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A Study of the Use of Sharia Law in Religious Arbitration in the United Kingdom and the Concerns That This Raises for Human Rights

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The use of Islamic norms in the determination of arbitration in England and Wales has become a source of great controversy. Concerns are raised for the human rights of vulnerable parties who may be pressured into arbitrations and who may not be treated fairly under the agreed rules of arbitration or by arbitrators themselves. The Arbitration Act 1996 limits the ability to appeal arbitration decisions and as such does not safeguard the rights of these parties. As a signatory to the European Convention on Human Rights the UK is under an obligation to uphold human rights standards domestically, and it is argued that the way in which arbitration on religious norms is currently regulated does not comply with this obligation. This article considers some of the possible adaptations or alterations that could rectify the situation, improving parties' experience of religious arbitration and ensuring that the system remains compatible with international human rights obligations.

Keywords: Islamic law, UK law, religious arbitration, human rights

In recent years there has been greater awareness of the role that Islam and Islamic practices play in the United Kingdom. Initially motivated by the increasing visibility of the British Muslim population, following several high-profile events domestically, this awareness has taken on a different nature and is often characterised by fear or mistrust of those who adhere to Islam. In addition, the publicity and criticism received by political regimes such as that seen in Iran have added to the public misconception of the religion as a whole. At the same time, as the immigrant population has increased, it can be argued that there has been a shift in multiculturalism, towards what has been termed 'new multiculturalism',[1] whereby minority groups focus on preserving their autonomous and individual ways of life. For many communities this preservation has become essential to maintaining their group identity in the face of modern society and its incumbent norms and pressures, not least to Muslim communities in the United Kingdom, who feel increasingly alienated by public misconceptions. In effect, the focus can be seen to have shifted away from integration and incorporation towards the co-existence of diverse and divergent cultures and peoples.

1 As discussed in M Helfand, 'Religious arbitration and the new multiculturalism: negotiating conflicting legal orders', (2011) 86 *NYU Law Review* 1231–1305.

This creates a demand for a kind of legal pluralism, whereby those who follow a religion of law (a concept expanded below), such as Islam, seek the ability to exercise a power of enforcement within their groups.

The problem lies in the conflict between the aims of this version of multiculturalism and the contemporary idea of the state as a guarantor of a set of rights.[2] There is a demand for the law to move in the direction of plurality and to cede or grant power to minority groups, and a simultaneous call for the state to provide effective protection of the human rights of each individual. This creates a situation where the law aims to enhance the autonomy of minority communities and to respect the private lives and beliefs of those groups, without reducing the protection guaranteed to members. This was addressed by the former Archbishop of Canterbury, Rowan Williams, who observed that

> if any kind of plural jurisdiction is recognised, it would presumably have to be under the rubric that no 'supplementary' jurisdiction could have the power to deny access to the rights granted to other citizens or to punish its members for claiming those rights.[3]

There has been widespread discussion of the compatibility of sharia law and Islam with these human rights standards and much criticism has been levelled at the religion in this respect.[4]

The questions which this article aims to address are: to what extent are sharia 'courts' able to operate within the legal systems of the United Kingdom[5] through the means of arbitration; does this raise legitimate concerns for human rights standards domestically; and what steps might be taken in order to improve the system? The first section will aim to provide an overview of the focus of this study and the concerns that are raised by religious arbitration. The second section will go on to consider the failings of the current system and some of the suggestions that have been made regarding improvements to religious arbitration.

RELIGIOUS ARBITRATION AND HUMAN RIGHTS CONCERNS

Arbitration is well established as a means of resolving private disputes without recourse to the national court system. The Arbitration Act 1996[6] authorises a

2 Ibid.
3 R Williams, 'Civil and religious law in England: a religious perspective', (2005) 10 *Ecc LJ* 262–282.
4 See for example the One Law for All campaign, <www.onelawforall.org.uk>, accessed 6 June 2013.
5 To attempt to assess the extent to which sharia law operates within communities themselves on a day-to-day basis would require extensive anthropological research and is beyond the scope of this article.
6 Arbitration Act 1996, c 23. The situation in Scotland is governed by the Arbitration (Scotland) Act 2010, which will not be specifically discussed, although general arguments surrounding religious arbitration might equally apply in that jurisdiction.

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form of binding arbitration where litigants can opt out of using domestic law and instead elect an alternative system by which to decide their dispute. Provided that both parties agree, these rules can be derived from any number of sources such as the (secular) law of another country or religious laws or rules.

It is important to emphasise that the only sharia or Islamic 'courts' that are in operation *within* the legal systems of the United Kingdom are those arbitration tribunals that operate using religious rules. There are more Islamic 'courts' or 'councils'; however, they operate outside the state system and their decisions are considered to be advisory or religious only.[7] Similarly, decisions of the various Batei Din are only binding under domestic law when they have been made within the context of an arbitration as defined by the Arbitration Act 1996.

Religious arbitration[8] has been the subject of a number of public debates in recent years. The former Archbishop of Canterbury provoked a huge media response after comments he made in a speech in 2008[9] were taken to suggest that he was in favour of the incorporation of Islamic sharia law into the domestic law of the United Kingdom.[10] The media interest in the topic has led to a number of studies being conducted on the role of religious tribunals.[11]

The media's concerns about the use of sharia law in the United Kingdom present a picture far removed from that which academic analysis reveals. This was recently demonstrated in the portrayal of Islamic councils in the BBC's *Panorama* episode entitled 'Secrets of Britain's sharia councils'. The programme painted a very negative view of Islamic councils (through the consideration of only a small number of cases in a single 'council') as dismissive of domestic law and deeply prejudiced against women, disregarding, among other complaints, domestic violence as something an abused wife brought on herself. The treatment in the programme provoked fresh media debate as well as a debate in the House of Commons the following day. This sensationalised picture is far removed from that discovered in the Cardiff report of 2011, in which research showed that there was

7 Their decisions are not enforceable in domestic courts beyond any contractual value they may have; however, their decisions may be considered binding within the community. See for example the Islamic Sharia Council, <www.islamic-sharia.org> (accessed 6 June 2013), which offers decisions on all areas of Muslim life.

8 This term is used to denote the forms and instances of arbitration where a dispute is decided on the basis of religious principles.

9 Williams, 'Civil and religious law in England'.

10 Similar comments were made by Lord Phillips: 'Equality before the law', speech at the East London Muslim Centre, 3 July 2008, available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_equality_before_the_law_030708.pdf>, accessed 7 June 2013. For a comprehensive discussion of the debate surrounding these speeches, see R Griffith-Jones (ed), *Islam and English Law: rights, responsibilities and the place of shari'a* (Cambridge, 2013).

