Muslim Arbitration Tribunal and Sharia Courts – Objectives and legal jurisdiction within England and Canada

1. Introduction

Over the past years, the United Kingdom has faced a firm growth of Muslim communities within its borders, and with it, a surge of faith-based arbitration services for Muslims.[1] In our present day we can observe the influence of religion on society and lifestyle of people but also we are witnessing the Western European race towards secularism and pluralism. However, in spite of all of these, the search and pursuit of religion overall would always have a place in the human heart.

The main purpose of this paper is to closely follow and answer to the following questions: How does the Muslim Arbitration Tribunal ("MAT") and Sharia Courts influence the English and Canadian society and culture? The relevance and significance of the Muslim Arbitration Tribunal and Sharia Courts for the present society.

I also think is only fair to explain beforehand the difference between the MAT and the Sharia councils. The MAT could be understood as an organization that is "governed under a set of procedural rules and comes under the Arbitration Act 1996. Nevertheless, the informal Sharia councils ("are not governed by any procedural rules") which existed in the UK for the last 30 years had different attempts to offer their services of reconciliation but not with the same success as the MAT.[2]

2. The Muslim Arbitration Tribunal (MAT) and Sharia Courts in England

Due to different cultural and political progresses, England headed to a point where they decided to integrate the Muslim community principles in the method of Sharia Councils. Around 1970 the Union of Muslim Organizations of the UK and Eire (UMO) presented their purpose in a formal manner to different governmental ministers while pursuing official acknowledgement of an independent system of family law which would consequentially apply to Muslims (who decide to use it) living in the UK. Nonetheless this act has been submitted in 1989 to the Home office and also recapped publicly in 1996. The ministers of the government response was really negative and also refused on the basis of the legislation found was not appropriate.[3] However, throughout the 1980 and 1990 a development of different kind of organizations were founded, concentrating on the importance of the political side of the "cultural and religious Islamic practices" as well as the practice of minority religious values. Today, over two hundred and fifty of this kind of organizations can be found in both England and Wales.[4]

The MAT was founded in 2007 by Sheikh Faiz-ul-Aqtab allowing different kind of disputes to be solved by using the Islamic Sharia Law. In accordance to the Arbitration Act,

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[1] http://lawdigitalcommons.bc.edu/iclr/vol36/iss1/7/ (accessed on the 8th of May 2013)

[2] http://www.inbrief.co.uk/preparing-for-trial/muslim-arbitration-tribunal.htm (accessed on the 11th of May 2013)

[3] http://www.law-essays-uk.com/resources/sample-essays/muslim-law/muslim-law-in-uk.php (accessed on the 8th of May 2013)

[4] http://www.law-essays-uk.com/resources/sample-essays/muslim-law/muslim-law-in-uk.php (accessed on the 8th of May 2013)

every ruling of the tribunals are connected in the law, therefore the parties involved accepts the tribunals authority in their decisions.[5]

The purpose of the MAT was to make available a concrete alternative for the Muslim community. The Tribunal is seeking to settle down different disagreements in accordance with Islamic Sacred Law (Sharia Law) and without having to choose to costly and time consuming lawsuit. The foundation of MAT is important and has great significance in the next step towards the Muslim community in providing them with a real chance to self-determine disagreements in accordance with Islamic Sacred Law.[6]

In 2009 there were 85 Islamic sharia courts in England, which work mostly from either mosques or private offices on different financial settlements as well as family disagreements in accord to the religious values. These courts can lay down certain judgments to which law courts can give full legal status if approved. Nevertheless, a large number of these courts functions behind closed doors which most of the time are covered to the average observed. Their decisions sometimes can be unfair to women and also backed by intimidation and pressure. Some people only count the five courts in London, Manchester, Bradford, Birmingham and Nuneaton as being ruled by the Muslim Arbitration Tribunal ("whose rulings are enforced through the state courts under the 1996 Arbitration Act").[7]

In 2008 Justice Minister Bridget Prentice told the Ministers of the Parliament, that in a case of family disagreement the parties involved are trying to resolve it in a sharia council and also wishes to be recognized by the English authorities, then they are free to sketch an agreement order which would encompass all the terms of the contract/pact and present it to an English court. This method will actually allow "judges to scrutinize it to ensure it complies with English legal tenets." However, all the verdicts from the sharia tribunals can be handed over to a family court judge for approval containing the essential outlines. This sharia courts within the Muslim Arbitration Tribunal are recognized as courts under the Arbitration Act. This law, that covers Jewish Beth Din courts, gives lawful authority to a court of law only if all parties implicated accepts and admits its authority.[8]

Another important thing to mention here is that a large number of controversies on the subject of the Muslim Arbitration Tribunals come also from the new media. In a great number of articles, newspaper headings and different kind of magazines described the idea of Islamic law has been officially adopted in Britain as well as the government has silently authorized powers for Sharia judges to direct and run different divorce cases. These ideas are without any foundation, because according to the head of the Lord Chief Justice, Lord Phillips "There can be no calling for imposing sanctions for failure to comply with Sharia law, not any questions of such courts sitting in this country, or such sanctions being applied within England and Wales. Those who live in the country are governed by English law and subject to the jurisdiction of the English courts."[9] Then in accord to Lord Phillips statement, the idea of a Sharia court and its authority is quite complicated. Until now we have observed the fact that Sharia courts has the

