

3-26-2013

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Recommended Citation

Rebecca E. Maret, *Mind the Gap: The Equality Bill and Sharia Arbitration in the United Kingdom*, 36 B.C. Int'l & Comp. L. Rev. 255 (2013),
<http://lawdigitalcommons.bc.edu/iclr/vol36/iss1/7>

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MIND THE GAP: THE EQUALITY BILL AND SHARIA ARBITRATION IN THE UNITED KINGDOM

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Abstract: The observance of Sharia principles in Islamic arbitration tribunals operating in the United Kingdom has been heralded for its ability to provide Muslim communities with internal, community-based fora for dispute resolution. Although the judgments issued by these faith-based arbitration tribunals lack binding legal authority, British lawmakers express concerns centered on threats to the existing national legal system and to England's deeply rooted social policy of equality and non-discrimination. Introduced to address these concerns in 2011, the Equality Bill proposes a legislative solution to further maintain the principle of equality within alternative dispute resolution channels. This Note argues that, despite the Equality Bill's laudable effort to curb discrimination and violations of England's policy of equality, legislative reform alone will be unlikely to affect the Bill's desired goals.

INTRODUCTION

Over past decades, the United Kingdom has experienced a steady growth of Muslim communities within its borders, and with it, a surge of faith-based arbitration services for Muslims.¹ Recent estimates posit that at least eighty-five Islamic law councils or tribunals currently operate throughout the United Kingdom.² Although the judgments issued by these faith-based arbitration tribunals lack binding legal authority,³ the tribunals continue to offer mediation services for family, business,

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¹ See DENIS MACÉOIN, SHARIA LAW OR 'ONE LAW FOR ALL'? 69 (David G. Green ed., 2009); Almas Khan, *The Interaction Between Shariah and International Law in Arbitration*, 6 CHI. J. INT'L L. 791, 800 (2006); Javaid Rehman, *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, 21 INT'L J.L. POL'Y & FAM. 108, 123 (2007).

² MACÉOIN, *supra* note 1, at 69.

³ John R. Bowen, *How Could English Courts Recognize Shariah?*, 7 U. ST. THOMAS L.J. 411, 412 (2010).

and some criminal law disputes,⁴ and their associated judgments have been considered by judges in English civil courts.⁵

On June 7, 2011, Baroness Caroline Cox proposed a bill (Equality Bill) in the House of Lords that seeks to limit the legality of Islamic law courts operating in England and Wales.⁶ The Equality Bill aims to provide additional protection for victims of domestic abuse and to make further provisions concerning equality under the law of alternative arbitration and mediation services.⁷ If passed, the Equality Bill would introduce a maximum five-year jail sentence for any person falsely claiming that Islamic law courts or councils have legal jurisdiction over family or criminal law,⁸ and would effectively force Islamic arbitration councils “to acknowledge the primacy of English law.”⁹ The Equality Bill has yet to receive a vote in the House of Lords, but already it has intensified the debate on how the United Kingdom might address the challenges posed by the complex relationship between the State and the minority cultural and religious populations living within English society.¹⁰

This Note proceeds in three Parts. Part I provides a background on Islamic law and the development of Islamic arbitration tribunals in the United Kingdom. Part I also details the growth and importance of arbitration in England. Part II discusses the Equality Bill, giving particu-

⁴ Arsani William, *An Unjust Doctrine of Civil Arbitration: Sharia Courts in Canada and England*, 11 STAN. J. INT'L REL. 40, 42–43 (2010).

⁵ See Bowen, *supra* note 3, at 423. See generally Uddin v. Choudhury, [2009] EWCA (Civ) 1205 (appeal taken from Eng.) (considering the testimony of a court-appointed joint expert on principles of Sharia).

⁶ See Arbitration and Mediation Services (Equality) Bill, 2010–12, H.L. Bill [72] cl. 1 (Eng. and Wales); Nesrine Malik, *What Is Lady Cox's Bill Really About?*, GUARDIAN (London), June 20, 2011, <http://www.guardian.co.uk/commentisfree/belief/2011/jun/20/lady-cox-bill-womens-rights>.

⁷ Arbitration and Mediation Services (Equality) Bill pmb., § 8.

⁸ See *id.* § 7.

⁹ Karen McVeigh & Amelia Hill, *Bill Limiting Sharia Law Is Motivated by 'Concern for Muslim Women'*, GUARDIAN (London), June 8, 2011, <http://www.guardian.co.uk/law/2011/jun/08/sharia-bill-lords-muslim-women>.

¹⁰ See, e.g., Andy McSmith, *The Big Question: How Do Britain's Sharia Courts Work, and Are They a Good Thing?*, INDEP. (London), June 30, 2009, <http://www.independent.co.uk/news/uk/home-news/the-big-question-how-do-britains-sharia-courts-work-and-are-they-a-good-thing-1724486.html> (describing support and opposition to the Equality Bill); Suhail Hasan, *Statement by the Islamic Sharia Council on Lady Cox's Recently Proposed Bill*, ISLAMIC SHARIA COUNCIL, <http://www.islamic-sharia.org/news/statement-by-the-islamic-sharia-council-on-lady-coxs-on-recently-proposed-2.html> (last visited Feb. 8, 2013) (opposing the Equality Bill); see also Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination*, 4 INT'L J. CONST. L. 488, 489 (2006) (discussing the rebirth of religious, ethnic, and cultural communities within Europe).

lar consideration to those aspects of the Bill that would impact Islamic arbitration tribunals. Part II also considers England's historical commitment to equality as shown by various pieces of equality legislation. Part III analyzes the potential impact of the Equality Bill, and argues that although the Bill is laudable in its objective, its intended consequences may only truly be realized by engaging in social—not simply legal—reform aimed at bridging the gap between England's existing legal system and its cultural minority populations.

I. BACKGROUND

A. *Islam in England*

Historically, Islamic culture has maintained a practice of encouraging peaceful resolution of disputes involving Muslims.¹¹ Rooted in an understanding of Muslims as *shahadat*—“witness over other nations”—Islam emphasizes that peace must first come from within and among Muslims themselves.¹² To be deserving of *shahadat*, Muslims must also be committed to initiating peace among their non-Muslim neighbors and other communities.¹³

Described as the “kernel of Islam,”¹⁴ Sharia, or Islamic law, provides Muslims not just with a formal legal code dictating what individuals are bound to do under law, but “what [individuals] ought, in conscience, to do or refrain from doing.”¹⁵ Sharia derives not from a central code or institution, but from a number of historical Islamic texts, including the Quran and the Sunna.¹⁶ Aimed at establishing standards of rights and responsibilities for Muslim societies, the Quran advances values such as compassion, good faith, and justice,¹⁷ and the Sunna provides a model for Muslim behavior based on “a more profound spiritual and religious meaning.”¹⁸ In drawing upon these sources, Sharia principles encour-

¹¹ R. Seth Shippee, “Blessed Are the Peacemakers”: Faith-Based Approaches to Dispute Resolution, 9 ILSA J. INT'L & COMP. L. 237, 245 (2002).

¹² *Id.* at 246.

¹³ *Id.*

¹⁴ Nicholas Pengelley, *Faith-Based Arbitration in Ontario*, 9 VINDOBONA J. INT'L COM. L. & ARB. 111, 114 (2005).

¹⁵ Gamal Moursi Badr, *Islamic Law: Its Relation to Other Legal Systems*, 26 AM. J. COMP. L. 187, 189 (1978).

¹⁶ See Dominic McGoldrick, *Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws*, 9 HUM. RTS. L. REV. 603, 606 (2009).

¹⁷ See Rehman, *supra* note 1, at 110.

¹⁸ *Id.* at 111.

age Muslims toward peace, reconciliation, and dialogue in the resolution of disputes.¹⁹

Traditional Islamic principles explain that Muslims should not immigrate to non-Muslim nations unless they are prepared to accept and obey the laws and customs of those nations.²⁰ From the perspective of many Muslim authorities, Muslims who nevertheless choose to move to non-Muslim nations “are required to accept the legal standards of the countries to which they move and to live there peacefully and responsibly, showing a good example to their non-Muslim neighbors.”²¹

In recent times, Muslims have increasingly settled in secular democratic nations, including the United Kingdom.²² In the years following World War II, the United Kingdom experienced a significant influx of Muslim immigrants hailing in large part from India and Pakistan.²³ Many of these immigrants were poorly educated, and faced high levels of joblessness and discrimination upon arrival in the United Kingdom.²⁴ Statistical analysis shows that even today, “Muslim communities on the whole remain immersed in deprivation, poverty, high unemployment and low educational achievements,”²⁵ and that “Muslims are also on the receiving end of a great deal of cultural antipathy, allegedly because of their religion.”²⁶

In response to high levels of racial discrimination and social exclusion, many Muslim communities in the United Kingdom, rather than adopting the country’s secular laws at the expense of their own religious heritage, have imported their culture and belief systems.²⁷ For Muslims living in the United Kingdom, the continued observance of Sharia principles provides a sense of solidarity, strengthened by the connections to Islamic culture and other Muslims.²⁸ Many Muslim communities have

¹⁹ See Shippee, *supra* note 11, at 245 (discussing principles contained within the Quran).

