

**Britain's Religious Courts:
Marriage, Divorce and Civil Law**

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Cardiff Law School, Museum Avenue, Cardiff University**

'Am I bothered?': The Relevance of Religious Courts to a Civil Judge
Keynote Address by The Hon. Mr Justice McFarlane

Introduction

Any speaker, particularly I would suggest a judge, who rises to address the impact of religious law upon the administration of civil family law should do so with their antennae keenly attuned to the need for total clarity in what they may say. This is a subject which has the potential to arouse controversy and forcefully expressed views as was evidenced by the reaction in certain quarters to speeches given by His Grace the Archbishop of Canterbury and by Lord Phillips, then Lord Chief Justice, in February and July 2008 respectively.

In preparation for this event I have taken time to read both of these speeches. Inevitably one's memory of them is clouded, if not dominated, by recollection of the Press reaction rather than the original content. Having undertaken that exercise I propose to share with you some of the detail of what Dr Williams and Lord Phillips had to say. I do so because it sets something of the context in which the discussion at today's conference is to take place, but I also do so because it seems to me that what these two prominent speakers sought to say was, in contrast to the press reporting of their words, not so highly controversial. The analysis from these two related but differing perspectives deserves far greater consideration than was given following their delivery in 2008. Fingers may have been seen to be burned and there is a danger that the topic may have for a time become a 'no go area' for debate. This conference provides a timely occasion to look at the topic once more in the cool light of day, rather than the heat of the initial media reaction.

I propose therefore to spend some short time summarising the contributions made in 2008 by the Archbishop and the Lord Chief Justice. After that I will highlight those aspects of the Cardiff Research Project which particularly strike me as a civil judge as

being of importance. Finally I will look to the regard, if any, that the civil family courts currently have to religious law and/or the decisions of religious courts before turning to offer a conclusion to the question posed in the title of this talk.

My purpose today is therefore to describe the current state of the debate, to highlight the Cardiff research and to describe the current approach of the courts. It is not my purpose to argue for, or propose, any change in the law.

Part One: The Archbishop and the Lord Chief Justice

On the 7th February 2008, Dr Rowan Williams delivered the foundation lecture in the Temple Festival series at the Royal Courts of Justice. The lecture was entitled 'Civil and Religious Law in England: a religious perspective'. The text was a sophisticated and highly scholarly discourse looking at what space might be allowed alongside the secular law of the land for the legal provisions of faith groups. In his later address, Lord Phillips described the Archbishop's contribution as 'a profound lecture and one not readily understood on a single listening'. If I can offer any service to my present listeners it is to try to distil the essence of Dr Williams' discourse into a number of points set out in plain terms. In attempting to do so I will inevitably tread with size 15 boots over the Archbishop's beautifully tilled words and for that I offer both him and this audience my humble apology. I hope that some will be driven by my vandalism to re-visit the original text as I have done and see the subtle and important points that are made there.

The focus of Dr Williams' address was widely based across the faith communities but he dwelt upon the Muslim faith as his primary example. In doing so he began by seeking to dispel one or two myths about Sharia by stressing that it was a long way from being a monolithic system of detailed enactments or black-letter law. Sharia designates primarily 'the expression of the universal principles of Islam and the framework and the thinking that makes for their actualisation in human history'.¹ 'Universal principles', being the eternal and absolute will of God for the universe and for its human inhabitants, are not a readymade system but something that has to be actualised. As Dr Williams said:

'if "shar" designates the essence of the revealed law, "Sharia" is the *practice* of actualising and applying it; while certain elements of the "Sharia" are specified fairly exactly in the Qur'an and the Sunna and,

¹ *Western Muslims and the Future of Islam* (Tariq Ramadan) page 32.

in the hadith, recognised as being authoritative in this respect, there is no single code that can be identified as **the** “Sharia”.’

There is thus no one statement of Sharia law that can be pulled off the legal bookshelf. There are, to a degree, different interpretations or concretisations of the Sharia that have been developed by different juridical traditions and applied in different ways in different states or communities.

Sharia, unlike our secular law, depends for its legitimacy not on any human decision, but on the conviction that it represents the mind of God and to that extent any human interpretation of it must, of necessity, be unfinished business so far as codified and precise provisions are concerned. Dr Williams therefore says that ‘to recognise “Sharia” is to recognise a *method* of jurisprudence governed by revealed texts rather than a single system’.

