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Five Options for the Relationship between the State and Sharia Councils

Untangling the Debate on Sharia Councils and Women's Rights in the United Kingdom

Machteld Zee, Leiden University, The Netherlands

Abstract

This study clarifies the positions in the debate on Sharia councils and women's rights in the UK by identifying the arguments for and against state accommodation of Sharia councils. In light of these arguments as well as practice and legal theory, a conceptual framework of five options a state may have is presented: i) full accommodation; ii) partial independent accommodation; iii) partial dependent accommodation; iv) no accommodation, no intervention; v) state intervention. It concludes that proponents argue in favor of "partial dependent accommodation," but that the UK, in reality, practices "no accommodation, no intervention," which has led to a bill in favor of state intervention.

The Arbitration Act of 1996 provides legal jargon for religious tribunals, and under the alternative dispute resolution Sharia councils have been able to function. Sharia councils, however, do not mediate or arbitrate. The *raison d'être* of Sharia councils is dealing with one-party divorce requests based on religious law.

Introduction

"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," said Lord Phillips of Worth Matravers, then Lord Chief Justice of England and Wales, during his speech, "Equality Before the Law," at the East London Muslim Centre in 2008. A few

months earlier, Rowan Williams, the Archbishop of Canterbury at that time, spoke on the topic of civil and religious law in England. Both speeches created mass controversy because both suggested that individuals should be able to choose jurisdiction when settling private legal matters, including the option to have matters settled under Sharia law. Some reactions displayed downright outrage. Was this public outcry justified?

The Canadian province of Ontario allowed private parties to solve legal matters on the basis of Sharia law by means of enforceable arbitration. Under great pressure from women's rights groups, Ontario revised several provisions of the Ontario Family Statute Law Amendment Act of 2009: any decision made by a third party in arbitration or other proceedings has no legal effect unless the award is in accordance with the law of Ontario or of another Canadian jurisdiction. The UK is currently experiencing a debate on a similar neuralgic matter. Sharia councils have been operating in the UK since the 1980s, and for a long time little attention was paid to them. The speeches in 2008, however, worked as catalysts, and the unease about an increasingly multicultural society and the question as to what extent a secular state should accommodate religious needs in the form of Islamic tribunals was brought to a higher level. Shortly after the speeches and under the Arbitration Act of 1996, it was stated that courts were able to endorse Sharia council decisions, making fatwas possibly legally binding. The debate intensified as reports on the discriminatory and involuntary nature of Sharia councils gained public attention, and, in combination with public campaigns and ongoing critical news coverage, something important happened: the House of Lords debated a Private Member's Bill in October 2012, which, if accepted, would severely curtail the scope of action for Sharia councils, and even create a new criminal offence, "falsely claiming legal jurisdiction."

This paper explores the positions in the debate on Sharia councils in the UK. First, I untangle the arguments in favor: what drove the proponents? Second, the responses to Williams' and Phillips' speeches as well as the functioning of religious tribunals are analyzed. Lastly, I discuss the proposed Arbitration and Mediation Services (Equality) Bill. The methodological aim is to create a framework of arguments by proponents and opponents for embedding Islamic religious tribunals in the secular legal system of the UK. By considering these arguments, legal theory, and the practices of Sharia councils, this paper builds a conceptual framework of options for the relationship between the state and Sharia councils.

Why Would Someone Visit a Sharia Council?

Joseph Schacht, the leading Western scholar on Islamic law, describes Sharia as the sacred law of Islam, the epitome of Islamic thought, as the most typical manifestation of the Islamic way of life: "the core and kernel of Islam itself." It consists of an all-encompassing body of religious duties; it is the complete aggregate of the commands of Allah that regulates the lives of all Muslims in every aspect (1). There are four sources of Sharia law: the instructions from the Qur'an; the example set by the Islamic prophet Muhammad and his companions in the *Sunna* (which includes his specific words, habits, practices, and silent approvals); consensus, or *ijma*, (in theory the Muslim community, in practice that of the *ulama*); and analogical reasoning, or *qiyas*. Taken together, Sharia embodies regulations regarding ritual and worship as well as political and legal rules. It is this last category, legal

rules, which is of importance for this research.¹ Under the header “legal rules” of Sharia, there are subdivisions of financial, penal, and family law. With regard to penal law, the UK holds a clear position: there is no recognition of those provisions that aim to subvert the state’s monopoly on its dealings with crime. Islamic financial law, however, can count on a more positive reception. In fact, the UK has actually committed itself to grant its relatively large Muslim population access to financial services consistent with their religious beliefs (see Financial Services Authority). It is the area of family law where conflicts and tensions with the national legal system are most apparent (Women Living Under Muslim Laws). Similar to modern legal systems, Islamic family law consists of rules regarding marriage, divorce, inheritance, property division, and child custody.