11 One such study, by Civitas, suggested that there were more than 85 Islamic tribunals in operation in England and Wales. D MacEoin, *Sharia Law or 'One Law for All'?*, ed D Green (London, 2009), available at <http://www.civitas.org.uk/pdf/ShariaLawOrOneLawForAll.pdf>, accessed 7 June 2013.

> no desire on the part of the tribunals to which they had access to expand their jurisdiction or to supersede the State's authority. They see themselves as providing a service to the faithful whilst recognising and affirming the parties' citizenship as residents in the wider society.[12]

This article will concentrate on arbitration using the principles of Islamic law or the sharia. The lack of public knowledge of the nature of Islamic laws has led to a high degree of suspicion surrounding the concept of sharia:

> The idea of *Sharia* calls up all the darkest images of Islam . . . It has reached the extent that many Muslim intellectuals do not dare even to refer to the concept for fear of frightening people or arousing suspicion of all their work by the mere mention of the word.[13]

This view has resulted in sharia 'courts' being treated with a higher degree of scrutiny than other religious tribunals, many of which are in fact long established in the United Kingdom.[14]

Islam can be described, as can Judaism, as a religion of law.[15] It is considered to regulate all aspects of a believer's life.[16] The word 'sharia' comes from Arabic meaning 'the path to the water' and is taken to mean the path that one must travel towards Allah. There is no single authoritative interpretation of sharia; different versions are in force in different countries and interpretation varies even between mosques. In his article 'Legal logic and equity in Islamic law',[17] John Makdisi explains the way in which this is often perceived by Western jurists: 'a strange and mistaken image of the Islamic judge *(qadi)* persists in American legal circles. US judges have offhandedly used the term *qadi justice* to symbolize a total denial of the law, namely, unprincipled, expedient and arbitrary lawmaking.'[18]

12 E Butler-Sloss and M Hill, 'Family law: current conflicts and their resolution', in Griffith-Jones, *Islam and English Law*, pp 108–115 at pp 111–112.

13 T Ramadan, *Western Muslims and the Future of Islam* (Oxford, 2003), p 31.

14 Examples of Catholic and Jewish tribunals are discussed extensively in G Douglas, N Doe, S Gilliat-Ray, R Sandberg and A Khan, 'Social cohesion and civil law: marriage, divorce and religious courts', available at <http://www.law.cf.ac.uk/clr/Social%20Cohesion%20and%20Civil%20Law%20Full%20Report.pdf> accessed 7 June 2013. Further discussion of the relationship between Jewish religious law and English law can be found in B Jackson, '"Transformative accommodation" and religious law', (2009) 11 *Ecc LJ* 131–153.

15 Jackson, 'Transformative accommodation'.

16 S Zubaida, *Law and Power in the Islamic World* (London, 2003), p 11.

17 J Makdisi, 'Legal logic and equity in Islamic law', (1985) 33(1) *American Journal of Comparative Law* 63–92.

18 Ibid, p 63. It has been pointed out that in many ways the lack of a codified system of laws closely resembles the common law system, in that rules are derived from accepted standards and past experience. See also B Turner, *Religion and Modern Society: citizenship, secularisation and the state* (Cambridge, 2011), ch 8.

Muslim societies have traditionally been patriarchal in structure and there is evidence of discriminatory laws at all levels of application, from the widespread inequality in Iran[19] to the inheritance laws seen in the United Kingdom[20] which stipulate that a female heir can only inherit half as much as a male heir. Sharia is often seen as synonymous with a system of discrimination against and oppression of women. This cannot, however, be taken as an accurate overview of sharia as a whole[21] because 'it is unfair to judge Islamic law (Shari'a) by the political systems which prevailed in various periods of Islamic history. It ought to be judged by the general principles which are derived from its sources'.[22] There are those who argue that sharia law is actually progressive: when it was developed it was a large step forward in the recognition of women's rights[23] and 'the Prophet was keen to improve the position of women in his time'.[24] Additionally it is important to consider the idea that sharia law is not a concrete entity, as explained by Mashood Baderin:

> With respect to applied law and applied political thought, the processes under the *shari'a* are essentially 'secularised', that is, transformed from the *shari'a*'s divine nature into a secular, temporal nature … While the injunctions relating to acts of worship are generally considered settled and unchanging, those relating to temporal inter-human relations, as derived by the earlier jurists from the Qur'an and *Sunna*, are more flexible and responsive to change according to time and circumstances. Matters relating to human rights and good governance fall principally within the sphere of temporal inter-human relations.[25]

From this it is clear that there is no exact answer as to the compatibility of sharia with human rights standards, nor is it possible to make an assessment of the precise treatment of women – sharia is flexible and can be adapted and developed along with the demands of modern society. While this is positive in that it goes against the presumption of sharia being archaic and sexist, it also

19 A Mayer, 'Gender discrimination and human rights in Iran', (2001) 19 *Iran Nameh*, available at <http://fis-iran.org/en/irannameh/volxix/gender-discrimination>, accessed 7 June 2013.

20 *Al Midani v Al Midani* [1999] Lloyd's Rep 923.

21 Turner, *Religion and Modern Society*, p 167: we 'must avoid prejudicially assuming that something called "Islam" does not accord women the same rights as something called "the West". These monolithic notions mask the fact that within Islam as well as in the West there are more or less endless debates about how women (men, children, the elderly, the sick and so forth) should be treated. Neither the common law nor the *Shari'a* are static, homogenous or consistent systems.'

22 International Commission of Jurists, *Human Rights in Islam: report of a seminar held in Kuwait in December 1980* (Geneva, 1982), p 7.

23 N Coulson, *A History of Islamic Law* (Edinburgh, 1964), p 14.

24 Zubaida, *Law and Power*, p 177.

25 M Baderin, 'An analysis of the relationship between *shari'a* and secular democracy and the compatibility of Islamic law with the European Convention on Human Rights', in Griffith-Jones, *Islam and English Law*, pp 72–93 at p 82.

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means that it is difficult to regulate application of Islamic norms, as there is no uniform and defined body of 'accepted' laws.

In support of religious arbitration

Far from being universally criticised, as might be assumed from the press, religious arbitration is in fact widely supported for a number of different reasons. Arbitration is often cheaper and faster than the traditional courts and has the benefit that an arbitrator can be chosen because they have expertise in the matter at hand. The proceedings are also usually private and therefore can be confidential, a desirable factor in many commercial and personal disputes.[26] The Ministry of Justice supports the use of alternative dispute resolution (ADR), stating in their Practice Direction on Pre-action Conduct that

> starting proceedings should usually be a step of last resort ... Although ADR is not compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings. The court may require evidence that the parties considered some form of ADR.[27]

Within the context of religious arbitration there are additional advantages. For many, particularly those who follow a 'religion of law', the ability to decide disputes on the basis of religious principles allows a demonstration of faith and promotes their freedom of expression.[28] As the former archbishop pointed out in his speech, some religious communities 'while no less "law-abiding" than the rest of the population, relate to something other than the British legal system alone'.[29] These people are given freedom to decide disputes in a manner compatible with their particular beliefs.

