect' for individual autonomy has been reflected in the way in which civil courts have dealt with cases concerning religious agreements. Bowen notes that there has

²⁶See S Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Hart/Bloomsbury 2015), M Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004), G Brod, 'Premarital Agreements and Gender Justice' (1993) 6(2) *Yale Journal of Law and Feminism* 229.

²⁷ On which see S Thompson, *Prenuptial Agreements and the Presumption of Free Choice* (Hart / Bloomsbury, 2015).

²⁸[2010] UKSC 42.

²⁹ [78].

³⁰*V v V*[2011] EWHC (Fam) 3230, [36.]

been ‘a partial opening of courts towards private arbitration of divorce, and even to arbitration conducted by religious bodies’.³¹ Civil courts have approved agreements reached by arbitration that cover financial and property disputes arising from relationship breakdown.³² Most notably in *AL v MT*³³ Baker J accommodated the parties’ wish for their matrimonial dispute to be arbitrated under rabbinical law at the New York Beth Din and the subsequent agreement on the basis the High Court would give ‘regard to the parties’ devout religious beliefs and wish to resolve their dispute through the rabbinical court’ and ‘that it [is] always in the interests of parties to try to resolve disputes by agreement wherever possible’.³⁴

It is likely that the weight given to religious agreements will continue to mirror the developing status of prenuptial agreements. The Law Commission has recommended for qualifying nuptial agreements (that is, marital agreements such as prenups that comply with a number of procedural requirements) to be made legislatively binding.³⁵ The effect of the proposed legislation, if introduced, would be that the court would no longer be able to set aside an agreement for being unfair (provided the needs of the parties are met). The Law Commission deliberately did not make any separate proposals for ‘religious marriage contracts’,³⁶ and noted that such agreements would be enforceable in the same way prenups meeting the qualifying criteria would be. The Law Commission justified their reluctance to give religious agreements special protection because:

³¹ J Bowen, *On British Islam: Religion, Law, and Everyday Practice in Shari’a Councils* (Princeton University Press, 2016) 178.

³² In *S v S* [2014] EWHC 7 (Fam) the court approved an agreement between a divorcing couple and recognised this as part of the ‘strong policy argument in favour of the court giving effect to an agreement that the parties have come to themselves for the resolution of their financial affairs following divorce’. Sir James Munby, President of the Family Division, stressed that such agreements would only be enforced if they were decided in accordance with the law of England and Wales and provided that there was no reason to believe that ‘there may have been gender-based discrimination’ [27].

³³ [2013] EWHC 100 (Fam).

³⁴ [12]. The High Court endorsed the parties proposal on the basis that ‘the outcome, although likely to carry considerable weight with the court, would not be binding and would not preclude either party from pursuing applications to this court in respect of any of the matters in issue’ [15]. It was also stressed that ‘the court’s jurisdiction to determine issues arising out of the marriage, or concerning the welfare and upbringing of the children, cannot be ousted by agreement’ [12] and that the respect for cultural practice and religious beliefs ‘does not oblige the court to depart from the welfare principle’ [29].

³⁵ The Law Commission recommended a number of procedural requirements for qualifying nuptial agreements. Both parties must have provided material disclosure of their assets, signed the agreements at least 28 days before the wedding and obtained legal advice. The precise nature of the legal advice is not prescribed, but each party must be advised independently (by different lawyers). The parties must also sign a statement to confirm they understand that their prenup will prevent financial provision from that specified in the agreement (unless the needs of the parties have not been met). These recommendations have not been implemented. See Law Commission, *Matrimonial Property, Needs and Agreements*, (Law Com No 343, 2014).

³⁶ Law Commission, *Marital Property Agreements* (Law Com No 198, 2011) para. 1.35.

