3. When multiculturalism and Islamic fundamentalism coincide: Sharia councils in the United Kingdom

Introduction

16th century French political philosopher Jean Bodin conceptualized the modern sovereign state as having the exclusive right to make laws and execute them within its territory.[385] Nowadays, due to immigration and increasing influence of Islamist doctrines, Sharia is competing as a body of laws within national borders. Half of British Muslim young adults prefers to have Sharia laws over secular laws while, at the same time, multiculturalists are publicly polishing the image of Islamic laws and advocating for the "right" to resort to those.

This takes Taylorian identity politics (also known as "politics of difference") a step further. Whereas Charles Taylor made the case that minorities had to be recognized for their difference which included the right to be *exempted* from certain universal legal obligations, new multiculturalism creates space for Muslims to have their "own" religious laws as an *additional* body of laws functioning within a state's borders.

That means that representatives of the multiculturalist ideology must have a positive view of Sharia as a basis of a legal system. That raises the question: how do *multiculturalists* view Sharia? Answering that question obviously involves a degree of generalization. There are, however, some points that are commonly present, which I will illustrate with the speeches by then principal leader of the Church of England, the Archbishop of Canterbury Rowan Williams and former Lord Chief Justice of England and Wales, Baron Phillips of Worth Matravers.

In 2008, Rowan Williams, at the time the most senior member of the national church, advocated the integration of parts of Sharia in a speech that caused a major controversy. A few months later, he was backed by the most senior judge in England

[385] Bodin 1992.

and Wales. According to Nicholas Phillips (1938), then Lord Chief Justice of England and Wales, "[t]here 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".[386]

Interestingly, resulting from a series of conventions signed by Turkey and Greece dating back to 1881, a Muslim minority in the Grecian province of Western Thrace depends on Sharia for decisions on family law disputes. Approximately 100,000 Greek citizens have Islamic law, which is actually a part of the Greek legal order. Greek courts also enforce decisions made by religious authorities. This can be considered problematic in light of European human rights, especially cases concerning women and children.[387] In fact, the Canadian province Ontario previously allowed for private parties to solve legal matters on the basis of Sharia law through means of enforceable arbitration – as pressed for by Islamic fundamentalists. Under great pressure from women's rights groups and liberal Muslim organizations, Ontario revised several provisions of the Ontario Family Statute Law Amendment Act 2009, so that now any decision made by a third party in arbitration or other proceedings has no legal effect, unless the award is exclusively in accordance with the law of Ontario or of another Canadian jurisdiction.[388] Now the United Kingdom is experiencing a similar debate.[389] The outcome of this debate is important: it matters whether national courts enforce Sharia council decisions or whether the state maintains a doctrine of 'one law for all'.

[386] Phillips, Nicholas, 'Equality before the Law', in: Ahdar & Aroney 2010, pp. 309-318. A video of the speech is online via http://news.bbc.co.uk/2/hi/uk_news/7488960.stm.
[387] Tsaoussi, Aspasia, and Zervogianni, Eleni, 'Multiculturalism and Family Law: The Case of Greek Muslims', pp. 209-239, in: Boele-Woelki, Katharina and Sverdrup, Tone (eds.), *European Challenges In Contemporary Family Law*, Antwerp: Intersentia 2011.
[388] See on the Ontario debate, *inter alia*, William, Arsani, 'An Unjust Doctrine of Civil Arbitration: Sharia councils in Canada and England', *Stanford Journal of International Relations* 2010, pp. 40-47; Fatah 2008, and Brown, Alexandra, 'Constructions of Islam in the Context of Religious Arbitration: A Consideration of the "Shari'ah Debate" in Ontario, Canada', *Journal of Muslim Minority Affairs* 2010, pp. 343-356.
[389] The United Kingdom consists of three legal jurisdictions: England and Wales, Scotland and Northern Ireland. All three have their own legal systems. The legal aspects of this discussion are mainly of importance in England and Wales, as in the strict sense, there is no 'British law'.

This Archbishop's speech sparked mass controversy as he made the point that it should be possible for individuals to choose jurisdiction when settling private legal matters, including the option to have matters settled under Sharia law. 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".[390] David Cameron, at that time leader of the Conservative Party, 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: "All citizens are equal before the law". The Archbishop's position was even questioned by his colleagues.[391]

In his defense of Williams, Lord Chief Justice Phillips – at that time the most senior representative of England and Wales' judicial system – stated that under the Arbitration Act 1996, private parties had already been able to employ Sharia law in the context of family disputes.[392] Similar to modern and secular legal systems, Islamic family law consists of rules regarding marriage, divorce, inheritance, property division and child custody. Both Williams and Phillips did have a case in point that it was already perfectly possible to have certain matters settled under Sharia – albeit not under the Arbitration Act.

In the United Kingdom, Islamic family law is institutionalized in the form of Sharia councils – which operate under the flag of mediation and arbitration. There have been publicly known Sharia councils in the United Kingdom since 1982, when sheikhs Sayyid Mutawalli ad-Darsh and Suhaib Hasan founded the first one. "The Islamic Sharia Council" has not been hindered by the government. In fact, it is a registered charity. [393] It is an umbrella organization consisting of around a dozen

[390] 'Sharia law not welcome here, says PM Brown', *Birmingham Post,* 9 February 2008.
[391] 'Cameron steps into Sharia law row', *news.bbc.co.uk*, 26 February 2008. See also: 'Williams 'shocked' at Sharia row', *news.bbc.co.uk*, 8 February 2008 and 'Sharia law row: Archbishop is in shock as he faces demands to quit and criticism from Lord Carey', *London Evening Standard*, 7 February 2008., 'The Church should have the guts to sack the Archbishop…and pick a man who truly treasures British values', *Daily* Mail, 11 February 2008. For a compilation of reactions, see 'Reaction in quotes: Sharia law row', *news.bbc.co.uk*, 8 February 2008.
[392] Ahdar & Aroney 2010, p. 317.
[393] http://www.islamic-sharia.org/aboutus/

Sharia councils. Other well-known Sharia councils are the Muslim Arbitration Tribunal, which has several departments and the Sharia council hosted by the Birmingham Central Mosque. Estimates run from about ten councils to 85 – with many councils functioning outside the limelight, for instance out of mosques and from websites.[394]

The Archbishop suggested looking at the possibilities of accommodation with a clearer eye, not to imagine we know exactly what we mean by Sharia, and "not just associate it with what we read about Saudi Arabia or whatever."[395] Together with the highest judge of England and Wales, the United Kingdom has two very influential endorsers of more Sharia for its citizens.

This chapter is a case study about Sharia councils in the United Kingdom.[396] The aim is not only to provide factual information about these councils, but also, by describing the councils' Islamist ideological foundations and practices, to challenge some of the assumptions in multiculturalist discourse. Moreover, what is the relationship between multiculturalism and the accommodation of Islamic fundamentalism?

[394] The number 85 comes from MacEoin & Green 2009. From interviews conducted with Islamic judges, the estimate comes at about ten, namely those in Wembley, Ealing, two in Manchester, Dewsbury, Bradford, Birmingham, Nuneaton, and London. Chief crown prosecutor Nazir Afzal estimates the number of councils at 90 (telephone interview 11 July 2013).

[395] He stated this in an interview with the BBC that same day of the lecture. See for a transcript: 'In full: Rowan Williams interview' (11 February 2008) via http://news.bbc.co.uk/2/hi/uk_news/7239283.stm. On Williams' website it says "or wherever" instead of "or whatever". The BBC's transcript reads "whatever". See: <http://rowanwilliams.archbishopofcanterbury.org/articles.php/707/archbishop-on-radio-4-uk-law-needs-to-find-accommodation-with-religious-law-codes>.

[396] For this case-study I have spoken with Lord Nicholas Phillips, Baroness Caroline Cox, professor of philosophy Anthony Grayling, barristers Charlotte Proudman and Elissa Da Costa-Waldman, Tehmina Kazi of British Muslims for Secular Democracy, professor of Law Maleiha Malik, Anne Marie Waters of ShariaWatch UK, Chief Crown Prosecutor Nazir Afzal, writer and journalist Gita Sahgal, Pragna Patel of the Southall Black Sisters, Charlie Klendijan of the Lawyers' Secular Society, Shaykh Siddiqi of the Muslim Arbitration Tribunal, and dayans Lichtenstein and Elzas of the London Federation of Synagogues. My gratitude also goes to qadis Khola Hasan, Suhaib Hasan, Abu Sayeed and Furqan Mahboob of the Islamic Sharia Council in Leyton, London, and qadis Amra Bone, Muhammad Talha Bukhari and the late Mohammad Naseen of the Birmingham Central Mosque Sharia Council, who have been so kind to accommodate my presence at several hearings. Earlier, I wrote on this topic: Zee, Machteld, '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', *Journal of Religion & Society* 2015, pp. 1-18.

This undertaking consists of several subtasks. First, I explain what multiculturalists understand to be Sharia and the relationship between multiculturalism and Islamic fundamentalism. Second, I describe the Islamist background of Britain's most known and influential Sharia council. Third, I give insight in the practice of Sharia councils. Fourth, having covered that basis, I challenge the desire to combine Sharia councils with human rights and discuss Sharia councils compared to rabbinical courts. Fifth, the Arbitration and Mediation Services (Equality) Bill is discussed, which aims to restrict the remit of Sharia councils. Lastly, I will discuss several secular alternatives to these councils.

Multiculturalists' view of Sharia

So far, it is possible to distinguish positions in this "Sharia council debate". Firstly, there are those denouncing the endorsement of the idea that "it should be possible to choose to have matters settled under Sharia", such as Brown and Cameron. Generally, the idea of endorsing Sharia for British Muslims is not a popular one, to say the least. At the same time, however, and this is particularly important for those with legislative powers, they did not introduce state measures to *counter* Sharia councils. Thus: morally and publicly rejected, but factually and legally unhindered. Condemned, but "laissez-faire". We label this as *tolerance*.

Next to the tolerant position, there are those who are *intolerant* towards Sharia Councils. Examples include the non-governmental organizations One Law for All, the organization Sharia Watch UK, Women Living Under Muslim Laws, IKWRO (Iranian and Kurdish Women's Rights Organisation, the Lawyer's Secular Society, Southall Black Sisters, and member of the House of Lords, Baroness Caroline Cox, who initiated a bill curtailing the extent to which Sharia councils can operate in the United Kingdom.

Thirdly, there are Islamists arguing in favor of Sharia councils in the United Kingdom. For instance, the members of the board of the Islamic Sharia Council make

their case for more Sharia in the West. Then there are Muslim citizens who subscribe to these views. A 2006 poll suggested that forty percent of British Muslims supported "there being areas in Britain which are pre-dominantly Muslim and in which sharia law is introduced".[397] An additional polling agency confirmed these results: 40 percent of Muslims aged between 16 to 24, compared to 17 percent of those over 55, said they would prefer to live under Sharia law in the UK.[398] A year later, another polling agency asked respondents to score this position: "If I could choose, I would prefer to live in Britain under sharia law rather than British law". There was a broad consensus that Sharia was unsuited to the UK: 75 per cent of those over 55 preferred British law, yet this figure dropped as ages went down: 75 per cent of 45-54 year-olds, 63 per cent of 35-44 year-olds, 52 per cent of 25-34 year-olds, and only 50 per cent of 16-24 year-olds.[399]

Half of the UK Muslim youth thus seems to prefer Sharia over democratically established laws, more than the previous generation. But the other half of young adult Muslims *does not*, according to these polls. There is also an active campaign by Muslims against Sharia. Take for instance Shaaz Mahboob, at that time vice chair of British Muslims for Secular Democracy, who 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". He believes that the assumption by the Lord Chief Justice that Sharia law could become a successful alternative form of alternative dispute resolution will only result in further alienating and segregating members of the Muslim communities from the rest of society. Labour MP Khalid

[397] '40 % of British Muslims want Sharia Law', ICM poll 20 February 2006 via <ukpollingreport.co.uk/blog/archives/146>.
[398] '40% of young UK Muslims want sharia law', Poll by UK think tank Policy Exchange 31 January 2007 via <www.wnd.com/2007/01/39942/>.
[399] See Mirza, Munira *et al*., *Living apart together: British Muslims and the paradox of multiculturalism*, London: Policy Exchange, 2007, p. 46, in: 'Sharia Law or One Law for All, p. 12. another poll conducted by the Centre for Islamic Pluralism, which has found that a majority, estimated at a minimum of 65 per cent, 'brusquely repudiated the imposition of sharia in Britain'. [399] 'Our survey shows British Muslims don't want sharia', *The Spectator*, 12 July, 2008. The Centre for Islamic Pluralism is an American think tank, which aim it is to 'Foster, develop, defend, protect, and further mobilize moderate American Muslims in their progress toward integration as an equal and respected religious community in the American interfaith environment', see <www.islamicpluralism.org>.

Mahmood said: “I, along with the vast majority of UK Muslims, oppose any such move to introduce Sharia law here.”[400] Most of the NGOs who run campaigns against Sharia are led by individuals with Islamic roots.

The Egyptian-Dutch writer Nahed Selim said: “If you want to help Muslims, help the right group and not the fossilized fundamentalists who want to see the coming generations grow up according to a misogynist ideology”.[401] More Sharia in the United Kingdom does have an effect on those Muslims who do not want to live under its rules, but who do increasingly face the pressure to do so.

Yemeni-Swiss associate professor Elham Manea (1966), author of *The Arab State and Women’s Rights. The Trap of Authoritarian Governance* (2011), states there are generally three groups of people who call for the introduction of Sharia councils in Western legal systems. Firstly, there are representatives of Islamic organizations representing traditional and conservative readings of Islam – among which *Islamists*. Second, there are academics from mostly a legal and/or an anthropological background.[402] Thirdly, there are high-profile European or North American officials or figures “who seem genuinely concerned about the integration of Muslim communities in their respective countries, and consider the move inevitable for any “successful” integration of Muslims”.[403] I will take the latter two together under the banner of multiculturalism, the fourth position, following tolerance, intolerance, and Islamist.

---

[400] ‘Backlash over call for Sharia’, *Birmingham Mail*, 8 February 2008.

[401] Selim, Nahed, ‘De sharia wordt in Nederland al volop toegepast’ (Sharia is already fully functioning in the Netherlands), *NRC Handelsblad*, 8 Juli 2009.

[402] See for instance these volumes which contain essays by scholars who are generally positive towards some form of accommodation of Sharia: Ahdar & Aroney 2010; Berger, Maurits (ed.), *Applying Shari’a in the West. Facts, Fears and the Future of Islamic Rules on Family Relations in the West,* Leiden: Leiden University Press 2013 and Griffith-Jones, Robin (ed.), *Islam and English Law. Rights, Responsibilities and the Place of* Shari’a, Cambridge: Cambridge University Press 2013. See also Berger, Maurits, ‘Juist blokkeren van shariaraad is dom’ (Actually, blocking a Sharia council is stupid), NRC Handelsblad 15 June 2012 and ‘Sharia council: same pitch, same rules’, Webmagazine Maastricht University 30 October 2012 via < http://webmagazine.maastrichtuniversity.nl/index.php/research/society/item/357-sharia-council-same-pitch-same-rules>

[403] Manea, Elham, ‘Introducing Sharia in Western Legal Systems. When States Legally Sanction Discrimination, *Qantara.de* 19 March 2012, via <http://en.qantara.de/content/introducing-sharia-in-western-legal-systems-when-states-legally-sanction-discrimination>.

However well-intended, multiculturalists do the opposite from what Nahed Selim advised: they do not support those Muslims advocating *against* more Sharia in the United Kingdom. In contrast, they publicly advocate for the accommodation of Sharia in the United Kingdom; Williams and Phillips being the best examples of high-profile officials who are leading the debate. Whether that is by opening up debate about the possibilities or stating there is no reason why the Arbitration Act should not accommodate it, both intellectuals base their conviction on the idea that it is Muslim identity, a pluralist society and religious freedom that warrant accommodation of Sharia. The argument is that more latitude should be given to minorities to resort to "their own" religious laws. The multiculturalist assumption is that being a member of an ethno-religious, in this case Muslim, minority signifies a setback compared to "indigenous" Britons. Legal universalism – the same laws for everyone – is considered discriminatory. The need for Sharia family law is constructed on the idea of a "Muslim identity" which needs to be recognized and accommodated in institutions. Access to Islamic legal institutions is considered emancipatory and just. For the proponents of the accommodation of Islamic family law it seems - morally and principally - plain *wrong* not to grant, at least to a certain extent, juridical autonomy to Islamic judges (*qadis*) and Muslims seeking Islamic legal solutions. 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.[404]

This "new" multiculturalism, as American associate professor of Law Michael Helfand labels it, focuses on the idea that the state needs to recognize that religious communities are independent legal orders with their own sets of rules and practices. Thus, even beyond recognition of minority cultures and not criticizing minority ideas and practices, new multiculturalism adds the need of *legal* autonomy to groups. The idea is that "[c]ultures and religions play a freedom-enhancing role by embedding

[404] See also: Budziszewski, J., 'Natural Law, Democracy, and Shari'a', pp. 181-206 (183), in: Ahdar & Aroney 2010.

shared values and interests into a series of rules and obligations. And, by building institutions to govern and maintain these rules, cultures and religions create communities that promote the core values shared by their membership." Helfand believes that if the state grants autonomy and self-governance to minority communities, this can expand the scope of liberty enjoyed by the group members.[405]

British professor of Law Maleiha Malik is favourable towards accommodating Muslim legal norms. She writes that law can be used as a strategy for the "accommodation of difference". In this sense, law and legal institutions have become more important as tools for the "politics of recognition" as the private identity has become more important in the public sphere. Even beyond individual disputes, the law and its institutions are the basis to sustain a sense of community. When it comes to the integration of Muslims, she contends, "it is important that law and legal institutions do not distort or misrecognise the value of religious norms and practices for those Muslims for whom they have significance." If the law does neglect "[…] important features of an individual's personal identity – e.g. as Muslims – this will cause harm to their sense of personal autonomy and self-respect."[406]

In the case of advocacy on behalf of Sharia councils, it means that multiculturalism now includes the idea that having an Islamic faith is such a vital marker for individuals, that it is justified to have an additional legal system recognized apart from the standing system of law. That also means that multiculturalists who support this idea probably have a positive view towards Sharia. What is that view?

To start: according to a multiculturalist, Sharia is not what I have presented it to be in the previous chapter. Sharia is not the driving force of adherents of a fundamentalist ideology. The sacred law of Islam is not considered "an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all aspects", as noted Arabist Joseph Schacht wrote in *An Introduction to*

[405] Helfand, Michael, 'Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders', *New York University Law Review* 2011, pp. 1231-1305 (1274-1275).
[406] Malik, Maleiha, 'Muslim Legal Norms and the Integration of European Muslims', EUI Working Paper 2009/29, via <http://cadmus.eui.eu/bitstream/handle/1814/11653/RSCAS?sequence=1>.

Islamic Law in 1964.[407] It is *not* considered as the aggregate of binding instructions following from Islamic sources such as the Koran and hadiths which function as "a totalizing force that inspires and regulates all aspects of public and private life" as sociology professor Haideh Moghissi stated.[408]

Moreover, the following is not considered as "true" representations of Islam – although adherents themselves vehemently disagree – Wahhabism, Salafism, Islamism, the regimes of Saudi Arabia and Iran, the Muslim Brotherhood, Al Qaeda (The Base), the Egyptian Islamic Jihad, Hizb ut-Tahrir (Liberation Party), Jamaat-e-Islami (Assembly of Islam), the Taliban (The Students), Al-Shabaab (the Youth), Hamas (Enthusiasm), Islamic State, Boko Haram (western education is forbidden).