Having set the ground by this description of “Sharia”, the Archbishop went on to point out that the great body of serious jurists in the Islamic world recognise that an individual who is both a Muslim and a citizen of a state, even if that state adopts Sharia law, has something of a dual identity as both believer and citizen. The two identities may not be 100% co-terminus and a degree of political plurality is consistent with Muslim integrity. He foresees problems arising where this dual identity is not recognised; either by assuming that the religious identity is all encompassing to the exclusion of a citizen’s role in relation to his state, or where the secular government assumes a monopoly of defining public and political identity.

For the remainder of his address Dr Williams looked at the theoretical and practical issues arising from a person living under more than one jurisdiction, meaning a person who owes adherence to the law of his faith and also to the secular law of his state. He considered three such issues or difficulties that may arise if greater prominence is given by the state to religious requirements:

- (a) Firstly, it may leave the legal process at the mercy of what might be called vexatious appeals to religious scruple. In this there is a need for a means by which the secular court can distinguish purely cultural habits from seriously-rooted matters of faith. There would need to be access to recognised authority acting for a religious group. In the Muslim context, the Archbishop considered that the role and value of current Islamic Sharia Councils would need to be much enhanced and developed so that

the secular lawyer can know with some certainty if a potential conflict is real, legally and religiously serious, or where it is grounded in either nuisance or ignorance;

(b) Secondly, recognition of a 'supplementary jurisdiction' (for example the jurisdiction of a church tribunal) in some areas, but especially family law, could have the effect of reinforcing elements which are repressive or retrograde and which may have particularly serious consequences for the role and liberties of women, for example with regard to forced marriage. There is a real problem in giving authority to a religious court to determine certain matters finally and authoritatively, one being that to do so may deprive members of that religious community of the rights and liberties that they would otherwise be entitled to enjoy as citizens. Dr Williams, after teasing the issues out, considered that such difficulties might be addressed if we are prepared to think about the basic ground rules that might organise the relationship between jurisdictions in an open manner that did not give any 'blank cheques' to unexamined systems that may have an oppressive effect;

(c) Thirdly, and most fundamentally, is it not both theoretically and practically mistaken to qualify our commitment to a secular legal monopoly? Surely the law is the law and all should stand before a public tribunal on exactly equal terms, so that recognition of supplementary jurisdictions is simply incoherent with modern Western legality. But Dr Williams argues that in a plural society, where citizens do have overlapping identities, it may be helpful to look at the vision of law guaranteeing equal accountability and access primarily in a negative rather than a positive sense, that is to see it as a mechanism whereby any human participant in a society is protected against the loss of certain elementary liberties and given the right to demand reasons for any actions by others that infringe self-determination. On this model the important springs of moral vision in society, for example religion, but also custom and habit, would be 'private' areas. The role of secular law would be the monitoring of such affiliations to prevent the creation of mutually isolated

communities whose members are denied public redress for wrongs or injustices. This model of the rule of law would preserve a protective space, which is accessible to everyone in which it is possible for a person to affirm and defend a commitment to human dignity *as such*, a space independent of membership of any specific human community or tradition.

One of Dr Williams' central themes is of particular relevance to today's conference. He observes that at first the question of how Islamic law and Islamic identity should or might be regarded in our legal system seems a somewhat narrow point, but in fact, as his address demonstrates, it opens up a very wide range of current issues and requires some general thinking about the character of law itself.

He counsels against misunderstanding modern rights based legal universality so that it leads to a situation where a person is defined primarily as the possessor of a set of rights and the law's function is seen as nothing but the securing of those rights irrespective of the custom and conscience of those groups which compose a plural modern society.

In this regard he tentatively suggests that 'it might be possible to think in terms of ... a scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters.' In such a development both 'jurisdictional stakeholders' (being the secular state, on the one hand, and the religious community on the other) would need to examine the way in which they operate; they would need to interact with each other and may themselves be changed by that encounter over time.

The limit of the Archbishop's suggestion was a voluntary choice of alternative jurisdiction for certain carefully specified matters. He made it plain that there could not be some subsidiary Sharia jurisdiction which 'could have the power to deny access to rights granted to other citizens or to punish its members for claiming those rights'.