Many Muslims have felt marginalised in British society, particularly since the events of 2001 and subsequent media coverage of the 'war on terror'.[30] The availability of religious arbitration may be seen to indicate an acceptance of the validity of Islamic beliefs and go some way to creating a remedy to this situation. Further, in contrast to the perception of the traditional adversarial court system of the United Kingdom as hostile and confrontational, religious arbitration is able to take into account and appeal to common values and beliefs held by

26 M Boyd, 'Dispute resolution in family law: protecting choice, promoting inclusion' (2004), p 10. Available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>, accessed 7 June 2013.
27 Ministry of Justice Practice Direction – Pre-action Conduct, §8.1.
28 The submission of the Christian Legal Fellowship in Boyd, 'Dispute resolution in family law', p. 63.
29 Williams, 'Civil and religious law in England', p 262.
30 See R Lambert and J Githens-Mazer, 'The demonisation of British Islamism', *The Guardian*, 1 April 2009, available at: <http://www.guardian.co.uk/commentisfree/belief/2009/mar/31/religion-islam>, accessed 7 June 2013.

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the parties: 'In *shari'a* councils, Muslims find a Muslim framework of dispute resolution that is culture- and religion-friendly, unlike the secular legal system which seems time-consuming, unfriendly and unable to take into account cultural and religious factors.'[31] It is this very factor that will increase adherence to the law and even help to uphold gender equality, in a way that could never be achieved by a secular court:

> ... it is an Islamic tribunal and presided over by trained community leaders, giving it the credence it needs within the Muslim community. This ingredient offers the legitimacy factor of the equation. Its importance is clear when decision[s] in favour of women are made against men who are ignorant of the rights of women afforded in Islam ... it will ensure that justice is administered by holding the person accountable to the very Deity he/she worships – an extremely powerful deterrent against non-compliance.[32]

One of the most cited and discussed arguments in favour of arbitration in particular is that it promotes autonomy.[33] Personal autonomy is the capacity of a rational individual to make their own, informed, decisions and to be 'part-author of one's own life'.[34] In brief, the argument is that having more than one option available to an individual promotes their autonomy. The availability of multiple forums for resolving a dispute allows parties to choose the one that will be most beneficial or suitable for them, a market element that forces the forums to 'compete' for the loyalty of the public by being more flexible and accommodating of the multiple views held in a community.[35]

The concerns raised by religious arbitration

For sceptics, however, arguments based on personal autonomy and religious freedom are largely idealistic and fail to take into account some of the realities of the situation. It has been pointed out that 'While there is little doubt that the accommodation of minority groups is an indisputable virtue, equally important is the dilemma concerning the potentially injurious effects of accommodation

31 P Shah, 'Judging Muslims', in Griffith-Jones, *Islam and English Law*, pp 144–156 at p 153. See also Boyd, 'Dispute resolution in family law', p 65.

32 M Shaiki, quoted in Boyd, 'Dispute resolution in family law', p 64.

33 F Ahmed, 'Personal autonomy and the option of religious law', (2010) 24 *International Journal of Law, Policy and the Family* 222–244.

34 As quoted in F Ahmed and S Luk, 'Religious arbitration: a study of legal safeguards', (2011) 77 *Arbitration* 290–303 at 292; this concept was central to the arguments put forward by both Dr Williams and Lord Phillips in their speeches. For a more complete discussion of the concept, see F Ahmed and S Luk, 'How religious arbitration could enhance personal autonomy', (2012) 1 *Oxford Journal of Law and Religion* 424–445.

35 A Shachar, *Multicultural Jurisdictions: cultural differences and women's rights* (Cambridge, 2001), p 122.

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policies on vulnerable individuals within such minority groups.'[36] Concerns have been expressed in particular about how parties 'choose' religious arbitration, and the fairness of the subsequent arbitration awards.

The personal autonomy argument relies on the presumption that the choice made is a free one. People are less likely to be able to make autonomous decisions about religious matters, however, 'if they are subject to public scrutiny and pressure to conform'.[37] As observed by Bernard Jackson, 'consent to religious arbitration (and thus sometimes to the application of discriminatory religious rules) may be culturally conditioned or pressured … State law in such circumstances has to decide to what extent it will compromise its individualistic principles.'[38] Vulnerable members of a religious community[39] will often face pressure to opt for religious arbitration where the possibility exists, even though they might receive a decision more beneficial to them in the state courts.

For some women there may be very strong pressures based on culture and/or religion, or fear of social exclusion. These issues may be very real in faith-based communities, where a women may be called a bad adherent to a particular faith or even an apostate if she does not comply with arbitration. Such condemnation would leave such women isolated, shunned in their communities or even their houses of worship. In addition, there are many women whose economic lives depend on a close association with their faith-based community or cultural group. This is particularly true of immigrant women who find jobs first in their own communities. These women may be particularly vulnerable to community pressure and may lose their jobs if they do not comply with arbitration. Some women may also fear immigration consequences. For other women there may be fear of violence. In some cases it may be a lack of resources or information. When any of these conditions are present it is not accurate or reasonable to suggest that arbitration is being chosen freely.[40] As Michael Helfand has pointed out,

> the fact that social and communal pressures do not constitute legal coercion does not render them irrelevant. While the opt-in theory of religious arbitration may provide a reason to enforce religious arbitral awards, the potential for pressured assent may provide a reason to pause.[41]

36 N Bakht, 'Were Muslim barbarians really knocking on the gates of Ontario? The religious arbitration controversy – another perspective', (2005) 40 *Ottawa Law Review* 67–82.
37 Ahmed, 'Personal autonomy', p 5.
38 Jackson, 'Transformative accommodation', p 150.
39 Vulnerable groups to which these fears apply include Muslim women, particularly those who depend on their husband or community for financial support.
40 Submission of the Legal Education and Action Fund (LEAF) to Boyd, 'Dispute resolution in family law' as quoted at p 50. Further potential consequences are discussed, with reference to India, in Ahmed, 'Personal autonomy'.
41 Hefland, 'Religious arbitration and the new multiculturalism', p 1287.