In addition, the following is not "true" Sharia as multiculturalists see it: Tariq Ramadan's and Yusuf al-Qaradawi's Middle Way Islamist method to turn Europe into a Sharia state, no freedom to leave Islam as apostasy is a capital crime, intolerance towards other religions and atheism, no freedom of speech, denouncing democracy as a man-made infidel concept, brutal punishments following from *hudud* laws, no freedom for women to walk around with their heads uncovered, unequal inheritance settlements for men and women, child marriage, forced marriage, the duty of (sexual) obedience for women to their spouses, no equal right to divorce for men and women, homosexuality as a crime, slavery, polygamy, Nazi-like Jew-hatred, violent jihad, vigilantism, segregation of the sexes, taqiyya, promoting ghettoization for diasporic Muslims – all this is *not* considered an adequate representation of Sharia according to multiculturalists.[409] All this is considered a *deviance* from what Sharia "really" is.

---

[407] Schacht 1982, p. 1.

[408] Moghissi 1999, pp. 69-70.

[409] Professor of International Law Dominic McGoldrick states that the following rules or practices would clearly be problematic in terms of the European Convention of Human Rights: severe punishments for crimes—death penalty executions or limb amputations; stoning or imprisoning women for adultery; the criminalisation of sexual activities outside of marriage and for homosexual or lesbian activities; non-recognition of the transgendered; certain rules concerning marriage and polygamy, even with more modern legislative and administrative limitations and restrictions on it that make polygamy difficult; honour killings or attacks; Talaq, i.e. unilateral divorce by men, without the consent of the wife, even with more modern legislative and administrative limitations and restrictions on it; allowing women divorce with their husband's consent but only upon the basis of foregoing financial benefits; child custody only for fathers; lack of succession rights for women, illegitimate children and female children; penalties for apostasy; and the absence adoption. See:

Well, what does it deviate from, one may ask? What *do* multiculturalists consider an accurate representation of Sharia? When studying multiculturalist thought, what Sharia is considered to "really" be, either a) remains (intentionally or unintentionally) vague, b) is unaddressed and/or c) is *not* the content of a fundamentalist ideology aiming to subvert both Muslims and non-Muslims to a totalizing force that inspires and regulates all aspects of public and private life.[410]

Above, I have sketched several positions in the debate of accommodating Sharia, ranging from intolerance (e.g. NGOs and Baroness Cox) to those endorsing more Sharia, e.g. Islamists. To illustrate the *multiculturalists*' view of Sharia, it is important to analyze the speeches made. I will cite parts of the speeches and highlight some of what I consider the most important.

Former Archbishop Rowan Williams proposes to rethink the nature of universal British law in the light of Islamic law and Islamic identity. He wonders what degree of accommodation the law of the land can and should give to minority communities with their own strongly entrenched legal and moral codes. He encouraged listeners to consider "a scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters. […] This may include aspects of marital law, the regulation of financial transactions and authorised structures of mediation and conflict resolution – the main areas that have been in question where supplementary jurisdictions have been tried". He stated that accommodating Sharia law to a certain extent was unavoidable. Moreover, it was nothing *new*: "as a matter of fact certain provisions of

---

McGoldrick, Dominic, 'Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws', *Human Rights Law Review* 2009, pp. 603-645 (621-622).

[410] For example, in the beginning of his lecture Williams states: "This lecture will not attempt a detailed discussion of the nature of sharia, which would be far beyond my competence; my aim is only, as I have said, to tease out some of the broader issues around the rights of religious groups within a secular state, with a few thoughts about what might be entailed in crafting a just and constructive relationship between Islamic law and the statutory law of the United Kingdom." Williams thus intentionally plans to not to discuss the nature of Sharia in detail.

Sharia are already recognized in our society and under our law; so it's not as if we're bringing in an alien and rival system".[411]

He recommends to dispel "one or two myths" about Sharia: "And what most people think they know of *sharia* is that it is repressive towards women and wedded to archaic and brutal physical punishments; just a few days ago, it was reported that a 'forced marriage' involving a young woman with learning difficulties had been 'sanctioned under *sharia* law' – the kind of story that, in its assumption that we all 'really' know what is involved in the practice of *sharia*, powerfully reinforces the image of – at best – a pre-modern system in which human rights have no role. The problem is freely admitted by Muslim scholars." The problem here, according to Williams, is not that Sharia is repressive towards women, that it encompasses brutal punishments, or that forced marriage is sanctioned under Sharia. The problem is that these practices *reinforce a negative image* of Sharia, an image of "a pre-modern system in which human rights have no role".

It also becomes clear that Williams thinks that the "assumption that we all 'really' know what is involved in the practice of *sharia*" is unfounded. Pinpointing what Sharia is in a coherent and accessible manner (as I have tried to do by providing a historical account of the roots of (political) Islam, and by systematizing its sources, its implications and its practical consequences) is something at times considered by some scholars as *essentialist*.[412] Essentialism is a term that is sometimes used in a derogatory way, especially when it comes to the multicultural debate. Generally, essentialism may refer to the attribution of a set of immutable features to entities (such as groups, cultures, or religions) which are considered necessary to establish its identity and function.[413] The point is that to a multiculturalist it is a mistake to

[411] 'In full: Rowan Williams interview' (11 February 2008) via <http://news.bbc.co.uk/2/hi/uk_news/7239283.stm.>

[412] Otto, Jan Michiel, 'The compatibility of Shari'a with the rule of law. Fundamentalist conflict: between civilisations? Within civilisations? Or between scholars?', pp. 137-154 (141-142), in: Groen, Adriaan in 't *et al.* (eds), *Knowledge in Ferment, Dilemmas in Science, Scholarship and Society*, Leiden: Leiden University Press 2007. Maleiha Malik states: "An essentialist approach fails to recognise the diversity that can exist within a social group." (Malik 2009, p. 4.)

[413] See: Cartwright, Richard, 'Some Remarks on Essentialism', *The Journal of Philosophy* 1968, pp. 615-626.

reduce Sharia to a smaller set of characteristics, especially if this set has a negative connotation. Rather, multiculturalists point out the large variety of (the practice of) Sharia and the impossibility of generalization. Thus, stating that Sharia is (merely) about repression of women, brutal punishments and forced marriage is considered a misrepresentation.

But, what *is* a correct representation in the eyes of multiculturalists then? That is the following.

Sharia is considered to consist of "*Universal* principles: as any Muslim commentator will insist, what is in view is the eternal and absolute will of God for the universe and for its human inhabitants in particular; but also something that has to be 'actualized', not a ready-made system. […] there is no single code that can be identified as 'the' *sharia*." And: "Thus, in contrast to what is sometimes assumed, we do not simply have a standoff between two rival legal systems when we discuss Islamic and British law. […] To recognise *sharia* is to recognise a *method* of jurisprudence governed by revealed texts rather than a single system." Moreover, as Williams quoted another Islamic scholar, "[…] that an excessively narrow understanding sharia as simply codified rules can have the effect of actually undermining the universal claims of the Qur'an." [sic]. Williams expressed expectations regarding the flexibility of Sharia in itself, as it is a body of universal principles which are open for interpretation.[414] He stated: "[…] far from being a monolithic system of detailed enactments, *sharia* designates primarily – to quote Ramadan again – 'the expression of the universal principles of Islam [and] the framework and the thinking that makes for their actualization in human history'".

Rather than a body of restrictions and obligations, Middle Way Islamists and multiculturalists portray Sharia as a source of *universal* principles and values.

[414] He referred to the opening of the doors of *ijtihad*, which is independent interpretation of Islamic sources. Even though there are many theorists who argue that Sharia is open for interpretation up to the level where it becomes a body of thought in line with secular notions regarding freedom and equality, it is questionable whether this will happen in an effective manner– especially as fundamentalists are very well organized and well-funded. See on *ijtihad* also Manji, Irshad, "Operation Ijtihad", pp. 158-187, in: *The Trouble with Islam. A Muslim's Call for Reform in her Faith*, New York: St. Martin's Press, and An-Na'im, Abdullahi, *Islam and the Secular State: Negotiating the Future of Shari'a*, Cambridge, Massachusetts: Harvard University Press 2008.

Apparently, there are Islamic principles that are valid for everyone, everywhere, at any time, and Sharia provides us with a framework and method to uncover these. Williams goes along with referring to Islamic principles as *universal*.[415] And: "But while such universal claims are not open for renegotiation, they also assume the voluntary consent or submission of the believer, the free decision to be and to continue a member of the *umma.*" Lastly, "*Sharia* is not, in that sense, intrinsically to do with any demand for Muslim dominance over non-Muslims."

Phillips also believed that Sharia is generally falsely negatively portrayed. "It has become clear to me that there is a widespread misunderstanding in this country as to the nature of Shari'a law. Shari'a consists of a set of principles governing the way that one should live one's life in accordance with the will of God. These principles are based on the Qu'ran, as revealed to Muhammad and interpreted by Islamic scholars. These principles have much in common with other religions. They do not include forced marriage or the repression of women. Compliance with them requires a high level of personal conduct, including abstinence from alcohol. 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. What would be in conflict with the law would be to impose certain sanctions for failure to comply with Shari'a principles. Part of the misconception about Sharia is the belief that Shari'a is only about mandating sanctions such as flogging, stoning, the cutting off hands or death for those who fail to comply with the law. And the view of many of Shari'a law is coloured by violent extremists who invoke it, perversely, to justify terrorist atrocities such as suicide bombing, which I understand to be in conflict with Shari'a principles. There can be no question of such sanctions being applied to or by any Muslim who lives within this jurisdiction."

[415] Stressing the universality of Islamic principles is a rather remarkable coming a) from the head of the *Anglican church* b) on behalf of *minorities* – for, if Islamic principles are for everyone and everywhere, there is no need for the suffix "Islamic" and the entire human race can submit to them (which is obviously the purpose of Islamists in the first place).

Phillips is convinced that the principles of Sharia simply do not include terrorism, the repression of women and forced marriage – the latter described by Williams as something to do with custom and culture rather than directly binding enactments by religious authority".[416] Rather than simply stating unacceptable parts of Sharia are un-Islamic – as Phillips does, Williams analyses "neuralgic questions of the status of women and converts" in more depth.

He stated that recognition of the authority of a communal religious court, 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", And: "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, author of *Multilevel Jurisdictions: Cultural Differences and Women's Rights* (2001), calls "transformative accommodation". She argues that it is institutionally feasible for the state to simultaneously respect deep cultural differences and to protect the rights of vulnerable group members, in particular women.[417]

---

[416] See on Imams and child marriages in the UK for instance: 'Britain's Underage Muslim Marriage Epidemic' Gatestone Institute 15 October 2013, via http://www.gatestoneinstitute.org/4017/uk-muslim-underage-marriage and 'The British child brides: Muslim mosque leaders agree to marry girl of 12... so long as parents don't tell anyone' *Dailymail.co.uk* 9 September 2012, via http://www.dailymail.co.uk/news/article-2200555/The-British-child-brides-Muslim-mosque-leaders-agree-marry-girl-12--long-parents-dont-tell-anyone.html.

[417] Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, Cambridge: Cambridge University Press 2001, pp. 4-5. See also: Shachar, Ayelet, 'Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law, *Theoretical Inquiries in Law* 2008, pp. 572-607 (302): "Counter-intuitively, the qualified recognition of the religious tribunal by the secular state may ultimately offer an effective, non-coercive encouragement of egalitarian and reformist change from within the religious tradition itself. The state system, too, is transformed from strict separation to regulated interaction. In this way, the "multilayered" or intersectionist identity of the individuals involved may be fostered. This approach also discourages an underworld of unregulated religious tribunals and offers a path to transcend the either/or choice between culture and rights, family and state, citizenship and islands of "privatized diversity."" How this should be realized remains vague and unaddressed. See for another contribution that calls for the accommodation of

Williams argued as well that the objection to "an increased legal recognition of communal religious identities can be met if we are prepared to think about the basic ground rules that might organise the relationship between jurisdictions, making sure that we do not collude with unexamined systems that have oppressive effect or allow shared public liberties to be decisively taken away by a supplementary jurisdiction." From this we may conclude that any accommodation of family law that is part of Sharia should be done in such a fashion that it does not deprive individuals of their (human) rights. How this should be practically realised remains vague and unaddressed.

The issue is that in reality women's rights are not secured in an alternative Islamic jurisdiction – as I will explain below. That is one of the main reasons that Williams' speech caused such uproar. Four days after his speech, Williams dropped his call for Sharia to apply to marital law, and instead pointed to "sensitive" questions about the status and liberties of women.[418] Yet, Phillips stated that "[i]t was not very radical to advocate embracing Shari'a 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."

The relationship between multiculturalism and Islamic fundamentalism

Both Williams and Phillips said that they did not want to suggest that there be parallel systems of law. Nonetheless, Williams also stated that the purpose of the lecture was

---

religious law in combination with upholding individual rights, while remaining vague on how this should be done: Malik, Maleiha, Malik, *Minority Legal Orders in the UK. Minorities, Pluralism and the Law*, London: The British Academy 2012.

[418] 'Happy clappy Rowan repents in Sharia storm', *Daily Mail*, 12 February 2008.

to share “a few thoughts about what might be entailed in crafting a just and constructive relationship between Islamic law and the statutory law of the United Kingdom”. He questioned “our commitment to legal monopoly” and analysed the conditions under which a “supplementary jurisdiction” would be acceptable. Phillips stressed that religious minorities may be exempted from certain laws. Likewise, he suggested, having to live under a singular jurisdiction which is the product of a Judeo-Christian culture while having a dual identity as both Muslim and British citizen is unfair, because it constitutes inequality compared to indigenous Britons. That is all the more the case, as Jewish courts have long existed in Britain, as both Phillips and Williams reason.

They do not support the introduction of Sharia that embodies corporal punishments. Williams also makes it clear that “an increased legal recognition of communal religious identities” may not have a detrimental effect on the status of women. That aside, they argue that for British Muslims it would be unsatisfactory and problematic to live as a citizen under the rule of uniform law. Their focus is on religious *family law*. “There needs to be access to recognised authority acting for a religious group: there is already, of course, an Islamic Shari'a Council, much in demand for rulings on marital questions in the UK; and if we were to see more latitude given in law to rights and scruples rooted in religious identity, we should need a much enhanced and quite sophisticated version of such a body, with increased resource and a high degree of community recognition, so that 'vexatious' claims could be summarily dealt with.”[419]

Up until this point we can summarize the claims by the former Archbishop and Lord Chief Justice as follows:

- Sharia is unfortunately and erroneously portrayed as something that should be denounced, namely as a single body of laws merely concerning the repression of women and cruel and unusual punishments.

[419] Ahdar & Aroney 2010, pp. 297.

- It *actually* is a body of thought that inspires Muslims in the form of certain universal principles. These universal principles are tremendously important for believers, who choose freely to be part of a community whose members are unified under this set of principles.
- Therefore, rather than making Muslims merely adhere to a uniform set of British laws, we should accommodate parts of Islamic law – mainly financial and family law – in the name of equality, especially because Jewish courts are allowed to function as well.
- On one condition: that this supplementary jurisdiction may not be repressive towards women.

What these universal principles are and what it practically means to accommodate Sharia remains unaddressed.[420] Both multiculturalist speeches lack an answer to the question *how* Sharia family law should be accommodated and what such an accommodation would involve. For instance, would it require new laws? What would such laws look like? Should the benefits of Sharia be incorporated in educational programs? Should the United Kingdom maintain formal ties with al-Azhar University for Sharia instructions? Should state courts accept Sharia when parties want to? Should Sharia councils be publicly funded? Should Islamic judges receive government-supervised training? Should barristers be educated in religious laws? A marble court house in the Temple area for an official British Sharia council? Or should we merely not think too critically of Sharia councils?

Moreover, what would it *practically* mean for a man to have Islamic family law accommodated? For a woman? For children? What *specific* problems would be addressed by accommodation of Islamic family law? What solutions would it bring about? Are there benefits other than "recognising Muslim identity"? How – specifically – are the rights of women protected in councils based on a body of thought that is

[420] On the two speeches, British scholar John Bowen stated: "These two addresses conveyed an authoritative stamp of approval, but did not clarify what it means to "recognise sharia." See Bowen, John, 'How Could English Courts Recognize Shariah?', *University of St. Thomas Law Journal* 2009-10, pp. 411-435 (411).

grounded in the belief that justice is found in the recognition of dissimilarities between men and women? Dissimilarities that require different rights, duties and punishments for either sex? On the basis of which "universal principles" are disputes to be settled? In short, how can we assess multiculturalist proposals to consider "a scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek to resolve certain carefully specified matters", if it is so vague?

Perhaps it is unfair to hammer on the lack of functional content, as Williams merely suggested looking at the possibilities of accommodation "with a clearer eye, not imagine we know exactly what we mean by Sharia, and not just associate it with what we read about Saudi Arabia or whatever."[421] Yet, I do not think it is unfair. I actually believe it is specifically important to point out the generally vague and optimistic character of these multiculturalist contributions to the Sharia debate. It is specifically important to draw attention to the fact that what multiculturalists envision for society regarding the accommodation of Sharia remains (intentionally or unintentionally) vague, is unaddressed and/or is focused on stating what Sharia is not, viz. the content of a fundamentalist ideology. It is vitally important because multiculturalist thought of this kind *creates space for the manifestation of Islamic fundamentalism*.[422] Multiculturalism emphasizes the "moral right" to have an identity recognized, an identity that differs from the dominant culture. Multiculturalists want to rid Sharia of its negative components and promote pondering over the possibilities of accommodating the remaining part. But what is that? What does that mean? This generally uncritical and positive attitude is benefiting Islamism.

The NGO Women Living Under Muslims Laws (WLUML) is represented in over 70 countries and provides information about codified and uncodified Islamic

[421] He stated this in an interview with the BBC that same day of the lecture: 'Archbishop on Radio 4 World at One - UK law needs to find accommodation with religious law codes', 7 February 2008, via <http://rowanwilliams.archbishopofcanterbury.org/articles.php/707/archbishop-on-radio-4-uk-law-needs-to-find-accommodation-with-religious-law-codes>.

[422] See also David S. Pearl, who contends that conflict between Islamic law and English law is avoided, inter alia, by a tolerant attitude which "[…] has allowed space for the unofficial development of new hybrid rules". In: Pearl, David S., *Islamic Family Law and Its Reception by the Courts in England*, Cambridge: Islamic Legal Studies Program, Harvard Law School 2000, p. 4.

laws. It aims to strengthen women's individual and collective effort in search of equality and their rights.[423] In secular states, WLUML is active against the increasing demands that Islamic laws be recognized. It also purports to challenge the idea that there is a "homogenous Muslim world." In 2006, two years before the former Archbishop and Lord Chief Justice made their contribution to more Sharia in Britain, WLUML published a report: "Recognizing the Un-Recognized: Inter-Country Cases and Muslim Marriages & Divorces in Britain". The report's authors lament the call for formal recognition of Muslim family Law in the United Kingdom. Interestingly, they find that those demanding this – Sharia councils themselves and "politico-religious organizations" are unclear about what it precisely is that they want to see recognized. The report gives various reasons why the precise content of the demands is unclear.

Firstly, given the diversity within the Muslim community, it would be unlikely that consensus could be reached about the content of a specific demand of Islamic family law. If efforts to that end were to be made public "[…] that would embarrassingly explode the myth that there has always been a monolithic way of 'being Muslim'." Also, what WLUML calls "politized elements in the community" – what I would call Islamists – are well aware that the state would in practice never support formal recognition of separate laws. The report concludes that "[…] given the above two factors, it is far more powerful to continue to make vague demands for recognition as this prevents open public debate both within the community and beyond on specificities while also giving those who make such demands the possibility of claiming for themselves the right to represent the community and its needs vis á vis British civil law. Indeed, it is in the best interests of the Shariah councils, for example, that Muslim family laws in Britain remain unregulated and uncodified because this then requires constant reference to the Shariah councils for interpretation."[424]

[423] "About WLUML", via < http://www.wluml.org/node/5408>
[424] 'Recognizing the Un-Recognized: Inter-Country Cases and Muslim Marriages & Divorces in Britain', Women Living Under Muslim Laws 2006, p. 81.