Following the eruption of adverse press comment which flowed from his lecture, Dr Williams sought to clarify his words a few days later². Nothing

² Presidential Address to the Opening of General Synod (11th February 2008).

should be done, he said, to remove from any individual their rights as a UK citizen and the ability of the law of the land to guarantee all the basic components of human dignity. He had not been talking about parallel jurisdiction and had stressed, twice, that there could be no 'blank cheques' in this regard in particular as regards some of the sensitive questions about the status and liberties of women.

He summarised his focus in these terms:

'So the question remains of whether certain additional choices could and should be made available under the law of the United Kingdom for resolving disputes and regulating transactions.

It would be analogous to what is already possible in terms of the legal recognition of certain kinds of financial transactions under Islamic regulation (including special provision around mortgage arrangements).

And it would create a helpful interaction between the courts and the practice of Muslim legal scholars in this country.'

In his address to the East London Muslim Centre on 3rd July 2008, Lord Phillips, as Dr Williams had done before him, pointed to the apparent widespread public misunderstanding as to the nature of Sharia law, which establishes a set of principles governing the way that one should live one's life in accordance with the will of God. He said 'I understand that it is not the case that for a Muslim to lead his or her life in accordance with these principles will be in conflict with the requirements of the law in this country'.

Lord Phillips made it abundantly clear that there could be 'no question' of Sharia courts with the power to apply physical sanctions sitting in this country. He said in terms: 'So far as the law is concerned, those who live in this country are governed by English law and subject to the jurisdiction of the English courts.' He referred to Dr Rowan Williams lecture and said:

'A point that the Archbishop was making was that it was possible for individuals voluntarily to conduct their lives in accordance with Sharia principles without this being in conflict with the rights guaranteed by our law.'

Lord Phillips concluded in these terms:

'It was not very radical to advocate embracing Sharia Law in the context of family disputes, for example, and our system already goes a long way towards accommodating the Archbishop's suggestion. It is possible in this country for those who are entering into a contractual agreement to agree that the agreement shall be governed by a law other than English law. Those who, in this country, are in dispute as to their respective rights are free to subject that dispute to the mediation of a chosen person, or to agree that the dispute shall be resolved by a chosen arbitrator or arbitrators. There is no reason why principles of Sharia Law, or any other religious code, should not be the basis for mediation or other forms of alternative dispute resolution. It must be recognised, however, that any sanctions for a failure to comply with the agreed terms of the mediation would be drawn from the laws of England and Wales. So far as aspects of matrimonial law are concerned, there is a limited precedent for English law to recognise aspects of religious laws, although when it comes to divorce this can only be effected in accordance with the civil law of this country.'

I hope that that resume is of value in reminding us of the detail of the state of the debate, such as it was, in 2008. In looking at the title of my address today and considering the relevance of religious courts to the determinations of a civil family judge, I would highlight a number of important points from the 2008 lectures:

- (a) first, on the analysis given by both speakers, Sharia law, by reason of its source and character, is not capable of precise and comprehensive codification or recital. There is unlikely to be one authority to which a civil court may turn for a definitive statement of the law;

- (b) second, any suggestion that Sharia law, or indeed the law of any other religion, should be 'recognised' by our domestic law, in the sense that certain legal matters would be delegated or ceded to religious courts is a very long way from being realised. As the Archbishops three 'difficulties' describe, there is a long way to go and a great deal of quite complicated thinking needed both as to the practicalities but also as to the very nature of the Rule of Law itself;

- (c) third, as Lord Phillips made clear, so far as the law is concerned, those who live in this country are governed by English and Welsh law and subject to the jurisdiction of the courts of England and Wales;
- (d) finally, the room for some individual choice may arise only where all parties to a dispute voluntarily agree to seek mediation or arbitration according to the principles of a chosen religious code. If this occurs it does not replace or in any manner erode the individual's right to seek redress in the secular courts and those secular courts are in no manner able, let alone bound, to apply any provision other than the domestic civil law.

