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## SEPARATION OF SHARIA FROM THE STATE AS ACCOMMODATION – EFFECTS AND LIMITS\*

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### **Sažetak**

#### **ODVOJENOST ŠERIJATSKOG PRAVA OD DRŽAVE KAO IZVOR PROSTORA PROMJENJIVOSTI: UČINCI I GRANICE**

*U suvremenim ustavnim demokracijama primjena vjerskog prava u određenim je granicama prepuštena pojedinačnom vjerniku te se država u to obično neće miješati. U ovome radu autor analizira taj uobičajeni odgovor na vjerske norme u kontekstu rastuće prisutnosti šerijatskog prava u Kanadi i Ujedinjenom Kraljevstvu. Utvrđuje se da on pojedinačnim vjernicima prepušta mogućnost da sami određuju kako će se i u kojoj mjeri vjersko pravo na njih primjenjivati. To nazivamo prostorom promjenjivosti. Na njegova ograničenja već ukazuje niz autora. Posebno se ističe problem pretjerane izloženosti pojedinca neumoljivoj vjerskoj tradiciji. Mi napominjemo da u potrazi za valjanim rješenjima tih i drugih problema treba imati na umu da odvojenost države i vjerskog prava te prostor promjenjivosti što iz nje proizlazi nisu prepreka različitostima, već njihova podloga. Zanimanje toga može dovesti do dodatnih poteškoća u uvijek napetom odnosu vlasti i religije.*

**Ključne riječi:** vjerske slobode, šerijatsko pravo, sekularna država.

### **1. INTRODUCTION**

Muslim law (Sharia) has made its presence known across the globe. Its rules on family life have been particularly controversial. The flows of migration have carried them to the liberal democracies of the West, where a number of groups requested that they be recognised or accommodated. Most commonly, it is

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\* All web resources referred to in this paper were last accessed on 27 September 2013.

suggested that family law arbitration under Sharia be allowed and that the resulting awards be granted some degree of civil effect. In other words, it is requested that the secular law outlines a space in which religious law would be free to flourish and regulate the lives of devout Muslims, at the same time strongly interacting with the national legal system. At the time of writing, such requests for accommodation have been resolutely rejected in Canada,<sup>1</sup> Australia,<sup>2</sup> Germany,<sup>3</sup> US<sup>4</sup> and, to some extent, the UK.<sup>5</sup> Thus, it would seem that a widespread response to the spreading of Sharia family law in the West has been to keep it separate from the state, rather than accommodate its peculiarities.

The academic debate on these issues has for the most part followed the dichotomy described above. Some argue for strict separation, claiming that all civil effect should be denied to Sharia's family law norms, most commonly on the grounds of their plain incompatibility with the public order of a liberal constitutional democracy.<sup>6</sup> Sharia, it is convincingly argued, endangers human rights guarantees, particularly gender equality, and the coherence of the legal order, threatening to introduce a fatal form of legal pluralism.<sup>7</sup> On the other side is a much smaller

- 1 Sturcke, J., Sharia law in Canada, almost, <<http://www.theguardian.com>>, 8 February 2008, available at: <http://www.theguardian.com/news/blog/2008/feb/08/sharialawincanadaalmost>.
- 2 Merritt, C., Sharia Law at Work in Australia, <<http://www.theaustralian.com.au>>, 20 July 2011, available at: <http://www.theaustralian.com.au/national-affairs/sharia-law-at-work-in-australia/story-fn59niix-1226097889992>.
- 3 Sharia in Germany? Politician Blasted for Support of Islamic Law, <<http://www.spiegel.de>>, 3 February 2012, available at: <http://www.spiegel.de/international/germany/sharia-in-germany-politician-blasted-for-support-of-islamic-law-a-813148.html>.
- 4 Kaleem, J., Sharia Law Campaign Begins As Muslim Group Fights Bans, <<http://www.huffingtonpost.com>>, 1 March 2012, available at: <http://huff.to/zwCYCC>.
- 5 Bingham, J., Sharia courts „as consensual as rape“, the House of Lords told, <<http://www.thetelegraph.co.uk>>, 20 October 2012, available at: <http://www.telegraph.co.uk/news/religion/9621319/Sharia-courts-as-consensual-as-rape-House-of-Lords-told.html>.
- 6 See, for example, Gaudreault-DesBiens, J., Religious Courts, Personal Federalism, and Legal Transplants, in *Shari'a in the West*, New York, Oxford University Press, 2010, p. 171; Buchler, A., Islamic Family Law in Europe? From Dichotomies to Discourse - or: Beyond Cultural and Religious Identity in Family Law, *International Journal of Law in Context* 8, no. 2 (2012), p. 204; Fretwell Wilson, R., Privatizing Family Law in the Name of Religion, *William & Mary Bill of Rights Journal* 18 (May 2010): p. 925; Report: "When Legal Worlds Overlap: Human Rights, State and Non-State Law, Versoix, Switzerland: The International Council on Human Rights Policy, 2009; Reiss, M., The Materialization of Legal Pluralism in Britain: Why Shari'a Council Decisions Should Be Non-Binding, *Arizona Journal of International and Comparative Law* 26 (2009): pp. 739–778.
- 7 Legal pluralism can be defined "as the condition in which a population observes more than one law" (Woodman, G. R., *The Possibilities of Co-existence of Religious Laws with Other Laws*, in *Law and Religion in Multicultural Societies*, Copenhagen, Djøf Publishing Copenhagen, 2008, p. 26.) For the purposes of this paper, I include religious laws encompassed by Sharia into other laws that may be observed by the population, and as such compete with the power of the secular government, even when they can be applied only without governmental sanction. For an introductory discussion on legal pluralism, see the work of John Griffiths. (Griffiths, J., *What Is Legal Pluralism?*, *Journal of Legal Pluralism* 24, no. 1 [1986]: pp. 1–55).

but nonetheless vocal group of scholars, who argue that it is a mistake to simply separate Sharia from the state.<sup>8</sup> Their claim is that accommodating Sharia may provide a range of benefits. Most notably, it is cogently argued that accommodation can facilitate pluralism in a constitutional democracy, enabling better integration of religious minorities and help eradicating problematic religious or traditional practices, such as child marriages. In this sense, it is concluded that some degree of accommodation is more protective of human rights and the liberal legal order than pure separation.

