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

### **A Critical Response to Machteld Zee**

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#### **Abstract**

Machteld Zee's article in the previous volume outlines the debate concerning the interaction between the state and the operation of Sharia councils in the United Kingdom. She does not purport to provide a solution, but to add some elusive clarity in an area already full of ambiguities. This author holds the view that, in its goal to present a full account of the debate, Zee's article is imbalanced in parts and not fully explored in others. I propose that, rather than suggested Government intervention in the form of top-down legislation, change ought to come from within the community.

Keywords: Sharia, Sharia councils, United Kingdom, family law, Islam, women's rights

#### **Introduction**

The premise of Machteld Zee's article, published in the previous volume of this journal, is to outline the debate with regards to the interaction between the state and the operation of Sharia councils in the United Kingdom, and to clarify the options going forward. The paper does not purport to provide a solution, but to add some elusive clarity in an area already full of ambiguities. The author presents arguments for and against the embedding of Sharia councils into the United Kingdom's secular legal system and finishes with a discussion of the *Arbitration and Mediation Services (Equality) Bill*. Yet, in its goal to present a full account of the

debate, the article ends up imbalanced in parts, not fully explored in others and the understanding of some basic concepts is left incomplete. It clouds rather than clarifies.

The article is well structured. The introduction is comprehensive and the author immediately highlights a semantic hurdle at the center of British conceptions of Islam: the meaning of Sharia. Sharia is an abstract philosophical concept meaning “a way”; it acts as an “overarching meta-norm approximating to the rule of law” (McGoldrick: 605). Zee is right to recognize this and the reader is encouraged to remember that living by Sharia is not merely a task of adhering to its legal rules but is a distinctly psychological commitment (McGoldrick: 604). Impressively, Zee also quickly locates the article’s contextual emphasis at the heart of the debate: Islamic family law. Specifically, this entails a discussion of the controversial issuance of *kebul*, *mahr*, and *talaq* in Muslim divorce, as well as “limping marriages.” In pinpointing these examples, the article becomes focused and manageable.

Relying on speeches by Dr. Rowan Williams and Lord Phillips, Zee is able to highlight the core arguments in favor of accommodation, which she then seeks to explain and challenge. These are: (i) a need for religious law by British Muslims; (ii) no incompatibility existing between Islamic and British legal systems; (iii) denying the right to choose jurisdiction amounts to an inequality before the law; (iv) freedom and equality override concerns about religious discrimination; and (v) other religious communities have their own tribunals and it is unfair to deny these to Muslims.

### Zee’s Position

First, Zee deals with a communal need for religious law and is strong on this point, correctly identifying that not all Muslims want a general adoption of Sharia law (see also Cumper: 46; Klausen: 193; and Foblets: 283), and that it may result in community isolation. A 2007 Report, “Living Apart Together: British Muslims and the Paradox of Multiculturalism,” underlines such a conclusion, with figures showing that 59% prefer to live under British law compared to 28% under Sharia law. However, data from the same report adds a crucial caveat which suggests that a growing religiosity now exists in younger generations: 37% of 16-24 year olds would prefer to live under Sharia law, with only 17% of those over 55 years old holding the same viewpoint (McGoldrick: 619). Such figures are striking and, should this trend continue in future generations, the overarching preference may change.

Second, Zee considers questions of incompatibility between the systems, assuming that a desire for accommodation exists. A clash between Sharia principles and liberal European principles is presented and explored in relation to two human rights instruments ratified by the United Kingdom: the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) and the *European Convention on Human Rights* (ECHR). Zee argues that, under CEDAW, gender equality is to be enshrined in all domestic legislation, trumping both cultural and religious norms. A 2013 general recommendation on Article 16 of CEDAW relates this specifically to issues of family law. It is likely that Sharia councils will be seen as contravening CEDAW’s principles. Zee’s argument raised in relation to points on the ECHR and, specifically, the case of *Refah Partisi (The Welfare Party) and Others v. Turkey*<sup>1</sup> (later

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<sup>1</sup> App nos 41340/98, 41342/98, 41343/98 and 41344/98 (ECHR, 13 February 2003).