[5] http://www.law-essays-uk.com/resources/sample-essays/muslim-law/muslim-law-in-uk.php (accessed on the 8th of May 2013)

[6] http://www.matribunal.com/index.html (accessed on 8th of May 2013)

[7] http://www.dailymail.co.uk/news/article-1196165/Britain-85-sharia-courts-The-astonishing-spread-Islamic-justice-closed-doors.html (accessed on 8th of May 2013)

[8] http://www.dailymail.co.uk/news/article-1196165/Britain-85-sharia-courts-The-astonishing-spread-Islamic-justice-closed-doors.html (accessed on 8th of May 2013)

[9] http://www.law-essays-uk.com/resources/sample-essays/muslim-law/muslim-law-in-uk.php (accessed on the 8th of May 2013)

authority to decide and rule different cases but they do not hold the power in imposing their sanctions of the people involved. In other words all the Sharia courts are subjected to the English courts and law.

The Sharia courts were first established in the UK in 1982 and they still continue to accept requests for arbitration and mediation services in their east London office.[10] The Islamic Sharia Council (ISC), like many other smaller Sharia councils around the country, has dealt with hundreds of cases involving Muslim marriage, divorce, finance, inheritance, domestic abuse, and some criminal proceedings.[11] However, for the most part, the main business led by the Islamic Sharia Council relates to different requests for divorce brought by young women.[12]

Within England, the legal indications for Sharia arbitration were performed in silence, without any official endorsement by the state. However, a large number of critics cite Gordon Brown's political motives to gain the Muslim vote as the reason for a lack of political opposition. Others cite the large Islamic push for legal acknowledgement.[13]

The Sharia courts controversy within England is mostly due to the evident problems of the sharia law poses to women's equality and democratic values. While observing the isolated nature of these arbitration courts they also function outside the public sphere and are also free from any meaningful independent oversight. Looking at these structures, although very common in arbitrations, it leads many critics to the point of believing that sharia courts will decide unfair judgments imposed through pressure on parties who did not agree with the court's jurisdiction. Nevertheless, along the same lines of thinking, some others believe that these sharia courts do not have the appropriate security for women and children who are trapped in abusive relationships.[14]

If we are to make a comparison between the MAT and the ISC we can observe some obvious differences. The MAT incorporates different perspectives from the British domestic law where the ISC neither adds them nor submit to any of its conditions. Furthermore, the more or less informal measures to the right of an appeal, place great favor to men over women. Likewise, all of the *fatwas*[15] ("a legal opinion or ruling issued by an Islamic scholar") that are delivered by the ISC points out clearly the "misogynistic and informal tendencies" of the organization.[16]

a. *Legal matters*

MAT operates inside the legal structure of England and Wales in this way is ensuring that any determination reached by MAT can be imposed through existing ways of enforcement open to normal accusers. Even though MAT must function within the legal framework of England and Wales, this does not prevent or hinder MAT from guaranteeing that all the results reached by it are in agreement with one of the renowned Schools of Islamic Sacred Law. The Muslim community will benefit for the first time of the chance to settle down disagreements according to the Islamic Sacred Law having the understanding that its result will be mandatory and enforceable.[17]

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[10] http://lawdigitalcommons.bc.edu/iclr/vol36/iss1/7/ (accessed on the 8th of May 2013)
[11] http://lawdigitalcommons.bc.edu/iclr/vol36/iss1/7/ (accessed on the 8th of May 2013)
[12] http://www.stanford.edu/group/sjir/pdf/Sharia_11.2.pdf (accessed on 9th of May 2013)
[13] http://www.stanford.edu/group/sjir/pdf/Sharia_11.2.pdf (accessed on 9th of May 2013)
[14] http://law.wustl.edu/WUGSLR/Issues/Volume11_3/Lepore.pdf (accessed on 13th of May 2013)
[15] http://www.thefreedictionary.com/fatwas (accessed on the 14th of May 2013)
[16] http://law.wustl.edu/WUGSLR/Issues/Volume11_3/Lepore.pdf (accessed on 13th of May 2013)
[17] http://www.matribunal.com/index.html (accessed on 9th of May 2013)

The overall use of the Sharia law in the MAT is solely grounded on the idea of a "voluntary submission" by the people involved to the authority of the tribunal. The MAT can only deal with religious divorces, marriages and also family disagreements. In the same time we need to understand that the tribunal is not allowed or claims to deal with affairs of criminal and family law (child custody). Nevertheless, a religious divorce is not a legally recognized if granted in the UK, although it may coexist side by side a civil divorce attained in a court of law found under the laws of both England and Wales.[18]

The MAT is legally dealing with only six issues, namely: "forced marriages, domestic violence, family dispute cases, commercial and debt disputes, inheritance disputes, and mosque disputes."[19]

b. Rules and procedures

The Procedural Rules which regulate and govern MAT ensure that the MAT operates within defined parameters. The Procedural Rules require that the Tribunal must consist of at least two members, one a scholar of Islamic Sacred Law and the other a solicitor or barrister registered to practice in England or Wales.[20] In accordance