The lack of functional concreteness on behalf of multiculturalists is particularly relevant to establish. Both multiculturalists and religious fundamentalists place religion as a core unifier of individuals within a community. Both Islamists and multiculturalists want Muslims to be able to live under Sharia. Multiculturalists and Islamists do differ regarding the *extent* to which that should be (made) possible. But both make the case that that is what is needed by Muslims – and a sizeable part of the Muslim population agrees. What it is that Islamists want is clear: a Sharia state for a unified umma, although they may well coach this in terms which are easier to stomach, as Qaradawi also believes works best. As I wrote in the previous chapter, it is a pragmatic decision to use "dawa language" – doublespeak, *taqiyya* – that avoids negative associations for western audiences. This also involves a language that avoids specifying the actual implications of introducing more Sharia. The use of "dawa language" is problematic, because it leads people astray as to the actual plans of Islamists to introduce more and more Sharia in the West. From very early on, the European Council of Fatwa and Research – presided over by Qaradawi – published several fatwas about Islamic family law. They urged European Muslims to demand official recognition of Islam from European governments, including the right to apply Sharia in cases of marriage, divorce and inheritance. In a later fatwa, it was repeated that as far as family law was concerned, European Muslims must deal with Muslim judges.[425]

This Middle Way Islamist approach to guide Muslims towards Sharia compliance in Europe is supported by multiculturalists that publically state that Muslim minorities have the "right" to have private matters settled by their "own" religious laws.

That multiculturalism, when aimed at accommodating Muslim family laws, aids Islamism is true in the wide sense, but in this specific case Williams and Phillips

[425] See Riccardi, Letizia, 'Women at Crossroads between UK Legislation and Sharia Law', *Journal of Law and Social Sciences* 2014, pp. 86-91 (86); see also Caeiro, Alexandre and Gräf, Bettine, 'The European Council for Fatwa and Research and Yusuf al-Qaradawi', pp. 119-121 (120), in: Peter, Frank and Ortega, Rafael (eds.), *Islamic Movements of Europe*, London: I.B. Tauris 2014.

actually benefit Islamists in a practical way, too. Consider this: in his speech, Williams quotes Tariq Ramadan, who is a Middle Way Islamist who uses different messages for his Muslim following and for a Western non-Muslim audience (*taqiyya*).[426] To the Western audience, Ramadan presents Sharia as a set of values and principles, a message that is somewhat more easily digestible than the version I have offered in the previous chapter. He writes that Sharia is primarily a question of values: justice, equality, freedom.[427] Yet, in his books and cassettes, available in radical Islamist bookstores, he praises the teachings of his grandfather Hassan al-Banna, the founder of the Muslim Brotherhood, and firmly supports Qaradawi.[428] That Williams draws on Ramadan's work to make a case for more Sharia in the United Kingdom, and subscribes to Islamist doublespeak that Sharia is not a body of laws but a set of principles, is another indication that multiculturalism gives Islamic fundamentalism oxygen.

The same can be said of Phillips, who states that Muslims living in Britain "are well represented by a variety of groups and individuals, including the Muslim Council of Britain, whose aims include the fostering of better community relations and working for the good of society as a whole." The Muslim Council of Britain is an umbrella organisation that comprises branches of the Muslim Brotherhood and is connected to Jamaat-e-Islami (one of the most influential Islamist organizations).[429] Its founder and (up to 2006) secretary-general, Iqbal Sacranie, is a leading British Islamist.[430] Like Ramadan, Sacranie uses the strategy of "dawa language". He has spoken of the importance of "championing justice and promoting tolerance through constructive engagement with society as a whole […]". On the other hand, he has also said of author Salman Rushdie "[d]eath, perhaps, is a bit too easy for him. His mind must be tormented for the rest of his life unless he asks for forgiveness to

[426] Wiedl 2009 and Fourest 2008.
[427] Ramadan, Tariq, 'Following *shari'a* in the West', pp. 245-255 (247), in: Griffith-Jones, Robin (ed.), *Islam and English Law. Rights, Responsibilities and the Place of* Shari'a, Cambridge: Cambridge University Press 2013.
[428] Phillips 2012, p. 262.
[429] Vidino, Lorenzo, *The New Muslim Brotherhood in the West*, New York: Columbia University Press 2010.
[430] See: 'Rushdie in hiding after Ayatollah's death threat', *The Guardian* 18 February 1989, via <http://www.theguardian.com/books/1989/feb/18/fiction.salmanrushdie>.

Almighty Allah." Sacranie has called for legislation criminalizing any defamation of Muhammad's character, as it is forbidden under Sharia.[431] He has supported Qaradawi, labelled Israel "a Nazi state" and compared Hamas suicide bombers to Mandela and Ghandi, stating all are freedom fighters.[432]

Moreover, in a music video, singer Deepika Thathaal (artist name Deeyah Khan) walks in a burka, which she takes off to reveal herself in bikini. She was threatened, spat on and was even once pepper sprayed during her performances. At that time, Thathaal could not walk around in Britain without the constant presence of bodyguards. Then Deputy Secretary General of the Muslim Council of Britain, Daud Abdullah, released a statement saying: "Many Muslim women do perform to audiences of other women at weddings, for example, because the sexes are strictly segregated. Those performers enjoy a good career. It's when women perform for wider, mixed audiences that differences of opinion emerge [...] These objections are based on the Islamic view that women should not draw unnecessary attention to themselves, because of the impact this will have on a male audience. The moral framework of Islam has already been laid down and women should not push beyond its boundaries for the sake of commercial gain."[433] This part of the Islamist "moral framework" is emphasized by the Muslim Council of Britain, yet – ironically – ignored or downplayed by Phillips, who gives his public support of the Muslim Council of Britain as well as of parts of Sharia for British Muslims.

Multiculturalists do not want a Sharia state, but what they do want is mostly limited to emphasizing a communal need for shared values and rejecting what is deemed a "too negative" focus on Sharia. Williams stated that we should look at the possibilities of accommodating Sharia "with a clearer eye". Also, we are not to imagine we know exactly what is meant by Sharia. But *who* may not imagine knowing exactly what is

[431] 'Just How Moderate is Iqbal Sacranie?', *MCBWatch* 4 August 2005, <http://mcbwatch.blogspot.co.uk/2005/08/just-how-moderate-is-iqbal-sacranie.html>
[432] Phillips 2012, p. 153.
[433] Murray & Verwey 2008, pp. 85-89.

meant by Sharia? Multiculturalists? Legal universalists? Or Islamists? May Islamists imagine they know what they mean by Sharia? This question is particularly interesting in combination with Williams' remark that we should "not just associate it with what we read about Saudi Arabia or whatever."[434] Let us see if the claims made by the most senior cleric and the most senior judge are justifiable in the light of Sharia councils in the United Kingdom.

Behind the Islamic Sharia Council

In his lecture, Williams specifically devoted attention to the London-based "Islamic Shariah Council". He said: "[t]here needs to be access to recognised authority acting for a religious group: there is already, of course, an Islamic Shari'a Council, much in demand for rulings on marital questions in the UK; and if we were to see more latitude given in law to rights and scruples rooted in religious identity, we should need a much enhanced and quite sophisticated version of such a body, with increased resource and a high degree of community recognition, so that 'vexatious' claims could be summarily dealt with." This is the most concrete suggestion he has to offer. This Sharia council needs to be sophisticated and awarded greater resources and recognition. May we associate it with what we read about Saudi Arabia?

"The Islamic Sharia Council" is based in Leyton, East London. It is the most "professional" and well-known one. It was the focus of BBC's *Panorama* documentary *'Secrets of Britain's Sharia Councils'* in 2013. It is located in a terraced house with wheelchair access, a reception, and has a website with downloadable forms. It was founded in 1982, when representatives of ten Islamic centres decided to establish "The Islamic Shari'a Council" as "a quasi-Islamic Court".[435] On its

[434] He stated this in an interview with the BBC that same day of the lecture: 'Archbishop on Radio 4 World at One - UK law needs to find accommodation with religious law codes', 7 February 2008, via <http://rowanwilliams.archbishopofcanterbury.org/articles.php/707/archbishop-on-radio-4-uk-law-needs-to-find-accommodation-with-religious-law-codes>.
[435] http://www.islamic-sharia.org/aboutus/

website, it says: “The objective of the Council was not just to guide the Muslims in matters of their religion and to issue fatwas when needed, but also to create a bench of ulama’ who would function as Qadis (Islamic judges, MZ) in matters such as matrimonial disputes that were referred to them. The creation of the ISC was thus a manifestation of the will of the Muslim community and a reflection of their collective desire to manage their personal affairs. The concept of the Council was the brainchild of the late Syyed Mutawalli ad Darsh (who was Imam at Regent’s Park Mosque at the time) and Dr Suhaib Hasan (who is the Secretary of the ISC at the moment).”[436] This initiative of founding “a quasi-Islamic court” was an enterprise by Islamic fundamentalists, rather than by individuals who seek to help Muslims answer religious questions. It was their full intention to create a “semi-legal system”.

On his personal website, Suhaib Hasan explains why he was one of the founders of the Islamic Sharia Council. He writes: “Is this community not permitted to arrange its personal affairs itself? What about issues of personal law, such as religious marriage, religious divorce, inheritance and endowments? According to the Fiqhi perspective and to historical realities, it is perfectly natural for religious minorities to wish to arrange such issues within their own communities. Muslim jurists, especially in the Iberian peninsula after the fall of Granada in 1492 when many Muslim communities were left under Christian rule, emphasised the importance of establishing a limited semi-legal system in issues of personal law.”[437]

[436] http://www.islamic-sharia.org/history-of-isc/

[437] He quotes jurisprudence from the four Sunni schools of thought to substantiate this position. From the Hanafi school of law, for instance, Hasan quotes “[…] if there is no Sultan nor someone to deputise him, as in the cases of Muslim cities such as Cordoba where non-Muslims had taken control, it is incumbent upon the Muslims to agree upon someone from among them who can be appointed as ruler, and who can then appoint a Qadi […].” Or, from Maliki law: “Wherever there is no Sultan or there is an unjust Sultan who does not care about the limits laid down by Allah, then the trustworthy and the people of knowledge stand there in the place of the Sultan.” The Shafi’i school has a similar point of view: “If the time is devoid of an Imam or a Sultan who has powers to run the affairs (of the country), then all matters are referred to the scholars. It then becomes incumbent upon the people, to whichever class they belong, to refer back to their scholars and to abide by their judgement in all matters. If they do that, they are guided to the right path. They will be the scholars and the rulers. […]. Lastly, from Hanbali law, most prevalent in Saudi Arabia, Suhaib Hasan quotes: “If a town loses its Qadi, the people should appoint someone as a Qadi for themselves. His orders and rulings are binding as long as there is no Imam to rule over them.” See: Hasan, Suhaib, ‘Muslim family law in Britain. A paper submitted to the international family law conference on 14 may 2014 at the University of Islamabad’, 20 May 2014, via <http://sheikhsuhaibhasan.blogspot.co.uk/2014/05/muslim-family-law-in-britain.html>.

"The establishment of such a religious body is not unique to the Muslim community", writes Hasan on his blog. "The Jewish minority in Britain has been present for over 350 years and has set up the Beth Din for a similar purpose. Other religious minorities such as the Sikhs and Hindus have also established alternative dispute resolution services for their respective communities."

That is correct, and, like multiculturalists, the Islamic fundamentalists of the Islamic Sharia Council focus on the Muslim community as a collective with special needs. That Jewish Battei Din – rabbinical courts – have been operating in the United Kingdom as well is an argument put forward by both multiculturalists and Islamists. It would be a matter of unequal treatment of Muslims if they were not allowed to have their private legal institutions, so the argument goes.

There is certainly a degree of overlap between religious family law institutions – which is further discussed below. There are indeed fundamentalist, or orthodox, Jewish councils. There are significant similarities and differences between Jewish and Islamic councils. One essential difference is that the representatives of the Islamic Sharia Council support, promote and activate the political ideology of Islamic fundamentalism, of political Islam. This means that beyond imposing Islamic family law on Muslims (which would be undesirable enough), the Sharia Council that Williams wants to accommodate consists of individuals who wish to turn the United Kingdom into a Sharia state and impose Islamic law on to the state. I will discuss three individuals to support this claim: Syyed Mutawalli ad-Darsh (founder of the Islamic Sharia Council, qadi (judge) and first president), Suhaib Hasan (founder, qadi and secretary) and Haitham al-Haddad (qadi and treasurer).

Firstly, there is the founder of the Islamic Sharia council, the late Egyptian-born Shaikh Syyed Mutawalli ad-Darsh (1930-1997). In 1970, the rector of the – fundamentalist hotbed[438] – al-Azhar University and he introduced a plan to launch international dawa. This took ad-Darsh to London as the imam of Regent's Park

[438] 'Kweekschool van het kalifaat' (Breeding Ground for the Caliphate), *NRC Handelsblad* 28 March 2015.

Mosque. As I wrote in the previous chapter, it was in the 1970s and 80s that the Muslim Brotherhood went global, backed by Saudi funding.

Supported by the Egyptian government, ad-Darsh publicly pushed for official recognition of as much Islamic family law as possible in the United Kingdom from the mid-70s onwards. His views were fundamentalist. For instance, he did not want to agree on specifying a minimum age for marriage,[439] nor was he willing to accept the legitimacy of marriage between a Muslim woman and a non-Muslim man. In 1982, he founded the first Sharia council and became a columnist and broadcaster, widely influencing the next generation of Muslims.

In 1992, he participated in a *fiqh* seminar themed "Muslims in the West" in France. It was hosted by the *Union des Organisations Islamiques de France*, which is closely connected to the International Muslim Brotherhood. He spoke alongside a variety of scholars, many from Saudi Arabia. Other participants included the late Syrian Muslim Brotherhood leader Abd al-Fattah Abu Ghudda, the late Lebanese and French Muslim Brotherhood leader Faisal Mawlawi, and present international Muslim Brotherhood leader Yusuf al-Qaradawi. It was the meeting that laid the foundation for *fiqh-al-aqalliyat*, jurisprudence for Muslim minorities in the West, the Middle Way towards a Sharia state (as discussed in the previous chapter). Many participants were to join the board of the European Council for Fatwa and Research (founded in 1997), currently presided over by Qaradawi.[440]

In the mid-90s, ad-Darsh was one of the first to use the internet to promote Islamism. In an interview two years before his death, he stated that he fully sympathised with the ideas of the international Muslim Brotherhood.[441]

---

[439] Ad-Darsh on child marriage: "There is no minimum age. The *wali*, guardian, of the children, male or female, has the right to conduct a marriage agreement on their behalf, as long as there is an interest for both parties." In: Wiegers, Gerard, 'Dr. Sayyid Mutawalli ad-Darsh's fatwas for Muslims in Great Britain: The voice of official Islam?', pp. 178-191 (188), in: Maclean, Gerald, (ed.), *Britain and the Muslim World*, Cambridge: Cambridge Scholars Press 2011.

[440] Who is now banned from entering the United Kingdom (as well as the United States), see 'Controversial Muslim cleric banned from Britain', *The Guardian* 7 February 2008.

[441] Wiegers 2011, pp. 178-191.

Now Shaikh Maulana Abu Sayeed is qadi and president. He stated that there clearly is not such a thing as rape in marriage, as sex is part of marriage. He said the "aggression" of reporting the husband to the police was greater than the "minor aggression" of forcing a woman to have sexual intercourse against her will. Sayeed argued that many married women who alleged rape were lying, because rape is a ground for divorce. "Why it is happening in this society is because they have got this idea of so-called equality, equal rights."[442]

Secondly, I would like to focus on the other founder of the Islamic Sharia Council, the earlier mentioned Shaikh Suhaib Hasan (1942). On his personal blog, Hasan shares some childhood memories from his home in the state of Malairkotla, India. In his own words, it was a childhood fully devoted to Jamaat-e-Islami – next to the Muslim Brotherhood, one of the first and most influential Islamist organizations.[443] Hasan's father had joined right after it was founded in 1941, and actively preached on its behalf. "No exaggeration if I say that I have been brought up in the lap of Jamaat", Hasan writes. One of his most pressing childhood memories "was the day when our whole house witnessed a lot of sadness and gloom. That was the day when the papers brought the news of the hanging of a great scholar, an Islamic activist, Abdul Qadir Audah, a leader of the Muslim Brotherhood in Egypt." [444]

After his childhood, Hasan studied in Saudi Arabia and worked in East Africa before moving to Britain in the 1960s.[445] Now he is secretary and judge of the Islamic Sharia Council, spokesman of Sharia law for the Muslim Council of Britain, and member of the board of Qaradawi's European Council for Fatwa and Research.

On his blog, Hasan states he wants a "limited semi-legal system in issues of personal law" based on Sharia for British Muslims. He publicly argues that Britain

[442] 'Rape in marriage is no crime says cleric', *Daily Express* 15 October 2010, via <http://www.express.co.uk/news/uk/205474/Rape-in-marriage-is-no-crime-says-cleric>
[443] Roy, Olivier, *The Failure of Political Islam*, Cambridge: Harvard University Press 1994, p. 35.
[444] Hasan, Suhaib, 'My Memoirs: Early Days of My Life, Part 1', 27 January 2015 via <http://sheikhsuhaibhasan.blogspot.co.uk/2015/01/my-memoirs-early-days-of-my-life-part-1.html>
[445] 'Sharia law UK: Mail on Sunday gets exclusive access to a British Muslim court', *Daily Mail Online* 4 July 2009 via <http://www.dailymail.co.uk/news/article-1197478/Sharia-law-UK--How-Islam-dispensing-justice-side-British-courts.html#ixzz3ZMpBmrBz>.

would greatly benefit from integrating aspects of family law into the nation's civil code. Like Williams and Phillips, he wants to address the "great misunderstanding" of the issue of Sharia in the West. "Whenever people associate the word 'sharia' with Muslims, they think it is flogging and stoning to death and cutting off the hand". He says it is out of the question that penal law would be introduced in the United Kingdom, as "[o]nly a Muslim government that believes in Islam is going to implement it."[446] Nevertheless, he advises Britain to adopt Sharia criminal law, so called hudood, also spelled hudud, laws: "If sharia law is implemented, then you can turn this country into a haven of peace because once a thief's hand is cut off nobody is going to steal. Once, just only once, if an adulterer is stoned nobody is going to commit this crime at all. There would be no rapists at all. We want to offer it to the British society. If they accept it, it is for their good and if they don't accept it they'll need more and more prisons."[447]

The documentary Undercover Mosque, though, reported that at a sermon he stated that the Caliphate will have "political dominance" in Britain, establishing "the chopping of the hands of the thieves, the flogging of the adulterers and flogging of the drunkards", and waging "jihad against the non-Muslims".[448] Hasan also "reveals the Jewish conspiracy" on YouTube by telling viewers about The Protocols of the Elders of Zion, a hoax document about Jewish world domination that Islamists take very seriously.[449]

Thirdly, there is Shaikh Haitham al-Haddad (date of birth unknown). He agrees with Hasan on Sharia punishments, stating that "It is a 'must' for all Muslims to establish hudood punishments", including for apostates and adulteresses. Born in Saudi Arabia, al-Haddad is now qadi and treasurer at the Islamic Sharia Council. He is also president of the British Muslim Research and Development Foundation. He

[446] http://www.telegraph.co.uk/news/uknews/1576066/We-want-to-offer-sharia-law-to-Britain.html
[447] 'Divorce: Sharia Style', Channel 4 Documentary, via: <https://www.youtube.com/watch?v=OB34_zrB2to>
[448] 'Dispatches - Undercover Mosque', Channel 4 Documentary, via https://vimeo.com/19598947. See also 'Why we should oppose Islamic Sharia councils in Britain', *Liberal Conspiracy* 16 August 2013 via < http://liberalconspiracy.org/2013/08/16/why-we-should-oppose-islamic-sharia-courts-in-britain/>
[449] 'Senior UK Imam Suhaib Hasan reveals 'Jewish Conspiracy'', 16 December 2013 via <https://www.youtube.com/watch?v=XGIjh47kP3w>

obtained a PhD at the University of London (SOAS) on the topic of Fiqh for Muslim Minorities in the West and often gives lectures at universities – although sometimes he is denied because of his views. Before obtaining a PhD at London University, he studied in Saudi Arabia, where he was a student of the Grand Mufti, the Hanbali scholar Abdul Aziz bin Abdullah bin Baz (1910-1999).[450] It should not come at a surprise that al-Haddad brought Wahhabi Saudi views to Britain.