confirmed in paragraph 51 of *Gündüz v. Turkey* ECHR 5) is less convincing. Here, the judgment concerned the dissolution of a political party in Turkey on the basis that it flouted the state's secular principles. There are several questions to be asked of this case. First, was the judgment specific to Turkey, rather than an unqualified pronouncement? This would be true taking into account Turkey's "strategic and political importance to Europe and its overwhelmingly Muslim population" (McGoldrick: 611). However, the very fact that similar sentiments were stated in *EM (Lebanon) v. Secretary of State for the Home Department* (2008; UKHL 64) means that it is a difficult line to follow. Secondly, is it fair to adopt a judicial approach that is distinctly Eurocentric (Cumper: 40)? Judge Kovler, in particular, criticizes the judgment for this, in both the present case and the subsequent case of *Şerife Yiğit v. Turkey* (App no 3976/05; ECHR, 2 November 2010). Finally, can one ever rightly assert that Sharia is no more than a one-dimensional law with a rigid stance, when it is clear that its norms are ever-changing? Zee fails to engage with any of these questions.

The third argument is an important one and concerns the denial of the right to choose between secular law and Islamic law in certain legal matters. The *freedom to choose* jurisdiction is described as an important part of one's identity. However, it is fairly argued that, because civil courts hold absolute jurisdiction over family matters, and because 95% of Sharia council work concerns divorce, a "choice" on jurisdiction is redundant: family law will always lie in the hands of civil courts. This has been confirmed in *Al Midani and Another v. Al Midani and Others* (1999; 1 Lloyd's Rep 923) and *Choudrey v. Choudrey* (1976; Fam 148). At this juncture, Zee concludes that a preference for universal law triumphs, leaving only questions of state intervention to be answered.

Fourth, freedom and equality override discriminatory religious practice. Here, Zee speaks practically of the discriminatory effects of quasi-legal bodies on females. She is particularly strong on the issue of non-voluntary obligations to attend and partake in one-sided mediation. It is, of course, impossible to remove power from social relations (Foucault). Moreover, evidence suggests that councils were set up specifically to control females, so that husbands could gain a more favorable divorce or enable a polygamous arrangement (Ahmed and Calderwood Norton: 382; Ali: 127). Zee highlights reasons for such heightened pressure: lack of knowledge of the language, the legal system or one's rights, and threats and intimidation, to name but a few.

The final argument is that other religions have elements of self-regulation and to allow one religion special rights is unfair. Zee is correct to refer to the Jewish allowances under the *Matrimonial Causes Act 1857* and to the issuance of the Jewish *get* (divorce). Jewish courts, like Sharia councils, are mainly concerned with religious divorce: why differentiate the two? The author does provide a clear reason for this, detailing that, by distinguishing the role of the Jewish court, which acts only as a witness to a divorce, to that of a Sharia council, wherein sheikhs often arbitrate, Jewish courts can be considered as not overstepping their jurisdiction. In fact, further protection for Jewish wives lies in the *Divorce (Religious Marriages) Act 2002*, and financial provision for their maintenance is guaranteed. Zee details how Muslim communities have not requested that the Act applies to them and concludes that the law is justified in not offering such a change. Rather than a logical conclusion, this represents a huge assumption, for in a patriarchal community one cannot equate desire for change with

an ability to petition for change: females may be forced otherwise, and males may feel that to suggest change is to ostracize themselves from the community.

### The Arbitration and Mediation Services (Equality) Bill

Zee concludes that the likely relationship is one of no formal recognition but with state intervention. Such intervention comes in the form of the *Arbitration and Mediation Services (Equality) Bill*, a Bill to prevent discrimination against women. Zee enters into a lengthy discussion on the effect the Bill will have on the *Arbitration Act 1996*, but fails to detail how it is unlikely to affect councils, for they operate outside of the parameters of the Act. Zee eventually does recognize that the relevant part of the Bill is the criminal offence of *holding out to have legal jurisdiction*. However, councils explicitly state in their accessible material that they do not have legal jurisdiction and, as such, they ought to remain unaffected. Zee claims that the Bill will lead to the end of Sharia councils; evidence suggests otherwise. It is inevitable, to borrow the words of Williams, that such councils continue to operate and, at least to a certain extent, that the British government allows them to do so. Moreover, Zee completely misses the danger of the Bill: Dr. Suhaib Hasan describes how councils would operate with heightened secrecy in already small communities, no doubt accentuating the very fears and difficulties faced by vulnerable women that the Bill hopes to eradicate (Maret: 276).