Part Two: The Cardiff Research

The aim of the current research project has been to collect information on the role and practice of religious courts in England and Wales in order to contribute to debate concerning the extent to which English law should accommodate religious legal systems. The project has focused upon marriage and divorce, rather than upon any of the consequences that may flow from the dissolution or annulment of a marriage in terms of children or property.

The session preceding this address has already described the scope of the project and further results and conclusions will be described as the day progresses. It is not my purpose to steal the thunder of Professor Doe and his colleagues, but for my own purposes it is necessary now to flag up those parts of the research findings which seem of particular relevance.

Firstly, over half of the cases dealt with by the Sharia Council in the research study involved couples who are not married under English civil law. There was, in those cases, therefore no jurisdiction for the domestic courts in relation to the existence or continuance of the status of 'marriage'.

Even when allowing for the fact that the three research subjects were local rather than national facilities, the number of cases dealt with by the three tribunals is in any event extremely small:

- Sharia Council: approx 150 pa
- Beth Din: approx 110 pa

- Roman Catholic National Tribunal for Wales: approx 40 pa

The scale of these figures can be appreciated when set beside the total for divorces in England and Wales in 2009 which was 114,000.

None of the tribunals has any legal status afforded to them by the state or the civil law. They derive their authority from their religious affiliation, not from the state, and that authority extends only to those who choose to submit to them.

The researchers have observed that 'the fundamental rationale for the grant of the religious annulment/divorce is to declare that the religious marriage is over and to enable the parties to remarry within the faith'. The focus is therefore on the marriage and its status and not on ancillary issues relating to finance or children. What is at stake is the licence to remarry in a manner recognised by the particular faith.

The use of the word 'choose' in terms of the parties choosing to go to a faith based tribunal is not entirely apt. This is not a truly voluntary process in the sense that once adherents have become members of the faith community and wish to remain so, they must use the religious court and are bound, within their faith community by its results. To opt out of the court's jurisdiction, may therefore carry the high price of having at the same time to opt out of the community of those who strictly adhere to the faith. It is not therefore to be seen strictly as a form of alternative dispute resolution.

Just as with the original religious marriage itself, for the adherents to a particular faith a marriage will not be fully dissolved until the requirements of the faith, and if necessary the faith court, are satisfied.

All three religious courts strongly encourage the parties to obtain a civil divorce, if applicable, *before* they engage in the religious proceedings. The researchers have identified some reasons which make this so:

- recognition that the civil law takes priority
- it is an attempt to avoid 'limping marriages' which sequentially fall between the religious and civil jurisdictions
- also, both the Sharia Council and the Beth Din regard the obtaining of a civil divorce as clear evidence of the parties' view that the marriage is over, and for the Sharia Council this is in fact conclusive.

- The Roman Catholic National Tribunal will not deal with an application for annulment until the civil divorce has been obtained.

At this stage it is right to refer to the one area of secular law which does indicate awareness of a separate religious process. It is to be found in the Divorce (Religious Marriages) Act 2002 which introduced section 10A into the Matrimonial Causes Act 1973. Under this provision either spouse may apply to the court for an order that a decree absolute may not be granted 'until a declaration made by both parties that they have taken such steps as are required to dissolve the marriage in accordance with [the usages of the Jews or any other prescribed religious usages] is produced to the court'.

At present this provision only applies to the Jewish process. It is wrong, in my view, to regard this provision as 'recognising' Jewish divorce. It simply provides a mechanism whereby the civil process can be stalled in order to prompt the obtaining of such a divorce. In practice the current research explains that the Beth Din will process the case through to conclusion, issue the declaration so that the civil court may pronounce decree absolute and only after that does the Beth Din issue the 'get' certificate to formalise the religious position.

In all of these examples, the religious courts acknowledge the primacy of the civil law and the current researchers have not in fact found any evidence of a desire on the part of the various religious bodies to alter that state of affairs.

The process before these various tribunals differs in each case from the paradigm model of civil court proceedings. This is partly because the issue being determined is different, for example the Beth Din is simply witnessing the fact that both parties are mutually seeking a divorce. Whilst the National Tribunal may be seeking to investigate whether there was true consent at the time of the marriage, this is not conducted in an adversarial process with both parties being heard and questioned in the same room at the same time.

In relation to issues of children and property the role of these three religious tribunals is limited.