Opposing the rulings that the MAT had gave away, the judgments made by the ISC has not binding authority under the Arbitration Act. Instead the ISC delivers only "mediation services," which ultimately gives to both parties a "non-binding view of the sharia law" on different aspects, such as divorce, marriage and civil disputes.[21]

According to Matthew Hickley (is Home Affairs Correspondent for the Daily Mail UK), the Islamic Sharia law courts are taking advantage of the ambiguous legal section of the British law in regards to their decisions as being binding concerning divorce, financial disagreements and also domestic violence.[22] Some officials say that this new system have claimed more than 100 cases since the summer of 2007. These court cases include a variety lawsuits: domestic violence (which is a criminal offence rather than a civil one), divorce, marriage as well as different disputes regarding inheritance. As for the future, is believed that these courts would be able to take an increasing number of "smaller" criminal cases.[23]

Mr. Sheikh Faiz-ul-Aqtab Siddiqi once said: "We realized that under the Arbitration Act we can make rulings which can be enforced by county and High Courts. The Act allows disputes to be resolved using alternatives like tribunals. This method is called alternative dispute resolution, which for Muslims is what the Sharia courts are."[24] Looking at Siddiqi's strategy, we can observe the reality of their influence among Muslims as well as their ways of going about things.

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[18] http://www.law-essays-uk.com/resources/sample-essays/muslim-law/muslim-law-in-uk.php (accessed on the 10th of May 2013)

[19] http://www.inbrief.co.uk/preparing-for-trial/muslim-arbitration-tribunal.htm (accessed on the 11th of May 2013)

[20] http://www.matribunal.com/index.html (accessed on 8th of May 2013)

[21] http://law.wustl.edu/WUGSLR/Issues/Volume11_3/Lepore.pdf (accessed on 13th of May 2013)

[22] http://www.dailymail.co.uk/news/article-1055764/Islamic-sharia-courts-Britain-legally-binding.html (accessed on the 10th of May 2013)

[23] http://www.dailymail.co.uk/news/article-1055764/Islamic-sharia-courts-Britain-legally-binding.html (accessed on the 10th of May 2013)

[24] http://www.dailymail.co.uk/news/article-1055764/Islamic-sharia-courts-Britain-legally-binding.html (accessed on the 10th of May 2013)

Since the MAT follows closely the rules and regulations of the Islamic Sharia law, let us take a look to some of them:[25]

- "A set of religious principles based on the Qur'an by which Muslims ought to live"
- "It has four parts: worship, commerce, crime and punishment, marriage and divorce
- "Banned behavior: drinks, drugs, adultery – should be punished"
- "The Qur'an sets sanctions such as lashes or stoning for adultery"
- "Permits behavior banned by the English law, for example polygamy"
- "Mosques often operates Sharia courts but their ruling have no legal status"

The people involved in the decisions matters is formed of Islamic scholars and qualified lawyers (adjudication panel). These must be UK qualified as well as having at least three years of experience after their qualification. The process of recruiting people is very rigorous which makes certain that the people who are chosen are suitable for these important roles.[26]

The ICS's practical rules are somewhat "less formal and equality-conscious" than most of the MAT.[27] For example, the divorce rules can be understood as:

- "The ISC offers application forms on its website for men and women. For men, the form must be accompanied by a document detailing the reasons the party in question is seeking a divorce. Women are subsequently notified by letter and given 30 days to respond. Men are then given a – talaq Nama – a document that makes the Islamic divorce official – which they must sign in front of two witnesses. Finally, the ISC mails two copies of the divorce certificate: one with the dowry enclosed to the woman and a second to the man."[28]

By looking at this example we can understand to an extent the difference between the MAT and ISC in regards to both authority as well as the legal way of going about their procedures.

c. *Types of Cases that the MAT deals with*:[29]

i. *Forced Marriages*

The statistics in these cases are roughly 70% of all marriages between a British-Asian and a partner from the Sub-Continent are made by force or include an amount of pressure and compulsion. According to a governmental survey, there were about 3,000 forced marriages a year but the MAT said that this number is much higher. The subject of forced marriages had triggered different kind of uprisings and disputes in recent years. However, not many people would actually know and understand what these forced marriages entails: "arranged and coerced."[30] By not making any difference between the two concepts, one might fail in the trap of misunderstanding and criticism. Furthermore, this would also point out an ignorance of the Asian Muslim community and their cultural practices. Consequently, this has a bearing on how to deal with actual cases of injustice and know the difference between real cases and false ones.

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[25] http://www.dailymail.co.uk/news/article-1031611/Sharia-law-SHOULD-used-Britain-says-UKs-judge.html (accessed on the 10th of May 2013)

[26] http://www.inbrief.co.uk/preparing-for-trial/muslim-arbitration-tribunal.htm (accessed on the 11th of May 2013)

[27] http://law.wustl.edu/WUGSLR/Issues/Volume11_3/Lepore.pdf (accessed on 13th of May 2013)

[28] http://law.wustl.edu/WUGSLR/Issues/Volume11_3/Lepore.pdf (accessed on 13th of May 2013)

[29] http://www.matribunal.com/cases.html (accessed on the 11th of May 2013)

[30] http://www.matribunal.com/cases_forced_marriages.html (accessed on the 12th of May 2013)

