

ISLAM IN ENGLISH LAW

SHOULD THE UK ADOPT A PLURALISTIC SYSTEM?

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Speaker*

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The Rt. Hon. The Lord Woolf of Barnes: The first of these talks was given by the Archbishop of Canterbury, under the banner of *Islam in English Law*. Each one has dealt with a specific subject under that heading. This evening we are looking at the question “*Should the United Kingdom adopt a Pluralistic Legal System?*” The question is quite specific and it is one which will be capable of giving rise to differences of views. This evening we will amicably discuss those different views.

The discussion is going to be led by our two speakers, the first of whom is The Honourable Marion Boyd who, as you’ve heard, was the former Attorney General of Ontario in Canada. You have, I hope, before you the brief summary of the distinguished careers of our speakers. I’m not going to take up time by reading all the details that are there but one will see that Marion Boyd is an appropriate person to listen to, since under the umbrella of the Arbitration Act, 1991 in Ontario, there was indeed established a Sharia Court. We will be particularly interested to hear what Marion Boyd has to say about that. She had previously given a report, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, which was released five years ago, or four and a half years ago, in December 2004. In November 2004 the government introduced legislation, *The Family Statute Law Amendment Act*, implementing many of her recommendations. Those who are given that responsibility know it is very important to first of all write a good report but, much more difficult and much more important, is to write a report which is so compelling that even though it is dealing with a novel area, the government feels compelled to implement it. I’ve had promises personally that reports I’ve written were going to be implemented but alas, even if the spirit was willing initially, sometimes one finds that after a period of time the spirit lags a bit and certainly the enthusiasm of the government in question for spending money and carrying out the recommendations so that they will be really effective, sometimes hangs behind.

Now I think that perhaps it’s best, so that you don’t have to listen to me for too long, that I, having introduced Marion who’s our first speaker, leave my introduction for the Professor who’s on my right, till afterwards.

The Hon. Marion Boyd: Thank you very much. It is a great pleasure to be here. I'm going to jump right in to talk to you a bit tonight about the context, the major issues and the current realities of family law arbitrations in our province. You will have heard many conflicting reports and it's important for you to hear a sequential account.

Family law in Canada is a shared jurisdiction between our federal government and our provincial governments. The division of powers is set out in the British North America Act of 1867 and was confirmed in our Constitution Act of 1982. Section 91 of the Act sets out the areas of exclusive federal jurisdiction: these include criminal law, marriage, and divorce. Section 92 sets out the areas of exclusive provincial jurisdiction and these include the solemnization of marriage, property rights and civil rights in the provinces.

The federal Divorce Act applies not only to married people who want a divorce, but also to the custody, access, child and spousal support claims that they make as part of that divorce. Ontario law, under the Family Law Act and the Children's Law Reform Act, applies to all other family law matters, including separation (as distinct from divorce) of married or unmarried couples, custody, access, support, division and possession of property, restraining orders, and related issues of child protection and enforcement orders.

Inheritance is also a provincial matter. Where there is a will, the wishes of the testator apply. However, an excluded surviving spouse may make application for herself and any dependent children under the Family Law Act if the net property of the deceased spouse is greater than that of the surviving spouse. Where a person dies intestate, the Succession Law Reform Act comes into play. All children of the deceased, whether born in or out of wedlock or whether natural or adopted, are eligible for support from the estate if they are still dependent and for a share in the estate if they are not. A surviving legal spouse is entitled to a preferential share of the estate.

Given the division of jurisdiction on family law and inheritance matters, Canadian family law differs substantially from one province to another, particularly with respect to division of property. For example, as a condition of confederation, Quebec is governed by the Civil Code, based on the French Napoleonic Code and the notion of patrimony. The Ontario Family Law Act explicitly provides in its preamble for a strong emphasis on the equal rights and obligations of both spouses, particularly with respect to responsibility for their children. In 2004, when the use of arbitration for family law disputes became an issue, arbitration was not included in either the Divorce Act or the Ontario Family Law Act; although both statutes explicitly encouraged mediation, neither required it. On the other hand, arbitration of family law matters is expressly forbidden in Quebec law, but mediation is mandatory. Section 27 of our Constitution requires us not only to permit but to enhance the capacity of multicultural communities in our land. So from all this you can see that, in a very real sense, we already have some pluralistic notions in our legal system and we have an ongoing constitutional obligation to honour multicultural aspirations.

Canadians have always been able to use arbitration as an alternative dispute resolution to settle matters without court intervention. The statute governing arbitration was adopted from British law in the 1890's and was available as the basis for arbitrating family law and inheritance matters, both in a religious or a non-religious context. But the act was woefully out of date. In 1990, the Uniform Law Commission of Canada proposed a model law which was subsequently adopted in Ontario and seven other provinces. The Arbitration Act, 1991 recognized the increased legitimacy of arbitration when two parties to a dispute freely and voluntarily agree to abide by the decision of a third party. The Act limited the supervisory role of the court in setting aside arbitration procedures when a properly executed arbitration agreement had been made and it allowed for the enforcement of an arbitration award by the court.

In 2003, an organisation called the Islamic Institute of Civil Justice announced publicly that it was setting up a “Sharia Court” in Ontario under the auspices of the Arbitration Act, implying that “recent” changes to the Act made it possible to enforce binding arbitration and that the Court no longer had oversight with respect to arbitrated settlements. Syed Mumtaz Ali, the main proponent of the Institute, suggested in media reports, that the existence of an Islamic Sharia Court required all “good Muslims” to settle their disputes only in that forum. Mumtaz Ali was already known as a proponent for a separate identity for Muslims in Canada, similar to that allowed constitutionally for Francophone and Aboriginal Canadians. A public storm ensued. It became clear that the previously existing faith-based arbitration services, which had been offered for years by Jewish, Muslim and Christian agencies, were completely unfamiliar to most Canadians. The impression was given that the Ontario government had handed over special powers to enable Muslims to settle legal issues without reference to Canadian or Ontario laws and that all the perceived injustices observed in Islamic countries governed by Sharia Laws were about to be visited on Muslim Canadians. Of particular concern, of course, was the unequal treatment of women under Sharia Law. Those who had fled Islamic states were convinced that the use of arbitration for family law was the thin edge of the wedge whose ultimate goal was a separate political identity for Muslims in Canada, where Sharia Law would eventually prevail in both civil and criminal matters. There was a huge public pressure on the government to intervene to prevent the Institute from proceeding. Much of the protest was frankly Islamophobic and very hurtful in the wake of 9/11.