The National Tribunal does not entertain a jurisdiction in relation to the consequence of an annulment, save that it may wish to be satisfied as to the arrangements for any children.

The Sharia Council and Beth Din are available to play a more active role, but are plain that in doing so they are not exercising a formal jurisdiction or making enforceable rulings.

Parties to proceedings before the Beth Din may invite the court to resolve any ancillary disputes, but the resulting process is not akin to binding arbitration since the jurisdiction of the civil courts on such matters may not be ousted by the parties' agreement [MCA 1973, s 34; CA 1989, s 10].

The Sharia Council advises parties to use the civil courts, but may give specific advice upon the future disposal of the dower paid or payable under a marriage contract.

Two final points before moving on to the concluding part of my address; firstly, in contrast to the unified national court system, the various religious tribunals available, particularly in the Muslim community, permit, as the researchers have found, for a degree of 'forum shopping' if the need arises. Each Sharia Council is autonomous and is not bound by any ruling given by a different council. Thus if parties fail to achieve a satisfactory outcome at one council, there is the potential to seek a different interpretation of the Sharia at another council. In terms of the secular courts 'recognising' the impact of Sharia law on a particular family law issue, the potential for there being different and separately valid utterances on the point, dependent upon the choice of council, needs to be borne in mind.

Secondly, and topically, the Family Justice Review established by the government under the chairmanship of David Norgrove has just published its interim report³ in which a premium is placed upon parties resolving disputes away from the court arena. Resort, or at least exposure, to mediation or other forms of dispute resolution is to be encouraged before a dispute may be permitted to move into the family court. In this regard, the potential for the various faith communities to provide assistance in dispute resolution, either within their formal council or tribunal structure or more informally is not to be ignored.

Part Three: The relevance of religious courts to a civil family judge

Speaking as a judge of the Family Division who is also a Diocesan Chancellor in the Church of England, and therefore an ecclesiastical judge, there is an historical irony

³ <http://www.justice.gov.uk/publications/policy/moj/family-justice-review.htm>

that is not lost on me. Until 1857 the jurisdiction regulating family matters in the realm fell within the ecclesiastical courts, there was thus no question as to the recognition of the Anglican Church courts decisions on the status of a marriage, they *were* the state tribunal for determining these issues.

Since 1857 marriage, divorce and nullity have been creatures of civil law. Whilst the civil law may recognise the validity of marriages celebrated in the course of religious rites (primarily obviously in the Church of England, but now through the granting of licenses to premises in other religious settings), the validity remains a matter of civil law and in the event of a dispute is determined in the civil court.

As I have already observed, the only glance that the civil court is currently permitted towards any religious process relates to the Beth Din and the facility by which a party may seek the postponement of pronouncement of decree absolute under the 2002 Act. Other than this very limited permissive provision, the answer to the question posed in my title in so far as it relates to divorce and the status of a particular marriage is plainly and clearly in the negative: the determinations of any relevant religious tribunal will have no direct impact upon the civil family court.

What is of more interest, in my view, is the relevance, or potential importance, of determinations about, or the effect of the faith law upon, issues other than the black and white determination of the status of the marriage in particular, from my perspective, I refer to decisions relating to children.

The UK is now home to individuals and families from all corners of the globe. I gather that the central London family court in Wells Street now has, and needs to have, the capacity to provide interpreters in no less than 250 different languages or dialects. The richness and variety of culture that these individuals bring to our island is beneficial and, in my view, truly enhances our collective life. But this range of cultures and religions may also bring increased complexity and with it a need for insight and understanding from the family judge that may not have been required, say, 30 or more years ago.

'British society' is now so multi-faceted and multi-layered that it may be impossible, or not totally relevant, to speak in terms of 'society' as if there were one homogeneous national grouping. In this regard Margaret Thatcher's famous words

are not out of place; there is no one society, just individual men, women and children and individual family groups. But that is not the total picture as a substantial number of the individuals who live in the UK are very closely involved in cultural and religious groupings within the wider community and are in fact members of something much more readily identifiable as 'society', albeit on a smaller scale, based on the grouping to which they are affiliated by birth or faith or both.