The Forced Marriages Act was introduced in 2007 and many think that it was a choice in the right direction, nevertheless, in itself is not a complete solution to the problems overall. At the moment this Act requires the victims to be confident enough and apply for such an order as well as facing the risk of accusation by the family members. Another way of approaching such conflicts would be the involvement of an English judge in the matter. However, the question would be then if the judge would have the knowledge and enough cultural sensitivity in order to identify a genuine problem. An additional point would be a question one might want to think about, "Who is able to protect the interests of a potential victim whilst at the same time not curbing the genuine and legal practice of Asian Muslim community?"[31] The question raised here is very sensitive as well as very complex, because as an outsider, the English judge would have a real struggle in making the right decision without any proper study of the cultural background of the matter. Because of the unique position of the MAT in the Asian Muslim community, many would agree that it is "the ideal body" through which one can confront the subject. The method suggested by the MAT in regards to this issue is to "identify coercion at an early stage providing relief to the potential victim whilst at the same time ensuring that there is a minimum possibility of recriminations."[32] However, this approach involves trained judges (of Asian backgrounds) who would interview both the victim and their family members. In order for a decision to be made, the judge will take into account all important factors and then come to a conclusion on the matter. If the judge observes no presence of oppression, the next step is the issuing of a certificate which ultimately can be used as a supporting document if the spouse needs to apply for a visa. An additional point is that judges are not obliged to give any kind of details regarding their decisions which therefore will keep them from being blamed.[33] I think that the method used here is kind of complex but in the same time I believe that it would work to a large extent. The fact that the judge will try to know both parties involved as well as understand all the factors involved says a lot about their genuine interest to help. Nevertheless, the fact that there is no mentioning of an appeal board but only the reality that the judge cannot be blamed for his decision it makes the situation a bit complicated.

ii. Domestic Violence

The subject of domestic violence has known a large amount of consideration because of the belief of being the general treatment of women within the Muslim community. According to the MAT, the pictured portrayed in the Media about "the patriarchal society where Muslim women are subjugated to their husbands and are subject to their every whim" is kind of twisted and not very accurate.[34] However, the 2006-2007 governmental statistic points out that 312,000 women reported different cases of domestic violence, out of which the proportion of Muslim women is unknown. This report suggests that the possible problem could be with the community, but in the same time for the women to come forward and ask for help for their problems, they could face the risk of retribution from family members. And additional point would be the reality of imams remaining silent in the midst of domestic abuse because of different pressures, for example the community. Sometimes because of the pressure of the community, the imams would not address such issues. Nevertheless, the main goal of the MAT in regards to the domestic

[31] http://www.matribunal.com/cases_forced_marriages.html (accessed on the 12th of May 2013)
[32] http://www.matribunal.com/cases_forced_marriages.html (accessed on the 12th of May 2013)
[33] http://www.matribunal.com/cases_forced_marriages.html (accessed on the 12th of May 2013)
[34] http://www.matribunal.com/cases_domestic_violence.html (accessed on the 12th of May 2013)

violence is to put an end to it (as well as keeping it under control), but also to dismiss different myths about Islam and domestic abuse as an overall concept.

iii. Families Disputes

Family disputes are nothing out of the ordinary life. However, one of the most usual problem found in the Muslims community in the UK is "the request for a *talaq*[35] (a practice used to divorce your spouse, by repeating the words "I divorce you" once or three times) divorce by the wife."[36] This issue is very complicated because the wife can easily get a divorce in the civil court but in regards to the religious court, the husband can deny it. As a consequence the entire community regards her as still being married which therefore puts her in a position of not being able to re-marry. In this situation the MAT has the authority to give a *talaq* in order to end the "limping marriage." This concept refers to the legal side where the two person are involved and got divorced in the civil court but have not succeeded in the religious one as well. However, it is considered by many scholars that when an Islamic marriage is terminated in the civil court it also terminates the religious one.

The overall authority of the MAT is limited and does give them the right to deal with criminal offences within the UK context. Nevertheless, in certain cases such as assault within the context of domestic violence, both parties are able to ask the MAT to support them in reaching resolution. This would then be observed and approved by the MAT but only as an independent organization. In the same time these terms of resolution for the conflict could then be passed on by the MAT to the Crown Prosecution Service (CPS) which ultimately will be directed through the local Police Domestic Violence Liaison Officers who must reconsider the criminal charges. However, the final decision to prosecute within this process will always belong to the CPS.[37]

iv. Inheritance Disputes

The subject of inheritance dispute is closely related to the property ownership. However, the MAT is "not a will-writing service"[38] but other organizations would offers such services. The function of the MAT in this case would only be "to request a decision or pronouncement on the shares of the various parties concerned according to Islamic law."[39] Nevertheless, in certain cases when there is a failure to act in accordance with the verdict of the MAT by one of the parties, the other party will still be able to present the decision of the MAT before the civil court as proof of "what the deceased would have known and intended."[40]

v. Mosque Disputes

Since there almost 1600 mosques within the UK where some of them have been involved in different kind of disputes, the MAT can only deal with the following:[41]

- "Dispute between two committee members."