²⁰ Stephen Schwartz, *Modern Islam and Democracy*, 6 REGENT J. INT’L L. 375, 377 (2008).

²¹ *Id.*

²² See Khan, *supra* note 1, at 800; Rehman, *supra* note 1, at 123.

²³ Javaid Rehman, *The Sharia, Freedom of Religion and European Human-Rights Law*, 22 IRISH STUD. INT’L AFF. 37, 46 (2011).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Joel A. Nichols, *Religion, Marriage, and Pluralism*, 25 EMORY INT’L L. REV. 967, 971 (2011).

²⁷ Khan, *supra* note 1, at 800.

²⁸ Stephanie E. Berry, *Bringing Muslim Minorities Within the International Convention on the Elimination of all Forms of Racial Discrimination—Square Peg in a Round Hole?*, 11 HUM. RTS. L. REV. 423, 441 (2011) (asserting that Islam provides “a badge of (symbolic) solidarity”).

formed in reaction to “the personal insecurities and vulnerabilities of [Muslim immigrants], and due to the racial prejudices from the wider white majority population.”²⁹

Community-based systems for resolving issues among Muslims living in non-Muslim countries offer internal fora for dispute resolution, adjudicating matters outside the parameters of the governing civic judicial system.³⁰ In non-Muslim countries, these alternative dispute resolution channels are often relied upon by Muslims who feel more comfortable presenting their problems in front of those who share a similar value system and who can offer solutions in accordance with principles of Islamic law.³¹ England, in particular, experienced a rise in the number of community-based institutions for resolving disputes between Muslims during the 1980s, when several Sharia courts in London and Birmingham were established, with others set up throughout England and Wales in the decades that followed.³²

Established in 1982, the Islamic Sharia Council continues to accept requests for arbitration and mediation services in its east London office.³³ The Islamic Sharia Council, like other smaller Sharia councils around the country, has dealt with hundreds of cases involving Muslim marriage, divorce, finance, inheritance, domestic abuse, and criminal proceedings.³⁴ For the most part, however, the business conducted by the Islamic Sharia Council relates to requests for divorce brought by young women.³⁵

Since late 2010, the Islamic Sharia Council has generally required women seeking divorce from an Islamic marriage to satisfy a four-step process: they must initiate civil court divorce proceedings, show proof that the couple has been separated for at least one year prior to divorce proceedings, provide assurance that their husbands will be able to see any marital children after the divorce, and, in some cases, return any

²⁹ Rehman, *supra* note 23, at 46.

³⁰ See Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1252 (2011).

³¹ See Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427, 441 (2006).

³² Bowen, *supra* note 3, at 418.

³³ *Id.* at 413.

³⁴ See William, *supra* note 4, at 43.

³⁵ Bowen, *supra* note 3, at 419.

mahr, or “dower,”³⁶ given by the husband to his wife upon their marriage.³⁷

Though many Sharia arbitration proceedings occur without the involvement of British civil law, the community-based system is heralded by many as helping to “preserve minority cultures and community values.”³⁸ Many Muslim immigrants, unfamiliar with the formalities of English legal proceedings, may appreciate arbitration tribunals that are more flexible and do not require the execution of many legal formalities.³⁹ As one scholar has noted, one of the principal benefits of community-based dispute resolution systems like those of the Sharia courts in England are their ability to “[s]ecure[] the authority of the local, common people in the formulation and application of Islamic law as opposed to a remote, centralized authority dominated by professional jurists and scholars.”⁴⁰

B. Arbitration in England

In issuing rulings on divorce and other disputes brought before them, Sharia arbitration tribunals in England generally acknowledge the legitimacy of each other’s judgments, thereby giving rise to the development of consensus on the procedural aspects of particular issues—notably, divorce.⁴¹ Nevertheless, controversy surrounds the legality of such judgments under English civil law, and whether English civil courts may consider awards handed down by Sharia arbitration tribunals.⁴² The issue of precisely how to situate such faith-based dispute resolution channels within the existing English legal framework becomes more complex when viewed in the context of England’s historical understanding of the role of arbitration tribunals.⁴³

³⁶ *Id.* at 414.

³⁷ *Id.* at 419.

³⁸ Wolfe, *supra* note 31, at 441.

³⁹ See Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent*, 25 J.L. & RELIGION 379, 403–04 (2009–2010). The cited article comments on the experience of Muslim immigrants in the United States; however, the discussion is relevant to the Muslim immigrant experience in other Western liberal democracies, including England and Wales. See *id.*

⁴⁰ Irshad Abdal-Haqq & Qadir Abdal-Haqq, *Community-Based Arbitration as a Vehicle for Implementing Islamic Law in the United States*, 1 J. ISLAMIC L. 61, 73 (1996).

⁴¹ See Bowen, *supra* note 3, at 418, 421.

⁴² See Rex Ahdar & Nicholas Aroney, *The Topography of Shari’a in the Western Political Landscape*, in SHARI’A IN THE WEST 1, 1 (Rex Ahdar & Nicholas Aroney eds., 2010).

⁴³ See *infra* notes 107–109.

The use of arbitration to resolve disputes outside of established judicial institutions has deep roots in English history.⁴⁴ By the end of the tenth century, a system of dispute resolution in Anglo-Saxon England had evolved as an alternative to the “practice of resolving disputes through violent methods of self-help.”⁴⁵ Arbitration proceedings in medieval England generally involved trade and commercial disputes,⁴⁶ and such proceedings were employed increasingly from the thirteenth through the fifteenth centuries⁴⁷ as arbitration gained appreciation among plaintiffs who heralded such proceedings as quicker and cheaper than litigation.⁴⁸ Parties to arbitration proceedings were sometimes provided with a written statement of the judgment, which included a penalty for failure to obey the judgment’s terms; in cases of non-compliance, a party could bring an action of debt or detinue at common law to collect damages for the other party’s failure to perform the award.⁴⁹ In this sense, arbitration proceedings and awards remained subordinate to the law of English courts, wherein English courts “provided the legal framework for arbitration agreements and the fora for the enforcement of, or appeal from, arbitration decisions.”⁵⁰

Through the fifteenth century, English common law permitted the use of arbitration proceedings as an alternative means of dispute resolution,⁵¹ but also retained the notion that arbitration proceedings remained subordinate to English civil courts.⁵² To this end, English common law maintained that arbitration agreements were revocable, on the theory that such agreements, “while not absolutely illegal, were opposed to public policy because they tended to oust the courts of jurisdiction.”⁵³ Toward the end of the seventeenth century, however, growing concern emerged over the high costs of litigation and its adverse impact upon the national economy.⁵⁴

⁴⁴ See Joseph Biancalana, *The Legal Framework of Arbitration in Fifteenth-Century England*, 47 AM. J. LEGAL HIST. 347, 348 (2005); Sidney P. Simpson, *Specific Enforcement of Arbitration Contracts*, 83 U. PA. L. REV. 160, 160 (1934).

⁴⁵ Valerie A. Sanchez, *Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today*, 11 OHIO ST. J. ON DISP. RESOL. 1, 35 (1996).

⁴⁶ See Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 2009 J. DISP. RESOL. 1, 14.

⁴⁷ See Biancalana, *supra* note 44, at 348.

⁴⁸ See *id.* at 355.

⁴⁹ See *id.* at 374.

⁵⁰ *Id.* at 348.

⁵¹ See *id.*

⁵² See *id.*

⁵³ Simpson, *supra* note 44, at 162 (footnote omitted).

⁵⁴ See LeRoy, *supra* note 46, at 18.

Recognizing that “arbitration was valuable for resolving trade disputes,”⁵⁵ England enacted the Arbitration Act of 1698,⁵⁶ which authorized courts to enforce arbitration awards if the parties agreed in advance that any award might be made a rule of court.⁵⁷ The Act, in authorizing proceedings for the resolution of disputes involving “merchants and traders”⁵⁸ adopted a commercial purpose.⁵⁹ By legitimizing the awards issued by arbitration tribunals engaged in resolving commercial disputes, the Act worked to relieve congestion in courts and reduce the high costs and protracted nature of the hearings associated with litigation.⁶⁰

Beginning in the nineteenth century, general principles relating to the administration of arbitration proceedings were detailed in successive arbitration Acts.⁶¹ These Acts, passed in 1889, 1934, 1950, and 1979, increasingly sought to limit judicial intervention in arbitration.⁶² The Acts also progressively decreased judicial power to ensure arbitrators’ compliance with English law by both limiting courts’ control over arbitration proceedings and their ability to hear disgruntled parties’ appeals from arbitration awards.⁶³

The most recent reformation to English arbitration law arrived with the enactment of the Arbitration Act 1996 (Arbitration Act), which

⁵⁵ *Id.*

⁵⁶ See An Act for Determining Differences by Arbitration, 1697–8, 9 & 10 Will. 3, c. 15 (Eng.), available at <http://www.british-history.ac.uk/report.aspx?compid=46901&strquery=arbitration>.