While both strands of jurisprudence make valuable contributions to the debate on Sharia in the West, they also contain blind spots. The advocates of separation are most zealous in requiring that Sharia remains separate from the state, treating separation as a barrier to stop an infestation, but little is said of its limitations and predicted effects.<sup>9</sup> On the other side lie those who suggest that a form of accommodation be introduced. Much like their opponents, however, scholars representing this position seem to view separation and accommodation as polar opposites. Where one is increased, the other is to be ignored or decreased. Consequently, their suggestions do not pay sufficient regard to the need to maintain separation between the state and Sharia.

The goal of this paper is to look past the described division between “separation” and “accommodation” as two mutually exclusive positions. Instead, it is argued that separation itself is a form of accommodation. Contrary to the claims of accommodationists, it too causes the state to engage with Sharia family law norms. Unlike accommodation requests made by different religious groups, however, its purpose is not to support the traditions upheld by communities of believers. Instead, it is meant to empower and accommodate the religious freedom of individual believer so that she may choose between the religious and secular laws, using both as she negotiates and constructs her identity, not as a citizen **or** as a believer, but both. This is achieved by the “transformative space” projected by Sharia’s separation from the state.

Nonetheless, the space has its limitations. It does not fully protect the interests of the individual citizen. Hence, limitations of the separation between the state and Sharia in this sense should be examined and alleviated. However, any such measure should not consider only the interests of those that need to be protected,

8 Shachar, A., *Religion, State and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, McGill Law Journal 50 (2005): pp. 49 – 88; Shachar, A., *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, Theoretical Inquiries in Law 9, no. 2 (July 2008), pp. 573-607; Ahmed, F. And Luk, S., *How Religious Arbitration Could Enhance Personal Autonomy*, Oxford Journal of Law and Religion 1(2) (2012): pp. 424-445; Kutty, F., *The Myth and Reality of Shari’a Courts in Canada: A Delayed Opportunity for the Indigenization of Islamic Legal Rulings*, University of St. Thomas Law Journal 7, no. 3: June 2011., p. 1.

9 Christoffersen, L., *Is Shari’a Law, Religion or a Combination? European Legal Discourses on Shari’a*, in *Shari’a as Discourse: Legal Traditions and Encounter with Europe* (Surrey: Ashgate, 2010), p. 73

but also the need to maintain the vitality of the transformative space. The agency of individual believers can then be properly advanced. By contrast, efforts to create state-sanctioned shortcuts to seemingly desirable goals may significantly erode its potency.

This paper proceeds as follows. In the first part, I look at the basic features of the relationship between state and religious law as moderated by separation (1). In the second part, I look at the two models of Sharia's separation from the state that have developed thus far (2). In the third part, I explain the "transformative space" that is developed by virtue of these models (3). The last part of the paper covers the limitations of separation and the attempts to alleviate them from the perspective of its transformative space (4).

## **2. STATE, RELIGIOUS LAW AND THEIR SEPARATION: AN OUTLINE**

Generally speaking, separation of the religious and the governmental generated a common secular space as the "lowest common denominator" that was to unite the population despite religious differences.<sup>10</sup> Therefore, religious conviction as a transcendental concept was not to have anything to do with the reason-based state. Instead, religion was to be removed from the powers the government has over the public sphere.<sup>11</sup> This was done against the background of abuse that emerged every time religion and the government uncontrollably joined forces. These range from the most extreme cases of persecution<sup>12</sup> and discrimination<sup>13</sup> to the seemingly mild endorsements of a single religion or a number of creeds which nonetheless wear away the principle of equality.<sup>14</sup> The one common feature of all these abuses is that they to some extent inevitably erode the individual freedom to choose and practice their belief, whether alone or in community with others.

Separation seeks to avoid the erosion of liberty by relegating religion into privacy, leaving each believer with the ability to adopt, practice and change any

<sup>10</sup> Raday, F., *Secular Constitutionalism Vindicated*, *Cardozo Law Review* 30, no. 6 (2006): 2770; Mahmood, S., *Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation*, *Public Culture* 18, no. 2 (2006): p. 524.

<sup>11</sup> Rosenfeld, M., *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, *International Journal of Constitutional Law*, Vol. 6, No. 3 & 4 (October 2008): p. 415.

<sup>12</sup> The example of the immediate post-establishment period in England being the case in point. (Rivers, J., *The Law of Organized Religions*, Oxford, Oxford University Press, 2010, p. 10.)

<sup>13</sup> Grim, B. J. and Finke, R., *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century*, 1st ed., New York, Cambridge University Press, 2011, p. 40.

<sup>14</sup> For a convincing investigation of this argument from the international law perspective, see Temperman, J., *State-Religion Relationships and Human Rights Law*, Leiden, Martinus Nijhoff Publishers, 2010, p. 165.

beliefs she might have and to form communities with others accordingly.<sup>15</sup> In this sense, separation accommodates the conscience of individuals and, by extension, the integrity of religious communities. The state, restrained by the mandates of separation, has to turn back from religion and cease using it as a political playground. Even though particular religious communities may vie for political power, the state has to deny any hope of fulfilling such temptations.<sup>16</sup> The more the government can avoid undue aggression or support to any particular religion, the safer from unnecessary governmental interference will religious identity of all become.