[35] http://www.thereligionofpeace.com/Quran/005-triple-talaq.htm (accessed on the 13th of May 2013)
[36] http://www.matribunal.com/cases_faimly.html (accessed on the 13th of May 2013)
[37] http://www.matribunal.com/cases_faimly.html (accessed on the 13th of May 2013)
[38] http://www.matribunal.com/cases_inheritance.html (accessed on the 14th of May 2013)
[39] http://www.matribunal.com/cases_inheritance.html (accessed on the 14th of May 2013)
[40] http://www.matribunal.com/cases_inheritance.html (accessed on the 14th of May 2013)
[41] http://www.matribunal.com/cases_mosque.html (accessed on the 14th of May 2013)

- "Disputes as to the treasury of the mosque- allegations of money squandering/misappropriation"
- "Disputes of hiring and firing."

These kind of disputes are very common and the MAT plays an important role in resolving them as well providing the methods for future references. I personally think that the MAT is doing a great job in settling down the mentioned disputes. Since the MAT has the knowledge and background for such things I would agree with the fact that is one of the best prepared organizations in dealing with this type of issues.

d. Case studies

The following case studies are vital for our understanding of how today's society has been influenced as well as affected by different decisions taken in history.

- **England**

The following study case represents the English setting and it is used with the purpose of bringing light upon how society has changed over time as well as how certain religious groups had influenced different laws.

"English constitutionalism is based on the rule of law, and from that flows equality before the law. It does not, however, recognize systems of personal law for different communities, but does recognize the right to practice freely cultural customs and religious beliefs within the confines of existing law. The practice of what may be deemed personal laws are often referred to as ethnic or religious customs, which are acceptable provided they do not directly contravene or contradict English law. The plural nature of society in western countries is characterized by a clash of a given set of values, identity, and interests between State laws and the minority of religious communities. In 1976, the Race Relations Act was enacted by Parliament to safeguard the rights of minority groups by attempting to create equal opportunities for ethnic and racial groups, but stopped short of extending protection to religious groups and failed to recognize religious discrimination as an offense. This Act defined Sikhs, Jews, and Gypsies, but not Muslims, Hindus, or Afro-Caribbean's, as ethnic groups. That is not to say that legal protections were not extended to certain religious groups. The Shop Act 1950 exempted Jews from Sunday trading laws. The Slaughterhouse Act 1979 provided both the Jewish population and Muslims the right to slaughter and purchase kosher and halal meat. Further, the Motorcycle Crash Helmet (Religious Exemption) Act 1979 allows Sikhs who wear a turban to drive a motorcycle without a helmet, which is compulsory for all others. The Race Relations (Amendment Act) 2000 requires public authorities to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between different racial and ethnic groups. The courts have also defined what is to be considered an ethnic or racial group. The Mandla v Dowell Lee (1983) case concerned a Sikh student who was prohibited from carrying or wearing religious symbols in school. The House of Lords had to interpret the meaning of ethnic minority. It took a wide view that included seven criteria, among which was a shared and common belief amongst its members. The House of Lords ruled that the headmaster had violated the Race Relations Act 1976, and Sikh children were permitted to carry religious symbols in schools. This case was an important victory for other religious and ethnic groups in England to be recognized by the judiciary. It is important to note, that until 2000, no legislation existed forbidding discrimination on religious grounds. Thus, relying on common law, religious groups

were able to assert rights that had not existed previously."[42] We can clearly observe the reality of how religion and ethnicity has influenced the society to an extent of sometimes even bending the rule of law in order to please (giving them freedom of expression and religion) the people involved. I personally think that governments from the western hemisphere (as well as democracies in general) ought to really think about the reality of every religious group and their requests for different kinds of expression of their religion within the society. In addition they should take in consideration the advantages and the disadvantages that are involved in this process of acceptance of religious traditions and practices.

Another example refers to a recent inheritance case, "the court of law split a man's estate by giving twice as much to his two sons as it did to his three daughters. And in six recent domestic violence cases, the court ordered the husbands to take anger management classes and participate in mentoring with community elders; the women withdrew their complaints from the police, who stopped investigations."[43] To an extent we can observe the lack of gender protection and equality. The question here would be: "can these courts be reconciled with the British and European laws,"? Maybe we cannot resolve the idea of authority between the two courts of law to a full extent but at least we should give it a try. However, I am not quite sure if these courts could be reconciled since they are so different from each other. The Sharia court is clearly a religious court where the British court is a secular court of law, therefore the chances of these two to be on the same page concerning all matters of law, equality of genders, regulations, as well as the way resolving disagreements are very low.

3. Muslim Arbitration and Sharia Courts in Canada

Before one can critique Ontario's ban on religious arbitration effectuated under the Family Statute Law Amendment Act and advocate for religious arbitration, one must first become familiarized with the historical background of religious arbitration in Ontario. This requires a brief review of the origins of the Islamic Institute of Civil Justice, its purpose and legal validity prior to the religious arbitration ban. Understanding the political climate and abrupt actions of the provincial government in 2006 will clarify the original just basis for the IICJ and the unfounded grounds on which the proposal was quashed.

a. Historical background of the Islamic Institute of Civil Justice and religious arbitration in Ontario