⁵⁷ See LeRoy, *supra* note 46, at 18; Simpson, *supra* note 44, at 165 (“If made a rule of court, refusal to perform the award was punishable as a contempt.”).

⁵⁸ An Act for Determining Differences by Arbitration, 9 & 10 Will. 3, c. 15.

⁵⁹ See LeRoy, *supra* note 46, at 19.

⁶⁰ *Cf. id.* at 18 (“Conventional litigation in courts of law caused tedious attendance and vast expenses that tended to result in empty purses and grey heads.”) (internal quotation marks omitted).

⁶¹ See Sir Anthony Evans, *Arbitration and the Role of Law*, 21 AM. REV. INT’L ARB. 295, 298 (2010).

⁶² See Okezie Chukwumerije, *English Arbitration Act 1996: Reform and Consolidation of English Arbitration Law*, 8 AM. REV. INT’L ARB. 21, 27 (1997); Evans, *supra* note 61, at 298; Lord Hacking, *The “Stated Case” Abolished: The United Kingdom Arbitration Act of 1979*, 14 INT’L LAW. 95, 101 (1980) (noting that the 1979 Arbitration Act affords parties to arbitration agreements the right to exclude judicial review); Michael Kerr, *Statutes: The Arbitration Act 1979*, 43 MOD. L. REV. 45, 48 (1980) (noting that the 1979 Arbitration Act attempted to strike a compromise between the view that courts should be kept out of arbitration altogether and the view that courts should retain a substantial measure of control over arbitrations to ensure that arbitration awards apply the law of the land); Simpson, *supra* note 44, at 160 (noting that the 1934 Arbitration Act explained that once an award had been made pursuant to an arbitration agreement, equity would enforce it if a contract between the parties would be specifically enforceable).

⁶³ See Evans, *supra* note 61, at 298.

sought to consolidate previous arbitration statutes and incorporate recent changes made by judicial decisions in England.⁶⁴ The general principles outlined in Part I of the Arbitration Act specify that parties to arbitrations “should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest,” and that “the court should not intervene” except in such instances.⁶⁵ In addition, the Act indicates that an arbitrator is held immune from “anything done or omitted in the discharge or purported discharge of his [or her] functions as arbitrator unless the act or omission is shown to have been in bad faith.”⁶⁶ In limiting the judicial reach of English courts into the arbitral process, the Arbitration Act effectively strengthened the power and authority of these arbitration tribunals, thereby promoting “the autonomy and effectiveness of the arbitral process and respect for the parties’ preference for a private system of dispute resolution.”⁶⁷

C. *Islamic Arbitration in England Under Arbitration Act 1996*

Shortly after the Arbitration Act was enacted, various Muslim lawyers interpreted the general principles enumerated in Part I of the Act as legitimizing Sharia councils to “act as arbitration panels” with the authority to issue “decisions [that] are legally binding,”⁶⁸ provided that all parties to a dispute grant the arbitral tribunal “the power to rule on their case.”⁶⁹ In 2007, a Muslim lawyer established the Muslim Arbitration Tribunal (MAT), housed in the Hijaz College Islamic University in Nuneaton, Britain,⁷⁰ claiming that the Arbitration Act granted legal jurisdiction to MAT.⁷¹ In August of that year, informal Sharia courts began to be established, taking on a variety of domestic disputes, particularly in the area of family law.⁷²

Reacting to the growing prominence of Islamic arbitral tribunals throughout England, one scholar has noted that “traditional, faith-based alternatives to the mainstream legal system are alive and well, and, in

⁶⁴ See Chukwumerije, *supra* note 62, at 21.

⁶⁵ Arbitration Act 1996, 1996, c. 23, § 1 (Eng., Wales, and N. Ir.).

⁶⁶ *Id.* § 29.

⁶⁷ See Chukwumerije, *supra* note 62, at 45.

⁶⁸ McSmith, *supra* note 10.

⁶⁹ McGoldrick, *supra* note 16, at 637; see Maria Reiss, *The Materialization of Legal Pluralism in Britain: Why Shari’a Council Decisions Should Be Non-Binding*, 26 ARIZ. J. INT’L & COMP. L. 739, 760 (2009).

⁷⁰ Mona Rafecq, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice?*, 28 WIS. INT’L L.J. 108, 124 (2010).

⁷¹ William, *supra* note 4, at 43.

⁷² Reiss, *supra* note 69, at 768.

many ways, busier and more influential than ever.”⁷³ Recently, the British Court of Appeal deferred to the role of faith-based arbitral tribunals in the case of *Halpern v. Halpern*.⁷⁴ In that case, the presiding Lord Justice Waller announced, in reference to a dispute arbitrated through a faith-based tribunal, that “arbitral tribunals can and indeed should decide disputes in accordance with the law chosen by the parties.”⁷⁵

More recently, in 2009, the Civil Division of the Court of Appeal for England and Wales decided the case of *Uddin v. Choudhury*.⁷⁶ In that case, English civil courts heard a dispute between two Muslim families arising out of a failed arranged marriage.⁷⁷ The marriage had been conducted in England in 2003 in an Islamic ceremony, called a *nikah*, and although the parties had originally intended to hold a civil ceremony following the *nikah*, none was ever held.⁷⁸ At the end of 2004, the wife applied to the Islamic Sharia Council for a divorce, which the Council issued in December of that year, dissolving the marriage.⁷⁹ In August 2005, the ex-husband, Mr. Mohammed Uddin, initiated civil proceedings to recover the value of £25,000, which he alleged had been taken by his wife’s family during the marriage.⁸⁰ In response, the ex-wife and her family brought a counterclaim, alleging that Mr. Uddin had agreed to pay his wife £15,000 by way of a *mahr*, or dowry, per the marriage agreement, and that this amount was outstanding.⁸¹

The trial court relied on evidence offered by a court-appointed expert on Sharia law,⁸² which the court considered relevant given that the parties had dealt with each other under Sharia principles.⁸³ The expert testified that the evidence given by the defendant and her family was stronger than that given by the plaintiff.⁸⁴ The trial judge accepted this conclusion and determined that the value sought by the plaintiff

⁷³ Shippee, *supra* note 11, at 238.

⁷⁴ *Halpern v. Halpern*, [2007] EWCA (Civ) 291, [37], [2008] Q.B. 195 [37] (Eng. and Wales); *see* Reiss, *supra* note 69, at 741.

⁷⁵ *Halpern*, [2007] EWCA (Civ) 291 at [37].

⁷⁶ *See generally* *Uddin v. Choudhury*, [2009] EWCA (Civ) 1205 (appeal taken from Eng.).

⁷⁷ *Id.* at [2].

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at [2]–[3].

⁸¹ *Id.* at [3].

⁸² *See* Bowen, *supra* note 3, at 423 (noting that the appointment of a single joint expert by the trial judge meant that both parties accepted this person as an expert in the matter).

⁸³ *Uddin*, [2009] EWCA (Civ) 1205 at [3].

⁸⁴ *See id.* at [3]–[4].

was unrecoverable.⁸⁵ The judge found that the £25,000 was partly comprised of various gifts that had been made by the plaintiff to the defendant and her family; because these gifts were not made conditional on the marriage as part of the *mahr*, once these gifts were made, they were absolute.⁸⁶ On the defendant's counterclaim, the judge held that the marriage contract, enumerating a *mahr* to be paid to the defendant and her family, constituted a validly-executed contract; as such, it was enforceable by the court, and the defendant was awarded £15,000.⁸⁷

On appeal, the court considered only whether the trial judge's opinion was legally and procedurally sound, and did not review the content of the evidence previously offered by the parties.⁸⁸ The Court of Appeal affirmed the ruling of the lower court, holding that the trial court judge correctly summarized and applied those principles of Sharia concerning marriage and dowry proffered by the expert.⁸⁹ The court added that the marriage ceremony was not recognized by English law, but that the marriage agreement was valid and had legal effect.⁹⁰ In analyzing the effect of the expert evidence on Sharia principles in the lower court, the Court of Appeal added that "as a matter of Sharia law in the circumstances of this marriage and its dissolution, the gifts were absolute, not returnable, not deductible from the dowry, and the dowry was payable notwithstanding the failure of the marriage."⁹¹

Uddin was one of the first cases to concern the intersection of Sharia principles and the English legal system within English courts.⁹² Although the *Uddin* court relied on expert testimony to affirm the existence of an Islamic marriage agreement as a validly executed contract, controversy surrounds the issue of whether English civil courts may consider awards handed down by Sharia councils and arbitration tribunals.⁹³ As one scholar points out, the *Uddin* court found it "unnecessary to inquire into the [Sharia] Council's ruling, and apparently no one asked further about it in court."⁹⁴ In addition, the trial judge relied up-

⁸⁵ *Id.* at [5].