At the time I was co-chair of the Law Society of Upper Canada’s Access to Justice Committee and a member of its Equity and Aboriginal Affairs Committee. As the regulator of lawyers, and now also of paralegals, the Law Society was under some pressure to intervene in this issue. As an ardent feminist and a Protestant woman of faith, I was deeply concerned about the divisive nature of this issue on women and its impact on our multicultural and religious communities. As the misinformation propagated by the media increased, I offered advice to my successor, the then Attorney General, that this storm was not going to subside unless the concerns were aired, the issues clarified and some constructive compromise developed. To my surprise, and somewhat to my dismay, I was then asked to head up a Review of the Arbitration Act, to consult with affected individuals and communities, and to report my findings to the government.

My report, entitled “Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion” was submitted to the government in December 2004. It is 191 pages long and includes 46 recommendations. Don’t worry; I promise I’m not going to go through it page by page! In a nutshell, and to the loud dismay of the opponents, I recommended that the government continue to allow arbitration of family law matters and that they allow these arbitrations to be carried out under religious laws if the parties freely agree to do so. However, I also recommended sweeping changes to all family law arbitrations as follows:

- That arbitration agreements be included in the provisions of the Family Law Act, be contemporaneous with the dispute, be in writing, signed and witnessed, and be able to be set aside by the Court on the same grounds as other domestic contracts or agreements;
- That the Court must approve any domestic agreement entered into by a Minor Child;
- That the Court be able to set aside any arbitration award which is unconscionable, where it does not reflect the best interests of children, where a party did not have or waive independent legal advice, where the parties do not have a copy of the arbitration agreement and a written decision including reasons, and, with respect to faith-based arbitration, where a party did not received a statement of the principles to be used in the faith-based arbitration before signing the arbitration agreement;
- That regulatory powers be added to the Arbitration Act to require arbitrators to maintain written records of issues, evidence, form of law, decision and reasons, to maintain those records for at least ten years, to include in any agreement an explicit statement that judicial remedies specified in the

Arbitration Act or the Family Law Act cannot be waived, to include either a certificate of Independent Legal Advice or an explicit waiver of Independent Legal Advice.

- That minimum requirements for the training and education of arbitrators be put in place and that there be a process for ongoing evaluation and oversight of arbitrations;
- That the parties in any arbitration be separately screened to determine issues of power imbalance between them to ensure that both parties are agreeing voluntarily to arbitration and understand the nature and consequences of entering into the process.
- That public legal education in family and inheritance law as well as community development in multicultural communities be put in place to ensure that vulnerable parties have a better understanding of family law and dispute resolution options.

I entirely understand the fears expressed by many opponents of arbitration that this private means of resolving family disputes may disadvantage vulnerable people, in particular women, and possibly erode hard-won equity rights over time. However, although we sought out examples of egregious wrongs resulting from arbitrations, the Review received no reports, anonymous or hearsay included reports that confirmed these fears were valid in our province given that religious arbitration had been going on for a long time. Nonetheless, the apprehension of so many people must be taken into account by a responsible government. The unregulated nature of arbitration left the whole process open to abuse. I heeded the advice of the vast majority of respondents to maintain the availability of family law arbitration but to recommend measures to ensure that arbitrators act appropriately under Canadian and Ontario law, that there is an appropriate oversight by the Courts, that parties are not coerced into arbitration, that parties are not allowed to waive their basic rights, and that arbitration orders can be effectively enforced through the Court. I believe that, with such legislation and regulation in place, with intensive public legal education about rights and obligations under family law, and with cooperative community development efforts aimed at including, and I can't stress this enough, minority citizens in our civil society, allowing faith-based arbitration not only provides everyone with a choice of dispute resolution methods but brings under the umbrella of our laws those who would otherwise operate outside them.

I am convinced that people of faith, who believe that their faith requires them to eschew the secular courts, will always seek faith-based dispute resolution. The issue for me is not whether the dominant culture allows such normative rules and practices of minority ethnic and religious communities to continue, but, rather how we can include these people so that their rights and freedoms as citizens are not swallowed up by cultural norms that do not respect those values. I believe in Ayelet Shachar's concept of multi-dimensionality, that we all have many identities simultaneously; we are citizens of our state but we may also define ourselves by gender, sexuality, age, race, language, ethnicity, religion and so on. In a liberal democratic and multicultural society like Canada, it is citizenship that allows membership in the minority community to take shape. Commitment to individual rights lies at the core of the legal and political organization of any liberal democracy and underpins freedom of information and expression, and the rights of minorities to legitimately enter into dialogue with the broader society. It is illogical and untenable in my view, to claim minority rights in order to then to entrench religious or cultural orthodoxies that seek to trample the individual rights of select others. Accommodation of cultural difference should not extend this far. Rather tolerance and accommodation must be balanced against a firm commitment to individual agency and autonomy. It is my view that including faith-based arbitration as a choice of dispute resolution and making arbitrations subject to the law of the land is a win/win proposition, a transformational accommodation, to use Shachar's terminology.

The government had clearly hoped that my findings would quiet the storm of controversy. While those in favour of family law arbitration were delighted and relieved that I did not recommend scrapping the whole

process, those opposed to arbitration and, more particularly, those opposed to faith-based arbitration, became even more vociferous. Fuelled by misinformation, the media continued to pummel the government daily. The controversy became very heated. Ontario was criticized around the world for permitting Islamic law to victimize our citizens. Eventually, and unfortunately on September 11, 2005, the Premier of the province blurted out to a reporter that he would put an end to religious arbitration in Ontario. It was a brilliant political manoeuvre; the heat on the government eased abruptly. But it was, in my view, bad public policy. The Ministry of the Attorney General was left to fashion a legislative and regulatory response.

The decision was to implement virtually all the legislative and regulatory recommendations from my report but to make faith-based arbitration awards advisory only, that is, they would not have any force in law. Citizens would still be able to choose faith-based arbitration, but the awards would not be enforced by the Courts. If one or more party to an arbitration, dislikes the decision of a religious tribunal, they can begin their case again in the civil courts without encumbrance. On the other hand, they may choose to follow the decision of the arbitrator and the court will never even know that the arbitration happened. As before, civil divorces are only available through the federal Divorce Act and the federal courts; religious divorces can continue through religious courts as they did before.