### Thematic Critique

The debate is outlined well but several instances exist where the material might have been probed deeper still, or was in need of clarification. First, there is an inherent lack of clarity as to the legal position of Sharia councils throughout the text. Sharia councils operate *outside* of the *Arbitration Act 1996* meaning that there is no legal recognition of Sharia councils and their decisions and no regulation of their activity. *Al Midani and Another v. Al Midani and Others* (1999; 1 Lloyd's Rep 923) offers an example of how courts welcome Council decisions whilst underlining their non-binding nature. This status is unlikely to change. Unfortunately, Zee did not make this clear and, worse still, she suggested that the speeches of Williams and Phillips encourage Sharia councils to gain legal recognition under the *Arbitration Act 1996*. Neither said such a thing. Phillips may have been closest, suggesting that our system goes a long way in embracing Sharia principles in family disputes. He did not, however, state specifically that this scheme be the already present *Arbitration Act*. The subsequent text seems confused. A bolder move would be to question, rather than accept, Parliament's insistence that arbitration, under the *Arbitration Act*, does not (and should not) apply to all areas of family law.

Second, there is a lack of emphasis placed upon the interaction between "law" and "culture" in the family context. Whilst the original exploration into Sharia family law principles is well-constructed, it lacks the depth offered by other articles in the area: it does not explore historical, social, or legal context, schools of thought or original religious source material, and, ultimately, their corruption within Sharia councils. In fact, only a minor role is attached to culture's corruptive effect on British Muslims' systems of beliefs. In contrast, Berry writes how, "the continued observance of Sharia principles provides a sense of solidarity, *strengthened by the connections to Islamic culture and other Muslims*" (Maret: 258, emphasis

added). If the law is a brick, then culture is mortar. To talk of one and not the other is unwise, and Zee fails to fully grasp the significance of the interaction.

Finally, questions concerning the vulnerability of females were not fully presented. There is an assumption that females are forced into councils but, with increasing numbers of dual civil and religious marriages taking place, the agency of women cannot be underestimated: to place them in a “fixed position within a system of social power” is sometimes wrong (Ahmed and Calderwood Norton: 386). In fact, Cumper writes how women’s rights are consistent with the limited accommodation of Sharia law and this must be explored further (55). By way of example, tribunals allow a woman to fulfill a religious duty; provide a means of “shopping for the best deal” within civil courts or Sharia councils; have certain safeguards; and recognize the limitations of their jurisdiction. To tar all with the same brush without recognizing the potential good that they might do is unfair.

### Context and Conclusions

Seen as a whole, this author is left unconvinced by the laying out of key arguments which are presented but not fully explored; the article is a restatement of what has come before but in a muddled and patchy fashion. Zee concludes that the United Kingdom is heading towards a *de facto* and *de jure* approach of equality in the form of top-down legislation. It is submitted that such a move is dangerous and could lead to grave consequences for the very women the legislation hopes to aid. In truth, the issue goes much deeper and is much more immediate than many would like to admit. The United Kingdom finds itself in an age of multiculturalism, a direct result of globalization and a change in immigration patterns, from sojourners to settlers. The 2011 UK census found that 4.8% of Britons described their religion as Muslim, the second largest religious group after Christianity. It is clear that, to meet the demands of accommodation for this multicultural society, active steps should be taken to understand the workings of Sharia within a British context. This has thus far proved problematic.