The controversy over using religious law to resolve family law issues in Ontario arose when the Canadian Society of Muslims, led by Syed Mumtaz Ali, proposed the establishment of Darul Qada, or Muslim arbitration board.5 This proposed arbitration board, otherwise known as the Islamic Institute of Civil Justice, would provide mediation and arbitration services for a range of issues, including family law.6 The IICJ was proposed to provide Muslims living in Ontario with the option to resolve personal law matters according to religious values and beliefs, while remaining within the framework of the Ontario judiciary system and integrated with the social fabric in Ontario.7 Because Islam is viewed as a holistic way of life, with all aspects of social life being guided by religious values,8 the IICJ provided a practical institution

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[42] http://www.law-essays-uk.com/resources/sample-essays/muslim-law/muslim-law-in-uk.php (accessed on the 9th of May 2013)

[43] http://www.intlawgrrls.com/2008/09/sharia-courts-in-uk.html (accessed on the 10th of May 2013)

through which Muslims could stay true to their beliefs, regulate personal law in a manner with which they might be most comfortable, and exist within the broader legal system in Ontario.9

Syed Mumtaz Ali's proposal was presented amidst the social context of Muslims being one of the fastest growing minority groups in Ontario.10 Recognizing that socio-political tensions hindered their integration into society in a post September 11, 2001 context,11 Ali hypothesized that if Muslims could practice their religion by leveraging the legal system they would be able to constructively address pertinent communal issues and contribute to the broader social fabric.12 As will be shown, it would encourage them to substantively enhance their participation in Ontario's democratic legal system. Despite the proposals potential for enhanced social integration, positive public policy effects, and legal validity (until 2006), the idea of Shari'a being applied through the Ontario legal system sparked strong opposition.13 Misconceptions voiced by various organizations about human rights and women's rights issues under Shari'a14 fueled strong opposition to the IICJ.15 Amidst this negative public spotlight on the IICJ, Premier McGuinty sought advice from the Attorney General, Michael Bryant, and the Minister Responsible for Women's Issues, Sandra Pupatello.16 These Ministers commissioned Marion Boyd, seasoned politician and former Attorney General, to explore the use of religious arbitration and its potential impact on vulnerable people.17 Boyd's research (the Boyd Report) determined that religious arbitration was legal and safe for use in Ontario, provided that the tribunals made use of practical safeguards in their administration.18 Although the Ontario government initially endorsed the proposal, pressure from various interest groups and organizations convinced Ontario Premier Dalton McGuinty to pass legislation blocking the proposed arbitration tribunal, despite the results of the Boyd Report.19 In February 2006, Ontario's legislature passed the Family Statute Law Amendment Act, prohibiting family law arbitration from using anything other than Ontario law as the basis for arbitration.

b. Pre-2006 Legal Basis for Religious Arbitration in Ontario

The IICJ would have operated within the requirements of the Family Law Act and Arbitration Act of 1991.21 After a careful analysis of the Family Law Act and Arbitration Act of 1991, it is clear that the IICJ was a legally valid method of resolving family law disputes outside of court. Further, the two pieces of legislation provided both procedural and substantive protections that enabled institutions like the IICJ to operate without compromising the rights and freedoms of parties who submitted to arbitration.22

Under the Family Law Act, couples may enter into domestic contracts, including marriage and separation agreements that define each spouse's respective rights relating to property, support, children, and ―any other matter in the settlement of their affairs.‖23 These contracts allow couples to enter into arbitration and mediation agreements.24 Prior to 2006, under sections 2, 31, and 32 of the Arbitration Act, couples could submit to arbitration, and mutually agree upon an arbitrator and the law that such arbitrator would apply to resolve their disputes.25 The IICJ would provide a formal institution that would arbitrate these disputes according to Shari'a law, and Ontario courts would enforce the resulting arbitration agreements.26 Under section 37, arbitration awards would be binding unless changed on appeal or set aside by the court.27 Questions of law may be appealed with permission of the court.28

In general, courts provide a high level of deference to arbitration awards.29 However, there is indication that courts employ a lower level of deference on family law issues.30 This

lower level of deference is exercised through a limited number of grounds on which an arbitration award may be set aside. For example, courts exercise parens patriae jurisdiction in disputes involving children to alter arbitration awards.31 For other issues in family disputes, a decision may be set aside if a party was not ―treated equally and fairly, ‖ which encompasses more than just procedural fairness.32 This can encompass situations where the arbitrator was unfairly biased against one party or an arbitration decision was obtained by fraud.33

Together, the Family Law Act and Arbitration Act of 1991 created a sensible legal framework through which the IICJ could have operated. The two acts provided grounds through which parties could appeal to alternative dispute resolution mechanisms and settle disputes contractually. The two acts enabled procedural and substantive mechanisms to protect all parties 'rights, and gave the judiciary an oversight and appellate role of review to ensure those rights were maintained.

c. Constitutional Concerns Regarding Religious Arbitration Are Unfounded as Charter Scrutiny Does Not Apply to Private Actions

Some interest groups have argued that arbitration of family law issues under religious law creates constitutional problems.34 In particular, critics such as the National Association of Women and the Law (NAWL) have argued that under Section 15(1) of the Canadian Charter of Rights and Freedoms, religious arbitration of family law disputes is unconstitutional.35 Section 15(1) provides that where the Charter is applicable, ―[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.‖36 Critics use this standard in conjunction with Section 28 of the Charter to argue that religious arbitration of family law and inheritance matters violates the Charter because it does not explicitly protect the equality of rights of women and children.37