He believes that "Muslims should prevent [non-Muslims] from ruling any country with a law other than the shari'ah and Muslims should rule the entire planet with this Islamic law, and should this lead to fighting the People of the Book, Allah said: "And fight them until there is no more Fitnah (disbelief and worshipping of others along with Allah) and (all and every kind of) worship is for Allah (alone)." For him, the ultimate aim of all Muslims is to see Islam governing the whole world. The "Islamic Republic of Britain" will only be possible if Muslims use the current political system to their advantage."[451] Besides wanting to establish an Islamic theocracy in the United Kingdom in general, he also believes that it is forbidden to join Christians in celebrating any of their festivals; that women enjoy their husbands being superior to them and should obey them; that female genital mutilation (or as he euphemistically puts it, "circumcision") is recommended as it is a "virtue" or an "honour" for women and is better for the husband; that those found guilty of engaging in extra-marital sex should be punished in the "harshest manner possible" – stoning to death; and that a husband should not be questioned why he hits his wife. On setting a minimum age for girls to be married off, he said that "Islamic law has no minimum age." "Thirteen, fourteen?" asked an audience member. al-Haddad replied "the earlier is the better, but you have to be careful of the legal issues."[452]

[450] "He has studied the Islamic sciences for over 20 years under the tutelage of renowned scholars such as the late Grand Mufti of Saudi Arabia as well as the retired Head of the Kingdom's Higher Judiciary Council." 'Author Archives: Shaikh (Dr) Haitham Al-Haddad' at http://www.islam21c.com/author/shaikhhaithamal-haddad/
[451] 'Haitham al-Haddad', *The Islamic far-right in Britain*, via <http://tifrib.com/haitham-al-haddad/>
[452] 'Shaikh Haitham Al Haddad 'The family' Talk at Masjid Umar R.A. Part 2', YouTube clip, published on 15 May 2012, via <http://youtu.be/fST0Vmyim44?t=12m56s>.

Moreover, homosexuality is considered a "crime against humanity" and "Jews are the 'descendants of apes and pigs' and the 'armies of the devil'" – and pointed to the Protocols of the Elders of Zion.[453] He justifies suicide bombings as long as non-Muslims are killed. He praised Osama bin Laden after his death in 2011.[454] On Salman Rushdie, who al-Haddad beliefs deserves capital punishment, he said in a Friday sermon: "And this reminds us, o Servants of Allah, of the stories of those who compose heretical writings, that you cannot tolerate esoteric interpretation, you rule on their apostasy and desertion of the religion […] in the West they are known as creative writers, and are considered as amongst the most innocent, but to us they are apostates, and their blood is halal."[455] On the separation between religion and the state, he said: "There is a conflict between these two sets of values. Muslims believe our values are best. The non-Islamic British believe theirs are better. But at the end of the day, understand this: Muslims are never going to give up certain principles, even if they are in conflict. That is a fact."[456]

It should be clear that the individuals driving the largest and most well-known Sharia council in the United Kingdom do not view Sharia as a set of general principles. They take the specific laws and instructions as seriously as one possibly can. They fully adhere to, and are activists on behalf of, Islamism. Their political and religious ideology to turn the United Kingdom into a Sharia state is clear, and so are their ties to the international Muslim Brotherhood. And they know what they are talking about, coming from al-Azhar in Egypt and studying under the Grand Mufti of Saudi Arabia. Their aim of spreading Sharia is not limited to the United Kingdom. Al-

[453] 'Haitham al-Haddad', *The Islamic far-right in Britain*, via <http://tifrib.com/haitham-al-haddad/>.
[454] 'Radicals who spread message of brutality, hate and intolerance', *The Times* 13 May 2013, via <http://www.thetimes.co.uk/tto/faith/article3763189.ece>
[455] http://hurryupharry.org/2012/02/04/more-wisdom-of-haitham-al-haddad/
[456] 'Sharia law UK: Mail on Sunday gets exclusive access to a British Muslim court', *Daily Mail Online* 4 July 2009.

Haddad expressed his wish to have a formally recognised Sharia council in The Netherlands, as well.[457]

These are the individuals behind the London-based Sharia council that former Archbishop Williams would like to see accommodated, sophisticated and awarded greater resources and recognition. Both multiculturalists and Islamists encourage Muslims to go down the path of Islamic fundamentalism. Multiculturalists may not know exactly what is meant by Sharia, but Islamists surely do. The latter are confident they are working towards official recognition of Islamic law. A statement on the Islamic Sharia Council's website reads: "Though the Council is not yet legally recognized by the authorities in the UK, the fact that it is already established, and is gradually gaining ground among the Muslim community, and the satisfaction attained by those who seek its ruling, are all preparatory steps towards the final goal of gaining the confidence of the host community in the soundness of the Islamic legal system and the help and insight they could gain from it. The experience gained by the scholars taking part in its procedures make them more prepared for the eventuality of recognition for Islamic law." [sic][458]

Williams and Phillips and other "new multiculturalists" may not subscribe to Islamist goals, but they are furthering them. They masquerade Sharia by making it fuzzy and elusive. They cleanse it from objectionable aspects and state it should be accommodated but just not the parts that are at odds with British laws – and remain vague on how that should be done and what that means. They create space by emphasising the need for Sharia by Muslims and by reprimanding those who do publicly speak out against objectionable parts; or Sharia in its entirety.

Having said all this, it could still be possible that the board members of the Islamic Sharia Council have been ventilating their *private* Islamist opinions and actually perform their duties quite well as Islamic judges. It is possible that they are

[457] Sheik Al-Haddad advocates the establishment of a Sharia council in the Netherlands as "it is the duty of the Dutch government to take care of its citizens", see: 'Pleidooi voor sharia-raad' (Plea for a Sharia council), *nos.nl* 11 June 2012 via <http://nos.nl/artikel/382618-pleidooi-voor-shariaraad.html>.
[458] http://www.islamic-sharia.org/aboutus/

perfectly able to operate within the boundaries of the human rights standards that Britain seeks to uphold. Let us turn to the legal status and practice of Sharia councils in the United Kingdom.

Sharia and Alternative Dispute Resolution

England has a rich history of resolving disputes outside judicial institutions.[459] The UK has a clearly defined legal framework, the Arbitration Act of 1996, which authorizes arbitration. The legal effect of an arbitration award is the same as any other judgment or order of the court, and is thus binding. The 1996 Act does contain a number of safeguards, so state courts may modify or – partially – set aside the ruling, for example, if the tribunal exceeded its powers, if an award relates to matters which are not capable of settlement via arbitration, if a party was under some incapacity, or if enforcing the award would be contrary to national law or public policy.[460]

Phillips stated that parties are already able to settle disputes by means of Sharia principles under the Arbitration Act 1996. He was referring to the stipulation 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." Sharia could thus function as a body of laws which the parties could use to resolve family disputes, as is the opinion of England and Wales' most important judge. Shaykh Suhaib Hasan of the London-based Islamic Sharia Council also uses the terminology of the Arbitration Act: "The existence of the ISC is legal under British law, based on legislation such as the

[459] See Maret, Rebecca, 'Mind the Gap: The Equality Bill and Sharia Arbitration in the United Kingdom', *Boston College International & Comparative Law Review* 2013, pp. 255-283 (261-263).
[460] Arbitration Act 1996, S46 (1), S66 (1), S68, S103. 'Public policy' is the principle that no person or government official can legally perform an act that tends to injure the public.

Arbitration Act 1996 which permits disputants in civil matters to go for mediation and alternative dispute resolution. The ISC is bound by civil legislation, and so it cannot judge on issues of child custody, maintenance and especially on issues of criminal law. It is thus not a parallel legal system but a procedure granted by legislation."[461]

The Muslim Arbitration Tribunal (MAT), an umbrella organisation of Sharia councils under leadership of Shaykh Faiz-ul-Aqtab Siddiqi, claims their main enterprise is arbitrating commercial disputes under the Arbitration Act 1996. Two private parties sign a binding agreement prior to the hearing and the tribunal consists of a minimum of two arbitrators – a UK qualified solicitor or barrister, and an Islamic scholar. This way, the outcome is in line with both "the Laws of England and Wales and the recognized Schools of Islamic Sacred Law" (art. 8 (2) of the Procedure Rules of the Muslim Arbitration Tribunal), and leads to a contractually binding arbitration award.[462] Appeals are not possible under the MAT's statute: article 23 of the procedural rules reads: "No appeal shall be made against any decisions of the Tribunal. This rule shall not prevent any party applying for Judicial Review with permission of the High Court." During an interview, Siddiqi told me there haven't been appeals as his clients are "satisfied customers who consider it a serious matter". Chief Crown Prosecutor Nazir Afzal stated later that the Muslim Arbitration Tribunal is known to deter parties from seeking appeal, even though individuals do have an inalienable right to challenge the award in court, which is codified in article 58 of the Arbitration Act. Yet, when correctly regulated by the Arbitration Act, Afzal sees no problem in the Muslim Arbitration Tribunal using alternative dispute resolution regarding local property disputes, especially when parties are equally matched.[463]

[461] http://sheikhsuhaibhasan.blogspot.co.uk/2014/05/muslim-family-law-in-britain.html

[462] See www.matribunal.com. There has never been an arbitration award appealed. Appealing an arbitration award in general is quite rare, nevertheless it is peculiar that the MAT statute bans it. (Interviews with public prosecutor Nazir Afzal (phone interview 11 July 2013) and barrister Elissa Da Costa-Waldman (phone interview 11 July 2013))

[463] Telephone interview with public prosecutor Nazir Afzal, 11 July 2013.

However, Sharia councils in general have been able to function under *the label* of arbitration and mediation, or Alternative Dispute Resolution. In academia it is also standard to refer to Sharia councils by using the terminology of Alternative Dispute Resolution (ADR).[464] It is my contention that this is incorrect. It is not merely erroneous because it fuses the concepts of *arbitration* (in which both parties agree to submit their dispute to a mutually agreeable third party for a decision to be made), and *mediation*, (when two parties voluntarily use a neutral third party to help them reach an agreement that is acceptable to both sides). Both concepts are not applicable. Firstly, because, as I will demonstrate below, a Sharia council's "core business" consists of dealing with women requesting an Islamic divorce and not commercial disputes. In fact, 95 per cent of the cases (hundreds per year per council) relate to divorce requests. Considering that mediation and arbitration are tools for extra-judicial decision-making for a minimum of *two parties* having a *legal dispute*, a *one-party* divorce *request* surely does not count as any form of alternative dispute resolution. But even if there were two parties, the Arbitration Act does not extend to divorce.[465]

Secondly, it is incorrect by definition because Islamic judges have an agenda of their own.[466] For instance, president of the Islamic Sharia Council Shaykh Abu Sayeed said regarding granting divorces on women's request that "we don't break the marriage. As long as marriage is sacred, our job is to reconcile the marriage".[467]

---

[464] See, *inter alia*, Rohe, Mathias, 'Alternative Dispute Resolution in Europe under the Auspices of Religious Norms', *Religare Working Paper* Number 6, 2011; Rohe, Matthias, 'Reasons for the Application of Shari'a in the West', pp. 25-46, in: Berger 2013; Boyd, Marion, 'Religion-Based Alternative Dispute Resolution: A Challenge to Multiculturalism', pp. 465-473, in: Banting, Keith *et al*. (eds), *Belonging? Diversity, Recognition and Shared Citizenship in Canada*, Montreal: McGill-Queen's University Press 2007; Keshavjee, Mohamed, *Islam, Sharia and Alternative Dispute Resolution: Mechanisms for Legal Redress in the Muslim Community*, London: I.B. Tauris 2013; Shachar 2008, pp. 572-607; Yilmaz, Ihsan, 'Muslim Alternative Dispute Resolution and Neo-Ijtihad in England', *Turkish Journal of International Relations* 2003, pp. 117-139. .

[465] See also Addison, Neil, 'Sharia Tribunals in Britain – Mediators or Arbitrators?', p. xi, in: MacEoin & Green 2009.

[466] See also on this issue: Moore, Kathleen, *The Unfamiliar Abode: Islamic Law in the United States and Britain,* Oxford: Oxford University Press 2010, p. 119.

[467] Interview with Abu Sayeed, London, 2 July 2013. See also: 'In the name of the law', *The Guardian* 14 June 2007 via < http://www.theguardian.com/world/2007/jun/14/religion.news>.

For an independent mediator or arbitrator – who should be neutral – to approach this task with such a clear personal agenda is entirely unacceptable.

Putting aside that concepts of mediation, arbitration and Alternative Dispute Resolution are used incorrectly, it is important to note that this is not a mix-up without consequences. Using the terminology of alternative dispute resolution as under the Arbitration Act creates a false impression that softens and obscures the reality that underlies the practice of Sharia councils. It further is implied that Sharia councils fall under a recognised regime that upholds legal standards, safeguards, and thus protects parties – which is not the case.[468] This means that most academic discussions about ADR, family law and Sharia councils are off base.

Sharia councils have no formally recognized legal jurisdiction over family law due to the sensitive nature of these disputes and their consequences. Some months after Phillips' speech, then minister of Justice Jack Straw confirmed this: "Arbitration 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."[469] The rulings coming from Sharia councils thus do not meet the legal system, they fall outside the Arbitration Act and the parties are thus not "protected" by legal safeguards. Nor are there any appeal procedures for parties that are confronted with unfair decisions.

It is a different issue when Sharia law is actually ingrained in state law, as is for instance the case with Iranian or Saudi Law. Then, national judges can encounter cases regarding international private law. There is some case law on English courts dealing with Sharia-based disputes. For instance, in one case the House of Lords argued unanimously that sending a mother and a child back to Lebanon would be a

[468] See also on this discussion MacEoin & Green 2009.

[469] 'Sharia Law in Britain: A Threat to One Law for All and Equal Rights', Published by One Law for All, June 2010, p. 13. moreover, the Lawyer's Secular Society states that the jurisdiction of the family courts cannot be ousted by contractual agreement (Edgar v Edgar (1980) 1 WLR 1410). At present inheritance disputes could in principle be the subject of a binding arbitration decision because they do not come under the jurisdiction of the Family Courts.

flagrant breach of the Convention, as she would lose custody of her son because of Sharia-inspired family law.[470] In another case, parents fought a custody battle, where the father asked the court to grant him the right to have the child live with him in Saudi Arabia. The father had spread but had then withdrawn allegations that the mother had associated with another man, which would have had draconic consequences for the British woman and child under Saudi Arabian Sharia law. The judge refused to grant the order.[471] British courts ruled in favour of the mothers, because Sharia law would have had unacceptable consequences for them.

Yet, these cases had to deal with Sharia law in other jurisdictions, namely Lebanon and Saudi Arabia. With regard to cases in English courts which are asked to settle a dispute coming from a sharia council's ruling, there are no such records. This could mean that these cases are swept under the carpet, or that there just are not many of these cases before the courts. This latter option seems more likely.[472] In fact, John Bowen, author of several publications on English law and Sharia, said in an interview that none of the judges and lawyers he had talked to, and he had asked many, said that they had ever seen an instance where a judge had enforced an agreement that came out of a "sharia council mediation".[473]

Interestingly, there is a case where the English court struck down a ruling by the London-based Islamic Sharia Council. In Midani v Midani in 1999, in a dispute about an inheritance settlement, two of four heirs (Myrna and Omar) challenged the London-based Sharia council's ruling regarding their late father's estate. They disputed that the council had the authority to make binding decisions and protested its jurisdiction over the matter. Although the two heirs did not attend meetings voluntarily and had put their objections to the Council's jurisdiction in writing prior to any outcome, the Islamic Sharia Council ruled that half of Myrna's inheritance was to

[470] House of Lords, Opinions of the Lords of Appeal for Judgment in M (Lebanon) *v* Home Secretary [2008] UKHL 64.
[471] House Of Lords, Opinions Of The Lords Of Appeal For Judgment, in the Case re J (a child) (FC), [2005] UKHL 40.
[472] For example, there was a case on dower in Uddin v. Choudhury, [2009] EWCA (Civ) 1205.
[473] Bangstad, Sindre, Leirvik, Oddbjorn and Bowen, John, ''Anthropologists are talking', About Islam, Muslims and Law in Contemporary Europe', *Ethnos* 2013, pp. 1 – 20 (6).

go to her brother Omar (as under Sharia men inherit more than women). The plaintiffs sought a declaration from the English court that the Sharia Council's ruling was not an arbitration award. The court ruled that it was unable to see how the ruling could be binding on the heirs without their consent. Moreover, the court held that: "The Shari'a Council is neither a national Court nor, in this instance at any rate, an arbitration tribunal. It does not derive its authority from any statute, nor from any consensus between the parties before me. Neither does it purport to. It describes its bench in terms of being a "quasi-Islamic Court" and its bench's decisions as "extra judicial". It would not seem even on its own opinion to be, therefore, a judicial body."[474]

With the exception of the Muslim Arbitration Tribunal (when it is legitimately functioning under the Arbitration Act – something which has also never been acknowledged by a British court), by far most of what is said about ADR and Sharia councils, is of the mark.[475] There is no overlap between British courts and the work of Sharia councils. Almost all Sharia councils, including the MAT, focus on Islamic family law. Moreover, it is unlikely that any Sharia council decision will be recognised as a binding arbitration award. In response to BBC's exposé on The Islamic Sharia Council, Helen Grant, Parliamentary Under-Secretary of State in 2013, said: "[S]haria law has no jurisdiction under the law of England and Wales and the courts do not recognize it. There is no parallel court system in this country, and we have no intention of changing the position in any part of England and Wales."[476] The Under-Secretary was right that the courts do not recognize the rulings of Sharia councils. However, it must be recognised that there are, in fact, two separate legal orders now functioning, of which one currently operates in the "shadow of the law". Multiculturalists argue that it should be possible to integrate Islamic family law in

[474] See Al Midani and Another v Midani and Others [1999] 1 Lloyd's Rep 923, 22 February 1999.
[475] See on the difference between MAT and other Sharia councils – such as the Islamic Sharia Council – Lepore, Christopher R., 'Asserting State Sovereignty over National Communities of Islam in the United States and Britain: Sharia councils as a Tool of Muslim Accommodation and Integration', *Washington University Global Studies Law Review* 2012, pp. 669-692 (680-685).
[476] Grant, Helen, 'Sharia Law' Hansard 23 April 2013, Column 289WH.

secular legal systems and that this can or should be done without violating human rights.[477] Let us see if reality allows for that to be possible.

Why would someone visit a Sharia council?