It is too early to know definitively what the result of this process will be. I believe that faith-based arbitration will continue and that, since it will operate outside the law, there is no guarantee that individual rights will be respected and coercion will not prevail. Some of the existing arbitration services, that had operated prior to this whole process, appear to be content to have their decisions considered advisory. For example, the Ismaili Conciliation and Arbitration Board and the Jewish Rabbinical Courts have operated in that fashion in provinces where family law arbitration is not allowed. In granting divorces, the Superior Court of Justice continues as before to be loathed to interfere with agreements reached by the disputants through mediation, arbitration or self designed separation agreements. Only when an agreement is egregious or when children's best interests may not be respected will the Court intervene. To my knowledge, none of the religious organizations has yet challenged the amendments to the Acts and there is no evidence of increased appeals to the Court.

The whole controversy did open a debate about the role of multiculturalism in Canada. This open dialogue has helped many to understand the value of diversity in our society and to appreciate the tensions that underlie any form of accommodation. Some of the overt prejudice and racism expressed during the process caused many people to re-examine their attitudes and to actively seek ways to come together. Many Muslims have committed to providing programs within their communities to foster a sense of Canadian citizenship. Many Canadians, previously unaware of arbitration as an alternative dispute resolution method available to them, are now choosing arbitration as a faster, cheaper and less adversarial way to settle their personal issues. There is some suggestion that arbitration should, in the future, become the norm, with only very contentious issues ever needing a full court hearing. The government has worked with legal and community groups to provide public legal education on family law in many languages and in many communities to the benefit of all. The Ministry's website now includes a thorough explanation of family law, what options there are and how to access assistance; there is clear information about arbitration as an option and the limits on faith-based arbitration are outlined. The regulatory requirements for arbitration are laid out so that consumers have some measure of quality control and protection. I don't know what the ultimate effect of all this discussion will have but I continue to hope that, taking everything into account, less harm than good will have resulted from the process.

Thank you.

Applause

The Rt. Hon. The Lord Woolf of Barnes: Now we're coming to Professor Shaheen Sardar-Ali but before I do so can I congratulate Marion Boyd on an excellent presentation which raises very interesting questions.

The Hon. Marion Boyd: Thank you.

The Rt. Hon. The Lord Woolf of Barnes: The Professor was formerly Professor of Law at The University of Peshawar in Pakistan. She was a member of the British Council Task Force on Gender and Development and she came subsequently to be the first cabinet minister in the North West Frontier Province (Pakistan). She served there as Minister for Health, Population, Welfare and Women's Development, in the government of the province. She's also been the chair of a national commission on the status of women in Pakistan and she's co-editor and co-author of many books which are set out in the handout. I call upon the Professor to address you now.

Professor Shaheen Sardad-Ali: Thank you.

I don't propose to present a paper but rather to raise more questions than assume or attempt to answer them. Just to give you a feeler of the tone and tenor of my interrogation and enquiry, the notes that I wrote for myself have as a working title (and its work in progress) "Towards Democratic Conversations on Islamic Law, British Muslims and Pluralist Legal Systems". The question mark is "Beyond Essentialism and Neo-Orientalism". These are the questions that I'm hoping to raise and ask.

Now long before 9/11, long before the invasion of Iraq and of Manistan, long before the wars of where I was born and brought up that stirred the Swat valley and the North West Frontier Province of Pakistan, I remember my childhood where people used to go on very onerous, long ship journeys to come to what we would Vallieth: the United Kingdom, England, Britain (whatever) or in common jargon, London. So London was England (or whatever), London was generic.

My earliest recollections of this far away place was with one of my great-grand uncles (and I must have been four or five) and my grandparent had tagged along with them. This was a very special treat for someone who had returned from Vallieth. I sat there on my knees and tried to listen to the report of the journeys. He said to my grandparents "Well actually" (because he'd really been sick and tired of everyone in the village coming and landing on his doorstep- He'd had to go on and on, again and again, repeating his story) "..On another day I'd be very happy to take you through the six months that I stayed there. But to cut a long story short, there are two things that you must all remember about Vallieth, about England, London. One: If you ever go there and want a cup of tea you must remember they call it cuppa tea". Everybody took that in to their minds. Next time they were in England and wanted tea they'd say- Can I have a cuppa tea. That's of course with the Partan accent. "The second thing that I want you all to think about is that if only they would recite the Kalima, they would be better Muslims than you and I". There was of course a pause and he repeated it again. Five years later somebody else came to England and back of course these two were the same, apart from the fact that the bananas were much bigger than in Pakistan. That just remained in my memory and in my imagination of what "the best of Vallieth" was and how it was perceived by these very good Muslims who thought that these people held values and had some norms that were so common and so close to our hearts that we said "All you guys need is to recite the Kalima and we'll be home and dry".

How different the atmosphere and the environment is today in terms of each one trying our sacred religions and our beliefs and value systems in to the political, social arenas and clothing and veiling them in the garb of religion. It's a question that I'm posing to all of us.

So the prerequisites really for the question that's posed today and for the dialogue that has been taking place, if we can call it a dialogue, in my mind I have a few basic and honest prerequisites that I feel need to be placed on the table if we are to make any honest, sincere progress. The first on my list is that **it's got to be a dialogue between equals**. We can't engage in essentialism and neo-Orientalism of one set of people talking down to the other. So it has to be a dialogue between equals if we are to produce, or expect to produce, some honest responses and answers and the way forward for the betterment of our countries.

The second is a **willingness to engage**, not to stalk at each other or through each other or over each other, but to engage respectfully between knowledge systems, East, West, North, South, whatever; to acknowledge and understand what the main issues of this dialogue are. What is it that we are actually trying to achieve?

The third would be **to distinguish between the notions of what is Sharia, what is fiche, what is anoon, what is state legislation?** In other words, what is the distance between the divine, the immutable and that which is human made, human thought-through and which is evolutionary, progressive and responsive to our lived experiences and lives?