⁸⁶ *Id.*

⁸⁷ *See id.* at [7].

⁸⁸ *See id.* at [5].

⁸⁹ *Uddin*, [2009] EWCA (Civ) 1205 at [11].

⁹⁰ *Id.* at [11], [13] ("As a matter of contract, arising out of the agreement which the parties had made, I think that the judge was entitled in law to say that this was an enforceable agreement . . .").

⁹¹ *Id.* at [14].

⁹² *See* Bowen, *supra* note 3, at 424.

⁹³ *See id.*

⁹⁴ *Id.*

on the testimony of a single expert called to give evidence on principles of Sharia, but some commentators have questioned the status of this witness's expertise, "given that he failed to draw the judge's attention to the Islamic rule that where the marriage is dissolved before consummation . . . the wife may lose the *mahr*."⁹⁵ The danger inherent in such an approach by judges is that it may lead to "an over-reliance on the testimony of the expert witness, which, when misunderstood, misapplied or downright erroneous can have dismaying consequences for fair and accurate dispute settlement."⁹⁶ Even beyond fears that such an approach may upset the fair settlement of disputes in private arbitration tribunals is the concern that rendering a decision in English civil courts that relies on principles of Sharia gives legal effect to decisions that have clear Islamic content.⁹⁷ In this sense, *Uddin* may be understood to have paved the way to more formal recognition by English civil courts of awards handed down by Islamic arbitration tribunals—even awards concerning marriage and family law, which fall outside the permitted subject-matter jurisdiction of arbitration tribunals.⁹⁸

Around the same time that *Uddin* was decided, the Archbishop of Canterbury delivered a widely contested speech at the Royal Court of Justice in London in which he suggested that some overlap between diverse systems of law was "unavoidable."⁹⁹ Despite the critical media response to the Archbishop's remarks, Lord Chief Justice Phillips, Britain's former highest judge, supported the Archbishop's position in a public statement in which he affirmed that "where the principles [of Sharia] did not come into conflict with the laws of England and Wales they could be followed without legal interference."¹⁰⁰

Despite the semblance of increased legitimacy conferred upon Islamic arbitral tribunals by the Arbitration Act, controversy continues to grow as British politicians voice concerns over gender-based discrimina-

⁹⁵ Katherine Spencer, *Mahr as Contract: Internal Pluralism and External Perspectives*, 1 Oñati Socio-Legal Series, no. 2, 2011, at 1, 12.

⁹⁶ *Id.* at 12–13.

⁹⁷ See Bowen, *supra* note 3, at 425.

⁹⁸ See *id.*

⁹⁹ See William, *supra* note 4, at 43 ("The Archbishop's words sparked a national debate about the future of Sharia."); Rowan Williams, Archbishop of Canterbury, Archbishop's Lecture at the Temple Festival Series, Civil and Religious Law in England: A Religious Perspective (Feb. 7, 2008), available at <http://www.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective>.

¹⁰⁰ News Release, Judicial Comm'n's Office, Lord Chief Justice Celebrates "Equality Before the Law" (Mar. 5, 2008), available at <http://www.judiciary.gov.uk/media/media-releases/2008/1208>.

tion against women participating in Sharia arbitrations.¹⁰¹ Because these proceedings occur in private, the concerns relate to whether “one of the parties may . . . have been pressured or coerced into participation, or deprived of rights which would be guaranteed had the matter proceeded under the jurisdiction of the civil courts.”¹⁰² Although operation of Sharia arbitration tribunals has been justified by the proposition that all parties resort to them voluntarily, women are often placed “in a poorer position than [they] would have been had [they] litigated under British courts.”¹⁰³ This general disparity in outcomes becomes particularly concerning when considering that many Muslim women are often pressured by family and community members to submit to arbitration and “keep dealings within the Sharia court,”¹⁰⁴ despite the potential for injustice for women in solving disputes through this method.¹⁰⁵

Even beyond fears of gender-based bias and coercion are concerns that Sharia tribunals have begun to transform the historically-accepted role of arbitration in England as a medium for resolving *commercial* disputes.¹⁰⁶ For example, although the Arbitration Act specifically prohibits any arbitration tribunal from hearing criminal matters, the fact that there is so little oversight of Sharia arbitration has created a space for Sharia tribunals to arbitrate beyond the purely commercial and “include smaller, criminal matters in their repertoire.”¹⁰⁷ Because of this shift in the use of arbitration as a means for resolving commercial matters to a far more expansive dispute-resolution channel, English law has been faced with the challenge of balancing an interest in preserving the “autonomy of arbitration” with the need to uphold fairness and equality through judicial intervention.¹⁰⁸

The expanded subject-matter jurisdiction of Islamic arbitration tribunals has become particularly disconcerting for British lawmakers because awards handed down by arbitral tribunals are not readily appealed.¹⁰⁹ Section 69(2) of the Arbitration Act provides that “[a]n ap-

¹⁰¹ See William, *supra* note 4, at 40.

¹⁰² Pengelley, *supra* note 14, at 112; see Reiss, *supra* note 69, at 764 (noting that women in Muslim communities are often pressured both by their families and by the *unmah*, or Islamic community, into submitting to Sharia arbitration).

¹⁰³ Reiss, *supra* note 69, at 764.

¹⁰⁴ Malik, *supra* note 6.

¹⁰⁵ See Reiss, *supra* note 69, at 764.

¹⁰⁶ See *id.* at 774; Miriam, *Baroness Cox Introduces Bill to Curb Sharia Tribunals in the UK*, CONTACT L. BLOG (June 16, 2011), <http://solicitors.contactlaw.co.uk/family-law/baroness-cox-introduces-bill-to-curb-sharia-tribunals-in-the-uk-991854.html>.

¹⁰⁷ See Reiss, *supra* note 69, at 774.

¹⁰⁸ Chukwumerijie, *supra* note 62, at 27.

¹⁰⁹ See Arbitration Act 1996 § 69(2); McVeigh & Hill, *supra* note 9.

peal shall not be brought . . . except with the agreement of all the other parties to the proceedings, or with the leave of the court.”¹¹⁰ Currently under the Arbitration Act, “[a]s long as the Shari’a courts abide by the provisions set forth in the Arbitration Act, any decision made by the Shari’a court becomes binding.”¹¹¹ Therefore, under the Arbitration Act, English law has effectively “created an outlet for parallel legal systems to acquire legitimacy.”¹¹²

II. DISCUSSION

A. *The Equality Bill*

Introduced in the House of Lords on June 7, 2011, the Equality Bill expressly aimed to further govern arbitration and mediation services and protect victims of domestic abuse.¹¹³ A primary consideration in the Bill’s drafting involved growing concerns that religious courts operating in England and Wales have been suffering from “jurisdiction creep”¹¹⁴ by “going well beyond their legal remit [where] some [Islamic arbitration] rulings are being misrepresented as having the force of the U.K. law.”¹¹⁵ To this end, Baroness Cox indicated that the Equality Bill is intended to address the possibility that some Islamic arbitration tribunals have moved away from deciding purely commercial matters, and toward expanding their arbitral repertoire.¹¹⁶

Another consideration in the Equality Bill’s drafting centered on a concern that women face possible discrimination in their dealings with Sharia tribunals.¹¹⁷ Baroness Cox expressed concerns that Muslim women are being deprived of their legal rights, and are being “intimidated’ and ‘coerced’ into going before [Islamic arbitration tribunals],” often because these women lack an understanding of their rights and the recourse available under U.K. law.¹¹⁸

¹¹⁰ Arbitration Act 1996 § 69(2).

¹¹¹ Reiss, *supra* note 69, at 740.

¹¹² *Id.*

¹¹³ Arbitration and Mediation Services (Equality) Bill pmb1.

¹¹⁴ Jerome Taylor, *Baroness Cox: ‘If We Ignore Wrongs, We Condone Them,’* INDEP. (London), June 20, 2011, <http://www.independent.co.uk/news/people/profiles/baroness-cox-if-we-ignore-wrongs-we-condone-them-2299937.html>.