So, why would someone go to a Sharia council? Sharia councils offer to resolve a variety of disputes and issues faced by the Muslim community, including Islamic marriage and divorce, mediation, and judicial deliberation and conciliation. Yet, much of the tension around Sharia councils arises out of concern for the status of women. That is not surprising as 95% of applicants to a Sharia council are women seeking a religious divorce (Shah-Kazemi: 18).

A Muslim marriage, or *nikah*, is a contract, a solemn Qur’anic covenant between a bride and a groom or their proxies. For the contract to be valid, the groom must provide a sum of money to which both parties have agreed, which is known as the *mahr*. This sum belongs to the wife. The *nikah* needs to be witnessed by two Muslim males. Men are allowed to enter into polygamous marriages, and may marry up to four wives. Marital rights (or duties) are, inter alia, consummation of the marriage, and the wife is entitled to maintenance. The incapacity or refusal to fulfil these obligations by either party may constitute the right to divorce (Shah-Kazemi: 7). In tight-knit Muslim communities, religious (and civil) divorce is strongly discouraged and disapproved of socially (Yilmaz: 305). Therefore, the primary objective of a Sharia council is to seek reconciliation between husband and wife, and it dissolves a *nikah* “only when there is no hope of understanding left and it has become the only alternative to resolve a family dispute” (Shah-Kazemi: 34).

There are several ways in which a divorce can be settled. For instance, if the husband wishes to divorce his wife, he can unilaterally – without permission of his wife – do so by pronouncing the *talaq*. If the woman initiates divorce, known as a *kebullah* agreement, both parties must agree to the wife’s release from the marriage contract, and in most cases she is expected to refund the sum of the *mahr* to the husband. The wife forfeits her right to maintenance. Also, a judge, or *qadi*, may independently rule a divorce without the husband’s consent, for instance, when the husband has renounced Islam, when he has a sexual defect, when he has not provided maintenance for his wife, has harmed his wife, or when adultery has been alleged by one party against the other. This is called *faskh* (Shah-Kazemi: 8).

¹ Due to the close connection with political history and political institutions (rather than with the development of Islamic law), constitutional, administrative, and international law fall under political rules. That is to say, modern legal categories, such as the separation of public and private law, do not apply. There is no clear distinction between worship, ethics, and laws, but, following Schacht, the body of Islamic law is arranged in such a fashion that the reader is able to view the doctrine against the background of modern legal concepts (Schacht: 112-14).

When a ground for divorce is accepted, a divorce is granted by the *qadi*. It must be understood that the Muslim community does not consider a secular divorce as the dissolution of a religious marriage. Muslim women turn to Sharia councils for divorce because of the religious community's conviction that women must abide by Muslim family law (Shah-Kazemi: 5). When a woman is considered married under Islamic law but not under civil law it amounts to marital captivity. This "split status" position may leave women vulnerable to the whims of "recalcitrant husbands, who are well aware of the adverse effect the situation has on their wives, as they fall between the cracks of the civil and religious jurisdictions." (Shachar 2008: 576). Women try their best to avoid this situation, therefore *faskh*, divorce initiated by women, forms the bulk of the applications for Sharia council rulings. Thus, if the husband refused to grant the *talaq*, or he is not willing to cooperate with a *khulla* agreement, a woman needs a Sharia council to establish divorce.

Arguments in Favor: Why the State Should Accommodate Sharia Councils

In 2008, Archbishop Williams and Lord Justice Phillips advocated state accommodation of Sharia councils. Williams argues that Muslims want Sharia councils, that the law of the land does not prohibit this, and that, due to the plurality of society, the state should allow individuals to *choose* jurisdictions when dealing with legal issues such as "aspects of marital law, the regulation of financial transactions and authorized structures of mediation and conflict resolution." With regard to concerns about possible negative effects on intra-communal equality, Williams states that recognition of the authority of a communal religious tribunal, especially with regard to family law, could have the effect of reinforcing repressive elements, with particularly serious consequences for the role and liberties of women: a Sharia council could, in effect, actually *deprive* individuals of rights and liberties. Therefore, he said, no "supplementary" jurisdiction could have the power to deny access to the rights granted to other citizens or punish its members for claiming those rights: "citizenship in a secular society should not necessitate the abandoning of religious discipline, any more than religious discipline should deprive one of access to liberties secured by the law of the land." To labor this point, he suggests thinking in terms of what Ayelet Shachar calls "transformative accommodation" and argues that it is institutionally feasible for the state to simultaneously respect deep cultural differences and to protect the rights of vulnerable group members, women in particular (see Shachar 2001: 4-5). Williams also argues that it is possible for secular laws to secure parties' fundamental rights in case of unlawful decisions based on religious laws. Finally, he argues that other religious communities have state-sanctioned religious tribunals, namely the Jewish Beth Din (pl. *Battei Din*) and ecclesiastical councils based on Catholic canon law, and, therefore, it is unfair and unequal to deny the Muslim community the possibility of Sharia councils.