And, finally: **to acknowledge that all major world religions have always had a streak of patriarchy in them**, an advancement of patriarchal norms. That one religion does not actually carry this distinction. So it's not simply Islam or Christianity, Hinduism or Jewdaism. We all have that streak. But that is not the only streak and there are multiple and diverse interpretations of the religious text which are just as equitable and human friendly. These are my prerequisites for the dialogue that might ensue between our communities.

If this was a simple question (*"Should the United Kingdom adopt a Pluralistic Legal System?"*) it would merit a simple response and my simple response would be No. But this is not a simple question and therefore my response cannot be a simplistic yes or no. Irrespective of that, my main objection to the manner in which the dialogue, the discourse and the public discussions on Islamic law, British Muslims, the United Kingdom and its legal system has carried on, is it has been an action and reaction, an offensive and defensive mode. It has not been an engagement. It has not tried to frame a dialogue in a question which is sharp, which is focused, which is robust and I feel that on both sides of the divide. There needn't have been sides of the divide but we have approached the issues in such a manner that it seems like an either/or situation, that it seems as if one is set to undermine the other. So the entire framing of the dialogue in my mind, and the questions that are being posed, are really not the appropriate questions that need to be asked.

For instance, I ask myself, why is it that the departure point of our discussion on Sharia and Islamic law and the English legal system, picks up selectively those areas of Muslim law that are contested terrain and have been so for centuries, that are contested and controversial and are the subject of debate and discourse throughout Muslim history and among Muslim communities? Why is Islamic law, the fiche, Sharia, anoon, fenced in to a very small, restricted area to the exclusion of the ethical, moral and universal norms that inform our respective religious traditions? For example, why is it that polygamy is also always thrown in as, "This is Islamic family law"? I'm sorry it's not as simple and black and white. Does Shaira in the UK mean that the Muslims are actually asking for polygamy to become part of the legal system? When in and of itself it is contested territory, it's controversial, it's contested and it is the exception rather than the norm in Muslim societies. There has always been a huge resistance against it to undermine it as a practice.

Secondly, if we look at the laws of inheritance, what is the major problem here in terms of the legal system operating in this country and the legal system across the Muslim world? Where are the fault lines? Where are the problem areas? Where is the convergence and divergence? I could go on and on but the last point I want to make on this question is why is it that divorce as an issue has come to the forefront and been tabled as one of the questions that Muslim communities are saying ought to be part of a parallel legal system? When in actual fact marriage in Islam is a civil contract and therefore, with religious undertones and overtones that's fine but, where is it that men and women in Muslim communities operate outside the legal system of their countries? How is it that if they were to adopt and except a divorce that has been handed down by an English court, how would that make them less Muslim then were someone to, in a parallel system, have the husband say the word Talaq to them? It's a question that I want to pose to you.

There are numerous other questions that I could raise but, for me, I think we need to change tracks and change our departure points. As a British Muslim my departure point is, I want this debate not to be held on the fringes and margins of society. I want it to be raised fairly and squarely within the parameters of equal citizenship rights of this country. I want the debate on my multiple identities and multiple norms that inform me whether legal, ethical, moral et cetera, to be fairly and squarely done as an equal citizen of this country. I feel that by picking up a few areas of the Islamic family law and making it appear as if these need to somehow be looked at in the shadows, invisibly, to me it is an insult to my equal status and equal rights as a British Muslim woman in this country. I feel that that's the departure point that I would wish to emphasize for a discussion and a discourse and in order to address the question of "*Should the United Kingdom adopt a Pluralistic Legal System?*" Can I also say that it is, with respect, a hiding away and an evasion of the real issues that confront Muslim communities in this country.

In Coventry, where I live, one of its wards which has the highest Muslim population can also boast of the worst health indicators in this country. The maternal mortality and the child mortality, the infant mortality, is the highest in England and Wales. That's where the departure point should be. That's where the value systems of Islamic law, English legal system, human rights, everything, converges. Why is that not the departure point? Of empowerment, of health, of education, of access to resources, making Muslim men and women empowered to come in to the main stream of life in this country and then of course, other issues of law and engagement with legal systems will follow.

In another country where I work, which is Norway, which has the largest Muslim population as its minority population, we have actually set up a legal advice project where we do comparative perspectives on Islamic law, Pakistani law and Norwegian law. At the end of a debate you find out and people say "They don't seem really that different do they?" In this country we could do similar programmes. That's one step of empowering men and women in this country to engage and interrogate the laws of this country as equal citizens but, at the same time, not compromising their Muslim identity. But I'm afraid the way the situation has, until this moment, transpired and panned out and played itself out, it's always been an unequal dialogue; it's been a selective dialogue of selective issues. That has done no one any good.

I look forward to some responses from these questions. Thank you.

Applause

Questions and Answers:

The Rev. Robin Griffith-Jones: Ladies and Gentleman, there are three colleagues who are now going to be coming round with the Church's roaming microphones. If you have a question that you would like to put forward please raise your hands (I see hands going up) and assorted colleagues will converge on you. I leave it to Lord Woolf to point towards those he'd like to raise questions from first.

The Rt. Hon. The Lord Woolf of Barnes: Could I ask those who are going to be asking questions to, first of all, ensure that they ask questions and to please keep the questions short. Could I secondly ask them to introduce themselves and say whether they have any particular office that they hold or represent and give us just an idea of their background? I'm going to start at the back as that seems to me a good place to start. There's a gentleman wearing a white hat, right at the back. Perhaps he could ask first.

First question: My name is Haitham AL- Haddad. I am a member of the Islamic Sharia Council in the UK, PHD candidate in SOAS. I think the question should be: Will the Muslim community be able to divorce themselves from Sharia? Will they be able to live without Sharia wherever they go? I'd like to ask the Professor, for example, I'm sure that she had an Ica not just a civil marriage which means that there is a level that every single Muslim, it doesn't matter how liberal he or she is, cannot divorce himself totally from Sharia. Therefore, as the Muslim community is growing in the UK and there are elements of Sharia which are already recognized within the judicial system, such as banking systems, such as halal meats, such as other things, so there can be extension for certain elements within the judicial system. That, with the growing of the Muslim community, is inevitable. That should be the crux of the point and that should be the start of the discussion. Thank you.

The Rt. Hon. The Lord Woolf of Barnes: Thank you very much. Will you answer first Professor?