¹¹⁵ Miriam, *supra* note 106 (quoting Baroness Cox).

¹¹⁶ *Id.*

¹¹⁷ *See id.*

¹¹⁸ *Id.*

As a response to these concerns, the Equality Bill proposes to amend various English Acts—notably, the Arbitration Act.¹¹⁹ If passed, the Equality Bill would insert into the Arbitration Act a provision entitled “6A: Discriminatory Terms of Arbitration.”¹²⁰ Section 6 of the Arbitration Act currently provides a limited description of the definition of arbitration agreements,¹²¹ but this new section would prohibit arbitration agreements or processes from expressly or implicitly providing “that the evidence of a man is worth more than the evidence of a woman,”¹²² “that the division of an estate between male and female children on intestacy must be unequal,”¹²³ and “that women should have fewer property rights than men.”¹²⁴ The new section would also prohibit arbitration agreements and processes from providing “for any other term that constitutes discrimination on the grounds of sex.”¹²⁵ An additional provision proposed by the Equality Bill would insert a set of requirements following Section 80 of the Arbitration Act,¹²⁶ which currently outlines “Notice and Other Requirements in Connection with Legal Proceedings.”¹²⁷ This new Equality Bill provision, entitled “80A: Criminal and Family Law Matters Not Arbitrable,” would prevent “[a]ny matter which is within the jurisdiction of the criminal or family courts [from being] the subject of arbitration proceedings.”¹²⁸

The Equality Bill also proposes amendments to other English Acts.¹²⁹ Adding to a section of the 2010 Equality Act pertaining to the duties of public authorities,¹³⁰ the Equality Bill would require public authorities to take active steps to remove or minimize inequities, including “steps to take account of the fact that those who are married according to certain religious practices . . . may be without legal protection,”¹³¹ and steps to inform “individuals of the need to obtain an officially recognised marriage in order to have legal protection.”¹³² The

¹¹⁹ See Arbitration and Mediation Services (Equality) Bill § 3.

¹²⁰ See Arbitration Act 1996 § 6; Arbitration and Mediation Services (Equality) Bill § 3(2).

¹²¹ See Arbitration Act 1996 § 6.

¹²² Arbitration and Mediation Services (Equality) Bill § 3(2)(a).

¹²³ *Id.* § 3(2)(b).

¹²⁴ *Id.* § 3(2)(c).

¹²⁵ *Id.* § 3(2)(d).

¹²⁶ *Id.* § 4(2).

¹²⁷ Arbitration Act 1996 § 80.

¹²⁸ Arbitration and Mediation Services (Equality) Bill § 4(2).

¹²⁹ *Id.* § 5.

¹³⁰ Equality Act 2010, 2010, c. 15, § 149 (U.K.).

¹³¹ Arbitration and Mediation Services (Equality) Bill § 1(4).

¹³² *Id.*

Equality Bill would also amend the Courts and Legal Services Act of 1990¹³³ by adding an additional provision to Section 118 of the Act, the Functions of Treasury.¹³⁴ The new provision details the terms by which a person who falsely claims legal jurisdiction may be guilty of an offense, which would include instances in which a person “falsely purports to be exercising a judicial function or to be able to make legally binding rules,”¹³⁵ or when a person “otherwise falsely purports to adjudicate on any matter which that person knows or ought to know is within the jurisdiction of the criminal or family courts.”¹³⁶ The Equality Bill would impose a punishment on any person guilty of an offense under this new section of imprisonment for up to five years, a fine, or both.¹³⁷

Although the Equality Bill does not specifically refer to Sharia arbitration tribunals, Baroness Cox described her support for the Equality Bill as stemming from concerns related to discrimination against women, as well as the incompatibility of allowing a parallel legal system to operate within the United Kingdom.¹³⁸ As Baroness Cox explained during an interview shortly after she tabled the Bill in June 2011, the Equality Bill would not prevent people from seeking advice and guidance from religious leaders.¹³⁹ Rather, it would impose a duty upon public authorities—such as the police, social workers, and health care workers—to inform women with whom they come into contact of their rights under English law, and would limit the authority of arbitral tribunals to adjudicate matters of family or criminal law.¹⁴⁰ For Baroness Cox, the notion of allowing arbitration tribunals to develop into a parallel legal system is incompatible with “[England’s] own historic and traditional legal system, particularly [where the parallel system] discriminates against women and is causing many women real suffering.”¹⁴¹

¹³³ Courts and Legal Services Act 1990, 1990, c. 41, § 118 (U.K.).

¹³⁴ Arbitration and Mediation Services (Equality) Bill § 7.

¹³⁵ *Id.* § 7(2).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Rebecca Duffett, *Baroness Caroline Cox and the Sharia Bill*, CROSS RHYTHMS (June 30, 2011), http://www.crossrhythms.co.uk/articles/life/Baroness_Caroline_Cox_And_The_Sharia_Bill/43747/p1/ (“[T]here’s been growing up in our midst, an alternative system, which affects many citizens, especially women. It’s a kind of quasi legal system that . . . discriminates systematically against women . . . I just don’t feel you can have a quasi legal system operating alongside our own historic and traditional legal system, particularly one which discriminates against women and is causing many women real suffering.”).

¹³⁹ *See id.*

¹⁴⁰ *See* Arbitration and Mediation Services (Equality) Bill § 4; Duffett, *supra* note 138.

¹⁴¹ Duffett, *supra* note 138.

B. *Equality and the Principle of Non-Discrimination in England*

The various amendments proposed by the Equality Bill endeavor to bring arbitration and mediation services within the ambit of equality legislation operating in England and Wales.¹⁴² At the heart of the Equality Bill's aims is an interest in more narrowly focusing the legal system's application of equality legislation—particularly in its application to arbitration and mediation services—on the principle of non-discrimination.¹⁴³ This principle has recently become a central goal of equality laws in England.¹⁴⁴

In the wake of World War II, the principle of non-discrimination formed an integral part of the political rehabilitative efforts made by European nations.¹⁴⁵ Guided by an understanding of equality and human rights as a “fundamental moral attribute of all human persons,”¹⁴⁶ England and other European nations drew on a theory of political liberalism that individual autonomy should not be subject to arbitrary prejudice.¹⁴⁷ In England, political concern for ensuring social equality was reflected in the gradual recognition of legal rights that encompassed a greater range of historically disadvantaged social and cultural groups.¹⁴⁸ Demands for expanded anti-discrimination legislation that could account for religious groups—particularly Muslims—grew within Britain toward the end of the twentieth century.¹⁴⁹ After the introduction of the Equality Race Directives in 2000 by the European Commission, England and all other European Union members were required to implement a number of equality duties within their own domestic legal structures by 2007.¹⁵⁰ The result in England was the passing of the Equality Act 2006.¹⁵¹

As the predecessor to the Equality Act 2010, the Equality Act 2006 introduced a number of anti-discrimination provisions into the English legal system, including provisions relating to discrimination on the ba-

¹⁴² Arbitration and Mediation Services (Equality) Bill pmb1.

¹⁴³ *Id.*; see Robert Holland, *Equality Act 2010*, SKILL J., June 2010, at 6, 6.

¹⁴⁴ See Equality Act 2010 § 149(1); Equality Act 2006, 2006, c. 3, § 3 (U.K.).

¹⁴⁵ See Eithne McLaughlin, *From Negative to Positive Equality Duties: The Development and Constitutionalisation of Equality Provisions in the UK*, 6 SOC. POL'Y & SOC'Y 111, 112 (2007).

¹⁴⁶ Julian Rivers, *Promoting Religious Equality*, 1 OXFORD J.L. & RELIGION 386, 392 (2012).

¹⁴⁷ McLaughlin, *supra* note 145, at 112.

¹⁴⁸ See Bob Hepple, *The New Single Equality Act in Britain*, 5 EQUAL RTS. REV. 11, 21 (2010).

¹⁴⁹ *Id.* at 13.

¹⁵⁰ See McLaughlin, *supra* note 145, at 115.