Once the choice (free or otherwise) to resolve a dispute by means of religious arbitration has been made, there comes the additional question of whether the arbitration itself will be fair. The rules of arbitration are extremely flexible; where vulnerable individuals are in effect coerced (if not legally coerced) into choosing religious arbitration, it is quite possible that these individuals will not be in a position to negotiate the terms of the arbitration in a way that would be fair to their interests. The same is true even where parties have readily agreed to religious arbitration. In many interpretations of sharia there are discrepancies between the rights and entitlements of men and of women: 'According to Shari'a law, a woman's testimony counts for only half that of a man. So in straight disagreements between husband and wife, the husband's testimony will normally prevail.'[42] Although this may not occur in all Islamic communities or tribunals, owing to the lack of a uniform body of law and application within Islam, it completely contravenes the principles of justice that are understood to be integral to the United Kingdom's legal system(s).[43] The inevitable result of arbitration agreements that incorporate such 'unfair' provisions are arbitration awards that are similarly unfair.

The case of *Al Midani v Al Midani* provided an example of unfair arbitration rules. The applicants to the court were two of the four beneficiaries of a will about which a dispute had arisen. The dispute was referred to the Islamic Shari'a Council of London (ISC). The applicants contested that they had not agreed to the arbitration and that it was therefore unenforceable. The court agreed and the order of the ISC was declared invalid on this basis. No mention was made of the fact that the arbitration had been decided on the basis of discriminatory principles.[44] It is not enough to rely on the assumption that no arbitration agreement or award that was so incompatible with generally accepted levels of gender equality and fairness would be enforced in the secular courts, because in many cases the factors that lead to the election of religious arbitration are precisely those that would stop litigants from appealing to the state system to enforce or quash a decision.

The ability of the state to interfere in arbitration decisions is severely limited by the 1996 Act, which aimed to limit both judicial involvement in the arbitration process and the right of appeal.[45] These aims have obvious benefits, such as preserving the freedom and autonomy of the parties to manage their own dispute,[46] and reducing the work of the domestic courts, and it is generally

42 Submission of Homa Arjomand of the International Campaign Against Shariah Courts in Canada to Boyd, 'Dispute resolution in family law', quoted at p 49.
43 Phillips, 'Equality before the law'.
44 Specifically that a female heir could only inherit half as much as a male heir. See *Al Midani v Al Midani*.
45 Saville LJ, 'The Arbitration Act 1996: what we have tried to accomplish', (1997) 13 Const LJ 410.
46 Ibid, p 411.

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acknowledged that the Act was largely successful.[47] The Act provides that parties are free to decide their own disputes subject to only those safeguards 'as are necessary in the public interest'.[48] This is reiterated by section 68, which stipulates that the state will only intervene in the case where an agreement suffers 'serious irregularity'. Further, under section 69, the parties can contract out of the ability to appeal the arbitration decision to the domestic courts. The Act was designed primarily with commercial arbitration in mind, and the certainty and flexibility that this provides is one of the qualities that makes it an attractive system for international commercial disputes. However, it can have a negative effect in the context of private disputes.

Considering the position of a vulnerable individual who may be coerced into religious arbitration or who may not be aware of the other options available to them, these sections of the Act place a worrying amount of power in the hands of those who draft the arbitration agreement. It is arguable that one instance where the state would intervene in the public interest would be where a vulnerable party was severely and unfairly disadvantaged by an arbitration agreement or award. The enforcement of any arbitration award by an English court is subject to challenge as to substantive jurisdiction where it is claimed that the arbitral tribunal acted outside its powers, and as to substantive irregularity, which would include failure to comply with the general rule of procedure that the tribunal should act fairly and impartially giving each party a reasonable opportunity to put their case. Thus any limitation by a sharia tribunal as to the weight to be accorded to a person's testimony based upon their sex or religion would probably fall under this heading and result in the award being unenforceable.[49] However, there is currently no automatic procedure whereby arbitration agreements are 'vetted' or reviewed, with the effect that such decisions or agreements go unnoticed. Further, it is suggested that the technical 'unenforceability' of a decision does not necessarily mean that the decision will not be enforced because, as pointed out by the same author, 'generally an English court will enforce an arbitral award without considering its merits'.[50] The second part of the article will discuss some of the safeguards that were proposed in Canada to attempt to remedy a similar situation.

Even on appeal there has been limited evidence of the state courts' consideration of the applicability of discrimination laws in the arbitration context. The most interesting incidence of this came in the case of *Jivraj v Hashwani*,

47 See, for example, D Speller and J Fly, 'The Arbitration Act ten years on: a paragon of party autonomy?', in *The International Comparative Legal Guide to International Arbitration 2007*, available at <http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/speller.pdf>, accessed 11 June 2013.

48 Arbitration Act 1996, s 1.

49 I Edge, 'Islamic finance, alternative dispute resolution and family law: developments towards legal pluralism?', in Griffith-Jones, *Islam and English Law*, pp 116–143 at p 122.

50 Ibid, p 121.

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decided in 2011 in the Supreme Court.[51] This case concerned the legality of a provision in an arbitration agreement which required the arbitrators to be members of the Ismaili community because this might be seen to place a religious requirement on employment, contrary to the Employment Equality (Religion or Belief) Regulations 2003.[52] The Supreme Court based their decision that this was in fact a valid stipulation on the fact that arbitrators are generally considered to be self-employed and therefore not 'employees' for the purposes of the Regulations.[53] The Supreme Court's ruling has several major implications,[54] not least that this seems to place all self-employed workers outside the scope of the Regulations and therefore leave them vulnerable to this type of discrimination. For our purposes, however, the major implication of this decision would seem to be that it excludes arbitration agreements in general from the ambit of such Regulations and sets them apart from the widely established requirements of equality.

The European dimension

It is possible that the state could be held responsible for decisions made through religious arbitration through the Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly known as the European Convention on Human Rights (ECHR), incorporated into domestic law by the Human Rights Act 1998, giving litigants the ability to rely on and enforce the ECHR rights in the state courts. As arbitration is a form of private dispute resolution, arbitration decisions themselves do not have to conform to the standards set out in the Human Rights Act.[55] The state, however, has a duty to ensure that the Arbitration Act 1996 is not in contravention of the ECHR. This means that, although arbitration agreements and decisions themselves are not directly subject to the Human Rights Act, the rights conferred by the ECHR are still important when considering the validity of the current arbitration regime.

Prima facie the right to freedom of religion and belief under Article 9 of the ECHR would seem to be enhanced by allowing arbitration based on religious principles. As discussed above, there are many for whom adherence to a set of religious 'laws' is an integral part of their religion. The right protects both the individual's belief (*forum internum*) and the manifestation of belief with others in both the private and public dimensions (*forum externum*).[56] The interests of the individual and the group are generally similar; however, in decisions

51 *Jivraj v Hashwani* [2011] UKSC 40.
52 Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660.
53 *Jivraj* at para 27.
54 R Buxton, 'Discrimination in employment: the Supreme Court draws a line', (2012) 128 *LQR* 1.
55 Although an argument might be put forward that they are performing a public function.
56 R Reed and J Murdoch, *Human Rights Law in Scotland* (third edition, Haywards Heath, 2011), 7.18.