Professor Shaheen Sardar-Ali: Thank you. Quick response there- I do not feel that the Ica is an issue here at all. In fact my proposition would be that just as in Christian marriages you do have places that have been designated for both ceremonies and people can have the religious ceremony as well as the civil ceremony, and I believe a number of mosques already in this country have that facility, I think that it is very important that there is an Ica ceremony as well as a civil ceremony but that the two could always be merged. I feel that is important. As citizens of the State, one without the other is not going to help us as citizens. So if I can give you the example of a woman who rang me up because she had had an Ica but a year down the line was thrown out of her house, the marriage had broken down, there was no civil ceremony and she had *no* status as a wife in this country. We should be honest enough to acknowledge that we know of a number of these cases. So to my mind it would have been Islamic to have the civil ceremony to prevent her from harm and the mucosa del sharia does not say that you should not engage in a civil ceremony. Have both by all means.

The Rt. Hon. The Lord Woolf of Barnes: Would you like, Marion, to add anything?

The Hon. Marion Boyd: I would just like to say that in our country it is not at all unusual for people to follow double traditions in terms of that, even when they come from the same tradition, for much the same reason. It is a kind of dual commitment on their part to both their religion and to their citizenship. In terms of the contractual arrangements around marriage, we've come a long way in Western thought, learnt a lot from our Muslim and Jewish neighbours, about the importance of sitting down ahead of a marriage and setting out a contract and setting out agreements about what we expect out of that. I hope that continues to grow with the use of domestic contracts in our Western tradition as well. It is something we have learnt is useful.

The Rt. Hon. The Lord Woolf of Barnes: I wonder if I could just add two or three little points. First of all, it is very common in this country *now* for certain people for reasons of their own, to have a civil ceremony which ensures that they have the protections that the State can offer and also a religious ceremony and there is nothing to prevent that happening. Of course, the ideal would be that you combine both. And, so far as the Jewish faith is concerned, that can happen. The second thing is, and it touches upon what Marion Boyd told us about the situation in Ontario, that agreements will be recognized in appropriate circumstances already in England and has recently been a decision of the Court of Appeal, which has aroused great interest because it gave new authority to prenuptial settlements. And the Court was going to be influenced by the existence of a prenuptial settlement in considering matters of financial relief after the break up of a marriage. It seems to me that it is at least possible (I'm not a family lawyer but) that if two Muslims were to set out certain principles upon which they would like to govern their relationship then, as long as there was nothing contrary to public policy in those agreements by English law standards, again the English courts would be prepared to take this in to account. So, the way forward would seem to be that one uses the ability, especially in matrimonial matters, for parties to make agreements to supplement the ordinary approach of the common law.

Now, next question- There is a gentleman holding up his hand at the front. Please Sir....

Second Question: My name is Dr. Mohamed Jindani. My subject of dissertation was the concept of dispute resolution in Islamic law. I've had two publications by Brill. The first one was "The concept of Mahr in Islamic law and the need of statutory recognition by English law. The second one was "Dispute resolution in the Shia Ismaili School in Islamic law and the need for Pluralism based on arbitration according to the Ismaili Constitution". My question today is addressed to The Honourable Marion Boyd. I made some quick notes but my question is rather brief. (Sorry, I was also at one time a practicing solicitor and now retired and a visiting lecturer at the School of African and Oriental Studies). My question is this, in your very erudite presentation of the law in Canada, I'm sorry indeed to hear that some vociferous opposition was made to many of the proposals on arbitration, but I do have some concerns, perhaps you could address these. The first one of these is that I did not hear from you regarding anything to do with the composition and qualification of the arbitrators. Perhaps you can explain? And, although I heard from you something that the decision of the arbitral award should not be unconscionable, I did not hear from you anything to do with natural justice which I think is very important. The other point I wish to make is whatever the quality of the arbitrary report and award is, and I think you have now said that it is of advisory concern only, is it not appropriate that such an award should be sealed by the court?

The Hon. Marion Boyd: To your first point, actually before you directed the questions, you mentioned the issue of Mahr and one of the problems in Ontario was that our Ontario superior courts had refused to uphold the contract around Mahr and the Supreme Court did not either. That has subsequently changed, our case law has changed and Mahr is now being upheld in other areas but that was one of the precipitating factors for the Muslim community to ask for consideration of Sharia based arbitration.

I did mention about the qualities of arbitrators. Under the Act, as it was, before the revisions that were made after my report, there was absolutely no qualification spelt out in the law. As long as the two parties agreed on the arbitrator, it could be anybody they both agreed upon. The concern there was that it meant that the person didn't necessarily know Canadian law at all and didn't even necessarily know Islamic law. In fact one of our leading Islamic scholars during the debate said that he thought there was probably only one person in our province who had a sufficient knowledge of Islamic law to be qualified to apply it. So one of the issues for me was to try and remedy this, to have mandatory education requirements, minimum though they may be, and to have people required to tell possible clients, people approaching them to arbitrate, what the principles were on which they were going to form the arbitration. That became a very important part of the revisions

that were then subsequently made by the government, by regulation to the Arbitration Act; those things are in place now, that people have to meet the minimum requirement.

The other part is that there is an oversight function so that the decisions of arbitrators, you ask should it be sealed, in fact our position was exactly the opposite. The sealing of these things then sends them in to the private realm where there is no possible way of judging what the overall impact over time of arbitrated settlements might be on eroding the civil rights of people within the country. So, exactly the opposite trend was there, that summaries of those decisions and the basis of those decisions now have to be made available for monitoring by the Ministry of the Attorney General. We have very few sealed court responses in our country. Most of our courts operate in public although the initials for the parties in family law may be used rather than the full name. One of the big arguments against arbitration in family law was *this* argument that it would become private and then any kind of behaviour could follow without judicial oversight.

I think I might have answered them all but I'm not sure.

The Rt. Hon. The Lord Woolf of Barnes: I think you probably have. I wonder if I could just see whether the Professor has anything to add. I would be particularly interested to hear from her whether she sees the initiative in Ontario as one which she would like to see followed in this country.

Professor Shaheen Sardar-Ali: My submission would be that I would very much hope that we can all work within the mainstream legal system of this country as equal citizens; that the legal system would be responsive to our needs and that there would *not* be a need for parallel systems.