Regardless of statements that Sharia councils *should* not involve matters of criminal law, in practice it turns out they do.[478] Unfortunately, though, there is little research on this. In Germany, various cases have been found of Sharia judges and families claiming jurisdiction over criminal matters. Legal scholar and journalist Joachim Wagner (1943) found the "mediation of criminal disputes" in 16 cases in less than a year in Germany's large cities. In *Richter Ohne Gesetz* (Judges without Law, 2011), Wagner describes how the prosecution of crimes, such as drug deals, extortion, murder and manslaughter, fails as victims and witnesses do not cooperate with public prosecutors. For instance, witnesses all of a sudden do not remember their testimony. Instead, families of victims and offenders had arranged to exchange blood money for freedom under the direction of Sharia judges.[479] Wagner warns against the rise of an Islamic parallel legal system that endangers the German rule of law.

In 2008, it became public that the British Muslim Arbitration Tribunal (MAT) handled six cases of domestic violence. In all six cases, MAT president Siddiqi said, Sharia judges ordered husbands to take anger management classes as well as mentoring from community elders, but issued no further punishment. All the women subsequently withdrew their complaints to the police, who halted investigations. The

[477] See also Wolfe, Caryn Litt, 'Faith-Based Arbitration: Friend or Foe - An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts', *Fordham Law Review* 2006-07, pp. 427-469 (466-467). "Enhancing the appreciation of the diversity of cultures is a positive goal, and the recognition of minority groups' distinctiveness does not contradict democratic ideals.[…] In response to the serious charge that religious arbitration can have the harmful result of disadvantaging vulnerable members of minorities even more one need only emphasize the extreme importance of allowing members of a minority religious or cultural group to preserve their heritage and values."

[478] Likewise, the Catholic Church has successfully managed to keep priests who were (are) suspected of child rape out of the secular penal jurisdiction by trying them according to canonical laws. See Verhofstadt, Dirk, *Atheïsme als Basis voor de Moraal* (Atheism as Foundation for Morals), Antwerp: Houtekiet 2013, pp. 58-61.

[479] Wagner, Joachim, *Richter Ohne Gesetz,* Berlin: Econ 2011.

advantage was, according to Siddiqi, that marriages were saved and couples were given a second chance.[480]

Also within British Somali community, Sharia is used to settle criminal cases. Saynab Muhamad, leader of the Somali Family Support Centre, believes the involvement of community elders is more efficient than getting the police involved. In one case a few years ago, Sharia was used to resolve the case of knife attacks among teenagers. The victim's family and the assailant came together with Somali elders. During an informal hearing the two parties were reconciled under the leadership of an Islamic judge. "Forgiveness" was purchased by the attacker; the police were never involved.[481]

Yet, evading criminal responsibility (or commercial disputes) are not the main reason individuals go to Sharia councils – including the MAT.[482] Moreover, Sharia criminal law or diverting Muslims away from secular criminal law enforcement and justice cannot even count on multiculturalist support. Vocal support from multiculturalists is based on the assumption that family law, and mainly marital law – will be the focus of Sharia – as is the case with fundamentalists. For reasons that are not particularly clear to me, both multiculturalists and Islamists present their case for Sharia *family* law as a "modest" demand. "We merely ask for family law to be recognized, and perhaps some commercial law", seems to be the basic idea. From a doctrinarian view, Sharia's hold on family law (e.g. marriage, divorce, maintenance) is particularly strong, especially compared to other legal branches, such as Islamic tax law or constitutional law.[483] But also from a practical point of view, wherever Islamists gain political power, it is Islamic *family law* that is pushed to the top of the agenda. For instance, when the Muslim Brotherhood was voted into parliament in

[480] 'Islamic Sharia councils in Britain are now 'legally binding'', *Daily Mail Online* 15 September 2008, via <http://www.dailymail.co.uk/news/article-1055764/Islamic-sharia-courts-Britain-legally-binding.html>.
[481] 'Sharia law UK: Mail on Sunday gets exclusive access to a British Muslim court', *Daily Mail Online* 4 July 2009.
[482] Although formally they claim to offer dispute settlements under a mixture of Sharia and the Arbitration Act, their income comes mainly from divorce requests just like any other Sharia council. (Interview with Shaykh Faiz-ul-Aqtab Siddiqi and Fiaz Hussein, 4 July 2013).
[483] Schacht 1982, p. 76.

Egypt after Mubarak's downfall, the first thing the Islamists did was roll back women's rights by means of legislating Sharia-based family law.[484] The process is witnessed all over the world where fundamentalists gain influence.[485] It is therefore with extreme caution and skepticism that calls for recognition or toleration of Islamic family laws should be assessed.

There are some multiculturalists who find the focus on negative aspects regarding the status of women discriminatory or racist. They find that criticism on minorities in light of sex discrimination is "used" to "portray" minorities negatively. Racism is taken as a cause for exaggeration of problems.[486] Moreover, many multiculturalists advocate that Sharia family law should be possible, "as long as it does not endanger women's rights". But is that possible? Let us clarify what happens at Sharia councils to see whether criticism on the status of women is justified or not.

In Britain, much of the tension around the debate on Sharia councils arises out of concern for women. This is not strange: over 95 percent of the applicants at Sharia councils are women seeking a religious divorce.[487] That is, women initiating a divorce for a marriage constituted under Islamic law. This is the *raison d'être* of these councils. Religious marriage and divorce are agreements wholly separate from civil marriage and civil divorce.

A Muslim marriage, or *nikah*, is a contract - "a solemn Qur'anic covenant" – between a bride and a groom, which they, or their proxies, must *freely* enter into, writes Sonia Shah-Kazemi who published a detailed report on why women visit

[484] See: Dyer 2013.
[485] See Bennoune 2013.
[486] That is the position of Malik 2009, p. 9 and of Phillips, Anne, *Multiculturalism Without Culture*, Princeton: Princeton University Press 2007, p. 2, who wrote: "Overt expressions of racism were being transformed into a more socially acceptable criticism of minorities said to keep their women indoors, marry their girls off young to unknown and unwanted partners, and force their daughters and wives to wear veils."
[487] Shah-Kazemi, Sonia Nûrîn, *Untying the Knot. Muslim Women, Divorce and the Shariah*, The Nuffield Foundation/Signal Press: London 2001, p. 18. Also: '[T]he overwhelming majority of cases are to do with divorce - 95% of the roughly 7,000 cases the council has dealt with since opening its doors in 1982', in: 'In the name of the law', *The Guardian*, 14 June 2007.

Sharia councils in 2001.[488] Shah-Kazemi here equates "the bride and groom" with "their proxies". That is because, under Sharia, the woman's marriage act can also be stipulated by her *wali*. A *wali* is the nearest male relative who acts on behalf of the woman as legal guardian. This makes it possible for a groom and the father of the bride to contract a marriage, leaving the woman out of the equation, especially if she is a minor.[489]

For the contract to be valid, the groom must provide a sum of money, the dower – to which both parties have agreed –, which is known as the *mahr*. This sum belongs to the wife.[490] The *nikah* needs to be witnessed by two competent – male – witnesses. Men are allowed to enter into polygamous marriages, and may marry up to four wives. Marital rights (or duties), inter alia, are "sexual availability", and the wife's entitlement to maintenance.[491]

Unfortunately, not all marriages are destined for eternal bliss. For the dissolution of civil marriages under UK law one spouse needs to divorce the other on the basis of grounds stipulated by law. These grounds include adultery, desertion, having been separated for a certain period, and "unreasonable behavior", which is as broad as having to watch boring TV programs all the time. The procedure and its outcome are sex neutral; it does not matter whether divorce is initiated by a man or a woman. All in all, it can take six to eight months if both spouses cooperate, but one spouse can frustrate the divorce, stretching it for years.[492]

A secular judge cannot dissolve a religious marriage. Religious divorce thus requires a separate dissolution. Women will want a divorce more than a man, since

---

[488] Shah-Kazemi 2001, p. 7.
[489] Schacht 1964, p. 161.
[490] Shah-Kazemi 2001, p. 7. In classical Islamic law, the mahr is usually divided in a 'prompt' and a 'deferred' part, the prompt sum is due in connection with the consummation of the marriage, the deferred part in case of divorce or death. See: Menski, Werner, 'Immigration and multiculturalism in Britain: New Issues in Research and Policy', paper of a lecture delivered at Osaka University on 25 July 2002, pp. 1 – 20, (5-6), available via <www.casas.org.uk/papers/pdfpapers/osakalecture.pdf>.
[491] Shah-Kazemi 2001, p. 7.
[492] 'Grounds for divorce', UK Government Website (last updated 5 February 2015), via <https://www.gov.uk/divorce/grounds-for-divorce>; Advicenow.org.uk, website by the charity Law for Life: the Foundation for Public Legal Education, see <http://www.advicenow.org.uk/advicenow-guides/family/survival-guide-to-divorce-and-dissolution/what-you-cant-expect-the-law-to-do-html,682,FP.html>.

Muslim men may marry up to four wives.[493] This means that if a man is dissatisfied with his marriage to his wife, he can easily ignore that particular marriage and find up to three others. Because the state does not recognize religious marriages, religious polygamy is not illegal. Furthermore, historically, there is overlap between the way a woman is released from marriage and the way a master frees a slave (manumission).[494] A husband can unilaterally – without spousal permission – divorce his wife by pronouncing the *talaq* ("I divorce you"), for which no grounds are needed. Rules differing per school of Islamic jurisprudence, the talaq needs to be said three times. He forfeits his right to return of the dower.

Remarriage with the same woman is possible. However, for that remarriage to be valid, the woman will first need a new marriage with a sort of "in between" husband, with whom she will have to have sexual intercourse with. After this has happened, she has to divorce him and can then remarry her first husband. This is for instance what happens if a man pronounces the talaq, but then changes his mind. All in all, it can be a very traumatizing experience for the woman who is basically forced to have sex with a strange man in order to return to her husband. This is called "*nikah halala*".[495]

---

[493] Sura 4:3 of the Koran states an explicit endorsement of the practice: "Marry of the women, who seem good to you, two or three or four; and if ye fear that ye cannot do justice to so many then one only."

[494] Ali 2010.

[495] "When a free man has pronounced a threefold divorce, the divorced wife is unlawful for him to remarry until she has married another man in a valid marriage and the new man has copulated with her, which at minimum means that the head of the erect penis fully enters her vagina." (n.7.7) Keller 1991. This is based on Koranic sura 2:230: "And if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other than him. And if the latter husband divorces her [or dies], there is no blame upon the woman and her former husband for returning to each other if they think that they can keep [within] the limits of Allah . These are the limits of Allah , which He makes clear to a people who know." See on the Nikah Halala also: 'Nikah Halala – Sharia divorce law that demands the wife to sleep with another man', *The Muslim Issue* 2 November 2014, via < https://themuslimissue.wordpress.com/2014/11/02/crazy-islam-nikah-halala-sharia-divorce-law-that-demands-the-wife-to-sleep-with-another-man/>. See also Ficq Council Birmingham: "Irrespective of whether a man pronounced to his wife the words of Talaq in one statement (e.g. "I give you Three Talaqs"), or in three separate statements (e.g. I give you Talaq, I give you Talaq, I give you Talaq."), according to the unanimous verdict of all Schools of Islamic Law (Hanafi/Shafi/Maliki/Hanbali) that these three Talaqs will be regarded in sharia law as being three Talaqs and a husband will cease to have the right to take back his wife without a sharia based Halalah. A Shariah based Halalah is whereby the wife freely marries someone else after having been divorced thrice and then after consummation of that second marriage is given divorce by the second husband or the second husband passes away, in this situation she may now remarry the first husband with a new marriage contract and with a new mahr (dowry)." Via < http://www.fiqhcouncilbirmingham.com/page/marriage_arbitration#Q21>

However, just like for Jewish women under Jewish law, it is (very) difficult for Muslim women to get a divorce under Islamic law if they want one. There are several ways in which a woman can obtain a divorce. For instance, the woman can initiate a *khulla* agreement. In that case, 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 dower to the husband. In a sense she "buys" a *talaq*. The wife forfeits her right to maintenance. Custody of the children can be put at stake. Although custody rulings fall under the sole jurisdiction of state courts and Sharia councils formally acknowledge this, there are known cases of the wife illegitimately losing custody in exchange for a divorce. In particular, women who lack knowledge of Britain's legal system run the risk of falsely believing Sharia councils have jurisdiction over custody matters.[496] From the BBC documentary "Secrets of Britain's Sharia councils" it has become clear that even women who have had a state court grant them sole custody of the children can face a subsequent ruling by Sharia judges reversing that ruling as Sharia has its own rules on custody.[497] Sharia's schools of jurisprudence have detailed custody settlements, which come down to the fact that the father is most likely to get custody of the child, especially if the woman remarries.[498] Furthermore, under a khulla contract, the couple can remarry without the wife needing to remarry and have sex with another man first.[499] Generally, husbands are known to frustrate the khul, which can be terribly dangerous if the husband is violent towards her and the children. Sharia councils can prolong this dangerous situation by siding with the husband, stretching the abusive marriage.[500]

---

[496] Private interview with barrister Charlotte Proudman, who has represented women at Sharia councils, 18 June, 2013. It is also a problem that academics repeat the Sharia Council's lie that they do not rule on custody issues. See for someone who does for instance, Bowen 2009-10, p. 419.

[497] "Secrets of Britain's Sharia Councils", BBC Panorama, 22 April 2013, via <http://www.bbc.co.uk/iplayer/episode/b01rxfjt/Panorama_Secrets_of_Britains_Sharia_Councils/>

[498] A woman has no right to custody of a child from a previous marriage when she remarries ("because married life will occupy her with fulfilling the rights of her husband and prevents her from tending the child"). (m. 13.4). If a child reaches the age of discrimination" (mostly at the age of seven or eight), it gets to choose the parent he wants to stay with, "though if a son chooses his mother, he is left with his father during the day so the father can teach and train him." Keller 1991, (m.13.5).

[499] Keller 1991, n.5.0.

[500] Telephone interview with Chief Crown prosecutor Nazir Afzal, 11 July 2013.

Other possibilities for dissolving the religious marriage are if the marriage has not yet been consummated due to the fault of the husband. Here, both parties can agree, without payment, that the wife is released from the marriage contract. This is called *mubara'ah*. Also, the woman, prior to the marriage, can adopt a clause in the contract in which the husband allows the wife the possibility of divorce.

Unlike under Jewish law, Sharia allows for women to obtain a divorce without a husband's consent. This is called *faskh*, and it forms the bulk of divorce procedures at Sharia councils. Whereas in Western secular legal systems the grounds for divorce are very easily met, this is not the case under Sharia. A qadi will need to check whether the divorce request meets the conditions. These are, *inter alia*:

- The husband's renunciation of Islam, apostasy or return to his former religion
- The husband has a sexual defect, is impotent, or has taken a vow to abstain from sexual relations
- There has been a corruption of the marriage, for instance if the husband is imprisoned for a specified period
- The husband has not provided maintenance for his wife, as he is required to
- The incapacity or refusal to fulfill marital obligations by either party may constitute the right to divorce
- The husband has deserted or harmed the wife
- Both parties have engaged in "mutual cursing", for instance, when adultery has been alleged by one party against the other[501]

So, continuing with the Islamic Sharia Council as an example, when a woman files for an Islamic divorce, she fills out an application form provided by the Sharia council.

[501] Shah-Kazemi 2001, pp. 7-8. The specific conditions depend on the interpretation of the different schools of law.

She is required to sign the application, which stipulates "I promise to accept the decision of the Council irrespective of my own personal interests in order to maintain the supremacy of the Sharia over all other considerations […] I also solemnly swear that at the moment I am not violating any of the matrimonial laws of the Sharia."[502] She pays a fee of £400 (which is peculiar as the Islamic Sharia Council is a registered charity).[503] She is either interviewed by a representative of the ISC, or the procedure will be conducted by means of written correspondence. The Sharia council will send three letters to the husband to inform him of his wife's decision to divorce him, and he may or may not reply, and he may or may not actually attend the hearing which the ISC schedules. The husband is invited to join his wife at session.[504]

When one of the above stated grounds for divorce is accepted, or is assumed to be proven – by the *qadi* – a divorce is granted. The Islamic Sharia Council embraces all four schools of Sunni jurisprudence. Once a month, fifteen scholars – e.g. Haitham al-Haddad and Abu Sayeed – meet at Regent's Park Mosque and discuss the cases until consensus about the outcome is reached.[505] There is no transparency, nor is there the possibility of redress.

---

[502] See <www.shariacouncil.org>.

[503] According to the annual report filed at the Charity Commission, the ISC holds a reserve of £170,241 in 2014. via <http://apps.charitycommission.gov.uk/Accounts/Ends55/0001003855_AC_20131231_E_C.pdf>

[504] Which can be a traumatizing experience. One woman interviewed by BBC's Panorama stated about being made to see her abusive husband at session: "I was shocked. Surely they can see that women who have been through this cannot be forced to meet up with someone who is abusing them." Samia Bano, a British scholar, researched the experiences of women at Sharia councils, and finds that: 'of the sample, ten women reported that they had been 'coaxed' into participating in the reconciliation sessions with their husbands even though they were reluctant to do so. More worrying still, four of these women reported that they had existing injunctions issued against their husbands on the grounds of violence and yet they were urged to sit only a few feet away from these violent men during the reconciliation sessions. Again, an extract of interviews reveals how potentially dangerous this may be for women and illustrates how husbands may use this opportunity to negotiate access to children and, in some cases, financial settlements, matters which are in effect being discussed under the 'shadow of the law'. Bano writes: 'A woman reports: 'I told him [the imam] that I left him because he was violent but he started saying things like "Oh, how violent was that? Because in Islam a man is allowed to beat his wife!" I mean, I was so shocked. He said it depends on whether he really hurt me! I was really shocked because I thought he was there to understand but he was trying to make me admit that somehow I had done wrong.' (Shazia, London), excerpt from: Bano, Samia, 'In Pursuit of Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the 'Sharia Debate' in Britain', *Ecclesiastical Law Journal* 2008, pp. 283-309 (303). See also: Bano, Samia, 'Muslim Family Justice and Human Rights: The Experience of British Muslim Women', *Journal of Comparative Law* 2007, pp. 45-52.

[505] 'Sharia law UK: Mail on Sunday gets exclusive access to a British Muslim court', *Daily Mail Online* 4 July 2009.

When it comes to delivering evidence for fulfilling the grounds for divorce, women are confronted with unequal burdens of proof compared to men. Islamists maintain that the sexes are naturally different which results in different rights, where women draw the shortest straw. Islamists find confirmation in Surah Al-Baqarah 2:282 that two female witnesses are required compared to one male witness: "[…] And bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses - so that if one of the women errs, then the other can remind her. […]" The Islamic Sharia Council has now updated its website. It used to say the following about the testimony of women: "Man's mind is uni-focal while the women's mind is multi-focal. In other words, a man would be fully occupied with the task he is involved with; he may not be distracted by anything else while being engaged in his activity. On the other hand, a woman may be busy in kitchen work and she will be easily alert to a phone buzzer or her infants cry from the cradle. In a way she is found to be more sensitive and active in her dealings. Thus she has got a very praise worthy character but that is not so good for a case of testimony which requires more attention and concentration. What is wrong then, if a second woman is needed, only to remind her is she fails to deliver her testimony completely. So it is a case of verification of the testimony, not that of degradation to the status of the women at all." And: "To deny the difference between the two genders is a denial of truth. Allah who created us, gave us rulings according to our nature. And all is well as long as we go by the nature."[sic][506]

Nonetheless, the Islamic Sharia Council can administer the *faskh*, although its qadis would rather see the marriage reconciled and are reluctant to dissolve it.[507]

[506] This text is no longer available on the Islamic Sharia Council's website.