At a fundamental level, when trying to advise upon a blueprint for such accommodation, a neutral viewpoint remains elusive. The two overarching critiques regarding the recognition, accommodation, or adoption of Sharia family law in Britain offer insight as to why this is the case. They can be summarized as: first, the law must have a universal jurisdiction; and second, that Sharia is incompatible with human rights considerations (Cumper: 37). It is broadly accepted that “monocultural assimilation” is inappropriate for a society made up of a multiplicity of differing groups. As such, a monolithic, universal, approach to law-making is insufficient in the circumstances; if the law is to be neutral, it cannot have a universal jurisdiction. Second, the *de facto* position that Sharia is incompatible with human rights considerations is difficult to contest. However, when such a debate is couched in the language of European liberal democratic “rights,” this is of no surprise. The two are often irreconcilable. Indeed, even when values are similar, such as *maslaha al-mahdun* (“best interests of the child”), Sharia’s values are often overlooked or quickly dismissed by a coupling with sensationalist remarks regarding the operation of its “law.” Finally, contradictions exist in the adopted language of persuasion on both sides of the fence. The moral justification, cited by the Archbishop, for the accommodation of Sharia law lies in the right to have equal treatment of all religions; the moral justification for judicial

intervention, cited by Baroness Cox, too, lies in equality. The problem with the language of “equality” is that such a term is simply a legal construct and one which, in this context, seems both short-sighted and flawed. True forms of equality, in a society still built upon Christian foundations, are almost impossible to attain.

That is not to say that Sharia councils are without fault. In particular, issues of gender inequality garnered through cultural distortions are seemingly ubiquitous. Ali describes but one example of this: the Islamic Sharia Council (ISC) website propounds a man’s superiority over his wife, justified by the belief that the man bears financial responsibility for his wife and family. Upon this assertion rests the ISC’s position that a husband has a unilateral right to pronounce *talaq*; women seeking a *khul’* divorce without “good cause” are reminded that the Prophet called such women “hypocrites.” Yet, the Supreme Court of Pakistan as far back as 1967, in *Khurshid Bibi v. Muhammad Amin* (PLD 1967 SC 97), declared unequivocally that a woman’s right to *khul’* was established, and that she did not have to give any “cause,” good or bad, to obtain it (Ali: 131). With a large percentage of British Muslims originating from Pakistan (38% of Muslims in England according to the 2011 UK census), this holds particular resonance to observers from the United Kingdom. Moreover, the British Muslim population is made up of those from a variety of ethnic backgrounds, whether that be Sub-Asian, European, Caribbean, Chinese, or Arab, to name but a few. Each group may hold themselves to the beliefs of a particular school of thought, those beliefs developed and adapted throughout time by complex interpretive processes (such as *ijtihad*). It becomes impossible for a single Sharia council to cater for the principles of each community: one cannot regulate a belief system that is, in itself, difficult to define. This is, however, in the very nature of a Sharia council, where patriarchal figures operate under a power game, defining what it means to be Muslim and what it means to follow the principles of Sharia. The danger of fusing fractured pieces of Islamic thought in this manner is that it can produce something that is, to quote the late Cassandra Balchin, “uniquely discriminatory, uniquely British and [largely] unrecognizable for Muslims in contexts outside Europe” (Balchin: 3). There is no bright line solution available to circumvent such an unruly beast. It is recommended that greater exploration and analysis into the socio-cultural impacts of Sharia on diverging twenty-first century Islamic communities based in multicultural societies is undertaken to add some color to an issue that is often left constrained to the black and white.

In conclusion, this author suggests that the debate ought to be reframed. No longer should we ask who trumps who, or what legal system ought to be compromised. Instead, we should simply ask: do the current legal provisions protect majorities and minorities within the UK; and, if not, how best do we achieve this? The answer, surely, is that they do not. The difference is that it is no longer a question of balancing rights and freedoms between communities but one about how to best protect both, in their social, historical, and cultural context. Ali writes that changes must come from *within* the community. To carry this out, it is suggested that education be at the forefront. Women ought to be educated on their rights and options and they must be able to partake in community-dialogue from an Islamic family law perspective: they must be brought out of isolation and not further forced into it. In turn, the wider public must recognize that they are not part of a monolithic culture but are autonomous beings, capable of engaging in such dialogue. As such, it is agreed with Zee that

the State's only option is to intervene. To intervene, however, is to create dialogue, enhance education and cultural understanding, and not to enact top-down legislation that will, ultimately, have little practical effect.

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