A wave of criticism followed the raising of questions on the possible adoption of some aspects of Islamic law in Britain. Then Prime Minister Gordon Brown stated that "it is very clear that British laws must be based on British values and that religious law, while respecting other cultures, should be subservient to British criminal and civil law" (*Birmingham Post*). David Cameron rejected any expansion of Sharia law in the UK and said it would undermine society, alienate other communities, and that allowing two laws to work side by side would be dangerous, adding that "All citizens are equal before the law" (*BBC Online*).

A few months later Lord Phillips followed with a lecture. According to Phillips, Rowan Williams had not been clearly understood, as the Archbishop certainly had not suggested the possibility that Muslims in the United Kingdom might be governed by their own system of Sharia law, but merely that it was possible to contemplate “a scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters” (2008). The former Lord Chief Justice argued that Muslim citizens are different from non-Muslim citizens and that this constitutes inequality, therefore the notion of equality before the law implies the possibility of settlement of legal issues on the basis of religious law in order to remedy this inequality. While Williams approached the issue of Sharia councils tentatively (“it should be possible to contemplate a scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters”), Phillips did not need such conjectural contemplation, as he already pointed to the “solution”: the Arbitration Act 1996. “The scheme” already existed, and had been functioning for a while. The UK has a clearly defined legal framework within which arbitration is authorized; the Arbitration Act 1996 offers the choice of applicable law to parties, thus providing a legal basis for and state recognition of the activities of Sharia councils. The Act stipulates that parties are free to choose the rules which are applicable to the substance of the dispute: S46 (1) “The arbitral tribunal shall decide the dispute – (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or (b) if the parties so agree, *in accordance with such other considerations as are agreed by them or determined by the tribunal*” (emphasis added). Even though such religious tribunals cannot grant civil divorces or make binding determinations regarding the custody of children, parties can, for instance, ask an arbitrator for a religious divorce or the dividing of assets upon divorce, including disputes relating to dower and maintenance, based on Islamic law (Büchler: 108-109). The legal effect of such an arbitration award could be the same as any other judgment or order of the court, and could thus be binding. The 1996 Act does contain a number of safeguards, so state courts may modify or – partially – set aside the ruling, for instance, if enforcing the award would be contrary to national law or public policy.

In short, these are the five main arguments put forward by Phillips and Williams. Both proponents:

- (i) determine a communal need for religious laws by British Muslims, and infer that
- (ii) there is no incompatibility between the Islamic and the British legal systems, and that
- (iii) denying the right to choose between secular laws and Islamic laws in certain legal matters constitutes inequality before the law, furthermore,
- (iv) the principles of freedom and equality as protected by secular law override concerns regarding religious discriminatory practices, moreover,
- (v) other religious communities have religious tribunals as well, and it would be unfair and unequal to deny the Muslim community the possibility of Sharia councils.

In short, for the proponents it seems morally and principally plain *wrong* not to grant, at least to a certain extent, judicial autonomy to Muslims. The moral justification lies in the equal

treatment of all religions, and, the reasoning goes, because British Muslims are not free to live under their own laws, as institutionalized by their own courts, they are not treated equally (Budziszewski: 183). The wish is for more legal latitude to be given to rights rooted in religious identity in the form of Islamic religious tribunals.²

Arguments Against: Why the State Should not Allow Sharia Councils to Function under British Law

If all Sharia councils only provide services that do not conflict with the national law, and its arbitration awards are only enforced if they are not contrary to public policy, then what is the problem? Why the reaction of outrage directed at Williams' proposal to allow Sharia councils to operate within the limits of the law?

There is a Communal Need for Religious Laws by British Muslims

Let us examine the arguments put forth by the proponents and see what the opposition has to say. Starting with the argument that Muslim minorities are in want of Sharia councils, one could say that this is not so much an argument as an assumption, which is, at best, only partially true. Shaaz Mahboob, vice chair of British Muslims for Secular Democracy, stated that “[t]here have been no calls from members of the British Muslim communities demanding the introduction of Sharia as a parallel justice system” (*The Independent*). Furthermore, he believes that the assumption by Lord Phillips that Sharia law could become a successful form of alternative dispute resolution will only result in further alienation and segregation of members of Muslim communities from the rest of society. Labour MP Khalid Mahmood said: “I, along with the vast majority of UK Muslims, oppose any such move to introduce Sharia law here” (*Birmingham Mail*). Their statements are backed by a poll conducted by the Center for Islamic Pluralism, which has found that a majority, estimated at a minimum of 65%, “brusquely repudiated the imposition of Sharia in Britain” (*The Spectator*).