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of the European Court of Human Rights (the Court) when these come into conflict, it is often the individual who loses out.

According to the judgment in the case of *X v Denmark*, a religious community is 'protected in its rights to manifest its religion, to organise and carry out worship, teaching, practice and observance and it is free to act out and enforce uniformity in these matters'.[57] This suggests that a religious community has the right to oblige its individual members to adhere to the religion to the extent that it sees fit and thereby to 'enforce' uniformity. Although this judgment was appropriate in the instance in which it arose,[58] it could have worrying consequences for vulnerable members of a religious community, suggesting that the protection of the right of the individual lies in their ability to leave the community.[59] Considering the position of a vulnerable individual member of a religious community, the legal right of exit from that community does not ensure that exit is practical or practicable, nor does it guarantee that membership is voluntary.[60]

Article 6(1) of the ECHR provides that 'In the determination of his civil rights and obligations … [everyone] is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[61] A question arises as to whether parties to an arbitration agreement should be able to contract out of the right to appeal,[62] as it is against the idea of a fair procedure. According to Dr Williams, it is a misconception that the existence of a 'right' requires each individual to activate it.[63] Indeed, Article 6 is one of the few rights that an individual can waive.[64] In domestic jurisprudence the ability to waive parts of Article 6 is also recognised, particularly in the case of arbitration,[65] owing to the fact that arbitration is generally private and not public; however, waiving the right to a public tribunal does not equate to waiving all rights to a fair hearing.

57 *X v Denmark*, App no 7374/76 (ECtHR, 8 March 1976) at para 158.
58 A Danish clergyman had imposed a religious requirement on the parents of children whom he was asked to christen; the Church dismissed him from his employment as he had no power to do so. The clergyman complained to the Court on the basis that his right to freedom of religion had been violated. It was held that the Church was not obliged to secure the religious freedom of its members, and that the right to resign from employment and exit the community was a sufficient safeguard.
59 A similar principle was shown in the case of *X v United Kingdom* App no 8160/78 (EComHR 12 March 1981), (1981) 22 DR 27, and in *Knudsen v Norway* App no 11045/84 (EComHR, 8 March 1985), (1985) 42 DR 247.
60 Ahmed, 'Personal autonomy'.
61 It is unclear whether Article 6 applies directly to arbitration tribunals because, although they derive their authority from statute, they are used to resolve private disputes. There has been no judgment determining this question directly. However it is clear that the state is at least under an obligation not to endorse decisions of arbitration tribunals that have been taken in contravention of the ECHR.
62 Pursuant to section 69 of the Arbitration Act 1996, which will be discussed in more detail below.
63 Williams, 'Civil and religious law in England'.
64 Reed and Murdoch, *Human Rights Law in Scotland*, §§ 3.32–3.34.
65 *Millar v Dickson*, [2001] UKPC D4 at para 53.

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When Article 6 is taken in conjunction with Article 14 it raises concerns that an arbitration process based on elements of sharia law might be contrary to the Court's views on gender equality. While it can be argued that Islamic laws do advocate equality between men and women as human beings,[66] they do not regard them as having equal roles.[67] This differentiation of gender roles can result in practices that contravene international human rights standards.[68] On this point it is interesting to consider the judgment of the Grand Chamber in the case of *Refah Partisi v Turkey*, in which the Court explicitly stated that 'shari'a is incompatible with the fundamental principles of democracy as set forth in the Convention'.[69] If discriminatory arbitration decisions are facilitated by the 1996 Act then the Act itself may come under constitutional scrutiny.

As in domestic jurisprudence, there is little case law available to suggest how the Court will deal with religious arbitration. The only case in which this can be said to have been considered is that of *Pellegrini v Italy*,[70] where the applicant applied to the Court after the Italian courts enforced a religious decision made in the courts of the Vatican to annul her marriage.[71] During the proceedings before the Vatican court the applicant had not been properly informed of the case against her, nor had she had legal representation.[72] The Court held that, in order to authorise the enforcement of the decision, the Italian authorities would have had to satisfy themselves that the applicant had had a fair trial under Article 6(1) of the ECHR.

While this judgment is promising in that it acknowledges that, in order to be considered valid, proceedings in religious courts (and therefore presumably, by extension, in religious arbitration) must be consistent with at least Article 6 of the ECHR, it did not go into sufficient detail as to provide an idea of the breadth of its applicability or to suggest the development of a general principle

66 See the discussion of the European Islamic 'Charter of Values' in Jackson, 'Transformative accommodation'.

67 For example, Article 6 of the OIC Cairo Declaration on Human Rights in Islam states that:

> (a) Woman is equal to man in human dignity and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage;
> (b) The husband is responsible for the support and welfare of the family.

68 M Baderin, *International Human Rights and Islamic Law* (Oxford, 2003), p 60.

69 *Refah Partisi (Welfare Party) and Others v Turkey* App nos 41340/98, 41442/98, 41343/98 and 41344/98 (ECtHR, 13 February 2003) at para 123. The decision of the court and many of the statements made in the judgment were not uncontroversial and much criticism has been levelled at Strasbourg in that respect. The facts of this case, concerning the dissolution of the Refah Party by the Turkish Constitutional Court, are not immediately relevant to the present article however. For further discussion of the case see Griffith-Jones, *Islam and English Law*.

70 *Pellegrini v Italy* App no 30882/96 (ECtHR, 20 July 2001).

71 The Vatican is not a signatory to the ECHR and therefore no case could be brought against them for the decision.

72 It was not suggested that this irregularity was because of the gender of the applicant; therefore it was not considered under Article 14.

that all arbitration and religious arbitration in member states must comply with the entirety of the Convention.

From the above it is clear that the domestic and European courts have adopted a rather 'hands-off' approach to the question of the fairness of religious arbitration. This is due in part to the long-standing judicial principle of non-interference[73] in the private affairs of religious groups.[74] Although there have recently been suggestions that a manifestation of a religious belief, such as the reliance on it in arbitration, 'must satisfy some modest, objective minimum requirements',[75] this qualification to the principle of non-interference is likely to be read restrictively.[76] A recent consideration of this principle in English law was provided by Mummery LJ in his judgment in the case of *Khaira v Shergill*,[77] when he expressed the idea of the balance that needs to be struck between competing interests. On the one hand, 'the courts do not decline to decide cases about civil rights … just because there is a religious element';[78] on the other hand,

> the authorities on the role of the courts in litigation about religious affairs establish, with a reasonable degree of certainty, that the courts abstain from adjudicating on the truth, merits or sincerity of differences in religious doctrine or belief and on the correctness or accuracy of religious practice, custom or tradition.[79]

It is suggested that the courts might be particularly reluctant to adjudicate on the validity of the content of an agreement to religious arbitration because of the combination of this religious element with the aim of preserving the efficacy of private arbitration as an alternative to court.