The Rt. Hon. The Lord Woolf of Barnes: Yes. I think it's a lady holding up her hand. Please....

Third Question: My name is Cassandra Balchin. I'm a founder member of the Muslim Women's Network UK. I'm also part of the international advisory group for Musawa, which is a global initiative for equality and justice in the Muslim family and part of the international network, Women Living under Muslim Laws.

I first have a question as to the composition of the vociferous opposition in Canada. I think it's important to clarify that there were many Muslim women who opposed religious arbitration and I think that that needs to be quite clear. Perhaps some of the audience here may not know that. That includes women who identify as *believing* Muslim women, so that's important. One of the questions is on the regulation of arbitration, which is where I find it very difficult to see it applying in the UK and where I have concerns, perhaps both of our guests would have views on this. If we talk about the training of arbitrators who determines what is a good arbiter? For example, you mentioned the question of only one person perhaps having sufficient knowledge of Islamic law in Ontario. Now I would be very concerned if that were applied in the UK. Who would be that one person? Because historically, authority and knowledge in Islam has been used to marginalize progressive views and to halt the development of Muslim jurist prudence. So therefore my concern, and I know this reflects the concern of many Muslim women in Britain who would prefer in fact for things to remain unregulated recognizing the rights violations that arise from that but preferring things to remain unregulated because that would retain an element of fluidity whereby articulate women within the community would produce sufficient pressure and change, rather than having the British state which to date doesn't have a very good record of understanding Muslim laws and Muslim jurist prudence, rather than having the British State define what is a good Muslim or what is good Muslim practice or not. Thank you.

The Hon. Marion Boyd: I'm so glad you asked the question about who was opposed because it might not be what some people would expect. I think the most vociferous group was a group led by a woman named Huma Ajeman who is an Iranian born citizen of Canada and who gathered together a huge collection of people who

were *very* very seriously concerned about this whole issue, who were very fearful of what they saw as a creeping recognition by Canadian officials of the very worst cultural practices rather than actual religious law. However, most of those people were also very strong secularists and placed their arguments in a way that, unfortunately, was quite demeaning for those who come from a faith position. In other words they made very strong comments that only the secular law should apply, that everyone should have to go through the courts, there should be no alternative dispute resolution because of their fear, their legitimate, genuine and passionate fear that the rights of others would be destroyed in that process.

The second group, a very articulate coalition of women, was made up of the Canadian Council of Muslim Women, women who identify as faithful Muslims but who act politically for the rights of Muslim women within their community, the National Association of Women in the Law which is a group which has done very wonderful work throughout Canada on women's rights and has made representation in many forms, very knowledgeable women, and the National Immigrant Women's Coalition. Their position led by the National Association of Women in the Law which at that point was based in Quebec and led by Quebec lawyers, was that arbitration should not be allowed anywhere in Canada, it's not allowed in Quebec and it should not be allowed anywhere in Canada, and the reason arbitration should not be allowed is that the power differential can never be overcome in that private system. I can tell you as a former Attorney General, the object of much of their fury over how the courts behaved with respect to women's rights, it was a bit of a surprise to me to have that recommendation come from that source when they know very well that the treatment of women's equality in our courts is far from perfect as well. Their argument was exactly as you say; that rather than handing over any authority that could be taken by a very liberal and understanding person of the context of Muslim life in Canada, it could in fact be hijacked by people who wanted to impose values that are completely contradictory to our Canadian law. Those were the two major groups that involved Muslim women.

We also heard from lots of Muslim women who did want arbitration to go on but they were also for the most part very strongly of the opinion that there had to be some measures taken to try and balance out the power between the parties if they were going to go for arbitration. So the suggestions about public legal education, community development, the issue of having pre-screening for issues of domestic abuse or power imbalance, came from those women primarily as well as the feminists who supported them.

The most vociferous people in favour of arbitration tended to be lawyers because many lawyers in Canada had begun to turn to arbitration as a way of resolving things more quickly; they found that when people felt that they were part of the decision they were more likely to go along with the decision and it saved the serial court complaints that you see when people feel that something has been imposed upon them and their story has never been told. Then of course there were the groups like the fathers rights groups who wanted arbitration to be completely free and hands off for the government because they understand very well that in that circumstance without some monitoring and so on, they would have the opportunity to erode the equality rights of their partners. They were surprisingly frank about their advocacy for arbitration and what they hoped to see accomplished by it.

Then there were the people inflamed on this issue by very serious misinformation about our whole legal system. I think one of the things that everyone involved in the legal system came away feeling was that we have not done a good job of helping people understand the law in our country and how it applies. For example, the Canadian Council of Imams did not understand that there is no such thing as an illegitimate child in Ontario; they didn't understand that. So a lot of their presentation was about how do we affect, how do we care for, how do we protect these children who are born of temporary marriages or who fall outside the purview of the particular law that they perceived.

So, there was a lot of discussion about it. I would say that though about ninety percent of those who came forward, whether they were for arbitration, for religious arbitration or not, were really in favour of the regulatory changes that the government made even if they were unhappy with the decision around how arbitration was going to go.

The Rt. Hon. The Lord Woolf of Barnes: Marion, just before you leave this answer, I know you've said quite a bit already, what do you say about the eligibility of the people who are carrying out the arbitration? How could you ensure that they had the qualities needed to do that delicate task satisfactorily?

The Hon. Marion Boyd: Well it seemed to me that the qualities needed are a very strong commitment to the rule of law and to natural justice which is what I forgot in the former person's question. The courses that have now been set up, the kinds of work that has been done, is precisely on those things, on fair procedure on equitable procedure, a clear understanding that Canadian rules of evidence apply *not* rules that are pulled out of a hat from some other place but *our* rules of evidence apply. If they're not followed then obviously the arbitration isn't going to be giving very serious advice to any court. So that's the sort of thing; not whether the person is a religious leader, not whether they are particularly an expert in one form of law or another but that they have an appreciation of the process of a fair and equitable arbitration. You always have to remember, arbitration was set up *not* to replace the courts but to offer another dimension for problem solving, problem solving were people decide they don't want to go through the process of the court but they want somebody they can trust to give a neutral decision. That's the way the arbitration process is decided. So, saying that you *must be a lawyer*, well we've certainly heard as we went through that some lawyers are very good at arbitration and others are not. Or if we were to say *you must have these particular qualifications in order to deal with these particular clients*, it isn't a very reasonable prospect because the whole Arbitration Act is based on people coming to a decision themselves about whom both of them can trust to make a decision fairly and equitably in their particular case. Arbitration was set out to do that and the court is always available if that's not what people want.