Williams and Phillips justify their call for state sanctioning of Sharia councils by determining a need within the British Muslim community. It is, in fact, their point of departure in this debate. However, there seems to be a majority that consists partly of those who do not share the wish for Sharia, and partly of those who actively oppose Sharia law in the UK. Why do Williams and Phillips not adhere to those individuals who do not wish to live under religious laws? Or, as the Egyptian-Dutch writer Nahed Selim says, “If you want to help Muslims, help the right group,” by which she means those Muslims who benefit from secular laws and do not wish to be pressured into going to Sharia councils by their peers.

There is No Incompatibility between the Islamic and British Legal Systems

For argument's sake, what if an overwhelming majority of British Muslims wanted to apply Sharia in the United Kingdom? Or, may a minority have the right to recourse to state-legitimized Sharia councils? This brings us to the second argument, and that is the

² Lord Phillips revisited this issue in 2013. His position remains unaltered; however, he added the importance of increasing general knowledge about the law, stating that “Legal literacy like religious literacy is good for society as a whole” (239).

assumption that there is no incompatibility between the Islamic and British legal systems. If there is no incompatibility, what is the objection against an Islamic legal system functioning side by side with the national legal system?

In the well-known *Refah v. Turkey* case, the European Court of Human Rights (ECHR) concurred with the decision by the Turkish constitutional court to ban the Refah Partisi (Welfare Party), because it operated in breach of Turkey's constitution, which stated that no political party may act counter to the state's secularist principle. Refah, which was expected to receive a large number of votes in the coming election, aimed at establishing a plurality of legal systems in order to enable Sharia to function for the Islamic part of the population. The party stated that this proposed plurality was actually intended to promote the freedom to enter into contracts and the freedom to choose which court should have jurisdiction. However, Turkey's secular principle entailed the notion that it considered the rules of Sharia incompatible with the democratic regime, as Sharia does not comply with the democratic foundation of equality between citizens before the law (§19-25). The ECHR concurred with the view that Sharia is incompatible with the fundamental principles of democracy, as conceived in the Convention:

It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts (§123).

There are sufficient grounds on which to disagree with Williams' statement that there is no incompatibility between the Islamic and the British legal system, especially with regard to the legal status of women. The problem lies in the fact that autonomous religious legal bodies aim to *perpetuate their collective identity* through *family law*. That is also one of the characteristics that distinguishes religious laws from, for instance, the legal effects regarding the statute of a tennis association. The key principle of religious family law is to define and regulate membership of the community. Women, clearly, are vital to the transmission of collective identity, and their reproductive function and their assigned role of primary caretaker are exerted to control communal membership. Additionally, through complex marriage and divorce rules, including property division and custody rules, women's dependence is deepened. That is why a religious and cultural minority takes control over issues such as marriage and divorce – it is crucial to the community's survival – and that is why they urge the state to accommodate differences by awarding them jurisdiction in family law. As Shachar points out, such allocations of legal power can assist a group in self-preservation; but accommodated family law does not merely define membership boundaries (who is in, who is out), they regulate the distribution of rights, duties, and the power relationship between men and women within the community's fabric. This latter aspect becomes painfully salient during divorce proceedings: when marriages dissolve in close-knit communities, “multicultural accommodation in the family law arena can bring deep tensions and dark inequalities to the surface” (Shachar 2001: 51-57). Remember the grounds for Islamic divorce mentioned earlier in this paper. A husband can simply pronounce the *talaq* for divorce, a woman needs to buy her freedom with the payment of the *mahr*, or needs to

demonstrate that the husband fulfilled one of the grounds for divorce, which in no way resembles the gender neutral and much simpler no-fault divorces in secular British law. Islamic grounds for divorce must be proven, via documents or testimonies, and the testimony of a woman is valued at half that of a man's testimony. This is unmistakably discriminatory towards women, and British national family law would not allow that different rights for men and women to be perpetuated.

Moreover, this idea receives legal backing by the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which the UK ratified in 1986. CEDAW's *ratio legis* is to remedy the tension between religious freedom and gender equality. States that have ratified the CEDAW are required to enshrine gender equality into their domestic legislation, and enact new provisions to guard against discrimination against women. Frances Raday, a staunch advocate for gender equality, states that CEDAW creates a clear hierarchy of values by giving superior force to gender equality when there is a clash between customs and cultural norms, including religious norms (678). In fact, in 2013, the CEDAW committee issued a general recommendation on article 16 of CEDAW, which deals with discrimination against women at the inception of and during marriage and at its dissolution by divorce or death. CEDAW recommends that all member states adopt legislation to eliminate the discriminatory aspects of family law regimes, whether they are regulated by civil code, religious law, ethnic custom, or any combination of laws and practices. Moreover, the Committee expresses "concern that identity-based personal status laws and customs perpetuate discrimination against women and that the preservation of multiple legal systems is in itself discriminatory against women" (CEDAW). Therefore, taking the *Refah* case and this recommendation into account, state accommodation of Sharia councils is, indeed, incompatible with the British legal system.

