



## The State and the Operation of Sharia Councils in the United Kingdom

### A Response to Shona Lester

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#### Introduction

Let me start by thanking Shona Lester for her most gracious commentary on my article on Sharia councils. She raises many points that deserve an elaborate answer. I also fully agree with her that many points in my own article need to be researched much more fully than I have done. This, however, is impossible within the limits of this rejoinder. So my first difficulty is to select a few points I consider to be the most important challenge to what I have argued in my article, “Five Options for the Relationship between the State and Sharia Councils,” published in the previous volume of this journal.

#### *Refah v. Turkey*

One of the first points I have to address is Lester’s criticism of the *European Convention on Human Rights* (ECHR) case law on the question whether Sharia law is compatible with the European Human Rights Charter. The ECHR said “no” in *Refah v. Turkey* (2003). This is, of course, a heavy blow for all those who adopt a sympathetic attitude towards the application of Sharia law in secular jurisdictions and, quite understandably, Lester addresses this issue. She raises the question whether the judgment is “specific to Turkey, rather than unqualified pronouncement.” From the argument developed in *Refah*, it is clear that all the considerations that the court presents are applicable in other legal orders that subscribe to the principles developed in the ECHR. If Sharia law contradicts the ECHR in Turkey, it also

contradicts the ECHR in Italy or France. That is the point of having a *European* Convention of Human Rights in the first place.

### **The Core of Islamic Family Law Is Readily Enforceable**

A second question Lester raises is whether one can “ever rightly assert that Sharia is no more than one-dimensional law with a rigid stance.” As with all things in life there is an element of vagueness and indeterminacy in Sharia law like there is in ordinary secular law, but there is not *only* vagueness. Lester’s suggestion that Sharia law’s “norms are ever-changing” is clearly overstating the case. Although I agree with her suggestion that I “fail to engage” this question, I do not want to adopt the thesis that nothing can be said about Sharia law because of the essentially vague and elusive character of the law. Especially if one reads Nuh Ha Mim Keller’s *Reliance of the Traveller: A Classic Manual of Islamic Sacred Law*, one will see that on many points the Sharia takes a relatively clear stance. There is vagueness if you interpret Sharia as a kind of ideal legal order, a conception of justice, a sort of natural law to be interpreted according to the whims of clerics, but that is not the real existing Sharia as codified in Keller’s handbook. Moreover, is it not clear from the fact that British Sharia Councils do function, that at least the Islamic judges themselves have no problem finding their way through “the forest of vagueness” every time they decide upon a case? This simple finding in itself makes it possible to say – in the spirit of H. L. A. Hart – that, yes, there are many “problems of the penumbra,” but the core of Islamic family law is readily understandable and enforceable.

### **Law Is Territorial**

Another clear difference between Lester’s views and mine pertain to a “choice” she is hinting at between secular law and religious law. She speaks about “the denial of the right to choose between secular law and Islamic laws in certain legal matters.” Lester rightly senses that I want to deny citizens such a choice, but so should everyone else who thinks about the consequences of such a choice. Law, from the nature of the concept, is territorial. In Germany, German law applies. In Finland, Finnish law. Playing with the idea that you can give people a “choice” in matters of jurisdiction is an illusory idea. Lester makes her proposal even worse when she is not speaking of a “privilege” to choose your own jurisdiction but a “right” to do so. Never in history has a state existed which gave its citizens such a right, nor is such a state ever likely to exist. This is only possible in Alice’s “Wonderland” or More’s Utopia. Giving people a choice in jurisdiction contradicts the whole idea of having a state in the first place. The state and national law is inherently connected with the notion of territorial jurisdiction. A state that applies the laws of another state to its own citizens is no longer a state, but a figment of the imagination.

### **The Infringement of Free Choice Is Not Bad**

Does denying the right to choose jurisdictions constitute a breach of freedom? Yes, it does. Is such an infringement of free choice bad? No, under the circumstances indicated, it is not. Sharia law is designed to restrict the freedom of Muslims. Women are not allowed the right to unilateral divorce, unless there is severe abuse, and even then Islamic judges or Imams are reluctant to pronounce divorce. The head of the Leyton Sharia council, Saudi trained Imam Haitham al-Haddad, advocates the death penalty for adulterers and apostates.