¹⁵¹ *Id.*

sis of religion, belief, or sexual orientation, and it imposed duties upon persons performing public functions relating to sex discrimination.¹⁵² Rather than assuming a neutral approach to equality legislation, the Equality Act 2006 adopted a far more proactive policy by enacting positive duties for public sector authorities to eliminate discrimination and promote equality.¹⁵³ Chief among the duties established by the Act was a general duty for public authorities to heed the need “to eliminate unlawful discrimination and harassment,”¹⁵⁴ and also “to promote equality of opportunity between men and women.”¹⁵⁵

In addition to imposing those general duties, the Equality Act also established the Commission for Equality and Human Rights (CEHR),¹⁵⁶ a body intended to better address issues of group discrimination and promote the “cross-fertilization of ideas and experience” to more thoroughly facilitate “fair representation, equality and diversity” within England and Wales.¹⁵⁷ The general duties assigned to the CEHR include encouraging and supporting the development of a society in which “people’s ability to achieve their potential is not limited by prejudice or discrimination,”¹⁵⁸ and “respect and protection of each individual’s human rights” is achieved.¹⁵⁹ The CEHR is also responsible for upholding “respect for the dignity and worth of each individual,”¹⁶⁰ ensuring that “each individual has an equal opportunity to participate in society,”¹⁶¹ promoting “mutual respect between groups based on understanding, and valuing of diversity and on shared respect for equality and human rights.”¹⁶²

The Equality Act 2006 specifically identified the need for the CEHR to target discrimination occurring within groups or classes of persons sharing a common attribute, including race, religion, or belief.¹⁶³ In this context, the Act further provided that the CEHR should promote understanding of the importance of good relations, encourage good practice between members of different groups, and “work

¹⁵² See Equality Act 2006 pmb., § 3.

¹⁵³ Linda Dickens, *The Road Is Long: Thirty Years of Equality Legislation in Britain*, 45 BRIT. J. INDUS. REL. 463, 473 (2007).

¹⁵⁴ Equality Act 2006 § 84(1).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* § 1.

¹⁵⁷ Dickens, *supra* note 153, at 488.

¹⁵⁸ Equality Act 2006 § 3(a).

¹⁵⁹ *Id.* § 3(b).

¹⁶⁰ *Id.* § 3(c).

¹⁶¹ *Id.* § 3(d).

¹⁶² *Id.* § 3(e).

¹⁶³ See *id.* § 10(2)(e)–(f).

towards enabling members of groups to participate in society.”¹⁶⁴ In this respect, the Act attempted to confront issues of discrimination by adopting positive obligations on the part of public authorities operating in English and Welsh civil society.¹⁶⁵

Despite the Equality Act 2006’s laudable attempts to implement a proactive approach to promoting the principle of non-discrimination within English and Welsh society, supplemental positive obligations were needed in order to better secure compliance with anti-discrimination laws.¹⁶⁶ Proposed as a bill to replace and incorporate many aspects of the Equality Act 2006, the Equality Act 2010 received strong political support from both Conservatives and Liberal Democrats in the House of Lords in April 2010, and entered into force in October 2010.¹⁶⁷ Merging several former Acts and statutes, the Equality Act 2010 serves as a single replacement to nine previous pieces of legislation,¹⁶⁸ thereby simplifying and harmonizing previous discrimination law operating in England, Wales, and Scotland.¹⁶⁹ Although it serves as a singular replacement to the Equality Act 2006, the 2010 Act incorporates key provisions of the prior Act, including those governing the CEHR.¹⁷⁰

The overarching aims of the Equality Act 2010 are to harmonize and simplify equality law.¹⁷¹ Among its several stated goals, the Act endeavors to eliminate discrimination, increase equality of opportunity, and enable duties to be imposed upon public sector authorities relating to their public functions.¹⁷² In creating expanded public sector duties, the Equality Act 2010 “recognises that members of disadvantaged groups will not have equal life chances or enjoy respect for their equal worth unless institutions take proactive measures to ensure equality.”¹⁷³

The new public sector equality duty contains three provisions, all of which encompass the need to have due regard for eliminating dis-

¹⁶⁴ Equality Act 2006 § 10(1).

¹⁶⁵ See Dickens, *supra* note 153, at 473.

¹⁶⁶ See *id.*; Rivers, *supra* note 146, at 390.

¹⁶⁷ See Holland, *supra* note 143, at 6, 9 (noting that although a majority of the provisions in the Equality Act entered into force in October 2010, several provisions were delayed until April 2011); see also Hepple, *supra* note 148, at 15 (noting that the Equality Act 2010 replaces several previous pieces of legislation, including the Equality Act 2006).

¹⁶⁸ See Hepple, *supra* note 148, at 15.

¹⁶⁹ See *id.* at 11, 14; Holland, *supra* note 143, at 6.

¹⁷⁰ See Hepple, *supra* note 148, at 15; Holland, *supra* note 143, at 6. Compare Equality Act 2010 § 152 (granting certain consultative powers to the CEHR), with Equality Act 2006 § 1 (establishing the CEHR).

¹⁷¹ Hepple, *supra* note 148, at 14.

¹⁷² See Equality Act 2010 § 149.

¹⁷³ Hepple, *supra* note 148, at 21.

crimination, harassment, victimization, and any other conduct prohibited by the Act.¹⁷⁴ The provisions also each address the need to advance equality of opportunity between persons who share a relevant characteristic and those who do not share it,¹⁷⁵ and the need to foster good relationships between persons who share a relevant characteristic and those who do not share it.¹⁷⁶ Rather than conferring individual rights upon British citizens, the Equality Act 2010 attempts to define where discrimination may occur, and extend public sector duties to offer added legal protection and give full effect to the right to equality.¹⁷⁷

III. ANALYSIS

A. Forecast for the Future

The Equality Bill proposes to further govern arbitration services in England and Wales, and to establish protections for the victims of domestic abuse.¹⁷⁸ In its purely textual form, the Bill may be understood to advance two goals.¹⁷⁹ In one sense, it responds to the need to prevent the development of parallel, competing legal systems by reaffirming the existing structure of English law.¹⁸⁰ In another respect, the Bill seeks to abate a perceived threat to England's longstanding policy of equality by responding to concerns of domestic abuse and gender discrimination.¹⁸¹ Thus, the Equality Bill has both clear legal and policy objectives.¹⁸²

1. Praise for the Equality Bill

To the extent that the Equality Bill seeks to advance its policy objective of promoting equality by targeting gender discrimination, the Bill has been heralded as laudable both in its intent as well as its potential practical effect.¹⁸³ Immediately following the Bill's proposal in the House of Lords, Bishop Michael Nazir-Ali, former Bishop of Rochester,

¹⁷⁴ Equality Act 2010 § 149(1)(a).

¹⁷⁵ *Id.* § 149(1)(b).

¹⁷⁶ *Id.* § 149(1)(c).

¹⁷⁷ See Holland, *supra* note 143, at 6.

¹⁷⁸ Arbitration and Mediation Services (Equality) Bil pmb1.

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² See *id.*

¹⁸³ See Andrew Brown, *The State Cannot Curb Sharia Law Alone*, GUARDIAN (June 9, 2011, 13:47 EDT), <http://www.guardian.co.uk/commentisfree/belief/2011/jun/09/sharia-law-bill>.

lent his support to the Bill by asserting that it would uphold the freedom of religion guaranteed to British citizens while also targeting the problem of unequal treatment occurring within Islamic arbitration tribunals.¹⁸⁴ To this end, the Bill has been praised for its potential to “raise consciousness that there are legal British remedies for discrimination which are freely available.”¹⁸⁵

The Bill has also been touted as a competent response to concerns that Islamic law tribunals “threaten the integrity of law in the British democracy, by promoting the unequal treatment of women in the British Islamic community.”¹⁸⁶ To this end, it is understood that the Bill seeks to regulate the operation of religious arbitration tribunals by prohibiting them from arbitrating matters that lie within the jurisdiction of English civil courts—notably, criminal and family matters.¹⁸⁷ In advancing this legal objective, some commentators anticipate that the Bill would likely “increase pressure on the Sharia Councils . . . to improve their practice and *actively* clarify for their clients before initiating mediation that their decisions have no legal weight.”¹⁸⁸ To the extent that the Equality Bill would work to construe more narrowly the channels of jurisdiction available to arbitration tribunals, some commentators forecast that the Equality Bill could provide critical clarity to an area of the law largely marked with confusion.¹⁸⁹

2. Criticism of the Equality Bill

Despite the laudable potential of the Equality Bill, the Bill has been criticized for its potentially harmful effects on England’s minority religious and cultural populations.¹⁹⁰ Emphasizing the important role

¹⁸⁴ *Bishop Backs Bill to Tackle Sharia Courts*, CHRISTIAN INST. (June 10, 2011), <http://www.christian.org.uk/news/bishop-backs-bill-to-tackle-sharia-courts/>.

¹⁸⁵ Brown, *supra* note 183.

¹⁸⁶ William, *supra* note 4, at 43; *see* Brown, *supra* note 183; *Bishop Backs Bill to Tackle Sharia Courts*, *supra* note 184.

¹⁸⁷ *See* Gillian Douglas & Russell Sandberg, *Religious Courts Provide a Useful Service for Those Whose Faith They Represent but They Are in No Way Replacing Civil Law in the Area of Marriage and Divorce*, LONDON SCH. ECON. & POL. SCI. (Aug. 16, 2011), <http://blogs.lse.ac.uk/politicsandpolicy/2011/08/16/religious-courts/>.