*Denying the Right to Choose between Secular Laws and Islamic Laws in Certain Legal Matters
Constitutes Inequality before the Law*

From the perspective above, the British legal system is not compatible with an Islamic legal system. But, one could argue that Williams and Phillips merely stated that Sharia councils could function *as long as there is no conflict with the national law*. Moreover, the reason *why* Muslims need the possibility to choose jurisdictions, it is argued, is, since Muslims have a dual identity, as believers within their community and as British citizens, it would be unsatisfactory and problematic to live as a citizen under the rule of uniform law. Therefore, if parties wish to have private matters settled in religious tribunals, they have the freedom to do so, even more so: the mere fact that there is a *choice* between jurisdictions implies *the freedom to choose*. The safeguards as laid down in the Arbitration Act prevent unlawful awards to be enforced by state courts, and, therefore, there is no state sanctioning of unlawful rulings by these religious tribunals. It becomes unclear precisely what the former Archbishop and the Lord Chief Justice expect from Sharia councils insofar as what they have to offer their Muslim applicants. Islamic marriage and divorce are not recognized by the British legal system. Child custody issues are dealt with exclusively in secular courts. Sharia councils, in general, have no legal jurisdiction over family cases due to the sensitive nature of these disputes and their consequences. This was confirmed by former Justice Minister Jack Straw in 2008, who said that "[a]rbitration is not a system of dispute resolution that may be used in

family cases. Therefore no draft consent orders embodying the terms of an agreement reached by the use of a Sharia Council have been enforced within the meaning of the Arbitration Act 1996 in matrimonial proceedings.” In fact, John Bowen, author of several publications on English law and Sharia, said in a recent interview that none of the judges and lawyers he had talked to, and he had asked many, said that they had seen an instance where a judge has enforced an agreement that came out of a “shari’a council mediation” (Bangstad, Leirvik, and Bowen: 6).

It is unlikely that Sharia council decisions will be recognized or upheld in court. This has consequences for the way we view the extent to which a state can sanction Sharia councils, and presents us with five options, ranging from most accommodating to most restrictive:

- (i) full accommodation: the secular state delegates legislation and jurisdiction to religious tribunals;
- (ii) partial *independent* accommodation: religious tribunals may deviate from state laws, and its rulings are enforced in secular court;
- (iii) partial *dependent* accommodation: when not conflicting with state laws, the rulings of religious tribunals are enforced in secular court;
- (iv) no accommodation, no intervention: the state does not accommodate, nor intervene; e.g., Muslims can have functioning Sharia councils, whose rulings are recognized by the community, but are neither recognized nor enforced by secular courts;
- (v) state intervention: the state does not allow religious tribunals to compete for legislation nor jurisdiction, and the state actively safeguards its monopoly.

This deconstruction is important because, firstly, it helps to conceptualize the question on to what extent the state should accommodate Sharia councils, and secondly, because it shows the inherent contradiction put forward by the proponents. With regard to the first option: this is not under consideration in this debate, as it is unlikely the United Kingdom would support formal recognition of separate laws. The second option is also merely theoretical, as religious courts may not deviate from the law of the land.

Proponents can be positioned under option three. Williams said believers should be able to *choose* jurisdictions, the law of the land should give leeway to religious claims, and no citizen should be deprived of his or her rights. Phillips also clearly opts for partial dependent accommodation; Sharia court rulings are accommodated within the existing framework of the Arbitration Act 1996. It is important to note that proponents of accommodation never specify which legal issues may be dealt with in religious tribunals. This vagueness makes it difficult to pinpoint what choosing jurisdictions means for Muslims. One might ask: for which legal question could a Muslim choose jurisdictions? Proponents make a hollow gesture: most Sharia council cases deal with family law and 95% of cases concern divorce requested by women. Since British civil courts do not recognize religious marriage and divorce, and seldom enforce arbitration awards that are founded on religious family law, there is no choice between jurisdictions. Choice would require two jurisdictions dealing with the same content, but with different rules, so that parties could choose which rules they would like to have applied to their cases. Since one jurisdiction deals with, for instance, *civil*

marriage and *civil* divorce, and the other with *religious* marriage and *religious* divorce, there are separate legal systems for separate legal matters. This consequently means there are no civil safeguards protecting parties against discrimination.