[507] American professor of Law Robin Fretwell Wilson gives the example of "Ameena": "Ameena sought assistance from the Islamic Sharia Council to divorce her husband. Backed by testimony of her daughter and two women's shelter workers, Ameena told the imam, Dr. Hasan, that her husband "beats me and the children." The imam documented the abuse including beating that caused a miscarriage. Although Ameena corroborated her claims of abuse, the imam referred Ameena's case to a council of seven imams. The council decided Ameena's husband should be given another opportunity to reconcile with her before they would grant Ameena a divorce, if the council did so at all. As of July 2009, "Ameena's fate remain[ed] in limbo." See: Wilson,

Thus, if the husband does not want to divorce his wife, it is very difficult for her to get divorced, even if there is (severe) abuse. He can keep her lingering in an abusive marriage for as long as he likes. Al-Haddad stated that a husband should not be asked about hitting his wife.[508] Qadi Suhaib Hasan has been filmed secretly on several occasions downplaying the severity of violence and deterring women from going to the police. In one instance, filmed by *The Guardian*, after a woman said her husband hit her once, he said: "Only once? So it's not a very serious matter".[509] In the BBC *Panorama* documentary, he asked: "He actually beats you? Severely, or just…", leaving that hanging in the air. "He hits me," the undercover reporter said, asking if she should go to the police. "The police, that is the very last resort," Hasan replied.[510] Abu Sayeed is fully aware that most of the women requesting divorce are on the receiving end of violence. However, testimonies by these women remain "allegations", if not confirmed by their husbands.[511]

Generally, it is not uncommon for a man to refuse cooperation regarding the divorce until he feels enough money has been paid by his wife, nor is it uncommon for women to plea before the qadi that she is a victim of domestic abuse, hoping that the "judge" will agree with her divorce request. I have witnessed these hearings. Women testify there has been emotional and/or physical abuse, that huge loans are taken out in her name which she will need to pay for, that the husband hasn't been seen for years, or that he has other wives besides her. No qadi appeared surprised when a woman told him or her about abuse, and the police are never mentioned. Public Prosecutor Nazir Afzal spoke to the Muslim Arbitration Tribunal a few years ago about their approach regarding women seeking religious divorces. He suspected that the Muslim Arbitration Tribunal discouraged abused women from seeking help,

---

Robin Fretwell, 'Privatizing Family Law in the Name of Religion', *William & Mary Bill of Rights Journal* 2010, pp. 925-952 (931).

[508] 'Shaikh Haitham Al Haddad 'The family' Talk at Masjid Umar R.A. Part 2', YouTube clip, published on 15 May 2012, via <http://youtu.be/fST0Vmyim44?t=12m56s>

[509] "Inside a sharia divorce court", *The Guardian* 9 March 2011, via: <http://www.theguardian.com/law/video/2011/mar/09/islam-sharia-council-divorce>

[510] "Secrets of Britain's Sharia Councils", BBC Panorama, 22 April 2013.

[511] Interview with Abu Sayeed, 2 July 2013.

which means they are perpetuating serious harm: “if a woman wants a divorce, they will say you will disgrace your family”.[512]

The organization Women Living under Muslim Laws wonders why “no research to date has questioned why Shariah councils do not automatically issue a certificate that following civil divorce, the religious marriage is also dissolved in the eyes of Muslim laws, and why instead they insist upon lengthy processes of calling husbands to ‘give evidence’”.[513] In fact, research shows that at this Sharia council 45% of cases were decided in six to eight months, 45% in 10-19 months, and 10% took much longer, which, considering the violent home situation, can be very dangerous for the petitioners.[514]

It is a valid critique. The Sharia council connected to the Birmingham Central Mosque had faster procedures and did not wait for the husbands to respond. This council was founded in the late 1990s. The mosque serves around 4,000 worshippers for Friday prayers. It is one of Europe’s largest mosques. Women can petition for a religious divorce, for which the Council asks a fee of £250 – “administrative costs”, when I asked about it. They do ten to fifteen cases per month. That makes an average of £37,500 per year.[515] When I visited in 2013, women had to back up their request in front of a panel of three qadi’s: Amra Bone, Muhammad Talha Bokhari, and chaired by Indian-born Mohammad Naseem, who died aged 89 in 2014. Naseem was a medical practitioner, mainly focused on male circumcisions. He was chairman of the mosque, and executive member and home affairs spokesman for the Islamic Party of Britain until it was dissolved in 2006. The Islamic Party of Britain was an Islamist political party which never succeeded in getting elected.[516]

[512] Interview with Nazir Afzal, 11 July 2013.
[513] ‘Recognizing the Un-Recognized’ 2006, p. 72.
[514] Bowen, John, ‘Panorama's exposé of sharia councils didn't tell the full story’, *The Guardian* 26 April 2013.
[515] The report ‘Equal and Free? Evidence in support of Baroness Cox’s Arbitration and Mediation Services (Equality) Bill’, researched and drafted by Charlotte Rachael Proudman 2012, comes at a wider estimate. “The Sharia Council rule on at least 20 Islamic divorces in one day of each month, thus the minimum amount the Sharia Council earns per month is £4,000, equating to £48,000 per annum.” (p. 71)
[516] Its viewpoints were, for instance, that the existing political parties did not suffice as “Muslims can’t rely on the secular system”, that the banking system needed to be reformed into an Islamic system, and that homosexuality needed treatment, was not to be tolerated and that homosexuals should be put to death for a

The Birmingham Central Mosque stance, I was told, is that marriage requires mutual love, trust and consent: "In Islam you live in happiness. Religion is for ease, not for hardship", Amra Bone said. Divorce procedures here take about two to three months, which is a relatively fast procedure. They do not wait for the husband to respond.

Their position is that they live as British citizens and accept the law of the land. Religious law can work with the civil courts on the basis that the law of the land is supreme, they told me. They believe in fast procedures, as "the Koran has made *talaq* and *khul* easy on purpose. Sharia has made very easy grounds for marriage and divorce. […] Islam is not intrinsically discriminatory against women."[517]

Yet, that is the question. Some people, including qadi Amra Bone, argue that Sharia councils actually help women by releasing them from a situation of marital captivity when their husbands are unwilling to cooperate with a religious divorce. In reality it is showed that women succumb to community pressure and go to a Sharia council, where they have to accept unfair decisions. Or, 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".[518]

Although the Birmingham council does give out *faskhs* in a faster and easier manner than the London-Based Islamic Sharia Council does, that has not settled the discriminatory nature of Sharia councils in general. Women still have to pay a large sum of money – especially considering they often lack sufficient means, all the more

---

"public display of lewdness". See: Dabrowska, Karen, 'British Islamic Party spreads its wings', *New Straits Times* (Malaysia) 16 November 1989, via <https://news.google.co.uk/newspapers?id=TbYTAAAAIBAJ&sjid=K5ADAAAAIBAJ&pg=6294,61245&hl=en> and 'Question Forum: Islamic View On Homosexuality', *Islamic Party of Britain* 9 March 2002 via <http://www.mustaqim.co.uk/ipb-archive/question/ans41.htm>. Birmingham MP Khalid Mahmood called for Naseem's resignation after he suggested the July 7 London bombings were a Government conspiracy. See: 'Chairman of Birmingham Central Mosque should quit over 7/7 bombings row says MP', *Birmingham Mail* 5 July 2009 via <http://www.birminghammail.co.uk/news/local-news/chairman-of-birmingham-central-mosque-should-241309>.

[517] This conversation took place on 1 July 2013 in between hearings at the Birmingham Central Mosques' Sharia Council.

[518] Ali, Shaheen Sardar, 'Authority and authenticity: Sharia councils, Muslim women's rights, and the English courts', *Child and Family Law Quarterly* 2013, pp. 113-137 (113).

as their husbands (as I have heard most women testify at Sharia council hearings) have plummeted them into debt. Moreover, all Sharia councils condone violence against women. Especially the Islamic Sharia Council actively detracts women from seeking outside help or police protection.[519] The Birmingham Sharia Council passively ignores the fact that women are victims of (severe) physical abuse. Both councils are the least bit concerned when women are in abusive domestic situations, even when there are children involved. Victims are not advised – sometimes even discouraged – from filing a police complaint against violent spouses. This is exacerbated by the fact that some applicants may lack knowledge of the English language and legal system, and their rights. Even more, there is evidence for the fact that refusal to settle a family dispute in a Sharia council can amount to threats and intimidation, or, at best, being excommunicated and labeled an unbeliever. Moreover, the councils make custody claims – something they deny in public.

Besides these insurmountable problems of which the scope differs per council and depends on those religious authorities pulling the strings, there is another prohibitive objection to positively evaluating the possibilities of Sharia councils. And that is that, ultimately, deference to these councils places religious authorities in the position to move women away from a system in which they are free to enter and exit relationships at will.

Marital captivity

Sharia councils are thus mainly concerned with women requesting religious divorces. Islamic marriages are not registered and not recognized by British laws. One could think: why get a religious divorce in the first case? Why not just separate from your husband and leave it at that? Why is it important to get a religious divorce apart from a civil divorce (if there also was a civil marriage)?

[519] See on victims of violence being detracted from seeking police protection also: Wilson, Robin Fretwell, 'The Overlooked Costs of Religious Deference', *Washington and Lee Law Review* 2007, pp. 1363-1383 (1375-1376).

Khola Hasan (daughter of Shaykh Suhaib Hasan), who was qadi in training when I spoke to her in 2013, told me that women want a religious divorce because their community expects them to get one, regardless of a civil divorce – if there ever was a civil marriage at all. Otherwise, the members of the community will ostracize the woman. It must be understood that in some Muslim communities, a secular divorce does not suffice when the religious marriage is not formally dissolved. Muslim women who turn to Sharia councils for divorce, do so as a consequence of the shared conviction within the religious community that there is a distinct system of Muslim family law, to which these women feel compelled to abide by.[520] When a woman is still considered married under Islamic law, but no longer under civil law (or never had a civil marriage), one speaks of "marital captivity" or "limping marriages".[521] Women can get a civil divorce in a court, but for an Islamic religious divorce they require the cooperation of the husband or a cleric functioning as judge.

The Dutch non-governmental organization Femmes for Freedom specifically supports women trapped in marital captivity and lobbies for legislation against husbands leaving their wives in such a situation.[522] The issue can present itself in two forms: either women face the law of their religion – mainly Islamic and Jewish law, but also Catholic and Hindu – or religious family law of their country of origin, for instance Pakistani law. Pakistan, like many other Islamic states, does not recognize Western civil divorces. In that case, a religious divorce needs to be registered under Pakistani law. The same goes for most Islamic countries.[523]

Being ostracized by one's community is one problem, but perhaps not the worst. This 'split status' position may, as Shachar describes, leave women under the

[520] Shah-Kazemi 2001, p. 5.
[521] The term "marital captivity" is my translation of "huwelijkse gevangenschap", which I first used in a blog for the Leiden Law Blog. See 'Femmes for Freedom: fighting against marital captivity', 14 June 2012 via < http://leidenlawblog.nl/articles/femmes-for-freedom-fighting-against-marital-captivity>. The term " limping marriages" is, for instance, used by Pearl, David and Menski, Werner, *Muslim Family Law*, London: Sweet & Maxwell, 1998, p. 34.
[522] See www.femmesforfreedom.com.
[523] The recognition of civil divorces under civil regimes between EU Member States is addressed in Brussels II Regulation (EC) No 2201/2003. There are no such agreements with the majority of Islamic states, who thus do not recognize EU civil divorces.

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."[524] And, as Femmes for Freedom states: "As long as the wife is tied to her religious marriage, she lacks independence and is hampered in her participation in society. She may become socially isolated and will not be able to start a new relationship. If she does start a new relationship without having obtained, for example, an Islamic divorce, she will be considered an adulterous women in most Islamic cultures and countries."[525] Other than shame that a community brings upon a non-divorced yet separated woman, she is never really free from her husband (who remains entitled to sexual intercourse sanctioned by Sharia, which can be a form of Sharia sanctioned rape). She cannot remarry as she is still married to her husband. There is the threat of having one's children abducted by their father.

An example of the problematic nature of marital captivity is the following: an Iranian woman is divorced under British law, but does not have an Islamic divorce. The Islamic Republic of Iran does not recognize her as divorced. Without her husband's consent, she cannot have her Iranian passport renewed. If her (ex-) husband abducts her children by taking them to Iran, she will probably never see them again. She is not able to travel without her husband's permission. And, if she chooses to start a new relationship or remarry, and she does manage to travel to Iran to see her children, she will be prosecuted for adultery for which the Iranian authorities award the death penalty.[526] As her (ex-)husband is unwilling to cooperate with the religious divorce, this situation could continue for her entire life.

Muslim women who are still considered married, can either stay alone for the rest of their lives or may start a new relationship, but they risk grave consequences in countries where adultery is considered a crime. With the husband being in control of the woman's future, it "[…] leaves women vulnerable to extortion, manipulation and

[524] Shachar 2008, p. 576.
[525] http://www.femmesforfreedom.com/english/
[526] Musa, Shirin, Shariaraad houdt vrouwen gevangen in hun huwelijk' (Sharia council keeps women trapped inside their marriage), *NRC Handelsblad* 12 July 2012.

abuse. Women who live in marital captivity are trapped for long periods of time, even decades, in a state of limbo and unable to rebuild their lives."[527] As the husband is able to marry up to four wives, he can easily continue his life without consequences.

The need to obtain a religious divorce next to a civil divorce can be pressing. One Dutch-Pakistani woman told me she did not particularly feel the need to get an Islamic divorce next to her Dutch civil divorce. However, her parents who lived in Pakistan told her that the villagers threatened to set her parents' house on fire – with them in it – if she were to continue her life without a religious divorce.[528]

From one perspective, it can be argued that Sharia councils actually provide a solution for the problem of marital captivity. For, if a husband frustrates the divorce or is entirely absent, a qadi can pronounce the divorce nonetheless, thereby releasing the woman from marriage. This is a different approach to a multiculturalist one. A multiculturalist focuses on a "need" stemming from a "religious identity", experienced as "member of a community". The pragmatic approach to releasing women from a – not seldom abusive – marriage obviously does not have the romantic connotation of accommodating Sharia to fulfill the spiritual needs of a religious minority. Countering the multiculturalist narrative, Pragna Patel, director of non-profit organization Southall Black Sisters and a founding member of Women Against Fundamentalism, speaks about the "fallacious construction of the needs of communities". She says: "religion is a private matter, a personal thing, what we do or how we pray and all that is our private matter. What we don't want is religion institutionalized in the provision of services, including legal services, because that is when your rights are violated."[529] This is particularly relevant. Sharia councils are not advisory institutions where co-religionists find each other in mutual faith. Sharia councils are constituting, fueling and maintaining a parallel legal order that has real consequences for individuals.

In a toxic mix of religious fundamentalism, culture and tight-knit communities, Sharia councils uphold the theory and practice of the stronghold men have over

[527] http://www.femmesforfreedom.com/english/
[528] Private interview with anonymous woman.
[529] Interview with Pragna Patel, London, 25 June 2013.

women. Sharia councils may "help" women who want a divorce, but it is a solution to a problem that they fuel and one that they seek to preserve. Moreover, that religious divorces are Sharia council's "core business" does not in the least bit mean that they are actually *willing* to help women obtain one. In fact, they are known to frustrate women in their requests, especially if the husband is unwilling to cooperate.

Sharia councils and human rights

Are Sharia councils and human rights compatible? That depends on who you ask. The European Court of Human Rights says they are not, as I show below. Yet, multiculturalists have two choices when answering this question. A first option is simply stating that Sharia councils *should* operate within the boundaries of human rights, viz. not violate notions of sex equality (how this is to be done is never specified). I label this the "wishful thinking" option. A second strand of reasoning is that, since "Sharia cannot be defined" and its norms are "ever-changing" – in the way secular laws can be clearly defined – it is not possible to have a meaningful debate on the compatibility of Sharia and human rights.[530]

Unfortunately, in the spirit of Williams and Phillips, it is widely accepted in academic circles to state that Sharia is diverse and flexible, and it is also common to simply do away altogether with "negative" analyses which might reveal there is an inherent conflict between Sharia and individual rights. Take for instance this acceptance of the idea that Sharia law is not a concrete entity: "From this it is clear that there is no exact answer as to the compatibility of sharia with human rights standards, nor is it possible to make an assessment of the precise treatment of

[530] See for instance Lester, Shona, 'The State and the Operation of Sharia Councils in the United Kingdom A Critical Response to Machteld Zee', *Journal of Religion and Society* 2015, pp. 1-9 (3). A response to Lester is: Zee, Machteld, 'The State and the Operation of Sharia Councils in the United Kingdom: A Response to Shona Lester', *Journal of Religion & Society* 2015, pp. 1-6. Also, Dutch arabist Maurits Berger states that it is "[…]almost impossible to give definitions or general overviews of 'Islamic values' that European Muslims adhere to, since these valueshave been developing into a numerous forms of Islam, ranging from liberal and integrated to ultra-orthodox and isolationist interpretations of Islam." See Berger, Maurits, 'The Third Wave: Islamization of Europe, or Europanization of Islam?', *Journal of Muslims in Europe* 2013, pp. 115-136 (129).

women – sharia is flexible and can be adapted and developed along with the demands of modern society. While this is positive in that it goes against the presumption of sharia being archaic and sexist, it also means that it is difficult to regulate application of Islamic norms, as there is no uniform and defined body of 'accepted' laws."[531] Yet, is it not clear from the fact that British Sharia Councils do manage to 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 argument in itself makes it possible to say that, yes, there are diverse interpretations, but the core of Islamic family law is readily understandable and enforceable. It is perfectly possible to study and evaluate the practice of Sharia councils in the United Kingdom, regardless of the diversity of Islamic laws and practices.

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 discrimination. In a previous section I laid out the *theory* on the grounds for Islamic divorce, which itself is discriminatory towards women. And the *practice* in Sharia councils confirms that.

Several reports confirm the experiences I have had at the Islamic Sharia council in London and the Sharia council hosted by the Birmingham Central Mosque. These Sharia institutions, according to the framers of the reports, are not merely offering a helping hand in granting women their religious divorces they so desperately seek in order to overcome the issue of marital captivity. Sharia councils are courts which operate outside their legal boundaries, where faith-based discrimination is institutionalized and women's dependence on Sharia and affiliated

[531] See Brechin, Jessie, 'A study of the use of Sharia law in religious arbitration in the United Kingdom and the concerns that this raises for human rights', *Ecclesiastical Law Journal* 2013, pp. 293-315 (297-298); See also Rehman, Javaid, 'Islam, "War on Terror" and the Future of Muslim Minorities in the United Kingdom: Dilemmas of Multiculturalism', *Human Rights Quarterly* 2007, pp. 831-878 (838), and Rehman, Javaid, 'The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq', *International Journal of Law, Policy and the Family* 2007, pp. 108-127: "[…] the hastiness in the condemnation of historic Islamic principles fails to take account of the contextual, and flexible nature of the Sharia and the rules of Islamic family law." (p.114)

institutions is deepened by means of pressure and (the threat of) violence enforced upon them. This is sanctioned by the community. For example, in the report 'Equal and Free', drawn up in support of Baroness Cox's bill which aims to restrict the role of Sharia councils, states:

"The establishment of Muslim arbitration tribunals and the growth of Sharia Councils may be welcomed in so far as they relieve British courts from pressure and provide perceived theologically appropriate resolutions to commercial and other disputes, whether under the Arbitration Act or via voluntary mediation. However, often based on inherently gender-discriminatory principles, or operating outside their legal limits, they have also often been the cause of much suffering for women in this country. […] One British Muslim woman states: "I'm speaking as a British Muslim – I would like to say that I feel terribly let down by the British State, with its schizophrenic response to the law, its own law, its abrogation of its responsibility to safeguarding rights of Muslim women." Many Muslim women claim they came to Britain hoping to escape the injustice of Sharia law – and found their plight is worse here than in their countries of origin. The injustice inherent in religiously sanctioned discrimination is often compounded by intimidation: pressure from families and communities often prevents women from seeking their legal redress available in civil law. Although the UK Government claims that all UK citizens have equal rights and access to the law of the land, this 'de jure' right is not a 'de facto' reality. This report provides evidence of the problems and suffering of Muslim women in Britain today, including: condoning of domestic violence by Sharia councils and councils; asymmetrical access to divorce; rulings regarding child custody that ignore the best interests of the child; discriminatory policies defining the testimonies of women as being only worth half that of men; and the denial of the concept of marital rape."[532]

[532] 'Equal and Free?' 2012, p. 9.