The task of this part of the paper is to look at the way this general logic of separation translates into the relationship of the state with religious law. In this regard, we might be tempted to conclude that the existence of separation requires that religious law be deprived of all civil effect. After all, as Temperman puts it, should the state become “the enforcer and guardian” of religious law, the legal system would be disrupted on several fronts. Most notably, the rights of individuals would be endangered by religious rules which may run contrary to them. Furthermore, a variety of systematic violations would take place, such as inequality before the law on the basis of religious belonging.<sup>17</sup> One possible scenario would then be that one law applies to Christians, another to Muslims, while national law retains jurisdiction over those without religious affiliation.

Hence, it can be concluded that believers may observe the tenets of their creed or refuse to do so but they should not expect the state to have anything to say about it. However, while religious freedom in itself does not give anyone the right to have the effects of religious laws sanctioned by civil law,<sup>18</sup> separation is not necessarily opposed to the state making such concessions.<sup>19</sup> For example, the state may decide to award religious marriages with civil effect.

In order for these and other possible allowances to be made, separation only requires that a proper procedure is in place, one that will avoid extremes in the

15 In some jurisdictions however, a movement away from this fundamental understanding of separation has been observed. For instance, the original French approach to religion, *laïcité*, moved from the understanding of separation as a restraint on the state and is increasingly becoming a restraint on the believer by strongly limiting the presence of religion in the public space. (See, Daly, E., *Public Funding of Religions in French Law: The Role of the Council of State in the Politics of Constitutional Secularism*, *Oxford Journal of Law and Religion* [August 23, 2013], doi:10.1093/ojlr/rwt039, p. 2).

16 As Sajó demonstrates, however, historical arrangements with a particular religion may make the state more vulnerable to its demands, thereby diminishing its objectivity when it comes to religious matters. (Sajó, A., *Constitutionalism and Secularism: The Need for Public Reason*, *Cardozo Law Review* 30, no. 6 [June 30, 2009]: p. 2413).

17 Temperman, J., *op. cit.*, p. 172.

18 See, for example, *Savez Crkava “Riječ Života” and Others V. Croatia* (app. No. 7798/08), para. 56.

19 As a result, the state has at its disposal considerable discretion in deciding which religious legal system it will privilege and in what manner. The resulting negative impact on separation from religion and the secular nature of the state itself will not be thoroughly discussed in this paper as it is a complex topic that has to be dealt with in a separate piece.

state's relationship with religion.<sup>20</sup> This procedure can be conceived in two tiers. In the first one, the state should determine which matters may be accommodated. For the second tier, the state should establish criteria that allow it to impartially decide whether accommodation can be made in a concrete case.

As for outlining the subject matters in which accommodation of religious law may be considered, the governing consideration is the fundamental nucleus of a legal system which the state must safeguard. It includes particular core values and minimal moral thresholds, such as gender equality and the child's best interest. The use of religious law may not be sanctioned by the state in a way which allows individuals to insulate themselves from these and other similar requirements and thereby erode the very heart of a national legal order. For this reason, certain branches of law will be completely withheld by the state, such as issues falling within the purview of the criminal law. More discretion may be exercised when it comes to contracts, property and particular issues concerning family law. For instance, domestic violence may not be considered as an application of religious rules that may be accommodated by the state.<sup>21</sup> By contrast, the choice of a marriage ceremony should be left to individual believers insofar as it does not endanger the already mentioned fundamentals of a legal order. Thus, a marriage ceremony conducted over the telephone with a mentally disabled spouse may not be condoned by the state, even though it may be perfectly valid under Sharia.<sup>22</sup> But if the state is requested to award civil effect to a religious ceremony conducted in a way and between individuals who could have otherwise married under civil law, there is little reason to refuse.

One of the main obstacles the state should navigate around at this stage is the propensity to extend the requirements of the legal order's core to issues that are objectively irrelevant. This is particularly likely to occur if the state adopts an ideology as its basis for regulating religious issues or favours only certain religions because of their traditional presence in a society.<sup>23</sup> In said cases, the state may end

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20 The greatest extremes being either a more or less violent purge of those supporting religious law or, on the other side of the spectrum, a full fusion of religious and secular laws or a complete replacement of the secular legal system with its religious counterpart (see for instance, the controversial decision of the European Court of Human Rights in *Refah Partisi and Others V. Turkey* (app. nos. 41340/98, 41342/98 and 41344/98); *Refah Partisi (the Welfare Party) and Others V. Turkey* [GC] (app. Nos. 41340/98, 41342/98, 41343/98 and 41344/98).

21 Accordingly, the Italian Supreme Court refused the cultural defence of a father who claimed he had a right to discipline his daughter for not memorising the Quran. (Supreme Court Sentences non-Italian Father for Child Abuse, Ansa.it, March 30, 2012, [http://www.ansa.it/web/notizie/rubriche/english/2012/03/30/visualizza\\_new.html\\_158869129.html](http://www.ansa.it/web/notizie/rubriche/english/2012/03/30/visualizza_new.html_158869129.html).)

22 *KC and NNC v City of Westminster Social and Community Services Department*, [2008] EWCA Civ 198.

23 See *supra*, footnote 16; Matija Miloš, Problem kompatibilnosti sekularne države i vjerskih sloboda: ishodišta i prilog rješenju [Compatibility of the secular state and religious freedom: causes and a contribution towards resolution], *Hrvatska pravna revija*, July/August 2013, pp 1-10



up diminishing separation, which should be avoided as much as possible as it may unnecessarily single out small or novel religious groups and may endanger the freedom of individuals in the process.