According to the fourth option, the state condones the functioning of religious courts on its territory. It is argued that as long as parties are free to seek appeal in secular courts – and there is thus always the ability of redress – Sharia councils may continue to operate. The main factor is that there is the *possibility* of going to a state court. Therefore, it might very well be possible that religious councils rule in a fashion that will not hold up in a state court, but the rulings stand in the eyes of the community. Rhetorically, it is maintained that recourse to redress keeps Sharia law from conflicting with national law. This is, as shown above, unfortunately not the case. There is no case of an individual seeking redress in court, and if that would happen, it is most likely that court rulings would always overturn Sharia law in favor of secular law. *De facto*, state sanctioning of Sharia councils thus occurs as described under option four: no accommodation, no intervention; the state does not accommodate, nor intervene. Sharia court rulings are carried out by the community, but are not recognized outside the community.

I believe this fourth option is what arouses opposition, such as the political lobby organization One Law for All, which “. . . demand[s] an end to all religious tribunals on the basis that they work against and not for equality and human rights.” Not only could the state’s legal system be opening up for religious laws, but the *de facto* presence of Sharia councils, in addition to the public advocacy thereof, is enough to raise concern. Opponents believe the development of autonomous, quasi-legal courts, does not deserve recognition. While Williams and Phillips *lament* the idea that legal universalism ignores the plural reality, women’s rights and secular rights advocates actually *embrace* the idea that there is one law that applies to every individual – male, female, Muslim, non-Muslim, and thus ignores the plural make up of society. This brings us to the fourth argument.

The Principles of Freedom and Equality as Protected by Secular Law Override Concerns Regarding Religious Discriminatory Practices

This fourth focal argument by the proponents of state sanctioning of Sharia councils is the epitome of this debate. There is growing concern over the development of a quasi-legal system, which functions contrary to the principle of equality before the law, and which is eroding the UK’s commitment to the eradication of gender discrimination. In a previous section I laid out the *theory* on the grounds for Islamic divorce, which I showed to be discriminating towards women. Several reports claim that the *implementation* of Sharia law at Sharia councils is even worse (MacEoin and Green; One Law for All; Proudman; BBC Panorama; Women Living under Muslim Laws). Religious tribunals, according to the framers of these reports, are not merely offering a helping hand in granting women the religious divorces they so desperately seek in order to overcome the issue of marital captivity. Sharia councils are tribunals that operate outside their legal boundaries, where faith-based discrimination is institutionalized and forced upon women.

Most importantly, the basic requirement of arbitration, voluntary agreement, is not met. For instance, the Sharia Law in Britain report devotes a great deal of attention to the

involuntary nature of Sharia court proceedings. It contests the general assumption that those who attend Sharia councils do so voluntarily, and that unfair decisions can be redressed in state courts. Also, in reality, women are often pressured by their families to go to a Sharia council and to accept unfair decisions. As professor of law Shaheen Sardar Ali labels it, “their very existence . . . *pressurises* women to use such forums to obtain ‘acceptance’ from their families and communities” (113). This is exacerbated by the fact that some applicants may lack knowledge of the English language, the legal system, and their rights. There is also evidence that refusal to settle a family dispute in a Sharia court can result in threats and intimidation, or being excommunicated and labeled an unbeliever (Proudman: 16).

Establishing the fact that the voluntary nature is, to say the least, questionable, is an essential part of the discussion. If women are coerced into the frameworks of Sharia councils, this severely impacts the rhetorical strength of arguing in favor of Sharia councils, which is founded on the notion of religious *freedoms*. Muslims should have the option to *choose* jurisdictions, as the proponents argue. In general, advocates in favor of state accommodation of Sharia councils hold freedom of religion to be foundational to their position, and suggest that suspicions of intra-group discrimination would be remedied by the presupposed voluntary nature of choosing a jurisdiction.

Other Religious Communities Have Religious Tribunals

Does the factual statement that other communities have religious tribunals lead to the normative claim that it is unfair to deny Muslims the possibility of Sharia courts?

In 1857, the UK parliament passed the Matrimonial Causes Act that reformed the law on divorce, moving litigation from the jurisdiction of the ecclesiastical courts to the civil courts. In addition, amongst Christian believers, a civil divorce suffices when ending a marriage contract. When Lord Phillips and Archbishop Williams refer to *other* religious tribunals, the Jewish courts are more analogous to Sharia councils.