¹⁸⁸ *E.g.*, Jenny Taylor, *Top Muslim Women’s Advocate Backs Cox’s Equality Bill*, LAPIDO MEDIA (June 13, 2011), <http://www.lapidomedia.com/top-muslim-womens-advocate-backs-coxs-equality-bill> (emphasis in original).

¹⁸⁹ *See* Hannah Bewley, *Harrow Campaigner and the Battle for Equality*, HARROW OBSERVER (Jan. 12, 2012), <http://www.harrowobserver.co.uk/west-london-news/local-harrow-news/2012/01/12/harrow-campaigner-and-the-battle-for-equality-116451-30103769/>; Taylor, *supra* note 188.

¹⁹⁰ *See* Hasan, *supra* note 10.

filled by religious arbitration tribunals, such a view posits that “[t]he interference of secular courts in religious issues, and [courts’] tendency to substitute judgment for religious authorities, can threaten the preservation of cultural and religious groups and their traditions.”¹⁹¹ The Bill has also been criticized specifically for its notification obligation, which requires public authorities to inform individuals of the need to obtain an officially recognized marriage under English civil law in order to receive legal protection, and that polygamous households may be unprotected by English law.¹⁹² Commentators posit that this requirement, in addition to being impractical, “also risks causing offence to those who it seeks to protect by stressing the ‘unofficial’ nature of their marriages and confusing the problem of non-registration with that of polygamous marriages.”¹⁹³

This critical perspective suggests that the ultimate deficiency in the proposed Bill lies in its failure to appreciate cultural sensitivities.¹⁹⁴ In championing this view, the Islamic Shariah Council’s Secretary, Dr. Suhaib Hasan, argued that the Bill “made no attempt to understand the workings of the shariah councils,” and that “it [was] morally wrong to comment on [the issue of the testimony of a woman being half of that of a man] without any knowledge of [it].”¹⁹⁵ Dr. Hasan further alleged that Baroness Cox has done nothing more than “regurgitate[] common myths about the role of women in Islam in an effort to undermine the work of the shariah councils,” and that “she deserves little praise” for doing so.¹⁹⁶

Although Dr. Hasan has suggested that Islamic arbitration tribunals “already operate within the confines of current legislation,”¹⁹⁷ the Equality Bill has been criticized even by those who acknowledge that the tribunals may, in some instances, arbitrate beyond their permissible subject-matter jurisdiction.¹⁹⁸ This wave of criticism principally centers on an understanding that any attempt to place limits upon the operative scope of Islamic arbitration tribunals would be null, since “Bill or no Bill, the Sharia councils will no doubt continue.”¹⁹⁹ Levied primarily

¹⁹¹ Wolfe, *supra* note 31, at 455.

¹⁹² See Douglas & Sandberg, *supra* note 187.

¹⁹³ *Id.*

¹⁹⁴ See Hasan, *supra* note 10.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Baroness Cox’s Sharia Bill Criticised by Islamic Council*, CHRISTIAN INST. (June 17, 2011), <http://www.christian.org.uk/news/baroness-coxs-sharia-bill-criticised-by-islamic-council/>.

¹⁹⁸ See Taylor, *supra* note 188.

¹⁹⁹ *Id.*

as an attack on the Bill's enforceability, this position essentially discounts the impact of the Bill's imposition of fines and prison sentences for any person guilty of an offense under the Bill.²⁰⁰ On this view, the problem with the Equality Bill is that its enforcement mechanisms are insufficient to affect its desired changes.²⁰¹

Given the criticism lodged against the Bill's enforcement system, greater oversight is needed for the Equality Bill to affect the greatest progress toward its desired goals.²⁰² In addition to the Bill's proposed notification requirements, aimed at informing parties of their legal rights and options under English civil law prior to arbitration, Parliament should require more thorough screening of tribunals and arbitrators.²⁰³ Additionally, Parliament could require tribunals to appoint at least two arbitrators to each dispute, and require that arbitrators hold a law degree or have some substantial experience within the English legal system.²⁰⁴ By imposing requirements that effectively create standards of qualification for arbitrators, Sharia arbitration tribunals could develop far more transparent procedures, more easily regulated by English law, rendering the Equality Bill's ends more effectively enforceable.²⁰⁵

Beyond the criticism surrounding the Equality Bill's enforcement mechanisms, others have urged that the essential problem made manifest by the Bill is that its proposed reforms will ineffectively address deeply-rooted social issues.²⁰⁶ Some commentators feel that the most pressing issue is whether "[Sharia councils] will respond more rapidly to pressure from *within* the community to move in line with understandings, including among Muslims, of equality and justice that require gender equality in family matters."²⁰⁷ Because many Sharia arbitration tribunals derive their power from religious, not State, authorities, some contend that the goal of equality in arbitrations, while

²⁰⁰ Arbitration and Mediation Services (Equality) Bill § 7(2); see Taylor, *supra* note 188 (opining that regardless of whether the Equality Bill is enacted, the Sharia councils will likely remain).

²⁰¹ See Taylor, *supra* note 188.

²⁰² See Wolfe, *supra* note 31, at 469 ("The proper response to the criticism of religious arbitration is not to ban it entirely, but to implement greater oversight procedures. Through heightened oversight, religious communities will be able to preserve their culture and heritage while the state will be able to fulfill its duties of protecting its citizens.").

²⁰³ *Id.* at 468.

²⁰⁴ Rafecq, *supra* note 70, at 137.

²⁰⁵ See *id.* at 137–38.

²⁰⁶ See Douglas & Sandberg, *supra* note 187; Taylor, *supra* note 188.

²⁰⁷ Taylor, *supra* note 188.

certainly commendable, requires social, not simply legal, action.²⁰⁸ At worst, the fear on this view is that without the requisite social reforms, Baroness Cox's Equality Bill may run the risk of augmenting a "kind of disconnect between religious law and civil law;" or, perhaps more pertinently, the gap between law and society.²⁰⁹

The perceived gap between law and society has encouraged calls for greater legal recognition of awards handed down by Islamic arbitration tribunals.²¹⁰ English courts "have refused to consider the impact of internal community pressure, demonstrating a deep misunderstanding of religious belief," and, very often, "courts are not equipped with the knowledge, sensitivity, and patience to fully resolve religious disputes."²¹¹ This suggests that "religious issues would best be resolved using internal community solutions and systems."²¹² Such a legal pluralist perspective aims to create spaces in which "more than one legal, or quasi-legal, regime occupies the same social field"²¹³ and "multiple overlapping communities seek to apply their norms to a single act or actor."²¹⁴

One approach to implementing a legal pluralist scheme of governance would be to confer territorial autonomy upon minority cultural groups residing within the State.²¹⁵ This approach entails granting "separate powers of internal administration . . . to regions possessing some ethnic or cultural distinctiveness, without those areas being detached from the state."²¹⁶ Conceding territorial autonomy to sub-state cultural groups could provide political and governmental authority to groups inhabiting those regions, which could very well prove to be the best way to accommodate national minorities.²¹⁷

²⁰⁸ See Douglas & Sandberg, *supra* note 187 ("[Islamic arbitration] tribunals . . . derive their authority from their religious affiliation, not from the State, and this authority extends only to those who choose to submit to them.").

²⁰⁹ See Nichols, *supra* note 26, at 976.

²¹⁰ See *id.*

²¹¹ Wolfe, *supra* note 31, at 467.

²¹² *Id.*

²¹³ Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1158 (2007) ("Historically, such [hybrid legal spaces] were most prominently associated either with colonialism . . . or the study of religion—where canon law and other spiritual codes have often existed in an uneasy relationship with the state legal system.").

²¹⁴ *Id.* at 1235–36.

²¹⁵ See Steven Wheatley, *Deliberative Democracy and Minorities*, 14 EUR. J. INT'L L. 507, 521 (2003).