Despite this argument, it is clear that religious arbitration of family and inheritance issues create no constitutional issues. First, under Section 32(1) of the Charter, the Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.38

Section 32(1) creates a distinction between public actions and private actions. In essence, Section 32(1) restricts the Charter's application to state action under statute, common law, and through third parties who are given power to act by governmental agencies.39 The Supreme Court of Canada's standard to determine whether there is a sufficient degree of government control in public action through third parties requires ―both an institutional and a structural link between a public body and the government . . . .‖40 Such a link exists ―where the government delegates power to a non-government actor or agency.‖41 The state confers power that it is granted by statute or common law.42 However, if the decisions that guide day-to-day operations of an institution are not controlled or made by the government, the Charter does not apply, despite authority being granted by statute.43 As former Attorney General Marion Boyd explains in the Boyd Report, private actions are not subject to Charter scrutiny:

Conversely, institutions . . . which derive their existence and powers from statute, are nonetheless deemed not to be controlled by government, if decisions that guide the day-to-day operations of these organizations are not taken by government. Therefore, in spite of being public institutions, in the case of hospitals and universities, or simply being regulated by statute, in the case of corporations, these entities are not bound by the Charter. On the other hand, as mentioned above, if the body is implementing a specific government policy, then Charter scrutiny will ensue.44

Such institutions include schools, hospitals, universities and corporations.45

Arbitration decisions fall within the realm of private actions.46 They are private because the decisions reflect the private, personal relationships of the parties involved, and the arbitrator derives his or her authority directly from the consent of the parties agreeing to arbitrate, and not from the Arbitration Act.47 There is no state compulsion to arbitrate.48

Given that religious arbitration would be subject to the requirement of voluntariness, and would not constitute a public action, religious arbitration decisions would not be subject to Charter scrutiny.49 This does not mean that arbitrations would not be subject to judicial review in limited contexts, as earlier explained, but no constitutional issues are created by permitting religious arbitration of family law issues.

One should note that this justification hinges on a requirement of voluntariness. The voluntariness requirement begs the question of whether, in practice, individuals would voluntarily assent to religious arbitration, or be forced into arbitration through various communal or other pressures. Although this is a valid concern, it will be shown that the concern easily dissolves in the context of a religious arbitration tribunal administrated with the proper procedural guidelines and substantive considerations to protect and foster voluntary and informed consent. As issues of voluntariness will be addressed shortly, one can easily conclude that religious arbitration and the IICJ were completely justified and permitted in Ontario prior to 2006, raising strong suggestions that the ban on religious arbitration in Ontario was motivated by non-legal considerations.

According to a survey taken in 2008 in Canada concerning religious arbitration is being said that Ontario Premier Dalton McGuinty ended all religious arbitration while being in accord with the public feeling, as an alternative of singling out the Muslim community and excluding Sharia law to settle down family disagreements. This survey pointed out the fact that sixty-three per cent of Canadians stand against any kind of religious community who wants to claim the right to use “a faith-based arbitration” in order to proceed with divorce, custody, inheritance and many other family divergences.[44] This entire survey was directed by the Centre for Research and Information on Canada.

According to the same survey, when they were asked specifically about the Muslim community and their request for a “faith-based arbitration” sixty-three per cent said a definite no to the question. The director of the research center Carsten Quell pointed out that the things they observed during the survey were not anti-Muslims by any means but rather they were simply

[44] http://www.canada.com/ottawa/ottawacitizen/soundoff/story.html?id=997485b8-bf66-41a1-bd58-8b8e1e434193 (accessed on 9th of May 2013)

against any "faith-based community." This explains why the opposition to grant the Muslim community the right of family arbitration.[45]

The following statistics will give us a brief overview of the different provinces and their negative response to the question of "religious arbitration" in general (no religion in particular): "Ontario 68%; Quebec 64%; Alberta 63%; New Brunswick and P.E.I. 59%; B.C. 57%; Manitoba 56%; Nova Scotia 55% and Newfoundland and Labrador 54%." The northern part of the country had a louder voice in allowing and encouraging the "faith-based arbitration." This include 49% of the people that disagreed with the idea that "no religious community should be allowed to use faith-based arbitration.[46] The main reason for this public opinion survey is based on the "national and international uproar" that broke out after a proposal was made concerning Muslims in Ontario to give them the possibility of using religious courts in order to settle down different family divergences. However, this choice existed since 1991 for Catholics, Jewish and other religious communities, but after long heated debates, Mr. McGuinty declared that his administration will announce a legislation which eliminate all the religious tribunals from the entire province. Mr. McGuinty stated the fact that whoever lives in Ontario and wants to seek different kind of advice from anyone, including religious leaders on matters of marriage, divorce, re-marriage or anything they are free to do it. However, concerning the matters of family law will no longer be decided by religious arbitration.[47]

4. Conclusions

In conclusion I would like us to simply look critically at some things that are of high importance to our understanding of the present situation in both England and Canada.

There are few things that we ought to mention about the Sharia courts within England and Wales in order to grasp the idea of how they work:[48]

- "Not open to public scrutiny"
- "Not publicize their decisions"

Since the things mentioned above are not open to the public there might be something suspicious about them. I personally thing that if a court is in accordance to the law, it should never be closed to the public. I also think that if decisions are never going public then again I feel something dubious is going on there.