The report 'Sharia Law in Britain: A Threat to One Law for All and Equal Rights' provides ample evidence of the arbitrary, discriminatory and involuntary nature of these Sharia councils.[533] Firstly, the report also contests the image of Sharia councils as functioning as arbitration tribunals under the Arbitration Act 1996. As I stated earlier, arbitration is founded on the principle that at least two parties decide freely to have their conflict adjudicated by an impartial tribunal under self-chosen rules. To this end, prior to the decision, the parties must sign an agreement that they will accept the outcome. It can be argued, however, that Sharia councils lack these basic characteristics of arbitration. In Sharia councils, there is no control over the appointment of judges or arbiters, nor an independent mechanism for monitoring them. Those before Sharia councils often do not have access to legal advice or representation, and the proceedings are not recorded. There are no traceable legal judgments, nor is there any right to question or appeal the judgment.[534] Besides, the *qadi* may issue a ruling on a divorce request without the presence of the husband, which again does not comply with the fundamental demand that arbitration demands two parties. One-party divorce rulings do not fall under the scope of the Arbitration Act. Also, it is odd that 95 per cent of their activities do not comply with the most basic notion of arbitration. And even more interesting, these councils have an inquisitorial approach, as opposed to an adversarial regime, which seems to be the most appropriate in arbitration proceedings. In addition, if a woman requests a religious divorce or child custody from an institution which presents itself as an arbitration tribunal, why make it so difficult for her? In principle, both men and women can take advantage of Sharia councils if they wish, but due to the discriminatory nature of Sharia, men have many more opportunities in practice.[535] An arbiter is supposed to be impartial, and not favor men as a default setting.

But also important, the basic requirement of arbitration – voluntary agreement – is not always met. The 'Sharia Law in Britain' report devotes a lot of attention to the

[533] 'Sharia Law in Britain' 2010, p. 2.
[534] 'Sharia Law in Britain' 2010, p. 9.
[535] 'Sharia Law in Britain' 2010, p. 14.

involuntary nature of Sharia council 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. As most principles of Sharia – contrary to what the proponents say – are contrary to British law and public policy, in theory they would be unlikely to be upheld in a secular court. Also, in reality, women are often pressured by their families to go to a Sharia council and to accept unfair decisions. British researcher Samia Bano, who visited Sharia councils and spoke to the women involved, found that, in reality, Sharia councils are "conceptualized in terms of a *duty* upon all Muslims to abide by the requirements of the sharia and the stipulations of the sharia councils."[536] Even more, there is evidence for the fact that refusal to settle a family dispute in a Sharia council can amount to threats and intimidation, or – at best – being excommunicated and labeled a disbeliever.[537]

Establishing the fact that the voluntary nature is, to say the least, questionable, is an essential part of the discussion, because 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*. Yet, even if Sharia councils – hypothetically – were accessed fully voluntarily, that does not end the discussion on the nature of Sharia law in the United Kingdom.

Regarding discrimination on grounds of sex, the most basic and fundamental issue is that it is by far mostly *women* who seek Sharia council services. This simple and basic finding deserves special attention. Men are not dependent on Sharia council rulings. As British professor of Law Shaheen Sardar Ali states: "If, being allowed to practise Islam in a non-Muslim jurisdiction is a matter of freedom of religion and minority rights, Muslim men and women ought to be equally keen to access such forums […]".[538] That it is mainly women needing the service should raise concern in itself.

[536] Bano 2008, p. 298.
[537] 'Sharia Law in Britain' 2010, p. 16.
[538] Ali 2013, p. 130.

Sharia family law consists of inherently discriminatory rules. It has become clear that the rules of the game are fundamentally more difficult for women than they are for men: something Islamists define as "justice" emanating from biological sex differences. Also, sexual obedience in marriage is not questioned by qadis. Marital violence is accepted as ground for divorce, rather than a ground to start an intensive community campaign against it.

Lastly, Sharia councils exist so that Islamic fundamentalists can promote their ideology whilst at the same time making money by letting women buy their freedom.[539] A freedom not seldom denied, if husbands are set on remaining married – religiously – to their wives.[540] It should not come as a surprise that Muslim women "[…] remain extremely cautious of initiatives to accommodate sharia into English law", as British researcher Samia Bano is convinced.[541] Needless to say, the multiculturalist's romantic view of the need Muslims have for Sharia is off beat.

Proponents of recognition of Sharia councils, such as Williams and Phillips, and many academics, are aware that Islamic laws can and do conflict with sex equality as codified in secular laws and treaties. But as multiculturalists, they simultaneously believe equality between Muslim minorities and the "indigenous" majority can be achieved by detracting from the universal nature of British laws. That means that Muslims should be able to resort to their "own" laws, but at the same time, this may not infringe upon sex equality. This is a condition set in most contributions to this particular debate: Sharia, yes, on the condition it is not discriminatory – yet it is never attempted to stipulate how this can be done. It is important to point this out.

Williams states that "an increased legal recognition of communal religious identities can be met if we are prepared to think about the basic ground rules that

[539] See also: Schwartz, Stephen and al-Alawi, Irfan, 'Our Survey shows British Muslims don't want sharia', *The Spectator* 9 July 2008: "The sharia divorce courts are in the hands of radicals who use them to promote extremist ideology while making money." Via < http://www.spectator.co.uk/features/825601/our-survey-shows-british-muslims-dont-want-sharia/>

[540] See for instance the testimony of "Sara" in: Cox, Caroline , 'A Parallel World. Confronting the abuse of many Muslim women in Britain today', *The Bow Group* 2015, p. 16.

[541] Bano 2008, p. 309.

might organise the relationship between jurisdictions, making sure that we do not collude with unexamined systems that have oppressive effect or allow shared public liberties to be decisively taken away by a supplementary jurisdiction". How this should be put into practice has yet to be specified. The problem multiculturalists ultimately have is that it is not possible.[542] Sharia is fundamentally discriminatory towards non-Muslims and women – as was also made clear in the previous chapter – while secular laws and human rights regimes explicitly denounce unlawful discrimination on grounds of sex and religion. Besides, multiculturalists overlook that even in Islamic countries or countries with a majority of Muslims are in a constant tussle to (re)define laws under the influence of competing religious fundamentalists and secularists.

These and other problems were dealt with by the European Court of Human Rights (ECtHR) in the well-known *Refah v Turkey* case (2001). The ECtHR concurred with the decision by the Turkish constitutional court to ban the Refah Partisi ('Welfare Party').[543] Refah operated in breach of Turkey's constitution, which stated that no political party may act counter to the state's secularist principle. Refah, an Islamist political party which expected to achieve a large number of votes at the coming election, aimed to establish 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 actually intended to promote 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

[542] See also Manea 2012: "[I]t is simply not possible to introduce Islamic law in family domain without violating human rights." Israeli law professor Frances Raday makes the argument that even in the hypothetical case that there be symmetry between religious and liberal values, then still this does not justify the accommodation and support for religious values. The outcome of symmetry, would logically and at the most lead to stalemate and not deference to religious values. (Raday, Frances, 'Secular Constitutionalism Vindicated', *Cardozo Law Review* 2008, pp. 2770-2798 (2773).

[543] *Refah Partisi (the Welfare Party) and Others v. Turkey*, (App nos 41340/98, 41342/98, 41343/98 and 41344/98) ECtHR 2001.

democratic foundation of equality between citizens before the law.[544] The ECtHR explicitly denounced the possibility of a societal model that enables legal pluralism[545]:

"Firstly, it would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State in the exercise of its above-mentioned functions, but static rules of law imposed by the religion concerned. But the State has a positive obligation to ensure that everyone within its jurisdiction enjoys in full, and without being able to waive them, the rights and freedoms guaranteed by the Convention. […] Secondly, such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy. A difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention, and more particularly Article 14 thereof, which prohibits discrimination. Such a difference in treatment cannot maintain a fair balance between, on the one hand, the claims of certain religious groups who wish to be governed by their own rules and on the other the interest of society as a whole, which must be based on peace and on tolerance between the various religions and beliefs."[546]

The ECtHR subscribed to the view that Sharia in itself is incompatible with the fundamental principles of democracy – ironically, a view Islamists agree with – as conceived in the Convention:

[544] *Refah Partisi (the Welfare Party) and Others v. Turkey*, § 19-25.
[545] See on Refah and legal pluralism also Macklem, Patrick, 'Militant democracy, legal pluralism, and the paradox of self-determination', *International Journal of Constitutional Law* 2006, pp. 488-516.
[546] *Refah Partisi (the Welfare Party) and Others v. Turkey*, § 119.

"Like the Constitutional Court, the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. 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."[547]

It was thus not *merely* legal pluralism that was problematic in itself, but the fact that *Sharia* would function as the content of an autonomous, separate, legal system, that drove the conclusion of the ECtHR. Citizens have religious freedom, including the right to manifest religion by worship and observance. However, the Court reiterated, that freedom is "primarily a matter of individual conscience which is quite different from the field of private law, which concerns the organisation and functioning of society as a whole."[548]

Yet, at the same time, multiculturalists in the United Kingdom defend the freedom to *choose* to resort to Islamic law for Muslim minorities. Muslims should thus have the option to choose jurisdictions, as the proponents argue. In general, those who favor state sanctioning of Sharia councils hold freedom of religion to be foundational to their position, and find suspicions of intra-group discrimination remedied by its presupposed voluntary nature. When it comes down to the degree to which Muslims may enact and enforce a sub-legal system that is fundamentally at

[547] *Refah Partisi (the Welfare Party) and Others v. Turkey*, § 123.
[548] *Refah Partisi (the Welfare Party) and Others v. Turkey*, § 128.

odds with the human rights framework of the law of the land, multiculturalists suddenly start to question whether those involved do so out of a sense of identity. Yet, this judgment makes it clear the European Court understands very well the importance of distinguishing between private religious convictions and the Islamist desire to institutionalize religious laws for a minority of Muslims in the West. 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 Convention. If Sharia law contradicts the provisions of the Convention in Turkey, it also contradicts the Convention in Italy, France or the United Kingdom. Two years after the Refah ruling, the ECtHR confirmed its views on the incompatibility between democracy and Sharia in the case of Gündüz v. Turkey.[549]

One could argue that the discussion about Sharia councils in the United Kingdom is different from a ruling against a political party that wants to have Sharia officially instituted. However, even if the demands of religious groups are mitigated in the sense that it should be "merely" restricted to family matters, then the tension with democratic values is still present. From the Refah case, as well as the discussion in the previous chapter, it is clear that Sharia encapsulates a theocratic state model. Even in a moderated form, such as informal Sharia councils, religious leaders have a position of leadership in religious communities whereby they exert tremendous power over individuals who happen to be pulled into a societal subsystem. As judges, fundamentalist leaders rule over the lives of people who depend on them without the possibility of redress or there being any form of accountability. It is difficult to harmonize this religious legal regime within the democratic structure.[550] Or, as British scholar Rumy Hasan states: "Importantly, the establishment of even a minimal Sharia jurisdiction will enormously increase the power of the mullahs and imams, who will then inevitably push for more exemptions to the law, and more Sharia laws and

[549] *Gündüz v Turkey* (Application no. 35071/97), ECTHR 4 December 2003, § 51.
[550] See also on this Cliteur, Paul and Rijpkema, Bastiaan, 'The Foundations of Militant Democracy', in Ellian, Afshin and Molier, Gelijn (eds.), *The State of Exception and Militant Democracy in a Time of Terror*, Dordrecht: Republic of Letters Publishing 2012, pp. 227-273 (264).

courts. Moreover, it will give the green light for religious leaders of other 'faith communities' to push for their own separate legal jurisdictions, a vista that cannot at all be appealing to anyone seeking a more just, unified, cohesive society."[551]

Moreover, the idea against informal Islamic private law receives legal backing by the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which the UK ratified in 1966. CEDAW's *ratio legis* is to remedy the tension between religious freedoms and sex equality. States that have ratified the Convention are required to enshrine sex equality into their domestic legislation, and enact new provisions to guard against discrimination against women. Professor of Law Frances Raday states that CEDAW creates a clear hierarchy of values by giving superior force to sex equality when there is a clash between customs and cultural norms, including religious norms.[552] Also, under Article 2(c) of CEDAW, State parties agree by all appropriate means to "establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination".

In fact, in 2013, the United Nations Committee on the Elimination of Discrimination against Women 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. The Committee recommended 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. This thus also includes Sharia. Moreover, the Committee expressed "concern that identity-based personal status laws and customs perpetuate discrimination against women and that the

[551] Hasan 2010, p. 253.
[552] See on the intersection of culture, religion, and gender in the context of international and constitutional human rights law: Raday, Frances, 'Culture, religion, and gender', *International Journal of Constitutional Law* 2003, pp. 663-715 (678) and Raday 2008, p. 2779.

preservation of multiple legal systems is in itself discriminatory against women."[553] From this point of view, it is bitter to see that Turkey has prohibited the unilateral divorce (talaq) by men under its secular civil code, while in the United Kingdom, multiculturalists are paying tribute to a system that embraces that religious construction.[554]

The Refah case and the CEDAW recommendation are strong arguments against the multiculturalists' focus on the right to religious freedom when it comes to accommodating religious laws in informal family law tribunals.

Sharia councils pose several problems. Firstly, it represents an encroaching influence of Islamism in Europe. Secondly, it is a problem that that expression of Islamism comes in an institutionalised form of legal pluralism. Thirdly, it is a problem that this pluralism does not entail, for instance, rivalry between two equally good systems, but rivalry between, on the one hand, a secular democratic system that sets out to protect the rights of members of (religious) minorities and women just like it does for every other citizen, and on the other hand, a system of Islamic laws that is clearly incompatible with freedom and equality. Muslim women who are part of tight-knit communities do not have the freedom and equal choice to decide to live their lives with or without marriage. This problem is a part of (sometimes tribal) group cultures, and exacerbated by Sharia councils. Sharia law is designed and intended to restrict and remove freedoms. But is that unique for *Muslim* women?

Batei Din: Jewish Councils

Multiculturalists state that equality also means that, like Jewish and Catholic minorities, Muslim minorities may resort to their own institutionalized councils. Hindus also have informal religious councils – there is hardly any research on those. Is it

[553] "General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, via <http://www2.ohchr.org/english/bodies/cedaw/docs/comments/CEDAW-C-52-WP-1_en.pdf>

[554] Otto, Jan Michiel (ed.), *A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, Leiden: Leiden University Press, p. 631.

indeed unfair to deny Muslims access to Sharia councils if other religious minorities have tribunals of their own?

Like the Muslim Arbitration Tribunal, the London-based United Synagogue offers faith-based arbitration to Orthodox Jews. On its website, it states: "In Jewish Law, civil disputes between Jewish parties are required to be adjudicated by a Beth Din adopting Jewish law as the law to be applied to the resolution of the dispute. The London Beth Din sits as an arbitral tribunal in respect of civil disputes and the parties to any such dispute are required to sign an Arbitration Agreement prior to a hearing taking place. The effect of this is that the award given by the Beth Din has the full force of an Arbitration Award and may be enforced (with prior permission of the Beth Din) by the civil courts."[555] Yet, like Sharia councils, the problem lies in family law, specifically in divorce proceedings.

In 1857, the UK parliament passed the Matrimonial Causes Act which reformed the law on divorce, moving litigation from the jurisdiction of the ecclesiastical courts to the civil courts.[556] 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. Just like the Sharia divorce regime, in the Jewish tradition a civil divorce decree does not dissolve the religious marriage.

According to Jewish law, marriage is a contract of ownership, where the husband (ba'al in Hebrew, which means owner) 'acquires' his wife. Jewish 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, out of his own free will.[557] The wife merely needs to accept the get. After ninety-two days she can remarry. The Beth Din acts as a witness to this process of mutual

[555] http://www.theus.org.uk/article/litigation. See also 'The Beth Din: Jewish law in the UK', *The Centre for Social Cohesion* 2009.
[556] See on the Rota (Roman Catholic councils) , Douglas, Gillian et al, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* 2011, pp. 29-32, via <http://www.law.cf.ac.uk/clr/Social%20Cohesion%20and%20Civil%20Law%20Full%20Report.pdf>
[557] Westreich, Avishalom, 'The Right to Divorce in Jewish Law: Between Politics and Ideology', *International Journal of the Jurisprudence of the Family* 2010, pp. 177-196 (177).

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 Jewish law and she is condemned as an adulteress if she has sexual relations with other men. In addition, if those relations lead to children, these offspring are branded *mamzerim* – a stigma that lasts for nine generations. A *mamzer* is prohibited from marrying any Jew other than another *mamzer*, and is thus barred from marrying freely within the Jewish community. This prospect of being unable to remarry and jeopardising 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 labelled *agunah*, a "chained woman" – she is left in marital captivity. However, a non-divorced man may cohabit with other women without the stigma of adultery, nor are his children born out of those relations considered mamzerim.[558]

Like Muslim women, Jewish women often find themselves at a disadvantage in the religious divorce process. Unlike Sharia councils, where a qadi can issue a divorce in the 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. The Islamic *faskh* thus offers a possibility for Muslim women to obtain a divorce from an absent or uncooperative husband, which Jewish women do not have. A Jewish husband, on the other hand, can frustrate the divorce even in cases of domestic abuse without a Beth Din stepping in.[559]

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 Batei Din, the UK passed the Divorce (Religious Marriages) Act in 2002. This Act aims to remedy the unbalanced bargaining power of the husband. If a

[558] Zornberg, Lisa, 'Beyond the Constitution: Is the New York Get Legislation Good Law?' *Pace Law Review* 1995, pp. 703-784 (703-704).
[559] See also Cares, Alison and Cusick, Gretchen, 'Risks and Opportunities of Faith and Culture: The Case of Abused Jewish Women', *Journal of Family Violence* 2012, pp. 427-435 (428).

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 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 finalised until the woman has received the get.[560] 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.[561] It must be added that this 2002 Act is successful within the Jewish community, as almost all Jewish citizens have a civil marriage combined with a religious marriage, which is unfortunately not the case in the British Islamic community. This also means that despite the similarities between Jewish and Islamic tribunals, both carry on institutionalizing marital captivity and upholding discriminatory religious laws. There are (legal) differences, both in religious family law regarding the competence of the councils, and regarding British secular law which recognises 'Jewish usages'.

Another important difference is that, other than Jewish women, Muslim women face grave penalties, including bodily harm, when they enter a new relationship if their previous religious marriage is not dissolved. Sharia attaches the death penalty to adulteresses. This punishment can be carried out in the form of honour-based violence, or as a punishment under state law, for instance in Pakistan and Saudi Arabia.[562] Violent family members are a problem cross-culture and religion. However,

[560] Comparable to the 1983 New York Get Law, see Broyde, Michael, 'New York's Regulation of Jewish Marriage. Covenant, Contract, or Statute?', pp. 138-163 (153), in: Nichols, Joel (ed.), *Marriage and Divorce in a Multicultural Context: Multi-tiered Marriage and the Boundaries of Civil Law and Religion*, Cambridge: Cambridge University Press 2011.