Similar perils should be avoided by the state as it addresses the second tier of the process leading up to granting civil effect to religious law. In it, the state or, most commonly, its judiciary, has to decide whether individual cases meet the requirements set in the first stage. In the example of a religious marriage, the state ought to put in place procedures to determine that each of those marriages meets the fundamental requirements of the national law. It should not merely rubberstamp every religious marriage.<sup>24</sup> However, it should also refrain from analysing religious marriages in a way that unjustifiably delves into issues of religious doctrine and beliefs.<sup>25</sup>

If the state moves into either of the mentioned extremes, separation is to some extent annulled. In the first case, religious law is effectively fused with the national law, as anything it provides will be approved by the state. In the other case, the state can become a *de facto* religious authority, aggressively directing the development of religious matters. In avoiding both of these situations, the state should restrict itself to the role of a “translator”.<sup>26</sup> For instance, if two parties have agreed to settle their dispute before a religious authority, and this agreement contains all an acceptable secular accord usually would, the state ought to have mechanisms that translate the will of the parties to civil law terms.<sup>27</sup> A state will thus decide in line with the agreement of the parties, but will not be apprehensive or welcoming towards it merely because its terms have not been inspired by a secular practice or Christian culture, but by “principles of the Glorious Shari’a”.<sup>28</sup> In this manner, civil effect is

24 Nota V. Nota, [1984] Fam Law 310. (the Court notes that the plaintiff, a Sikh, should completely submit herself to her religious traditions in the whole: “She is a Sikh and they have come to this country and settled here... The Sikhs are very proud of their culture, not surprisingly, and it is good that they want to retain it in this country. But if they wish to retain their culture they must do so in total.” [paragraph 16])

25 Siahbazi V. Rastegar, 2012 ONSC 2384 (judge identifying an otherwise valid Sharia premarital contract with stoning in Afghanistan); V.B. V. Cairns Et Al, (2003) 65 O.R. (3d) 343 (the court noting that the Bible allows religious alternative dispute resolution mechanisms only in the case of a minor offense, such as theft); Uddin V. Choudhury, EWCA (Civ) 1205 (2009) (the court reinterprets Sharia’s rules on dowries and gifts by relying on a religious expert different to the one the parties consulted instead of comparing their accord with the requirements of the national legal system)

26 András Sajó, Preliminaries to a Concept of Constitutional Secularism, International Journal for Constitutional Law, Vol. 6, No. 3 & 4 (October 2008), p. 626.

27 It is possible that the translation will be feasible only in part. The rest of the religious message then inevitably gets lost in the translation as only a part of it is transferred to the language of the civil law. For example, in paragraph 11 of the case Uddin V. Choudhury, already referenced in footnote 25, the Court established that the parties were married under English law only regarding the dowry and gifts received by the bride. Their marriage, however, was not recognised outside these narrow limits because a proper ceremony with a civil effect was not conducted.

28 Shamil Bank of Bahrain EC v Beximico Pharmaceuticals Ltd and others, [2004] 1 W.L.R. 1784 (overturning the courts below; they refused to interpret a contract merely because it



granted to religious law if and to the extent it meets the terms of the secular law, which ensures that the separation between them is not diminished.

In sum, separation of religious law and the state allows for a number of alternatives. On the one hand, religious law may be deprived of all civil effect. On the other hand, civil effect may be granted in particular cases provided that the national law maintains its authority and establishes procedures that protect separation and the national legal order itself from erosion. In any case, the believers may always submit themselves to a religious rule or abstain from it as a matter of their own personal conviction. If no laws are violated in the process, the state will in principle not interfere. However, as will become evident from discussing the models which employ the principles expounded here in relation to Sharia, separation's approach to religious law is in no way free from significant difficulties.

### 3. ACCOMMODATING SHARIA FAMILY LAW THROUGH SEPARATION: TWO MODELS

Having covered the basic features of separation between religious law and the state, I next look at how these fundamental characteristics figure in the relationship between Sharia and the government. This part of the paper looks at two models that developed thus far, the Canadian top-down (2.1) and the British bottom-up (2.2) approach to Sharia.<sup>29</sup> The first one deprives religious law of civil effect, although not completely, while the other one is more open to sanctioning religious family mandates under civil law.

#### 3.1. *Canada: top-down separation*

In Canada, the debate on the position of Sharia took off when a group of Muslims made public their intentions to establish a tribunal that would apply Sharia to the members of their community. The plan was to have it in the province of Ontario, where legislation on alternative dispute resolution left open the possibility to arbitrate family law disputes under religious law. The very idea caused a furore that swept across the country, including Quebec, where no family law arbitration was

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referenced "the principles of the Glorious Shari'a", although the contract could have been translated to secular terms without involving any religious issues); Ali v. Ali (2000), case unreported but described in Menski, W., "Immigration and Multiculturalism in Britain: New Issues in Research and Policy," KIAPS: Bulletin of Asia-Pacific studies, vol XII/2002, p. 5 (a British judge refuses to award the sum of money the bride was supposed to receive according to Sharia, instead he changes the amount to be paid by one pound without any proper justification)

29 For a theoretical background of the difference between the top-down and bottom-up models as employed in this paper, see Schuck, P. H., *The Limits of Law: Essays on Democratic Governance*, Boulder, Westview Press, 2000, pp. 419–455.

ever allowed.<sup>30</sup> The central cause of the tumult was the fear that institutionalizing arbitration would give obscure religious groups a chance to introduce patriarchal traditions into the Canadian society. It was feared that, under the cover provided by arbitration's private nature, a number of abuses would be perpetuated. As Sharia's rules on a variety of areas, such as getting married,<sup>31</sup> marital life,<sup>32</sup> inheritance,<sup>33</sup> divorce<sup>34</sup> and child custody<sup>35</sup> may be less protective for women than the national law, the chief concern was that the ever fragile gender equality would be brought to naught. Women would be forced to stay in abusive relationships,<sup>36</sup> the assimilation of immigrants to the Canadian society would be made harder and there would be inequality before the law. Thus, it was argued that there should be only one, Canadian law, and that it should apply to all.