²¹⁶ *Id.*

²¹⁷ *Id.*

In England, if it should become apparent that accommodating social and cultural differences within society is not possible, “separate legal and political regimes may be needed.”²¹⁸ For example, one scholar suggests:

English ideas of contract could . . . underpin recognitions of Islamic divorces as “valid,” to the extent that the parties to a religious divorce procedure sign affidavits agreeing to the terms of the procedure and the range of possible outcomes. In that case, to affirm validity would . . . [be] to see whether the [Sharia] council obeyed its own procedural rules.²¹⁹

Those adopting a legal pluralist perspective posit that by acknowledging the reality of “hybridity” rather than seeking to disregard it, English society would more likely be able to create spaces for “creative adaptation, and innovation, and to inculcate ideals of tolerance, dialogue, and mutual accommodation.”²²⁰ Such hybrid legal spaces have been touted as providing the nearest means by which to promote the peaceful coexistence of social and cultural groups within a diverse world.²²¹

Although a legal pluralist perspective would suggest that hybrid, parallel legal systems should operate without any intervention by the State, the English legal system has far too great of an interest in protecting its citizens and upholding its historical tradition of equality to “completely turn a blind eye to injustices that may be carried out through religious arbitration.”²²² Despite the benefits proposed by the legal pluralist perspective, various jurisdictions that have attempted to adopt such a hybrid legal system “are failing to provide their inhabitants with either a just or a stable legal order.”²²³ Legal pluralism may also ultimately involve differential treatment of individuals that may threaten individual liberty and protections under the law.²²⁴ Furthermore, the legal pluralist perspective neglects to address the developing gap between law and society, and even threatens to exacerbate the divide because a legal pluralist approach would suggest that society might develop separately, alongside, and never intersecting with, its parallel

²¹⁸ *Id.* at 520.

²¹⁹ Bowen, *supra* note 3, at 435.

²²⁰ Berman, *supra* note 213, at 1237.

²²¹ *Id.*

²²² Wolfe, *supra* note 31, at 467.

²²³ Adam S. Hofri-Winogradow, *A Plurality of Discontent: Legal Pluralism, Religious Adjudication and the State*, 26 *J.L. & RELIGION* 57, 59 (2010–11).

²²⁴ Macklem, *supra* note 10, at 490.

national legal system.²²⁵ If bridging the gap between law and society remains a goal of the Parliament, legal pluralism does not provide a solution.²²⁶

B. *Suggested Social Reforms to Accompany the Equality Bill*

In further considering the feared fissure between law and society, the ultimate issue raised by the Equality Bill becomes clear.²²⁷ Though deserving of praise—both in its stated goals and in its effort to uphold a stable, singular legal system—the Equality Bill’s ultimate shortcoming lies not within its text, but with its approach.²²⁸ The Bill’s attempt to remedy social problems of discrimination, domestic abuse, and inequality through amendments to English laws must be accompanied by social, not only legal, reform.²²⁹ As it currently stands, the Bill’s purely legislative attempt to affect desired social changes may not only prove ineffective, but may actually work to augment the perceived divide between law and society.²³⁰ Legal reform alone may very well prove to be the demise of the proposed Bill.²³¹

In order to avoid worsening the perceived gap between the English legal system and society, the Equality Bill should be accompanied by social reforms aimed at further accommodating Muslim community members within English society.²³² Assuming sufficient enforcement mechanisms are implemented to ensure proper oversight of Sharia arbitrations and to protect vulnerable parties, banning Sharia arbitration entirely “would be a much too severe response.”²³³ Sharia arbitration tribunals fill an important social role “of allowing members of a minority religious or cultural group to preserve their heritage and values,”²³⁴ and the reality of large, fully developed Muslim communities within the

²²⁵ *Cf. id.* (discussing how differential treatment of individuals under a legal pluralist approach could threaten individual liberty and the rule of law within society).

²²⁶ *See* Reiss, *supra* note 69, at 777.

²²⁷ *See id.* at 773–74.

²²⁸ *See infra* notes 230–234 and accompanying text.

²²⁹ *See infra* notes 233–239 and accompanying text.

²³⁰ *See* Nichols, *supra* note 26, at 976 (explaining how a disconnect between religious and civil law may be ameliorated by greater legal recognition of religious tribunals); *cf.* Wheatley, *supra* note 215, at 517 (discussing how inclusive social reforms may facilitate minority participation within society).

²³¹ *Cf.* Wheatley, *supra* note 215, at 517 (espousing the value of social reforms).

²³² *See id.*; Malik, *supra* note 6.

²³³ Wolfe, *supra* note 31, at 467.

²³⁴ *Id.* at 466–67 (noting that enhancing appreciation within society of diversity of cultures is a positive goal, and that the recognition of minority groups’ distinctiveness is not in contradiction to democratic ideals).

United Kingdom demands a greater social awareness and sensitivity on the part of British lawmakers toward these cultural values.²³⁵

A practical approach to social reform may entail enacting measures to encourage Muslim representation within the English political system.²³⁶ Encouraging Muslim minorities to participate fully in English civil society would lead to more proportionally accurate numbers of Muslims in public office.²³⁷ Such a move would position Muslims and other cultural minorities living under English law in a place to engage in governmental dialogue in “a horizontally organized deliberative process,” more clearly involving those groups in public society.²³⁸

In calling for increased opportunity for political representation by Muslim community members, an end to political hegemony is more imperative than a pursuit for total demographic accuracy in Parliament.²³⁹ “The focus of reform should be the removal of features that have resulted in lower representation of [Muslims] in the legislature than in the population.”²⁴⁰ By creating institutional links between religious groups and the affairs of the State, these social reforms may help “in developing politically informed and politically constructive religious perspectives that are not naively optimistic about the nature of politics.”²⁴¹ Reforms aimed at encouraging public participation of Muslim and other minority groups may also work to foster a greater sense of tolerance and open-mindedness within English civil society,²⁴² while also promoting “the stabilization of people’s identities and . . . their

²³⁵ Rehman, *supra* note 1, at 123–24 (“The steady growth of adherents of Islamic faith in the UK—a consequence *inter alia* of proportionally higher birth rates, secondary migration through family and marriage resettlements and conversions to Islam—also necessitates a great awareness and sensitivity towards the religious, cultural and ethical values of these communities.”).

²³⁶ See Wheatley, *supra* note 215, at 515.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 516.

²⁴⁰ *Id.* at 516, 517 (“[Social reforms] might include one or more of the following: quotas in electoral lists, reduction in the quorum for registration of a party, privileged funding for minority parties, lowered thresholds for entering Parliament, or reserving seats for representatives of minorities. Such measures can appear problematic in advance of their introduction, but may quickly become accepted subsequently.”).

²⁴¹ Tariq Modood, *Multiculturalism, Secularism, and the State*, REPUBLIC, June 2005, at 15, 24, available at <http://theirelandinstitute.com/republic/04/pdf/modood004.pdf>.

²⁴² See Camil Ungureanu, *The European Constitution-Making and the Question of Religion* 16 (Eur. Univ. Inst., Working Paper No. 2007/01, 2007), available at http://cadmus.eui.eu/bitstream/handle/1814/6663/sps_2007_01.pdf?sequence=3.

increased willingness to integrate in the democratic life of a country.”²⁴³

The value reached by such reforms lies not in affording cultural minorities “a share of political power,” but in granting recognition to minority groups as “equal, albeit culturally distinct, members of the polity with a right to be included in the decision-making process.”²⁴⁴ Enacting such social reforms alongside the proposed Equality Bill would better ensure that English legal and social policies affecting Muslims and other minority cultural groups will “enjoy a greater degree of legitimacy in the eyes of both majority and minority populations,” encouraging cultural differences to be channeled into democratic institutions, and bridging the gap between law and society.²⁴⁵

CONCLUSION

For many Muslims currently living in England and Wales, observing Sharia principles has provided a sense of solidarity and interconnectedness to Islamic culture and other Muslims. The use of faith-based arbitration services in connection with Sharia principles has been largely attributed to an interest in providing internal fora for dispute resolution, where Muslim community members often feel more comfortable presenting their matters to those who share a similar value system. Though the judgments issued by these faith-based arbitration tribunals lack binding legal authority, the recent growth of Sharia arbitration services throughout the region has raised concerns among British lawmakers. Chief among the problems identified by English legislators are threats to both the sovereignty of the existing English legal system and to England’s longstanding policy of promoting equality and the principle of non-discrimination within society.

Addressing these concerns, the Equality Bill proposes a legislative solution that aims to provide additional protection for the victims of domestic abuse, and to further provide for equality under the law of alternative arbitration and mediation services. Heralded as a competent response to both the legal and policy concerns identified by legislators, the Equality Bill has been touted as likely to bring critical clarity to the law governing arbitration and mediation services, and likely to raise awareness of remedies under England’s equality and anti-discrimination laws. Nevertheless, this Note urges that legislative re-

²⁴³ *Id.* at 17.

²⁴⁴ Wheatley, *supra* note 215, at 527.

²⁴⁵ *Id.*

form alone will not affect the desired goals of the Equality Bill. Without engaging in complementary social reforms, the Equality Bill may actually work to augment the growing divide between England's governing legal system and its society. As this Note suggests, social reforms aimed at encouraging public participation of Muslim community members within English civil society may provide a means of bridging the rift between England's existing legal system and its cultural minority populations. Until such reforms are embraced, any purely legislative attempt to rectify legal and social ills will be unlikely to address the growing gap between law and society in the United Kingdom.