‘[W]e do not accept that anyone should be subject either to more or to less legal protection, in terms of the financial consequences of divorce, by virtue of their race or membership of a faith group. To make such a proposal would be discriminatory. Those who wish to make, and to abide by, religious marriage contracts will always be free to do so subject to the constraints of the legal obligations and to society as a whole’.³⁷

Two cases discussed by Bowen not only underscore the ‘new respect’ for individual autonomy, but also reflect the Law Commission’s view, that religious agreements made before a religious marriage should have decisive weight in the same way a standard prenuptial agreement would. These cases concern whether agreements to give a marriage gift can be enforced following the breakup of the marriage.³⁸ In the first case, *Shahnaz v Rizwan*³⁹ a couple married in India with a marriage agreement that stipulated payment on divorce. Winn J held that ‘the right to dower, once it has accrued as payable, is a right in action, enforceable by a civil action without taking specifically matrimonial proceedings’ and could be enforced as a ‘proprietary right’.⁴⁰ Bowen argued that framing it as a proprietary right insulated the agreement against the objection that ‘the agreement was a kind of pre- or ante-nuptial contract’.⁴¹ For Bowen, this was unsatisfactory since regarding it as a contractual obligation would require judges ‘to know the parties’ understandings, including whether the parties intended to be enforceable in law’. In the second and more recent case, the courts did consider the religious agreement as a contractual rather than proprietary right. *Uddin v Choudhury*⁴² concerned a religious (and legally unregistered) marriage. The bride succeeded in her counter-claim for payments of dowry, which she said had been agreed prior to the marriage, but had not been paid. Mummery LJ held that:

‘This was not a matter of English law. There was no ceremony which was recognised by English law, but it was a valid ceremony so far as the parties were agreed and it

³⁷Ibid., para. 1.36.

³⁸J Bowen, *On British Islam: Religion, Law, and Everyday Practice in Shari’a Councils* (Princeton University Press, 2016) 184-193.

³⁹[1965] 1 QB 390.

⁴⁰At 401.

⁴¹J Bowen, *On British Islam: Religion, Law, and Everyday Practice in Shari’a Councils* (Princeton University Press, 2016) 189.

⁴²[2009] EWCA Civ 1205.

was valid for the purposes of giving legal effect to the agreement which had been made about gifts and dowry'.⁴³

Crucially, he noted that 'as a matter of contract arising out of the agreement which the parties had made ...the judge was entitled in law to say that this was an enforceable agreement.'⁴⁴ As Bowen has noted, 'In this sense the civil judges recognized, not shari'a, but contractual acts taken in an Islamic context'.⁴⁵ These cases suggest that civil courts are increasingly reflecting a 'new respect' for individual autonomy by applying a contractual approach to enforce religious agreements. This raises the question of whether religious agreements made before or after marriages should be treated like any other form of nuptial agreement and whether it should make any difference whether the marriage in question was religious marriage or one that was legally registered. These cases underline the conclusions reached above concerning the need to place the sharia debate within the context of wider changes in family law and the desirability of reform. There is clearly a need for experts in religion law and family law to collaborate.⁴⁶ As John Witte Jr has noted, a 'large body of scholarship in American law schools has gathered around the perennially contested issues of law, religion and family life'.⁴⁷ By contrast, although there are some notable exceptions,⁴⁸ discussion of 'law, religion and family life' in major UK Law and Religion texts would appear to be a major omission.⁴⁹ It is an area where further research is clearly necessary.

⁴³ [11].

⁴⁴ [15].

⁴⁵ J Bowen, *On British Islam: Religion, Law, and Everyday Practice in Shari'a Councils* (Princeton University Press, 2016) 187.

⁴⁶ There are other areas outside the religious tribunal context where such collaboration is needed, for example, in relation to the legal disputes concerning the religious upbringing of children.

⁴⁷ J Witte, Jr., 'The Study of Law and Religion in the United States: An Interim Report' 14 (2012) *Ecclesiastical Law Journal* 327, 344.

⁴⁸ With the notable exception of C Hamilton, *Family, Law and Religion* (Sweet & Maxwell, 1995) and works that focus on religion and children such as S Langlaude, *The Right of the Child to Religious Freedom in International Law* (Brill, 2008) and S Jivraj, *The Religion of Law* (Palgrave, 2013).

⁴⁹ The chapter on 'family matters' in J A Robilliard, *Religion and the Law* (Manchester University Press, 1984) has no equivalent in R Sandberg, *Law and Religion* (Cambridge University Press, 2011) or J Rivers, *The Law of Organized Religions* (Oxford University Press, 2010). However, family law is discussed by the likes of R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (2nd edn, Oxford University Press, 2013), A Bradney, *Religions, Rights and Laws* (Leicester University Press, 1993) and A Bradney, *Law and Faith in a Sceptical Age* (Routledge, 2009).