The Ontarian government first attempted to address the concerns raised by investigating how religious arbitration operates in practice. Marion Boyd, the former Attorney General, was commissioned to draw up a report on the matter. She did not find many problems with religious law being applied in the arbitration setting, possibly because the private nature of arbitration made a more comprehensive research harder.<sup>37</sup> Nonetheless, Boyd recommended that religious arbitration be kept as long as additional safeguards are provided in order to protect more vulnerable parties, particularly women.<sup>38</sup> However, the permissive tone and argument of her report hardly appeased the objectors to religious arbitration.

30 Bakht, N., *Were Muslim Barbarians Really Knocking On the Gates of Ontario?: The Religious Arbitration Controversy - Another Perspective*, *Ottawa Law Review*, 40th Anniversary (Summer 2005): p. 19.

31 Fournier, P., *In the (Canadian) Shadow of Islamic Law: Translating Mahr as a Bargaining Endowment, in Law and Religious Pluralism in Canada*, UBC Press, 2008, pp. 140–160.

32 Sechzer, J. A., *Islam and Women: Where Tradition Meets Modernity: History and Interpretations of Islamic Women's Status*, *Sex Roles* 51, no. 5/6 (September 2004), p. 270.

33 For a detailed overview on Sharia provisions on inheritance, including the views of different schools of interpretation, see Hallaq, W. B., *Sharia Between Past and Present: Theory, Practice and Transformations*, Cambridge, Cambridge University Press, 2009, pp. 289–295.

34 It is known that under Sharia the husband can grant the divorce with more ease than the wife. The original reasoning behind this difference was twofold. On the one hand, since the man was traditionally the provider, he was considered to have the right to a privileged treatment and, on the other, the woman was considered to be too emotionally unstable to deserve the same right. (Emon, A., *Islamic Law and the Canadian Mosaic Politics, Jurisprudence, and Multicultural Accommodation*, University of Toronto Legal Studies Research Paper No. 947149, 2006., available at: <http://bit.ly/T2CFu5>, p. 7).

35 For a detailed discussion on the matter, see Hallaq, op. cit., pp. 287–289.

36 Fretwell Wilson, R., op. cit., after footnote 38 (commenting on a case of a British Muslim who was made to “reconcile” with her abusive husband).

37 Weinrib, L. E., *Speech, Religion, and the Traditional Family, in Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World*, Utrecht, Eleven International Publishing, 2007, p. 182.

38 For more detail on Marion Boyd's concrete recommendations, see Boyd, M., *Executive Summary of the Report Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, Ontario, Ministry of the Attorney General, December 2004, available at: <http://bit.ly/JRyQWY>.

Indeed, there were powerful reasons militating against adopting the findings of the Boyd report in practice. First of all, the debate over the place of Sharia was highly polarized, in no small part because of Sharia's advocates, who implied that applying religious law should exclude the application of Canadian law.<sup>39</sup> Such a direct claim of not just interference, but of primacy of religious over the secular could have only resulted in an equally resolute retort of the government, reaffirming the dominance of the national law.<sup>40</sup> The room for a more nuanced discussion was thus most probably hard, if not impossible to maintain. The second important circumstance was Canada's multicultural nature.<sup>41</sup> Its policies tend towards inclusion, rather than separation and particularisation of different social groups.<sup>42</sup> For this reason, the very idea of introducing measures that might single out a group on the basis of religion was likely to have been suspicious at the outset.

Therefore, the Ontarian government decided to maintain separation between Sharia and itself by way of the Family Statute Law Amendment Act of 2006. Specifically, all family law alternative dispute resolution conducted under any law other than the one of "Ontario or of another Canadian jurisdiction" were not to be considered arbitration in the first place and were deprived of any civil effect.<sup>43</sup>

This general rejection of religious family law is the central feature of the top-down approach. The government puts in place a unified standard by determining that no religious family law arbitration is permitted and religious communities, Muslims included, are thereby expected to keep the respective part of their religious identity and practice private. Therefore, Sharia is not uplifted to the level of the national law, nor is it given any lesser level of recognition by the government.<sup>44</sup>

39 Shachar, A., *Religion...*, cit., para. 19; Bambach, L. A., *The Enforceability of Arbitration Decisions Made By Muslim Religious Tribunals: Examining the Beth Din Precedent*, *Journal of Law and Religion* 25 (2010): p. 411.

40 Ministry of the Attorney General, *McGuinty Government Declares One Law for All Ontarians: Only Canadian Law to Apply to Family Law Arbitrations*, Ontario.ca, 15 November 2005, available at: <http://news.ontario.ca/archive/en/2005/11/15/McGuinty-Government-Declares-One-Law-For-All-Ontarians.html>.

41 Section 27 of the Canadian Charter provides that the Charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". (Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.)

42 Bhabha, F., *Between Exclusion and Assimilation: Experimentalizing Multiculturalism*, *McGill Law Journal* 54 (2009), p. 53.

43 'An Act to amend the Arbitration Act, 1991, the Child and Family Services Act and the Family Law Act in connection with family arbitration and related matters, and to amend the Children's Law Reform act in connection with the matters to be considered by the court in dealing with applications for custody and access', February 23, 2006. Specifically, its section 2.2 provided that "(1) When a decision about a matter described in clause (a) of the definition of "family arbitration" in section 1 is made by a third person in a process that is not conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction, (a) the process is not a family arbitration; and (b) the decision is not a family arbitration award and has no legal effect."

44 Note that some channels through which religious family law may acquire civil effect were left open. These include domestic contracts and allow the state more oversight. (Amien, W.,

Legal pluralism cannot formally compete with the national law and thereby create divisions on the grounds of religion.