As in the Sharia divorce regime, in the Jewish tradition a civil divorce decree does not dissolve the religious marriage. Talmudic law mandates both spouses’ consent in a religious divorce. The termination of a Jewish marriage is executed by a writ of divorce (the *get*), delivered by the husband to his wife (Westreich: 177). The wife needs voluntarily to accept the *get*. The Beth Din acts as a witness to this process of mutual consent and the writing of the *get* for the divorce to be lawful under Jewish law. Without a *get*, a Jewish woman cannot remarry under Talmudic law and is condemned as an adulteress if she has sexual relations with other men. Also, if those relations lead to children, these offspring are branded *mamzerim*; a *mamzer* is prohibited from marrying any Jew other than another *mamzer*, and is barred from marrying freely within the Jewish community. This prospect of being unable to remarry and jeopardizing not only herself but her children, too, is devastating to observant Jewish women. If unable to divorce due to an unwilling or disappeared husband, a woman can be trapped in a dead marriage for years (or perhaps her whole life), and is labeled *agunah*, a chained woman. Conversely, a non-divorced man may cohabit with other women without the stigma of adultery, and any children born out of these relations are not considered *mamzerim* (Zornberg: 703-704). Unlike Sharia councils, where a *qadi* can issue a divorce in absence of a husband, it is not possible for a Jewish woman to obtain a *get* without her husband’s cooperation. In that vein, a Beth Din does not function as a “court”; it is a

witness to the dissolution of the marriage. In contrast, a Jewish judge (*dayan*) does not have the independent authority to issue a religious divorce, which a *qadi* does have.

In order for Jewish women not to be pressured to agree to unfair financial or (informal) custodial demands in order to obtain the *get* under the supervision of male-dominated Battei Din, the UK passed the Divorce (Religious Marriages) Act in 2002. This Act aims at remedying the unbalanced bargaining power of the husband. If a Jewish couple requests a divorce from a civil court, the civil judge can withhold the final legal civil dissolution of a marriage until a declaration is made by both parties that they have taken such steps as are required to dissolve the marriage in accordance with those usages. This means that the civil divorce will not be finalized until the woman has received the *get*. Interestingly, the 2002 Act explicitly mentions the “usages of the Jews,” and “any other prescribed religious usages.” “Prescribed” means that any other religious group may subject itself to the Act by asking the Lord Chancellor to prescribe the religious group for that purpose. Yet, no application has been received from any Islamic group requesting such recognition (Hunt). It must, however, be added that this Divorce Act is successful within the Jewish community because almost all Jewish citizens have a civil marriage combined with a religious marriage, which is unfortunately not the case in the British Muslim communities.³ This also means that despite the similarities between Jewish and Islamic tribunals – both are mainly concerned with religious divorces – there are significant legal differences, both in religious family law regarding the competence of the councils, and regarding British secular law which recognizes “Jewish usages.”

What does this mean for the relationship between the state and religious tribunals? Regarding Sharia councils in the United Kingdom, we have established the fact that Islamic tribunals are not accommodated, nor does the state intervene. However, with regard to Jewish courts, the state has made legislation in order to provide women a legal instrument to help obtain a religious divorce. That means that there is a fundamental difference between the legal relationship between the UK and Jewish courts, where there is formal recognition of the Jewish practices regarding family law and state intervention. Sharia councils, which have not received any formal recognition, are not the subject of state intervention. This may be changing, as the next section outlines.

The Arbitration and Mediation Services (Equality) Bill

Four years after the Archbishop and the Lord Chief Justice delivered their speeches, a bill was proposed by Baroness Cox in the House of Lords. The Arbitration and Mediation Services (Equality) Bill’s aim is to prevent discrimination against Muslim women and “jurisdiction creep” in Islamic courts (*The Guardian*). The bill addresses the concern that some Sharia councils apply Sharia principles that go well beyond their legal remit, such as dealing with criminal law (for example, pressure being placed on women to withdraw

³ In a personal interview held on 18 November 2013, *dayanim* (Jewish judges) Elzas and Lichtenstein of the London Federation of Synagogues said that the Divorce (Religious Marriages) Act of 2002 is functioning as intended. Kholi Hasan, judge-in-training at the Islamic Sharia Council in Leyton, London, has informed me that many British Muslims opt for just a religious marriage, without a civil marriage (personal interview held on 1 July 2013).

allegations of domestic violence) or family law, that some Sharia court rulings are being misrepresented as having the force of UK law, that some Muslim women are being coerced into agreeing to arbitration or mediation which ought to be voluntary, and that some proceedings of Sharia councils are discriminatory against Muslim women. Yet, the bill's influence also intentionally extends to Jewish courts, which are seen as hubs of gender inequality as well. The bill explicitly makes clear on the face of legislation that sex discrimination law applies directly to "Arbitration Tribunal" proceedings: the bill proposes to amend the Arbitration Act of 1996 by inserting that discriminatory rulings can be struck down under the bill. It specifies three areas that these provisions are intended to affect (although the provisions are not restricted to these three): (i) treating the testimony of a man as worth more than a woman; (ii) preferring a male heir over a female heir in inheritance rights in the case of intestacy; (iii) preferring a man over a woman in property rights. Moreover, it creates a new criminal offence for falsely claiming legal jurisdiction. The maximum penalty would be seven years in prison. The reception of the bill in the House of Lords was remarkably positive.