Further, as emphasised earlier, the courts face a large barrier in that they may only consider and determine the validity of an award when the question has been referred to them by the parties to the dispute. There is no system currently in place that provides for the monitoring of religious arbitration decisions and agreements, and it is argued that more regulation of the system is needed in order to provide protection for vulnerable individuals and to fulfil the state's obligations under the ECHR sufficiently.

73 Sometimes also called the doctrine of non-justiciability.
74 As discussed in *HH Sant Baba Jeet Singh Maharaj v Eastern Media Group Ltd* [2010] EWHC (QB) 1294 at para 5 per Eady J: 'the well-known principle of English law to the effect that the courts will not attempt to rule upon doctrinal issues or intervene in the regulation or governance of religious groups'.
75 *R v Secretary of State for Education and Employment* [2005] UKHL 15 per Lord Nicholls of Birkenhead.
76 R Sandberg, *Law and religion* (Cambridge, 2011), p 200.
77 *Khaira v Shergill* [2012] EWCA Civ 983.
78 Ibid at para 64.
79 Ibid at para 19.

ADDITIONAL SAFEGUARDS AND THE FUTURE OF RELIGIOUS ARBITRATION

There are clearly many reasons why it is desirable to maintain a system that allows religious arbitration in the United Kingdom. The current structure of the system, however, does not contain sufficient safeguards to ensure the fairness of arbitration to the parties. This section aims to discuss the flaws of the current system and some ways in which it might be improved.

The flaws of the current arbitration regime

Even where parties have not specifically contracted out of the right to appeal under section 69 of the Arbitration Act 1996, there are very restrictive criteria under which the courts will grant leave to appeal, where 'the determination of the question will *substantially* affect the rights of one or more of the parties'.[80] Although human rights considerations are present in the Act, they are subject to qualification.[81] This has the worrying effect that decisions that interfere with the parties' rights on a less extreme basis will be enforced as a matter of public policy. In the case of a woman who has been subjected to community pressure to consent to an arbitration agreement, this might not be considered to have a 'substantial' effect on her rights, and therefore would be deemed a valid arbitration under the Act. The UK's obligations under the ECHR are absolute,[82] and it is difficult to see how requiring rights to have been 'substantially' interfered with in arbitration before the state will step in is consistent with these obligations, as it could indirectly facilitate low-level but prevalent abuse of the rights of certain groups. At this point, 'it is helpful to recall that one of the historical motivations of the ECHR system was to stop small-scale violations becoming larger ones'.[83]

The high threshold for appeals from arbitration decisions ensures that arbitration remains an attractive forum for the settling of disputes. If there were an unlimited right of appeal then the integrity of the system would be undermined. Parties should be able to choose arbitration without the fear that they will simply end up in court. This does not, however, negate the fact that vulnerable individuals may be disadvantaged and have their rights adversely affected by the system as it stands. In order to preserve the independence of the arbitration system and to avoid the marginalisation of arbitration as a form of dispute resolution there need to be greater safeguards in place to ensure that arbitration

80 Arbitration Act 1996, s 69(3)(a) (emphasis added).

81 Other relevant sections of the Act include s 1, s 68 and s 70. See, for example, the case *of HMV UK Ltd v Propinvest Friar Ltd Partnership* [2011] EWCA Civ 1708.

82 Some rights can be restricted, but only where this pursues a legitimate aim, is in accordance with the law and deemed necessary in a democratic society. There are further procedures in place for derogations in times of national emergency.

83 D McGoldrick, 'The compatibility of an Islamic/*shari'a* law system or *shari'a* rules with the European Convention on Human Rights', in Griffith-Jones, *Islam and English Law*, pp 42–71 at p 46.

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cannot be used to facilitate the systematic abuse of the rights of vulnerable persons.

Considering Canada: possible improvements to the arbitration system

The Ontario Report was compiled by a former Attorney General in 2004 as the result of a consultation on the use of religious principles – in particular those of Islam – in arbitration. The Report recommended that religious arbitration should continue but that certain further safeguards needed to be imposed in order to ensure the fairness of the system. In this section, the Report will be used to discuss possible improvements to the arbitration system in England and Wales. The Report recommended several ways in which the system of religious arbitration might be improved.[84] This study focuses on two in more detail as they appear to be most relevant to the current situation in England and Wales: a requirement for independent legal advice, and the training and regulation of arbitrators.

Independent legal advice (ILA) is an effective means of ensuring that parties are aware of their individual rights. A lay person may not necessarily understand all of the implications of a binding arbitration agreement, particularly one that purports to limit or exclude the right of appeal. By requiring parties to have independent legal advice they will be enabled to understand fully the process that they choose. If ILA were to include an explanation of the parties' rights under domestic law, they would then be able to make an informed choice as to the best forum for their dispute.[85]

Unfortunately, ILA is not guaranteed to be of much practical use to a vulnerable party. The pressures that persuade a vulnerable party to choose religious arbitration may still be present, regardless of whether legal advice is obtained. Advice does not necessarily have to be followed. A further concern raised in the Report is also applicable in the domestic context:

> . . . despite its recognized utility, in practice, independent legal advice may be of little use to clients who submit to arbitration using an alternative legal framework; this is so because most Ontario-trained lawyers are likely to be unaware of the repercussions and consequences of a system of law that they are not familiar with. Lawyers may only be of assistance to clients to the extent of explaining their rights in the Canadian legal context.[86]

The suggestion for greater training and education of arbitrators would seem to be more practicable in England and Wales. The relatively small size of the

84 See Boyd, 'Dispute resolution in family law', s 8, for the full recommendations.
85 See submission of B'nai Brith to Boyd, 'Dispute resolution in family law'.
86 N Bakht, 'Family arbitration using sharia law', (2004) 1 *Muslim World Journal of Human Rights* 1–24 at 7.

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jurisdiction would allow a standardised licensing requirement to be created and enforced. In Ontario, most of the respondents to the Report were in favour of imposing some qualification requirements on potential arbitrators.[87] Under the Arbitration Act 1996 as it stands, there are no compulsory restrictions on the identity of an arbitrator, although the parties may impose restrictions of their own.[88] A requirement that an arbitrator has a minimum level of training in arbitration and dispute resolution would have a minimal organisational impact on the arbitration system. Where religious organisations wanted to make religious arbitration available to their members, a potential arbitrator could undergo training for that purpose, and this training requirement might serve to give further recognition to the validity and importance of arbitration as a process.