Gays, Christians, and Jews obviously do not deserve to be on equal footing with Muslims. These views are perfectly in line with Islamic holy law. Sharia law is designed and intended to restrict and remove freedoms, and defending the “right to choose” for this anathema of freedom demonstrates nothing else than the inability to use language properly.

When it comes to Sharia councils, it is free will that is central to the debate. What follows are quotes and projections of Muslims either claiming that they do not wish to be subjected to Sharia councils or that they do. Lester quotes: “the continued observance of Sharia principles provides a sense of solidarity, *strengthened by the connections to Islamic culture and other Muslims.*”

Lester suggests that I fail to fully grasp the significance of the interaction between law and culture when it comes to Sharia law. That may indeed be the case. I do not see how fully grasping the interaction between law and culture is significant when it comes to assessing the limits of tolerable deviance. To illustrate my point: the polls teach us, unfortunately, that there are Muslims who feel that adulterers should be put to death and that this is important to their cultural identity. There are Muslims who feel they do not need a civil marriage and that a Sharia marriage (*nikah*) suffices. I am also sure that there are Muslims who prefer to not live under Sharia laws, and are perfectly capable of embracing their variant of a cultural identity. Prominent Muslims, such as Bassam Tibi, deny that it is impossible for Muslims to live in the western world. You can be a perfect Muslim and not accept Sharia law. Sharia law is *not* essential for Muslim identity.

The enormous diversity among Muslims is often claimed by faux liberals to counter “essentialist” claims consisting of negative interpretations of Islamic communities, ideas, and practices (such as Islamic terrorism). I embrace this diversity and state that the same goes for positive claims. When people claim that certain Muslims should be able to decide for themselves whether they wish to go to Sharia councils, I say “No.” Since there is such an enormous diversity among Muslims, including those fighting against the institutionalization of religious tribunals (yes, there are Muslims who find Sharia councils abhorrent), we cannot say in general that religious legal institutions are a positive contribution to one’s identity.

### **Non-Judgmentalism and the Overstated Importance of Identity**

For some people this is the exact moment when the confusion about “what Muslims really want” results in well-meaning non-judgmentalism. That means that because we do not know what Muslims in general want, we should not say what we think is best. Or, we should restrict ourselves to stating that some Muslims want to live under Sharia law and some do not, and that this drives us to the conclusion that we cannot make general statements about Muslims. This, however, is no longer feasible. We are in the midst of a heated public and academic debate on the limits of Islamic ideas and practices. Those not involved, e.g. astronauts and little children, may abstain from judging. This does not apply to all those who are involved. That also means that in the discussion on the admissibility of Holy Law that is, again, fundamentally at odds with the law of the land, the discussion about “what Muslims want” is by far not as relevant as it appears on first sight.

Allow me to explain. There are girls who wish to be ultra-skinny and visit pro-Ana sites to learn how they can get through the days not eating without feeling hungry. There are

people joining neo-Nazi movements. There are people who, if they were allowed, would walk around naked through the streets. Undeniably, neo-Nazi's feel a sense of community, and so do girls exchanging advice on pro-Ana sites. Nudists feel nudism is a part of their identity. Yet, somehow, we (albeit it in some cases merely morally) judge this behavior negatively, and in some cases enact and enforce laws to prohibit these acts. We judge behavior positively or negatively day in, day out. Yet when it comes down to the degree to which Muslims may enact and enforce a sub-legal system that is fundamentally at odds with the rights scheme of the law of the land, we suddenly start to question whether those involved do so out of a sense of identity. But that in itself is an empty statement. Those advocating against Sharia councils and for one law for all do so out of a sense of solidarity and cultural identity. My writing about this topic is a product of my identity. Those reading this piece have chosen to read this and not the sport's section of a newspaper as a result from their identity. Even claiming that identity is something worthy of our respect is part of one's identity. Yet, for some implicit reason when it comes to Muslims we should respect that identity. Why, one may ask? Because it is important. Why is it important? It just is. The authority of the identity-argument is rhetorically very strong, but when challenged surprisingly weak. Why should Muslims be able to choose jurisdictions? Because it is important to their identity as Muslims. Now think about this: Zee, why do you want Muslims to stop going to Sharia councils? Because as a fourth generation jurist and a third generation feminist, legal unity and gender equality are important to my identity. Right. I sincerely hope the reader wants me to step up my game when I use that argument as validation for my judgment.