However, legal pluralism cannot be wished away. While the state may refuse to grant it civil effect, it remains a social fact. As such, religious family law continues its existence and can still play a substantial role in the life of Muslims. It can be applied in private, much as any other religious practice could be.<sup>45</sup> Naturally, establishing a religious tribunal in a garage or a living room is in itself not a problem as long as the individual believer has a chance to voluntarily define and agree to its terms. However, should a believer be forced into religious dispute resolution by the pressures of a tightly knit religious community or a traditional family, there is little to protect her. The likelihood of this scenario occurring was, after all, one of the key arguments against allowing Sharia arbitration to continue.<sup>46</sup> Nonetheless, it seems separation as applied in Canada only pushes the possible abuse into privacy, but does not tackle it. Instead, it is expected that the informal tribunals still operating in particular communities take a hint and ensure their workings are in line with requirements of the national law.<sup>47</sup> The individual believer, on the other hand, is supposed to abandon those applications of religious law which she finds particularly injurious and unacceptable. As a matter of fact, even if a religious tribunal violates criminal law norms, the believer whose interests are being harmed may still be expected to “exit” by turning to the authorities. If she is not able to do so, the consequences may be dire.<sup>48</sup> Even so, no other proper protection is offered by the top-down approach.

In conclusion, the Canadian example demonstrates one way to separate Sharia from the state. The specifics of the solution applied in Ontario reveal a blanket,

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Muslim Private Laws (MPL) in Canada: A Case Study Considering the Conflict Between Freedom of Religion and Muslim Women’s Right to Equality, in *Conflicts Between Fundamental Rights*, Oxford, Intersentia, 2008, p. 403.)

45 This, in fact, is precisely what is going on in Canada. (Rohe, M., *The Current Debate on Islam*, in *Law and Religion in the 21st Century: Relations Between States and Religious Communities*, Surrey, Ashgate, 2010, p. 338).

46 Bakht, N., *Family Arbitration Using Sharia Law: Examining Ontario’s Arbitration Act and Its Impact on Women*, *Muslim World Journal of Human Rights* 1, no. 1 (2004), p. 9.

47 The argument may be seen as problematic on account of its formalistic nature. Namely, it could be argued that it does not fully take into account the nature of human identity. Bhamra argues that human beings do not take their identity to mean just those segments of their personality that are necessarily pleasant and empowering. On the contrary, even agency-depriving factors are appreciated as much as those that are “positive” (Bhamra, M. K., *The Challenges of Justice in Diverse Societies: Constitutionalism and Pluralism*, Surrey, Ashgate, 2011, p. 26). A Muslim woman can, for instance, be as attached to a patriarchal interpretation of Sharia as she can to a progressive one. A simple external ban does little, if anything to change this self-understanding. Consequently, since a religious community does consist of human beings who may carry such attachments, there is some reason to doubt that a ban would change anything. At the end of the day, it may be perceived as a reason to react against the government even more and intensify the attachment with the traditional.

48 Reese, F., *Family Found Guilty in Honor Murder Case*, *Yahoo! Voices*, January 30, 2012, available at: <http://yhoo.it/xUFAwe>.

top-down stripping of civil effect directed at religious law norms. It leaves the believers with a choice between the national and religious norms. However, the possible effect of strong traditional communities to which they belong is not dealt with appropriately. Therefore, while it is undoubtable that the Canadian approach upholds separation, it does have some pronounced weaknesses. Interestingly, the United Kingdom replicates the same problem despite its different approach to Sharia.

### **3.2. UK: bottom-up separation**

The UK deals with the separation of Sharia from the state through the “bottom-up” approach. Briefly put, it is a reflection of British pragmatism.<sup>49</sup> Should the legal system notice a particular disconcerting practice, it will be prohibited, but only when experience shows that it is problematic. Whether Sharia is generally oppressive or not is not an issue the government is very likely to tackle, unless practical necessity dictates otherwise.<sup>50</sup> In essence, approaching Sharia in such a manner means applying the social laboratory philosophy, where the best solution is sought by incremental tinkering with Sharia in practice. For this reason and unlike its Canadian counterpart, the bottom-up model is more open to granting civil effect to religious law.

Because of the seemingly permissive nature of the British approach, some would argue that it is not in fact a case of separation between Sharia and the state. In particular, Zucca proposes that it is instead a form of special engagement between the two, where the secular law strives to “learn more” about Sharia.<sup>51</sup> However, as was argued earlier, separation of the religious and the governmental is not necessarily a relationship where the latter ignores the religious or deprives it of its public presence. Particularly as far as religious law is concerned, separation is maintained for as long as the state draws into its decisions facts required for it to perform its tasks, irrespective of their religious context or significance. If this condition is met, civil effect may be granted to religious norms without compromising their separation from the state.

49 McCrudden, C., Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The JFS Case Considered, *International Journal of Constitutional Law* 9, no. 1 (2011), p. 7.

50 *Em (Lebanon) (Fc) (Appellant) (Fc) v Secretary of State for the Home Department Appellate Committee*, [2008] UKHL 64 (2008) (Sharia child custody norms are incompatible with the British legal order, but Sharia in itself is not characterised in any way); *KC and NNC v City of Westminster Social and Community Services Department*, [2008] EWCA Civ 198 (marriage invalid due to disability, the involvement of Sharia was not criticised, nor the fact that it sanctions marriages concluded over the telephone).

51 See Zucca, L., *What Is the Place of Sharia Law in European Legal Systems?*, in *A Secular Europe: Law and Religion in the European Constitutional Landscape*, Oxford, Oxford University Press, 2012, available at SSRN: <http://ssrn.com/abstract=2128049>.

That this is the way the British system operates may be seen from the recent decision of the High Court of Justice in *AI v. MT*.<sup>52</sup> In this case, a devout Jewish couple married both under civil law and the law of their religion, *Halacha*. After seven years of married life which resulted in two children, the couple decided to end their relationship. Their intention was to settle matters before a religious authority, the *Beth Din* in New York and then have the resulting agreement recognised in the UK. Following several developments of no immediate concern for this paper, the couple managed to agree on the terms of their divorce before the already mentioned Jewish authority. This included relevant financial arrangements and child custody plans. The High Court of Justice then gave the resulting agreement civil effect.