In addition to ensuring that arbitrators have a minimum level of training, a system whereby education of arbitrators was compulsory would also enable greater regulation of arbitrations themselves. In Ontario, Boyd has suggested that 'the unregulated nature of arbitration left the whole process open to abuse'.[89] There were several submissions to the Report which suggested that, on completion of an arbitration qualification, arbitrators should become members of a governing body, to which parties could apply should they be dissatisfied with the conduct of their arbitrator.[90]

With regard to religious arbitration using sharia principles, concerns have been raised in Britain about the lack of regulation and uniformity present in the system. A governing body of arbitrators would go some way towards allaying these concerns by allowing more regulation and oversight of the arbitration process and of decisions. It has been noted, however, that none of these measures could seek to unify the rules that were used in arbitration, or to standardise or impose a hierarchical structure within a religious community because 'State measures favouring a particular leader of a divided religious community or seeking to compel the community, or part of it, to place itself under a single leadership against its will would constitute an infringement of the freedom of religion.'[91]

As it stands in England and Wales, the Arbitration Act 1996 provides very little effective control of the arbitration process. Limiting judicial involvement in arbitration is crucial in ensuring that commercial disputes are able to be resolved decisively through the means of arbitration. However, the system

87 Boyd, 'Dispute resolution in family law', p 109.
88 *Jivraj*.
89 M Boyd, 'Ontario's *shari'a* court: law and politics intertwined', in Griffith-Jones, *Islam and English Law*, pp 176–186 at p 180.
90 Boyd, 'Dispute resolution in family law', p 110.
91 *Supreme Holy Council of the Muslim Community v Bulgaria* App no 39023/97 (ECtHR, 16 November 2004) at para 96.

leaves much to be desired in the context of arbitration using religious principles. The ability of the parties to contract out of the right to appeal removes a very important legal safeguard, and in order for the system to withstand criticism and to protect vulnerable parties more regulation would be needed. One possible way to do this would be to require all arbitrators to hold minimum qualifications in dispute resolution and to be held accountable to an overseeing body.

Maintaining or excluding religious arbitration

It is clear from the above discussion of current and possible future safeguards to religious arbitration that there are deficiencies in the system; however, it has been shown that there are also many advantages to the Act and its provisions. Parties are able to settle disputes based on a system of laws or rules that they understand and identify with, and this, notwithstanding any concerns for vulnerable individuals and the fairness of such procedures, enhances the autonomy of the parties. The question arises as to what the best way forward might be, in terms of improving the arbitration process and protecting those vulnerable individuals for whom the current system presents a problem.

The Ontario approach

The Ontario sharia debate had a somewhat surprising conclusion: despite the extensive recommendations set out in the Report,[92] the Ontario government decided to legislate to allow family arbitration to be conducted only in accordance with Ontario state and Canadian federal law.[93] It could be suggested that to rule out the possibility for arbitration on any rules other than those of the state means that no discriminatory rules can be used, while preserving arbitration as an alternative to the traditional court system. Essentially, by taking greater control of the system and the way in which the power of arbitration tribunals can be exercised, the state is able to limit its interference, because there is no conflict between state law and the rules used in arbitration.

Further, vulnerable individuals, who may feel pressured to pursue religious arbitration, are afforded a protection by a system that does not allow such arbitration. Where there is no other option there can be no 'shame' in opting for the domestic court system.[94] No-one can be pressured into taking an option that is not available. It is possible, therefore, that the adoption in the UK of a policy akin to the one in Ontario would be beneficial to the parties to arbitration and would eliminate many of the human rights concerns that are raised by the current system. It has been pointed out that technically 'the new amendments appear to find a balance between religious freedom and equality by permitting family

92 Boyd, 'Dispute resolution in family law', s 8.
93 Family Statute Law Amendment Act 2006, s 59.2.
94 Boyd, 'Dispute resolution in family law', p 53.

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arbitration with religious principles, so long as such principles do not conflict with Ontario's family law'.[95]

Turner argues that 'there is a danger that the formal recognition of religious laws in general and *Shari'a* in particular would contribute to a further fragmentation of modern societies',[96] in that it allows and legitimises the continued segregation of members of different religious groups. To continue to allow religious arbitration might be seen as a 'ghettoisation' of Islamic and other religious communities,[97] further alienating many who already feel alienated by British society. The multicultural ideal of integration of different cultures into one society is effectively hindered by the establishment of separate courts.

Criticisms of the Ontario approach

Alternatively, a reaction of this kind could result in a perpetuation of the problems of the system and of multiculturalism more generally.[98] As was stated by the European Court in the case of *Supreme Holy Council v Bulgaria*, 'The role of the authorities in a situation of conflict between or within religious groups is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.'[99] It is noted that any decision to abolish religious arbitration under the Arbitration Act 1996 would affect the workings of all religious 'courts', not just those that rely on principles of sharia law. The seemingly narrow question of the use of sharia law within England in fact

> puts in question the scope of the right to religious liberty and of the restrictions – and the limits to those restrictions – that can legitimately be placed, under the ECHR, on the right to manifest one's religion 'in public and private'.[100]

Many of the concerns that have been raised about the use of sharia law in religious arbitration apply equally to other religions, but not all do. For example, the Roman Catholic Church has a clear hierarchical structure that goes some way to establishing a check for the decisions of tribunals as they are necessarily accountable to those higher than them, and ultimately to the Vatican.[101] Additionally,

95 Bakht, 'Were Muslim barbarians really knocking?', p 19.
96 Turner, *Religion and Modern Society*, p 173.
97 Submission of the Muslim Canadian Congress to Boyd, 'Dispute resolution in family law', p 52.
98 The situation in Ontario is still relatively new and there is little information available on the consequences of this move. The discussion in this section is therefore speculative, based on assertions made by various academics.
99 *Supreme Holy Council v Bulgaria* at para 96.
100 Baderin, 'Analysis of the relationship between *shari'a* and secular democracy', p 73.
101 That is not to say that a decision of the Vatican would necessarily be above reproach, as shown in the case of *Pellegrini*. However, it does go some way to ensure that there is at least a uniform application of principles, which may then be monitored effectively.

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many of these courts, such as the London Beth Din, which was established in the early eighteenth century,[102] play a very important role in the lives of religious communities within the United Kingdom. Legislating to limit their legal or 'official' power would create unnecessary tension between the state and these religious communities.

The Civitas report of 2009 came to the conclusion that sharia courts should be expressly excluded from the ambit of the Arbitration Act 1996.[103] While this suggestion might be seen to solve the problem of other religious courts being affected by the decision, it would in fact go even further towards alienating and ghettoising Islamic communities and establishing a difference of treatment between religions that might itself fall foul of discrimination laws. A Private Members Bill introduced by Baroness Cox[104] purported to address the issue by including amendments to the 1996 Act that would specifically exclude rules that discriminated on the grounds of sex,[105] and would prevent arbitration on all matters of family law.[106] These provisions would in theory be an effective way of legislating to allay some of the concerns raised by religious arbitration, particularly on the basis of sharia law. However, the lack of regulation of arbitration in general might serve to perpetuate gender discrimination regardless.