The Rt. Hon. The Lord Woolf of Barnes: Professor would you like to add anything?

Professor Shaheen Sardar-Ali: Yes. My concern regarding arbitrators goes to the heart of qualifications and how they would actually address, because if it is a faith based perspective here that we are adopting, then surely we need to be aware of the various schools of thought within the Islamic leaders traditions and how they might vary quite drastically, the outcome of which and the implications for the parties to this arbitration, my concern would be that again it would go down to authority and acceptance of the arbitrators. I'm a Sunni – Hanafi and if you have a Sharafi – Sunni or a Shia Afma Sheri or a combination there of, how is this arbitration going to go forward? That's one important aspect in this. Secondly, I would like us respectfully to bear in mind cultural Islam and cultural manifestations of how we interpret Islam. For instance as a Muslim from South Asia my perspectives on Islam and how I believe the Sharia is applied to me and how I perceive and understand it would be quite different to my compatriots in the Middle East, in South East Asia, in Africa or in anywhere else. So, my position on this is that it is a very dangerous way forward and if the outcome is going to be justice and equity for all I shudder to think what the result would be if you had an arbitrator who was inclined or only understood one kind of Islam.

The Hon. Marion Boyd: And in an effort to try and remediate that, I'm not saying it resolves it completely, that's why we now require an arbitrator to set out very clearly before an arbitration agreement is signed, what form of law they would be using and what the consequences of that would be. So that's an effort to remediate that I don't suggest that that resolves it at all.

The Rt. Hon. The Lord Woolf of Barnes: Thank you very much. There's a gentleman here with his hand up.

Fourth Question: Sorry I can't stand up so I'll sit and speak. My name is Usef Van Huey. I'm speaking from a practitioner's point of view. I see a lot of disputes between parents and I think the problem is neither academic or ideological, the problem is that we should really look at it in a practical way. Just to give you an example to counter the example of the Professor. I know a lot of women who are divorced by law but not divorced religiously and they tend to suffer for years and years and years as they can't get remarried again because they are not able to get a religious divorce. I think as long as there are enough people who act and react by their religious beliefs, we mustn't really bring ideology and what we think is right, we must be down to earth and try to tackle the problems. I think the problem already mentioned, one, is this problem actually exists in Muslims communities. It is not something which is only in the West. A lot of Muslim communities struggle with a lot of the questions raised to do with women. There have been many attempts to try to address this problem. One of them the Professor mentioned is this contractual agreements, when people actually marrying in a Muslim country sign an agreement which says you don't have the right to marry more than one wife, you can't do this you can't do that, so that is a contractual agreement. The second problem is, as the Professor alluded, there is no one Sharia law, no one Islamic law; you have different schools of thought which can contradict each other on many occasions. I think the best way to resolve this, and I would be very interested to hear the Professor's views on this, that the main problem is not actually the law as such, it is the lack of Muslim institutions to be able to tackle the problems, it's usually that the arbitrator is male, they don't have access to any female councillors or female arbitrators, they usually have a very basic knowledge of the law of the land which they're supposed to respect and I think we should really engage on a course where we recognize the people's need for religion to be dictating certain parts of their lives but at the same time we engage in, if you like, empowering or self regulation within mosques and Islamic centres, so they have better understanding of the pitfalls of the Sharia law as they see it. I think one of the speakers mentioned about more involvement of women putting on pressure and I think that's really what I see as the best way forward. Thank you.

The Rt. Hon. The Lord Woolf of Barnes: Thank you very much. Professor?

Professor Shaheen Sardar-Ali: Thank you for your question. In response to the first question that you specifically posed of these limping marriages which my colleague and friend Professor Menski has written about years ago, where women are in limping marriages because the Muslim husbands refuse to pronounce the word Talaq, but on the back of the divorce that they have received from the English courts will very happily have remarried but left the women in the limping marriage. My response to this would be, as a good Muslim, when there has been an irretrievable break down of marriage, when there has been a severance of marital relations, when a court of the land we live in and are obliged to follow has declared the marriage ended, is it Islamic, is it on the bases of Adal, is it justice and equity of the Sharia for the man, why is it that it has got to be the woman who has got to seek alternatives and beg the man to come and pronounce just the word Talaq, when in English divorce actually means the same thing, a decree for divorce. Why is it that the onus of being Muslim has always got to have the pressure of the community bear upon the woman? That is the question that I want to ask and I ask as a Muslim women, because all my ideas and thought and submissions are from within the Islamic tradition. The alternative institutions that have been set up in this country particularly to alleviate women of these limping marriages until fairly recently, have not had a single woman sitting on it. It's only recently that you find maybe a few women sitting there. So, to my mind I think it is extremely selective use of Sharia and Islam and Muslimness. If we can only have the bottom line as Adul and the spirit of Shaira, I'm sure that these problems can be solved quite amicably.

The Rt. Hon. The Lord Woolf of Barnes: The lady over there on the right.

Question Five: I'm so sorry for twitching madly. My name's Alisa d'Costa. I'm an English Barrister and I specialize in matrimonial law. I'm also on the committee and I do legal training for Jewish Women's Aid and when I hear anybody talking about religious marriage and limping marriages I think of a group that we have, or had or still have some, in the Jewish religion called the Agunah, the chained wives, who also can experience the liming marriage. But fortunately English law developed the Divorce Religious Marriages Act and what one can do is to have a recital in the financial order that provides the husband must comply with the Beth Din in giving the wife her Get, her religious bill of divorcement and I see no reason why Sharia law could not have the same thing, in having religious disputes dealt with by religious courts. The Beth Din is in fact an arbitration within the arbitration acts in this country and, as far as Jewish law is concerned, one has to abide by the law of the land except when there's a religious dispute and that does not conflict with the law of the land. Again, I put it to the Professor, is there any reason why we couldn't have Sharia courts up and down the country? Indeed I think The Daily Mail on June 29th said there were eighty five in existence already. So I don't see that there is a particular problem.