The Court's approach is of great interest for this paper, as it conclusively demonstrates that the British system is in fact a form of separation. Most obviously, the Court did not base its decision on religious law, but is grounding it in national law. The ruling of the *Beth Din* was treated as a source of relevant facts that weighed strongly on the Court's opinion. However, it was in no way binding for it or the parties. Secondly, the High Court noted expressly that whether religious law can be transposed into secular terms is to be decided on a case-by-case basis, with the secular law retaining its supremacy at all times.<sup>53</sup> Were the British approach not a form of separation, the Court would either dismiss or affirm the decision of the religious authority, possibly providing its own interpretation of religious law. Were it a system of "learning", as Zucca asserts, the judiciary would surely master all relevant information about *Halacha* by now, as the application of the Jewish legal system is far more common and less controversial than *Sharia*.<sup>54</sup> It would not scrutinise the *Beth Din* as the High Court of Justice did. As this is not the case, it can only be concluded that the UK retains the separation between the religious and the secular law, albeit in a more flexible form.

Much like the top-down approach, this supple, experience-based application of separation has positive and negative sides. The most obvious positive feature is that it avoids condemning *Sharia* as necessarily oppressive at the outset. This does not needlessly antagonise the proponents of this religious law system. More importantly, unlike the Canadian approach, the British system transfers the control over the position of *Sharia* in society over to Muslims. It is the way they apply *Sharia* that will ultimately determine whether the government will remain more flexible or move in and deprive religious norms of any possibility of a civil effect. By this token, religious communities are encouraged to avoid forcing extremist interpretations of religious norms unto their members.

52 *AI v. MT*, [2013] EWHC 100 (Fam).

53 *Ibid.*, paras. 27, 29.

54 Bambach, L. A., op. cit., p. 380; Witte Jr., J. and Nichols, J. A., *Faith-based Family Laws in Western Democracies?*, *Fides et Libertas: The Journal of International Religious Liberty Association*; U of St. Thomas Legal Studies Research Paper No. 11-09; Emory Public Law Research Paper No. 11-160; Available at SSRN: <http://ssrn.com/abstract=1805304> (2010): p. 131.



This incremental approach could be said to have been achievable precisely because the British Muslim population is for the most part not making particularly strong claims for a greater recognition of Sharia.<sup>55</sup> The reasons for such a different attitude towards the national legal system are manifold. For one, Muslim religious norms are perceived as an intimate matter, as such wholly disassociated from the state.<sup>56</sup> In reality, the latter is sometimes seen as the product of a corrupt and fallen society, Sharia becoming the “ethical reservoir” in a barren desert.<sup>57</sup> Additionally, Muslims have over time developed a hybrid law of their own (i.e. *angrezi shariat*), which combines religious norms with the openings left in the secular law.<sup>58</sup> Finally, the British have strongly impacted the development of personal law systems in their former colonies.<sup>59</sup> By traditionally leaving family law matters to religious tribunals, the British authorities fostered the understanding that marriage has nothing to do with the state.<sup>60</sup> For this reason, at least some immigrants coming to the UK today are less likely to be overly concerned about what the state has to say on family life.

However, the distance between Muslims and the national legal order which made the bottom-up approach possible is also the source of its weaknesses. Not only are adherents of Sharia and other systems of religious law less likely to contest the state, but are fundamentally not going to be interested in seeking its aid. Indeed, Werner Menski observes the rejection of the national legal system by Muslim immigrants, a trend which is further encouraged by the prejudice and negativity

55 This much is clear from the nature of the recent debate on Sharia itself, which was not initiated by a Muslim group, as was the case in Canada. Instead, the controversy was triggered by the now former Archbishop of Canterbury, Rowan Williams. It was he who was heavily criticised for his suggestion that the existing Sharia tribunals should be more “integrated” into the British legal system. The Muslims themselves, however, were drawn in only subsequently. (For an analysis of the Archbishop’s views, see Budziszewski, J., *Natural Law, Democracy, and Shari’a*, in *Shari’a in the West*, New York, Oxford University Press, 2010, p. 206.)

56 Yilmaz, I., *Muslim Laws, Politics and Society in Modern Nation States*, Aldershot, Ashgate, 2005, 62. (noting a number of factors that contributed to this attitude: distrust towards secular institutions, their perceived lack of legitimacy and avoidance of public embarrassment that could occur if family matters would be brought before a court of law)

57 Machado, J. E. M., *Freedom of Religion: A View from Europe*, Roger Williams University Law Review, vol. 10/451, 2009, 467.

58 Menski, W., op. cit., p 56.

59 Shah, for example, argues that the efforts of the colonial authorities to recreate Western notions of religion in South Asian colonies contributed to the division of the personal law systems in line with the religious criterion imposed, causing difficulties. Namely “post-colonial states have had to contend with the wide-ranging and problematic task of reconnecting official laws to indigenous frameworks, as had been the case in the pre-modern era” (Shah, P., *Thinking Beyond Religion: Legal Pluralism in Britain’s South Asian Diaspora*, *Asian Law* 8 [2006]: 243).

60 Douglas G. et al., *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts*, Cardiff, Cardiff University, June 2011, p. 18; Shah P., *A Reflection on the Shari’a Debate in Britain*, *Studia z Prawa Wyznaniowego* [Studies of Ecclesiastical Law] 13 (2010), p. 11. (noting that the fact Muslims are able to arbitrate in family law disputes reinforces the impression that the state is in some way disassociated from family and marriage)



they face in the contemporary British society.<sup>61</sup> One example of this occurring is the low registration rate of Muslim marriages before the national law.<sup>62</sup> This means the spouses may face significant difficulty in invoking rights and protections that would be provided by the state were the marriage properly registered. It also means that the state, as its institutions are not contacted, may lack information on the way Sharia works in practice and may therefore have problems with detecting problematic practices and issuing adequate measures. This renders some of the most important features of the bottom-up system meaningless.