A further concern surrounding the abolishing of religious arbitration would be that it would probably continue unregulated and 'illegally'.[107] An individual will not automatically give up their culture just because the state has ruled that they should be subject only to domestic laws. Any system whereby the state has control over the determination of laws remains viable only as long as the 'legal status' of contracts, associations and decisions is important to the parties.[108] There is a risk that imposing stricter regulations surrounding the rules of arbitration would not improve the system but would lead to more people choosing to bypass it.

CONCLUSION

The application, albeit limited, of sharia law in the domestic law of the United Kingdom is undeniably a controversial issue. In practice it is difficult to

102 See D Katz, *The Jews in the History of England* (Oxford, 1994).
103 MacEoin, *Sharia Law or 'One Law for All'?*, p 7.
104 Arbitration and Mediation Services (Equality) Bill. This Bill had its second reading on 19 October 2012 but did not progress further as it was felt that its provisions were sufficiently covered by existing legislation and that introducing a separate Bill would complicate and confuse the area. Speaking on the BBC's *Panorama* episode 'Secrets of Britain's sharia councils', aired in April 2013, Baroness Cox indicated her intention to reintroduce the Bill during the next Parliamentary session.
105 Arbitration and Mediation Services (Equality) Bill, part 2, s 3.
106 Ibid, part 2, s 4.
107 T Farrow, 'Re-framing the sharia arbitration debate', (2006) 15 *Constitutional Forum/Forum constitutionnel* 79–86 at 80.
108 Ahmed, *Religious Arbitration*, p 298.

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assess the extent to which it is utilised and to establish what rules will be applied, owing to the non-uniform nature of sharia law. It is not possible to arrive at a definitive statement of what its application will be in a certain situation nor to make a completely objective assessment of the current state of play.

The Arbitration Act 1996 was designed primarily with commercial arbitration in mind and, as such, its provisions are tailored to achieve the best outcomes in this area. As a result, the Act possibly does not have sufficient safeguards to protect against the danger of systematic abuse of parties' rights.[109] There is an appreciable risk to vulnerable individuals from arbitration based on religious norms, and the fear of this risk is echoed across the world. While there is a lack of information available that could lead to a conclusion that there is widespread abuse of the rights of vulnerable parties under the current system, there *is* sufficient information to show that such abuse is at least a potential consequence of the system as it stands.

It is an unfortunate truth that no legal system is above reproach, and that extends to any arbitration system because 'even plainly illegal activities may occur unless state authorities find out about them in some way. Similarly, people may suffer from unjust arbitral awards, unless they bring them to the attention of the courts.'[110] However, the role of the state is not and should not be to 'go looking' for people breaking the law, because, as a signatory to the ECHR and many other international human rights treaties, the United Kingdom has a responsibility to do all that is practicable in order to protect the rights of citizens and has a duty not to legislate in a manner that facilitates the abuse of those rights. It is quite possible to amend the law as it stands in order to make it more obvious when these standards are not upheld and to allow for sanctions to be imposed on those who fail to uphold them.

In the light of the problems posed by abolishing the system as it stands and the limited evidence of discriminatory treatment arising from religious arbitration using sharia law, it is argued that the only alternative is to preserve it, trying to regulate it as far as possible to ensure that arbitration based on rules other than those of the state itself is conducted in compliance with generally accepted standards of equality and fairness. This might not be a perfect solution but it would allow 'a measure of transparency, accountability and competence'.[111] It is better to maintain a system that is slightly flawed and attempt to reform it than to abolish it and remove all possibility of regulation. Additionally, it is

109 It is suggested that, although some of these concerns could be remedied by legislation, deeper issues would remain.

110 Letter from the Ministry of the Attorney General to the Canadian Council of Muslim Women, as quoted in Bakht, 'Family arbitration using sharia law', p 6.

111 A Emon, 'A mistake to ban Sharia', available at <http://www.law.utoronto.ca/news/article-emon-mistake-ban-sharia>, accessed 12 June 2013.

noted that the United Kingdom is committed to pluralism and multiculturalism and

> if one believes that cultural traditions should not be culturally swamped in a secular, tolerant multicultural environment – in other words that multiculturalism is not a smokescreen for de facto assimilation – then it is difficult to reject the legal pluralism position. Any coherent and convinced multicultural position has to embrace legal pluralism.[112]

In order to improve the system of arbitration it is submitted that additional safeguards should be employed. Entirely abolishing the system whereby parties may rely on religious considerations in arbitration would result in unnecessary tension between cultural groups and would have consequences far beyond those intended. The only practicable solution is to employ a system whereby there is increased regulation of arbitrators, and arbitrators should be able to be held accountable for their decisions. It would be important to emphasise that this regulation would not have a substantive impact on the rules used in arbitration, beyond ensuring that there was equality between the parties, because of the independence guaranteed by the Arbitration Act 1996 and the advantages of being able to decide a dispute based on considerations other than those enshrined in the domestic law. This regulatory authority should, however, be a visible presence, and it should be made clear that any arbitration not conducted by a registered arbitrator within their capacity as outlined would not be legally enforceable.

Throughout this discussion it has been seen that problems arise from the mere fact that there are two different cultural frames of reference in play, each competing for recognition. The problem is one inherent to multicultural societies: different cultures impose different moral and social standards on their members. It might be considered that the debate surrounding the use of sharia-based arbitration in England and Wales, and indeed internationally, has been motivated more by the popular perception of such issues than any real and appreciable problems that have arisen. It could therefore be argued that a deeper problem than that of human rights and religious arbitration exists: the perception of Islam in the West.

The characterisation of Islam and the sharia as archaic, arbitrary and unprincipled is an unhelpful simplification that serves to perpetuate a hostile public perception of the community in general. The reality is that the sharia is simply a different system from that to which we are accustomed in the United Kingdom, based on principles derived from a legal tradition going

112 Turner, *Religion and Modern Society*, p 157.

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back millennia. Fear of this difference has led to sensationalism, and it might be suggested that it is this sensationalism that represents the greatest threat to justice in England and Wales. The arbitration system as it stands is not perfect. However, improving the system will neither compensate for nor remedy some of the deeply held public misconceptions surrounding Islam itself. This article has argued for an approach that allows for more regulation of arbitration in order to allay some of the fears surrounding the abuse of vulnerable parties, while retaining the integrity of the system as an alternative to court.

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