If this bill were accepted, the opponents of Williams' and Phillips' plea in favor of Sharia councils will have established that the state explicates and stands firm on its position regarding gender equality and the law: no state court may enforce an arbitration award that is discriminatory towards women. It also connects a positive equality duty to public bodies, which need to actively inform women of their rights, and Sharia councils need to make explicit to their applicants that they have no jurisdiction whatsoever.

Considering this bill in connection with the question of to what extent a state should sanction Sharia councils, the bill steers in the direction of option number five above, state intervention: the state does not allow private religious tribunals to compete for legislation nor jurisdiction.⁴ The similarity between the effect of what Williams, Phillips, and this Bill propose is actually interesting; both positions state that Sharia law cannot trump secular law, which means that, in both cases, Muslims are not awarded the freedom to have their religious laws enforced by the state. Yet, whereas Williams and Phillips (falsely) offer British Muslims the possibility to choose jurisdictions for family law – as there are separate legal systems for separate legal matters, this bill explicitly eliminates the possibility of two jurisdictions for family law. Yet, for a part of the British Muslim community, there are still two separate (socio-)legal realities, of which one, it is asserted, should lose its quasi-legal autonomy.

Conclusion

The question that this paper has sought to address is: what are the options for the relationship between the state and Sharia councils? Former Archbishop Rowan Williams and Lord Chief Justice Nicholas Phillips argue that state accommodation of Sharia councils is required to meet the needs of British Muslims, which is legitimized with a discourse on freedom of religion. It is argued that individuals should be able to choose jurisdictions when

⁴ 118A "Falsely claiming legal jurisdiction: A person who falsely purports to exercise any of the powers or duties of a court or to make legally binding rulings shall be guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding 7 years."

it comes to certain legal matters, such as financial and marital issues. By analyzing the arguments in favor of accommodating Sharia councils within the British legal framework in conjunction with the reactions of the opponents, legal theory and practice, it has become clear that there are, in fact, several reasons, according to the former Lord Chief Justice “*why principles of Sharia Law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution.*” The Arbitration Act of 1996 has provided legal jargon for religious tribunals, and it is under the header of mediation and arbitration that these Sharia councils have been able to function. However, Sharia councils do not mediate or arbitrate. Their core business consists of dealing with women requesting an Islamic divorce. In fact, 95% of the cases (hundreds per year per council) relate to divorce settlements. And, considering that mediation and arbitration are tools for extra-judicial decision-making for a minimum of two parties, a one-party divorce request surely does not count as any form of alternative dispute resolution. It is, however, undeniable that, at least for a part of the British Muslim Community, Sharia law is inevitable when dealing with issues regarding marriage and divorce. In fact, personal family laws are the most significant area of law in the debate on accommodation of religious law, and it is these personal family laws that conflict most with secular legal norms, such as gender equality.

The proponents of, albeit limited, legal jurisdiction for religious tribunals have encountered immense resistance, and the opponents have been able to make a strong case against this claim by focusing on the arbitrary, involuntary, and discriminatory nature of Sharia councils, which culminated in the Arbitration and Mediation Services (Equality) Bill.

For now, we can discern five options with regard to the extent to which a state can sanction Sharia councils. These options are i) full accommodation; ii) partial *independent* accommodation; iii) partial *dependent* accommodation; iv) no accommodation, no intervention; and v) state intervention. It is not likely that the UK will formally recognize a separate legal system based on Sharia that deviates from state law, so the extent to which the state can sanction Sharia councils ranges from option iii to v, that is, it ranges from court enforcement if not conflicting with national laws, to state intervention. Yet, in reality, the *raison d'être* of Sharia councils is dealing with one-party divorce requests based on religious law that has no formal recognition, and therefore parties are not in the position to *choose* jurisdictions.

However, it must be recognized that there are, in fact, two separate legal systems now functioning, one of which currently operates in the shadow of the law. That is the status quo, which I have labeled as option iv: no accommodation, no intervention. It is this option the bill seeks to alter by creating the criminal offence of falsely claiming legal jurisdiction. It is unclear what effect that would have on the functioning of religious courts in the socio-legal reality of Sharia law in the United Kingdom. Nevertheless, it seems that the United Kingdom is moving away from accommodating assumed religious needs of a minority, and is moving towards equality before the law for both Muslims and non-Muslims, *de jure*, as well as, *de facto*.

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