According to the Civitas study, "the Islamic courts should no longer be recognized under the British law." They have finally reached this idea because according to Dr. David Green who says the following: "The reality is that for many Muslims, sharia courts are in practice part of an institutionalized atmosphere of intimidation, backed by the ultimate sanction of a death threat."[49]

[45] http://www.canada.com/ottawa/ottawacitizen/soundoff/story.html?id=997485b8-bf66-41a1-bd58-8b8e1e434193 (accessed on 9th of May 2013)

[46] http://www.canada.com/ottawa/ottawacitizen/soundoff/story.html?id=997485b8-bf66-41a1-bd58-8b8e1e434193 (accessed on 9th of May 2013)

[47] http://www.canada.com/ottawa/ottawacitizen/soundoff/story.html?id=997485b8-bf66-41a1-bd58-8b8e1e434193 (accessed on 9th of May 2013)

[48] http://www.dailymail.co.uk/news/article-1196165/Britain-85-sharia-courts-The-astonishing-spread-Islamic-justice-closed-doors.html (accessed on 8th of May 2013)

[49] http://www.dailymail.co.uk/news/article-1196165/Britain-85-sharia-courts-The-astonishing-spread-Islamic-justice-closed-doors.html (accessed on 8th of May 2013)

The chairman of the Commons counter-terrorism subcommittee, Patrick Mercer said: "We have an established law of the land and a judiciary. Anything that operates outside that system must be viewed with great caution. If crimes are going unreported to police, this will erode the authority of those who have to enforce our law. In a sovereign state there must be one law, and one law only."[50] Looking at Mercer and his statement, I personally thing that he has a very good point in making it clear that the people who live in England and Wales ought to accept and observe the laws and statues of the land they reside. It sounds kind of crazy the idea that if a large number of religious believers live in a land different from their own and which does not have courts where their rule of law is not present then we should make it possible. The idea is that these kind of courts are very hard to control (keep them in accordance to the law of the land) them in a sensitive manner.

In accord to the Muslim Council in Britain who condemned the Civitas study that is not accurate but they also said that is stirring up hatred and animosity among Muslims. Another spokesman pointed out that "All Sharia councils are perfectly legitimate. There is no evidence they are intimidating or discriminatory against women. The system is purely voluntary so if people don't like it they can go elsewhere."[51] However both of the examples mentioned above are subjective and do not give a clear picture of how these courts really work with people. It is easy for one to either criticize or accept them but what it is important here is that everyone (women and children especially) receive a fair treatment and that also there are not death treats involved for the parties involved.

Philip Davies (is a British Conservative Party politician; he is the Member of Parliament for Shipley in West Yorkshire[52]), also said: "Everyone should be deeply concerned about the extent of these courts. They do entrench division in society, and do nothing to entrench integration or community cohesion. It leads to a segregated society. There should be one law, and that should be British law. We can't have a situation where people can choose which system of law they follow and which they do not. We can't have a situation where people choose the system of law which they feel gives them the best outcome. Everyone should equal under one law."[53] According to the above statements, one should really keep in mind that the reality of the situation and its implications. If a society is being characterized by segregation and exclusion just because one does not agree, accepts or assumes the beliefs of the other then that would be one of the consequences. I also see that there is a very complicated situation in denying one's freedom of expressing to an extent but in the time what do we do with the idea of not having everyone equal under one law (the law of the land) so to say.

Douglas Murray, who is the director of the Centre for Social Cohesion, openly criticized the latest progress of the Sharia courts as "appalling." He also said the following: "I don't think arbitration that is done by sharia should ever be endorsed or enforced by the British state."[54] Even though Murray thinks differently I would tend to agree with his position on this point, although there not much explanation of his position in this case. However, before I would also

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[50] http://www.dailymail.co.uk/news/article-1196165/Britain-85-sharia-courts-The-astonishing-spread-Islamic-justice-closed-doors.html (accessed on 8th of May 2013)

[51] http://www.dailymail.co.uk/news/article-1196165/Britain-85-sharia-courts-The-astonishing-spread-Islamic-justice-closed-doors.html (accessed on 8th of May 2013)

[52] http://www.philip-davies.org.uk/about-philip (accessed on the 10th of May 2013)

[53] http://www.dailymail.co.uk/news/article-1196165/Britain-85-sharia-courts-The-astonishing-spread-Islamic-justice-closed-doors.html (accessed on 8th of May 2013)

[54] http://www.dailymail.co.uk/news/article-1055764/Islamic-sharia-courts-Britain-legally-binding.html (accessed on the 10th of May 2013)

want to point out that before the British government is endorsed by these Sharia courts, they should first look through the decisions as well as for any irregularities that might have sneaked through.

Dominic Grieve (Shadow home secretary) said: "These tribunals have no place in passing binding decisions in divorce or criminal justice hearings. Far from handling more criminal cases. They should be handling none at all. British law is absolute and must remain so."[55] Once more we can observe the reality of disagreement as well as the significant concern for the idea of Sharia courts handling criminal cases. I personally think that one should be aware of the importance of such concerns and not treat them lightly.

[55] http://www.dailymail.co.uk/news/article-1055764/Islamic-sharia-courts-Britain-legally-binding.html (accessed on the 10th of May 2013)