Professor Shaheen Sardar-Ali: In response to your last question of saying there are eighty five, those are Muslim Sharia councils, they are informal institutions. I'm afraid the decisions, at least the country where I come from which has a ninety eight percent Muslim population, it would really have no validity. It would be a decree of divorce handed down by the English court that would actually go down as a dissolution of the marriage.

The Rt. Hon. The Lord Woolf of Barnes: What about ancillary matters, such as questions relating to the children or the financial arrangements?

Professor Shaheen Sardar-Ali: I was about to come to that Sir. I do not believe that using the Jewish Bethdin argument, that Muslims have got to necessarily follow this argument. I do believe from the bottom of my heart and in all honesty that the Islamic legal tradition is sophisticated, responsive and contemporary enough to be able to play within the mainstream English legal system and that most of the provisions which are presently on the ground in the English legal system are not un-Islamic or non-Islamic. I do not favour parallel institutions of dispute resolution, that is my position and I would like to stick to that.

The Rt. Hon. The Lord Woolf of Barnes: Thank you very much.

The Hon. Marion Boyd: Just a brief response to you about the issue of religious divorces. The Coalition of Jewish Women for the Get in Canada worked throughout the late 80's and managed to get similar legislation put in, in 1989 in Canada in the Divorce Act which was then adopted in our Ontario Act. It does apply to all religions. It has gone to the Supreme Court and it has been upheld that a divorce settlement that is in any way dependent on a religious divorce has no place in law. Although the instigators of that happened to be a group of very determined Jewish women who's major concern was that if they remarried their children would not be Israeli citizens. In fact they are the same group or an off-shoot of that group that worked here in England. In answer to this women's question that that's an example perhaps that we should follow; that when women have a strong belief, they can make changes within their community and they can make changes to the mainstream law. I think that one of the interesting things that we saw was some of the women from the Coalition of Jewish Women for the Get, talking with the Muslim groups of women about what might be accomplished through that goal, talking about trading techniques may have been one of the most important outcomes of the whole discussion.

The Rt. Hon. The Lord Woolf of Barnes: I'm afraid this must be the last question- The lady with the head scarf.

Question Six: Thank you. That's what I normally get pointed out as. I'm rather concerned about the lack of rigour and depth very often in public debates about this issue. My name is Aliah Abieri. I'm from the Lokahi Foundation. One of the many floors in the debates surrounding Sharia and its application in the West is the lack of recognition that Sharia is fluid and by its nature very complex and context dependent. It's not naturally simultaneous to criminal law as enforced by the modern nation state. Would you agree that this is a common oversight which is an obstacle to productive debate on the issue and what would you summarise as the main floors or examples of lazy thinking in the debate that you think are also obstacles to productive discussion on the issue?

The Hon. Marion Boyd: There certainly was in the beginning of our discussion a lot of misunderstanding about whether allowing arbitration of family law matters would in fact have some criminal implications. There's no question about that and there were both sides of the debate. There certainly are people who want to see a full Sharia regime which includes the joining of civil and criminal matters. There is a small group that really want to see that happen in Canada but again this division of powers that we have in our country, where the federal government is responsible for all criminal law and it's the same criminal code that gets applied across the country although enforcement and prosecution take place by each province, means that the case law that builds up and the traditions are fairly strong. There was absolutely *no one* speaking in the mainstream about wanting to see that happen. Only one proponent mentioned it and the other proponents of religiously based arbitration basically told the review "Don't pay any attention to him; that's not what we want. We are only concerned with civil law". So if that was the gist of your concern, it wasn't something that arose in our debate because we have no jurisdiction over criminal law and it simply was not an issue. Our Arbitration Act, as is yours, is very clear that no arbitrator can require somebody to do something that is against the law; they cannot council or require that. They cannot under the Arbitration Act as it was and as it is make a solution that would not be applicable by a court in our land. So that protection was always there and was never missing from the whole debate.

The Rt. Hon. The Lord Woolf of Barnes: Thank you very much Marion.

Well I'm afraid it is now time to bring the discussion to an end. I know we could go on for a substantial period longer but I think important things have come out. It is perhaps just useful to summarise one or two important points.

As I understand what has been said on all sides here, no one is saying that the English law, both statute and common law, should have attached to it, parts of Sharia. On the other hand, it *is* clear from the discussion that we've had, that there are many ways in this country in which those who have a particular faith are able not only to resort to the letter of the English law in this part of the United Kingdom and likewise in Scotland, but that they *can* usefully use the flexibility of our legal system so as to meet their individual needs. As long as the two parties in family matters are agreed as to what they want then there are ways forward which could be used to resolve many disputes. If there are particular difficulties those are matters which parliament would be prepared to address as they did with the Jewish woman who couldn't get a Get, because otherwise a section of society would be in an unjust and unfair position. It seems to me at any rate, listening to what you say, that study of our own religious requirements will in many situations indicate ways forward for minority religions in this country. And often, the best way forward is for different racial groups to join together and study them.

If I may I'm going to finish by making a plug for a body which I'm very closely involved with, called the Woolf Institute, which deals with studying interfaith matters of concern to the Abrahamic faiths, that includes Christianity, Islam and Jewdaism. It is my belief that more and more people are turning to that because if we are going to be the multicultural society that we like to think we *can* be, then it's critically important that we

understand, that there is greater knowledge and understanding across the community, of what are actually the requirements of different faiths.

Could I thank everybody who's taken part this evening in this discussion? Can I particularly thank the two speakers who are sitting on either side of me, for their contributions. As this is the last lecture could I just say what a wonderful initiative this series of lectures has been and how indebted we are to those who have organised the series? They started off on a tremendous high note and they've continued to maintain the high ground and I'm glad to say that this final discussion has been of equal quality. We are very indebted to the Master of the Temple and all those who worked with him to make these discussions a reality.

Thank you very much. Will we express our thanks in the normal way?

Applause

The Rev. Robin Griffith-Jones: Ladies and Gentleman, could I just ask you to thank yourselves for making this series possible. The response won by the Archbishops opening of this Series, confirmed us in the new that the series was of real importance and it is your attendance of sessions and your interest in the series that shows that we were right to start this, so we owe all of you a great deal of thanks.

Thank you all very, very much indeed.

Applause