[561] Hunt, Phillip, 'House of Lords (Written Answers): Justice: Sharia Law' Hansard 3 Mar 2008, Column WA154.

[562] The Crown Prosecution Service states: "Honour based violence (HBV) can be described as a collection of practices, which are used to control behaviour within families or other social groups to protect perceived cultural and religious beliefs and/or honour. Such violence can occur when perpetrators perceive that a relative has shamed the family and/or community by breaking their honour code.", see lemma 'Honour Based Violence and Forced Marriage' via

as American emerita professor of psychology Phyllis Chesler states, the specific planning of murdering often young women is typical of Islam-rooted communities. Moreover, major religious and political leaders in developing Muslim countries keep silent and it is mostly Islamic communities that maintain an enforced silence on all matters of religious, cultural, or communal "sensitivity", thereby perpetuating violence.[563] The aspect of (life-threatening) violence gives Islamic, thus other than Jewish, marital captivity an even more problematic dimension.

Regarding Jewish courts, the state has made legislation in order to provide women with some leverage when husbands do not want to cooperate with a religious divorce. From interviews with rabbinic judges it was clear that it also works in practice: women have been able to obtain the get more easily since the Divorce (Religious Marriages) Act. 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; and the UK and Sharia councils, which have not received any formal recognition, nor are they the subject of state intervention. What these two systems do have in common, though, is that they function based on a system that is inherently discriminatory towards women. Their religious laws are the foundation of a system keeping women stuck in a situation of marital captivity. Religious leaders are not keen on reform. Furthermore, both Muslim as well as Jewish men are known to stall religious divorce and use their power to blackmail women to negotiate favourable financial and custodial settlements in the civil procedure.[564]

Religious tribunals calling upon divine laws concur with this system and support community convictions involving shame and honour that keep marital captivity alive as an issue. Other than a tolerant (denounce yet accept) or intolerant (denounce and intervene) position, multiculturalists support the system of women

---

http://www.cps.gov.uk/legal/h_to_k/honour_based_violence_and_forced_marriage/#a04) See also the documentary "Banaz: A Love Story" (2012), by Deeyah Khan.

[563] See: Chesler 2010, pp. 3-11.

[564] Hamilton, Carolyn, *Family, Law and Religion*, London: Sweet and Maxwell 1995, pp. 118-120.

being dependent on religious councils and their husbands for their freedom. Yet, the romantic vision multiculturalists have regarding the possibility for Jewish and Muslim minorities to have access to their own laws is off beat.

The Arbitration and Mediation Services (Equality) Bill

There is an additional problem that marks another difference between Jewish women and Muslim women. That is, Jewish women – apart from a tiny minority – generally also have a civil marriage, and therefore the Divorce (Religious Marriages) Act actually works as a lever.[565] However, only about ten percent of the UK's mosques are registered to conduct civil ceremonies under the 1949 Marriage Act.[566] It is believed that a high percentage of Muslim marriages are religious only, not civil. A further problem is that the criminal offense of performing a marriage ceremony that is not registered under the Marriage Act 1949 is not enforced.[567] This cements the false belief that the nikah (Islamic marriage contract) is registered under domestic law.[568] It is also problematic that – unlike Jewish women – Muslim women often have relatively little knowledge of the British legal system and are unaware of their rights.[569] It is this that the bill seeks to address.

In 2012, four years after the Archbishop and the Lord Chief Justice delivered their speeches, The Arbitration and Mediation Services (Equality) Bill was discussed in the House of Lords. The bill's aim is to prevent discrimination against Muslim

[565] Interview with rabbinic dayanim at the London Federation of Synagogues, London 18 November 2013.
[566] See Kuric, Lejla, 'Britain's sharia councils and secular alternatives', Leftfootforward.co.uk 2014, via <https://leftfootforward.org/2014/04/britains-sharia-councils-and-secular-alternatives/>
[567] As under section 75, see also Addison, Neil, 'Lady Cox's bill is not so controversial', *The Guardian* 23 June 2011.
[568] Proudman, Charlotte, 'A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry', *Family Law Week* 31 January 2012, via < http://www.familylawweek.co.uk/site.aspx?i=ed95364>
[569] In June 2014 Justice Minister Simon Hughes told the House of Commons: "The Government is committed to the protection and promotion of the rights of women, families and children. This includes raising awareness of the legal consequences of 'religious only' marriages and encouraging mosques to register in order to be able to carry out legally recognised marriages in their various facilities." See: 'Muslim 'wives' discover that they have no marriage rights', *Family Law Week* 11 December 2014, via <http://www.familylawweek.co.uk/site.aspx?i=ed137790>. See also Jaan, Habiba, 'Equal and Free? 50 Muslim Women's Experiences of Marriage in Britain Today, Aurat Research Report 2014, via < https://www.secularism.org.uk/uploads/aurat-report-dec2014.pdf>

women and “jurisdiction creep” in Islamic courts.[570] It 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 allegations of domestic violence) or family law; that some Sharia council 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.

The bill does not aim to interfere in the internal theological affairs of religious groups, as the report ‘A Parallel World. Confronting the abuse of many Muslim women in Britain today’ states.[571] The report is drafted by a member of the House of Lords, Caroline Cox, who initiated the bill. It states furthermore that: “In a free society, and in accordance with the hard-fought tradition of freedom of religion and belief, individuals must be able to organise their affairs according to their own principles, whether religious or otherwise. However, attempting to operate a parallel legal jurisdiction and to allow the de facto creation of new legal structures and standards is unacceptable.” This aim is in line with the European Court of Human Rights’ approach to Sharia. The bill explicitly makes it clear that sex discrimination law applies directly to ‘Arbitration Tribunal’ proceedings: the bill proposes to amend the Arbitration Act of 1996 by stating that discriminatory rulings can be struck down under the bill. New provisions include: “No part of an arbitration agreement or process shall provide – (a) that the evidence of a man is worth more than the evidence of a woman, or vice versa, (b) that the division of an estate between male and female children on intestacy must be unequal, (c) that women should have fewer property rights than men, or vice versa, or (d) for any other term that constitutes discrimination on the grounds of sex.”

[570] See, for instance, ‘Bill limiting sharia law is motivated by 'concern for Muslim women'’, *The Guardian*, 8 June 2011. The Bill was announced in 2011, and debated in the House of Lords in 2012.
[571] See Cox 2015.

It also creates a new criminal offence of 'falsely claiming legal jurisdiction' under the Courts and Legal Services Act 1990: "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."[572]

Moreover, the Equality Act would be amended so as to impose a statutory duty on public institutions, such as the police, social workers and health care personnel, to inform women they come into contact with about the rights they have under domestic laws.[573]

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

This addresses for instance the practices of the Muslim Arbitration Tribunal. The MAT – at least formally – functions in a different way to other Sharia councils in the sense that they perform Islamic divorces as well, but they claim their main focus is on arbitrating financial disputes under the Arbitration Act. For example, the MAT adjudicated on an inheritance dispute between three sisters and two brothers. In accordance with Sharia law principles, the men were given double the inheritance of the women.[574] The new MAT website addresses concerns regarding sex discrimination. It now says it offers: "A platform through which women are included as part of the expert panel and ensure that there is no bias within the organisation against genders. The active role of women professionals provides a sense of support

[572] The Bill extends to England and Wales only. See Arbitration and Mediation Services (Equality) Bill [HL] 2012-13).
[573] Duffet, Rebecca, 'Baroness Caroline Cox And The Sharia Bill', *Cross Rythms* June 30 2011, via < http://www.crossrhythms.co.uk/articles/life/Baroness_Caroline_Cox_And_The_Sharia_Bill/43747/p1/>
[574] Cox 2015, p. 6.

and guidance for the client and also offers re-assurance that the sensitivity of the matter is appreciated."[575] There is no updated research on the MAT's practice.

Nonetheless, the question is whether the bill also addresses Sharia councils in their essence. The bill aims to restrict the (discriminatory) practices of Sharia councils under the Arbitration Act. However, it is my contention that it will be very difficult to enforce in court. The *raison d'être* of Sharia councils is one-party divorce requests, with either an absent husband or one frustrating the process (and thus disagreeing with the procedure as such). It would only count as arbitration if there was a married couple giving sole decision-making power to an independent qadi (which is not the case). A second step would be, hypothetically, if one of the parties is unsatisfied with the outcome and decides to go to a secular court to strike down the arbitration award based on the amended Arbitration Act. This is even more unlikely considering the repercussions that would follow from challenging a "divine ruling".

Sharia councils do not arbitrate – with the exception of the Muslim Arbitration Tribunal. In general, they are divorce councils. Their products are registered *talaqs*, *khuls* and *faskhs*. Not arbitration awards considering a decision on a dispute between two parties. Therefore, the Arbitration and Mediation Services (Equality) bill misses the mark for the largest part.

There is one important exception to this. Barrister Charlotte Proudman, who has represented many women during their divorce procedures at Sharia councils, explained to me how the creation of the criminal offense could be effective.[576] The biggest improvement would be in the elimination of illegitimate custody rulings. Proudman has experience with clients who have been made to surrender custody of their children to their (sometimes abusive) husbands based on Sharia council rulings – although the councils formally deny this. These women did not know that custody rulings were the sole remit of secular courts. When these women finally learned about their rights, they would go to a secular judge to seek custody of their children

[575] http://www.matribunal.com/why-MAT.php
[576] Interview with Charlotte Proudman, London 18 June 2013.

after this had been denied by qadis. However, as is custom in many secular legal systems, the secular judge would deny their request based on the ground that the children had been accustomed to the situation of living with their father and that disruption to a child's life should be kept to a minimum.[577] It is at this point that the proposed criminal offence for falsely claiming legal jurisdiction may work. Charges could be pressed against the qadi(s) ruling on custody. If the criminal court were to convict the qadi(s), this could have a positive effect on restricting the *de facto* remit of Sharia councils.[578] General and special prevention could benefit the wellbeing of children and restrict the effects of the inherent sex discrimination of these councils.

The Islamic Sharia Council responded to the bill. It is believed that the deficiency of the bill lies in "its failure to appreciate cultural sensitivities". Suhaib Hasan argued that the bill "made no attempt to understand the workings of the shariah councils," and that "it [was] morally wrong to comment on [the issue of the testimony of a woman being half of that of a man] without any knowledge of [it]." He also stated that Baroness Cox merely "regurgitated common myths about the role of women in Islam in an effort to undermine the work of the shariah councils," and that "she deserves little praise" for doing so.[579]

Secular alternatives to Sharia councils

Valuable as this bill could actually be in keeping the public debate on religious tribunals going, it unfortunately does not address the problems arising from the fact that for at least a part of the British Muslim community, Sharia law is inevitable when dealing with issues regarding marriage and divorce.

[577] See also: 'Multiculturalism and Child Protection in Britain: Sharia Law and Other Failures' Published by One Law for All, June 2013, via < http://www.onelawforall.org.uk/wp-content/uploads/Multiculturalism-and-Child-Protection-in-Britain.pdf>.
[578] The same goes for Batei Din, yet it is very unlikely that Jewish women in Britain think a Beth Din holds formal jurisdictional powers.
[579] See Maret 2013, p. 276.

Rather than, for instance, outlawing Sharia councils, it is very important to study alternatives for women who seek religious divorce, be it Jewish, Muslim or whatever religious denomination. Is it possible to keep women independent from religious authorities yet at the same time be able to resolve the issue of uncooperative husbands who leave the women in marital captivity?

I also believe this is better than to wrongly refer to arbitration, and maintaining vague about Sharia and the fact that "it should not frustrate women's rights"; yet leave the question *how* that should be organized unanswered. The United Kingdom could look into the following legal alternatives.

The Netherlands has two secular alternatives for women who have been put into a situation of marital captivity by their husbands. The first important alternative to Sharia councils was established by the Dutch-Pakistani Shirin Musa in 2010. After years of failed attempts to get her husband to cooperate with the divorce, she took the civil route: the 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 religious marriage. He instantly did. The Dutch civil court established that it was important for women to carry on with their lives, including remarriage, and not have to face penalties in Islamic countries, often the woman's country of origin.[580]

After her religious divorce – for which Musa principally refused to go to a Sharia council for, Musa founded Femmes for Freedom. This NGO sets out to help, financially and otherwise, women of all denominations in marital captivity. In 2013, Femmes for Freedom successfully lobbied to extend the law against forced marriage to include marital captivity – being forced to *remain* married – as a criminal offence (in case of complaint).[581] That makes the Netherlands the first country in the world to

[580] See Rechtbank Rotterdam, 08-12-2010, 364739 / KG ZA 10-1018; ("Vordering tot medewerking aan ontbinding van het religieuze huwelijk na echtscheiding naar Nederlands recht toewijsbaar. Door zijn weigering daaraan mee te werken houdt de man de vrouw gevangen in wat zij ervaart als een religieus huwelijk. De man gedraagt zich aldus in strijd met hetgeen volgens ongeschreven regels in het maatschappelijk verkeer van hem kan worden gevergd.") See also: Rechtbank Amsterdam 22 May 2014, case number/rolnummer: c/13/563478 / KG ZA 14-495 HJ/NRSB; Rechtbank Den Haag 11 January 2013, case number/rolnummer 431258/KG ZA 12-1273.

[581] Under article 284 of the Dutch Criminal Code. See for the amendment: *Kamerstukken II* 2012/13, 32840, 8.

criminalize marital captivity. According to Musa, after years of marital captivity, a woman finally pressed charges, which caused her husband to immediately cooperate with a religious divorce. If the United Kingdom were to create this as a criminal offense as well, British Muslim women who are refused a religious divorce could not only press charges against their uncooperative husbands, but potentially also against the qadi. The qadi could be held accountable for acting as an accessory to marital captivity. Religious authority holders who have the power to pronounce divorce yet refuse to do so can be held criminally liable.

Moreover, rather than the woman not being able to travel to her country of origin in fear of being prosecuted, it is now the husband who risks prosecution for the crime of leaving his wife in a state of marital captivity.

This basically means that if Muslim women were to resort to secular courts to make their husbands cooperate, they would no longer be dependent on religious tribunals for their religious divorces. Although, it is unclear whether civil and criminal liability of keeping a woman in marital captivity stretches to uncooperative judges of Sharia councils as well. Future litigation will have to show the extent of the law.

Unfortunately, this does not solve the problem of Islamic countries that do not recognize secular civil law regimes. Recognition of intra-country divorces is something that should be codified in treaties concerning international private law. Moreover, the Dutch secular alternatives also do not solve the problem of *absent* husbands and marital captivity. In the case of Jewish law, there are no ways out of the religious marriage when the husband is untraceable.

There are interpretations of Sharia where marriage to an absent husband after a certain period automatically constitutes a "divine divorce". That is, for an automatic religious divorce, no Sharia councils are needed. More fundamentalist interpretations, however, state that there always needs to be a *talaq* or a qadi ruling on divorce.[582] If important state actors, such as an archbishop and the most senior

---

[582] '11681: Does leaving one's wife for a long time count as divorce?', *Islam Question and Answer*. Quoting the Saudi Grand Mufti Bin Baz: "So long as the husband has not uttered the word of divorce to her, and the wife

judge call for the accommodation of Sharia as a basis for "dispute settlement", the fundamentalist interpretation is favoured. A greater recognition of Sharia councils means a greater acceptance of the unofficial regime of marital captivity. When multiculturalists and Islamic fundamentalists call for the recognition of Sharia councils, women's dependence on these institutions is deepened, and the secularization process of fundamentalist Sharia rules is weakened.

The (potentially grave) consequences of a woman continuing with her life – for instance remarrying without a religious divorce, possibly causing shame or violating "honour" – ultimately depend on family members, (ex-)in-laws, and tribe and/or community members. This means that for many Muslim women with missing husbands, the reality is that some do rely on Sharia councils for their freedom.

It will take immense global community reform, education, secularization, laws and enforcement, (police) protection, and emancipation to counter this social, cultural and religious problem of marital captivity and honour based violence. Only the future can tell how this develops. Surely, promoting the institutionalization of Sharia councils – run by Islamists, backed by multiculturalists – will halt this development. As Yemeni-Swiss political scientist Manea Elham writes: "In fact, these voices are actually calling for the legitimization of systematic discrimination against women and children. And such discrimination will certainly not help any successful integration of migrants' communities of Islamic faith. Indeed, it will only lead to the cementation of closed parallel societies, with two types of women, Western women who enjoy their rights according to the state's laws, and migrants' women who do not."[583]

---

has not gone to the qaadi to seek a divorce, then divorce has not taken place. She is still his wife and divorce does not take place automatically." < http://islamqa.info/en/11681>.

[583] Elham 2012.

Conclusion

While downplaying the problems faced by individuals under the increasing influence of Islamism, former Archbishop Williams and Lord Chief Justice Phillips made statements about Sharia as “universal principles”. These high-profile public figures argued that Sharia could and should be accommodated for the sake of equality and in light of the need to recognize Muslim identity – which is also what Islamists do.

Contemporary multiculturalism incorporates the need for (some degree of) legal autonomy for “communities”. Since it is religious codes that provide such laws, multiculturalists, like fundamentalists, place religion in the core of one’s identity. Multiculturalists believe that such accommodation is possible within the (legal) norms of the host society – either by simply stating that unacceptable parts of Sharia “have nothing to do with Islam”, which is not true, or that parts of Sharia may not clash with other human rights, which is not possible – especially with regard to family law. Yet, to the untrained ear, their call may sound sympathetic.

Multiculturalists do not want a Sharia state, but what they *do* want is vague, remains unaddressed, and is mostly limited to emphasizing a communal need for shared values and rejecting what is deemed a “too negative” focus on Sharia. Clarity is key to any debate. The vagueness of what Sharia should hold for British society has the result that people postpone their negative judgment whilst hoping that it can’t be all that bad. This is how multiculturalists create space. This space is readily consumed by fundamentalists who claim Muslims are entitled to Sharia, like multiculturalists argue as well.

The lack of functional content in multiculturalists’ claims should be met with caution. Islamic fundamentalists, such as the leaders behind the Islamic Sharia Council, are influential. They reach a wide audience of susceptible Muslims in Britain and beyond its borders, and are pursuing more Sharia in the United Kingdom and elsewhere in Europe. The frequent plea that Sharia should be allowed as long as it does not conflict with equal rights is wishful thinking at best and perilous at worst. It

detracts from the truth: that Sharia is a competing body of laws on British territory, and that these laws are hostile towards non-Muslims and towards women, to say the least. Moreover, Sharia is incompatible with democracy: a conviction shared by secularists, Islamists, and the European Court of Human Rights.

The well-meant mitigation that it is merely Islamic *family* law that requires recognition is, other than multiculturalists – also in academic circles – believe, not a modest demand. Wherever Islamists gain political power, it is Islamic family law that is pushed to the top of the agenda. Sharia councils are not institutions where Islamic individuals go to whenever they experience an identity-driven need for a psychological commitment to their community. Instead they are revived anachronisms cementing women's secondary and dependent position.

Unfortunately, some women actually do depend on these councils if their husbands are set on keeping them in a situation of marital captivity. Rather than cementing the continuance of this international problem of marital captivity, for instance by espousing false and romantic notions of community cohesion and religious needs, the United Kingdom would do well to offer its citizens secular alternatives to Sharia councils. The Netherlands offers women who are kept in marital captivity the possibility of pressuring husbands into cooperation by means of civil and criminal liability. Future litigation will tell whether this will release Muslims from the pressure of being ruled by Islamic laws at a larger scale.