### Secular Alternatives to Sharia Councils

Fortunately, Lester and I agree that Sharia councils are not without fault. The point is that when it comes to legal unity that is based on legal sex equality and Sharia councils, we must make a choice. Phillips and Williams state that Muslims should be able to choose, but the reality is that society at large is forced to choose between either Sharia councils *or* legal unity that is based on legal sex equality. I agree with Lester that the *Arbitration and Mediation Services (Equality) Bill* is not the answer to this conundrum.

The Netherlands has recently introduced two alternatives for women who have been put in a situation of marital captivity by their husbands. Dutch criminal law against forced marriage, polygamy, and female genital mutilation has been widened to include marital captivity as a criminal offence. According to Pakistani-Dutch Shirin Musa, after years of marital captivity, a woman finally pressed charges, which caused her husband to immediately cooperate with a religious divorce. A second important alternative to Sharia councils was established by Shirin Musa herself: after years of failed attempts to get her husband to cooperate with the religious divorce, she took the civil route: the civil judge imposed damages upon the husband for each day of non-compliance with the court's ruling that he had to release her from the marriage. He instantly did. She founded the organization Femmes for Freedom in order to help, financially and otherwise, women of all religions in marital captivity to use these secular legal routes to set themselves free. This basically means that women are no longer dependent on religious tribunals for their religious divorces when

secular legal regimes offer effective alternatives for religious tribunals, making them practically redundant.

### Final Words

In my view Lester has – like Lord Phillips and Rowan Williams – a sort of romanticized conception of Sharia law. We should never forget: Sharia law is pre-modern law and reflects pre-modern conditions. The idea that you can apply legislation from the eighth century to present day conditions without violating modern human rights law as it has developed since the Second World War in the Universal Declaration of Human Rights (1948) and other human rights charters is illusory. What you can do, of course, is leave out all the elements where Sharia law contradicts the Universal Declaration and implicitly acknowledges that modern human rights law is the norm, not Sharia. It shows that even faux liberal defenders of freedom feel the moral and legal superiority of secular human rights in their bones (and rightly so). Allowing Sharia to operate merely within constraints set by non-Muslims can hardly be a celebration of freedom, even though proponents of the idea of limited Sharia do state their case accordingly. It is more than anything a rhetorical gift, a gesture in words, from “choice defenders.” In fact, the “monolithical, universal, approach to law-making,” which Lester currently deems insufficient, has worked and continues to work in Western nations *despite* diversity. There is no reason why the presence of Muslims should be seen as a new kind of diversity that justifies legal plurality.

### Bibliography

Hart, H. L. A.

- 1958 “Positivism and the Separation of Law and Morals.” *Harvard Law Review*. 593-629.

Keller, Nuh Ha Mim

- 1991 *Reliance of the Traveller: A Classic Manual of Islamic Sacred Law*; ‘Umdat al-Salik by Ahmad ibn Naqib al-Misri (d. 769-1368) in Arabic with Facing English Text, Commentary, and Appendices. Edited and translated by Nuh Ha Mim Keller. Beltsville: Amana.

Phillips, Nicholas

- 2008 “Equality Before the Law: East London Muslim Centre” (3 July). Available online at <http://www.judiciary.gov.uk/media/speeches/2008/speech-lord-phillips-lcj-03072008>.
- 2013 “Equal Before the Law.” Pp. 286-293 in *Islam and English Law: Rights, Responsibilities and the Place of Shari’a*. Edited by R. Griffith-Jones. Cambridge: Cambridge University Press.

Williams, Rowan

- 2008 “Civil and Religious Law in England: a Religious Perspective” (7 February). Available online at <http://rowanwilliams.archbishopofcanterbury.org/articles.php/1137>.

Tibi, Bassam

- 1994 "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations." *Human Rights Quarterly* 16: 277-99.
- 2008 *Political Islam, World Politics and Europe: Democratic Peace and Euro-Islam versus Global Jihad*. London: Routledge.
- 2011 "From Old Jihad to New Jihad" pp. 35-65 in *Terrorism, Ideology, Law, and Policy*. Edited by Gelijn Molier, Afshin Ellian, and David Suurland. Dordrecht: Republic of Letters Publishing.