When a child from such a community is the subject of proceedings in the Family Courts in England and Wales, what regard, if any, does the court have to the mores, dictates and expectations of the cultural or religious group to which the family belongs? Where, to take one example, a Muslim family is before the court, what regard does the secular English court have to Sharia Law?

As a common law jurisdiction, the answer to that question is that the approach develops on a case by case basis, but always subject to the statutory requirement that any issue as to a child's upbringing must be determined by affording paramount consideration to that child's welfare. Within the overall welfare evaluation, when determining what weight to give to one or another feature amongst the issues that go into one side or the other of the balancing scales, the cultural and/or religious context must be taken into account. The court will need to understand how one or other arrangement for the child's care will be received by the family and wider community in accordance to the dictates of the faith and law of that community.

The Children Act 1989 laid down in English and Welsh law the primacy of the child's welfare in relation to the resolution of any question before the Courts concerning the welfare and upbringing of a child, whatever the nature of that child's parentage or family unit. However, in those parts of our jurisdiction which have large micro-communities, quite where the balance lies in welfare terms between recognising and accepting the traditional norms of other cultures within a society

and judicial system based on European traditions and values is, and will remain, one of the greatest problems facing family courts in the 21st century. It is necessary for the court to adapt the exercise of evaluating each child's welfare, and the factors in the welfare checklist that have to be considered, to the circumstances of the individual child.

How does that play out in practice? I will offer you two examples:

Example Number One:

Early on in my judicial career⁴ I encountered a case where a mother wished to remove her son, then aged 9, in order to set up home with him and her new husband in Holland. All the parties were Iraqi nationals. The father was the 'mantle head' of his group of families in Iraq which numbered some 20,000 individuals. The boy, as his eldest son, would in normal circumstances succeed him as mantle head, but that succession depended upon the continuation of a close relationship between the father and son. The court heard evidence from experts in Sharia Law and from members of the family committee in Iraq which would ultimately decide whether or not the child would inherit his father's role. For some time the boy had been living in the primary care of his mother, the father accepted that this state of affairs should continue and the expert evidence established that if it did, and boy was not in the primary care of his father, then he would be unlikely to inherit. Thus it appeared that his prospects of becoming mantle head were already badly compromised whether or not there was a move to Holland. In the event, the other welfare factors in the case pointed strongly towards granting the mother's application, which was the outcome that I as the judge endorsed. But the position in Sharia law was by no means irrelevant to the court's considerations. It was a substantial factor that played in favour of the father's position as part of the overall welfare evaluation. No one

⁴ *Re A (Leave to Remove: Cultural and Religious Considerations)* [2006] EWHC 421 (Fam); [2006] 2 FLR 572.

element in any welfare evaluation is automatically the determining factor, or 'trump card', in any particular case, but, in an appropriate case, the impact or consequences of the various options under Sharia Law may well be very persuasive.

Example Number Two:

In a multicultural society such as ours, it is, of course, not totally unusual for young couples to form relationships outside their own community and across the religious divides. Again, where there is a dispute as to the welfare of a child born to such a couple, the cultural and religious aspects of the case may well be prominent. One striking example, again from my own experience when I was still a barrister, arose from a dispute between a young Muslim mother and her Jain husband around the care of their two children⁵. The principle issue was whether their son, who was then aged 8 years, should be circumcised. Whilst neither of the parents had been regular adherents of their respective religions when they were together, the religious imperatives had become prominent once they had separated and returned to their respective families. The mother, supported by her family with whom she had become reunited, was adamant that the boy should be circumcised and that this was an absolute requirement of the Muslim faith. The Jain faith, however, is well known for its advocacy of non-violence, which involves reverence for all life and the avoidance of harm or injury to others. Circumcision is strictly forbidden in Jainism and the father was firmly opposed to his son undergoing this procedure.

The evidence heard by the judge included detailed expert evidence on both the Muslim and the Jain faiths. In her conclusions, the judge gave prominence to the fact that the children had been brought up to the ages of 10 and 8 with a mixed cultural heritage and had experienced life in both a Jain and a Muslim household. They were by then of such an age that they were too old for one of their religions of origin to be

⁵ *Re S (Specific Issue Order: Religion: Circumcision)* [2004] EWHC 1282 (Fam); [2005] 1 FLR 236.

favoured over the other. In due time, as children of a mixed heritage, the judge held that each child should be allowed to decide for themselves which, if any, religion they would wish to follow. Circumcision, once done, cannot be undone. The judge therefore decided that the question of whether or not he should undergo circumcision was a matter for the boy to decide once he was old enough to do so. She therefore refused to permit the operation to take place at that stage.

As in my first example, the dictates of the religion or internal faith based law were described in detail to the court and fully evaluated by the judge. In this case there was a stand-off between two different, and on this point, opposing beliefs. Under English and Welsh law the judge was obliged to decide the issue by affording paramount consideration to the child's welfare and did so by giving prominence to the mixed cultural heritage which had been characteristic of the family's life before separation.

None of what I have said should be heard as a plea to put the clock back or return to a simpler and straight-forward age. We are where we are. My purpose has been to point up just how complicated modern society in our jurisdiction has become. As the second example shows, one difficulty for the family judge is to try to see how this maze of relationships may be experienced through the eyes of a child who is trying to get on with the task of growing up within them.

The judge's role is to look to the welfare of the child, where there is a dispute about his or her upbringing. In doing so, rather than having a stereotypical view of how family life should be, the modern judge has to be as flexible and as insightful as possible in trying to understand the particular family before the court so that he may in due time determine how the arrangements within that family can best be ordered to the child's benefit.

Conclusions

My conclusions can be stated briefly.

1. The law in England and Wales does not recognise, in the sense of giving legal precedence to or automatically enforcing the decisions of domestic religious courts.
2. The position with regard to the civil court in England and Wales acknowledging or affording precedence to foreign courts, which may have a religious basis, is outside the scope of this conference.⁶
3. Save for the facility for the court to postpone granting a decree absolute of divorce in Jewish cases to which the 2002 Act applies, the processes of and conclusions of any religious court have no relevance to the determination of marital status by the civil family court.
4. The three religious tribunals studied in the current Cardiff research fully accept this position and seek to dovetail their processes around the civil jurisdiction.
5. Any debate about the potential for this formal position to change is very much in its early stages, with the Archbishop of Canterbury's contribution demonstrating the profound level at which these issues would fall to be considered and the modest level of coexistence or interaction that might be contemplated even if *any* change in the current situation were to occur.
6. The number of cases coming before the tribunals in the present study is modest, but for each of the individuals involved the need for their marital status to be correctly recognised is likely to be of profound personal importance.
7. The fact that over half of the couples dealt with by the Sharia Council had not undertaken a marriage that was valid in civil law is of note. The parties to such a 'marriage' are therefore denied access to the civil family law jurisdiction as to property rights and financial provision post-divorce, with the potential for the wife, in particular, to be disadvantaged thereby.
8. In contrast to strict matters of status and direct recognition of the religious law, when one moves away from matters of status and turns to consider

⁶ Family Law Act 1986, Part II; Council Regulation (EC) 1347/2000 or Council Regulation (EC) 2201/2003.

issues relating to children, the answer to the colloquially phrased rhetorical question in my title: 'am I bothered?' is 'yes I am bothered' as to the religious and cultural impact of the various options for the future care of a child.

9. As I have sought to explain, the family judge must afford paramount consideration to the welfare of the individual child before the court. That child does not exist in a vacuum. He or she will be a member of a family, live in a community and may or may not be being brought up in accordance with a particular custom, culture or religious norm. The factual context around the child will be made up of many elements. Each will have a greater or lesser degree of relevance in a particular case. Where there is a prominent religious element it is important for the court to understand that dynamic and, if necessary, to have regard to the opinion or determination of any relevant religious tribunal or expert that may be relevant.
10. What I have described is not the same as full legal recognition of the religious law in the sense that it is determinative of any issue in the family case. Rather it is a matter of the judge taking note of the religious perspective and placing it into the overall balance. To do otherwise would be wrong and contrary to the full evaluation of the child's welfare.

So 'Am I Bothered?': yes I am if the religious element is a significant part of the parent's, family's or child's experience. I am interested in seeing the individual human beings in a family case in a rounded way because of the impact that these individuals have with respect to the individual child whose welfare is my paramount concern.

'Am I subservient to or reliant upon the determination of a religious court?': the answer to that is given with great respect but also with total clarity: No, I am not.

[END]