For example, the UK in principle allows religious arbitration in certain limited areas (excluding divorce and similar sensitive matters). However, since Muslims prefer informal, mediation-like, community-based tribunals to arbitration,<sup>63</sup> the state faces difficulty in obtaining reliable data to do anything about the possible weaknesses of its approach. The ultimate result is a closed-down set of private religious tribunals that the state knows very little about, with practically redundant and possibly problematic arbitration provisions. At the end of the day, then, the British approach remains ineffective when it has to deal with the possible abuses of the arrangement it has in place.

Some attempt to correct the described faults of the British approach by making efforts to move it closer to the Canadian one. This is a solution recently suggested by the controversial Baroness Cox. Claiming that rights of women are being endangered by the legislation currently in place, she tabled a bill aimed at extinguishing aspects of the arbitral proceedings that she felt were problematic for women's rights.<sup>64</sup> The bill is still in the House of Lords at the time of writing this paper and it is not certain whether it will be enacted.

Nevertheless, the fact that it was introduced provides an interesting opportunity to compare the British and Canadian systems. Similarly to the arguments raised in

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61 Menski's typology of the relationship immigrants establish with the national law encompasses four phases. In the first one, the immigrants are unaware of the national law. In the second phase, they begin to understand there is something beyond religious norms, and they attempt to apply the latter in a way that accounts for the national legal system. In the third stage, the Muslim population integrates the secular and religious laws, but does not abandon the latter fully. The final stage is one of disillusionment with the national legal system, whereby Muslims fall back onto religious norms. They consider themselves rejected by the national legal order, so they reject its supremacy in turn, although they might not attempt to challenge it. (Menski, W., *Law, Religion and Culture in Multicultural Britain*, in *Law and Religion in Multicultural Societies*, Copenhagen, Djøf Publishing Copenhagen, 2008, p. 47).

62 Neil Addison, a well-known British scholar, notes that the lack of marriage registration is the chief problem for Muslim women, rather than applying Sharia before an informal tribunal. (Addison N., *Sharia Is Not the Problem Here*, <<http://www.theguardian.com>>, available at: <http://bit.ly/bA4D0B>.)

63 For example, the Sharia Council in Britain does not attempt to establish itself as an arbitration tribunal under the 1991 Arbitration Act, but rather describes itself as a mediator. Indeed, in *Al Midani*, the Queen's Bench found that the organization does not meet the requirements of an arbitration tribunal, although the option for reaching that status in the future was not foreclosed. (*Al Midani & Anor v Al Midani & Ors*, [1999] C.L.C. 904 [1999], pg 913).

64 Use of Sharia 'Courts' Increasing in UK, The Christian Institute, 18 January 2012, available at: <http://www.christian.org.uk/news/use-of-sharia-courts-increasing-in-uk/>.

Canada, Baroness Cox claims that her aim is to protect the rights of women.<sup>65</sup> The provisions she envisages would achieve this goal are prohibitions that appear to be based on scant empirical data.<sup>66</sup> Unlike the Ontarian ban, however, the proposed bill is not just a blanket ban on religious arbitration. Specifically, in addition to this general restriction,<sup>67</sup> the Bill pinpoints particular actions, such as pretending one is a judge who can make a binding decision.<sup>68</sup> In this respect, it is more aggressive than the Canadian prohibition, as it singles out potential aspects of religious proceedings that may be seen as problematic.<sup>69</sup> It also shows a greater attention to detail and an effort to seek out matters that may be of highest priority when it comes to human rights protection.

Again, however, it is questionable whether introducing such bans does anything in particular. For example, the person presiding over a religious tribunal may not find it necessary to claim they have the authority to issue legally binding decisions under British law. It is enough for them to assert that their pronouncements are in line with Sharia. Since those who turn to religious tribunals could see them as more legitimate than the national courts, the fact that they have a decision in line with their religious law will in itself create a sense of being bound to act in a certain manner. If one wishes to be a good Muslim, the decision of the Sharia tribunal will have to be abided by. Whether there is an authority to issue legally binding decisions is then beside the point.

Finally, the Bill does contain some laudable provisions, such as the obligation of the religious tribunal to inform the parties of their right to turn to the national courts and of the need to register marriage before the national law as well in order for it to be completely valid.<sup>70</sup> However, it is not certain how such solutions would work out in practice. The problem in the UK seems to be that Muslims do not trust national institutions sufficiently and that the law does not recognise this problem.<sup>71</sup> It is hard to see how this bill could fundamentally change this and why should the possibly oppressed members of the Muslim communities be particularly encouraged or empowered to step up once it becomes law.

In summary, the British system is at present characterised by an effort to be attentive to the situation on the field. Much like the Canadian system, its efforts appear to be directed at providing space for a development and change of religious

65 Muslim Women's Advocate Backs Bill to Tackle Sharia, The Christian Institute, July 5, 2011, <http://www.christian.org.uk/news/muslim-womens-advocate-backs-bill-to-tackle-sharia/>.

66 Malik, N., What Is Lady Cox's Bill Really About?, <<http://www.theguardian.com>>, June 20 2011, available at: <http://www.theguardian.com/commentisfree/belief/2011/jun/20/lady-cox-bill-womens-rights>.

67 Cox, C., Arbitration and Mediation Services (Equality) Bill [HL], 2010, available at: <http://bit.ly/19aW6Lt>, sec. 4(2).

68 Ibid., sec. 7(2).

69 Amassing prohibitions in this manner has been recognised as a clear attempt to extinguish religious norms in question. (Woodman, G. R., op. cit., p. 32).

70 Cox, C., op. cit., sec. 4.

71 Yilmaz, I., op. cit., p. 80.

law between individuals. Yet, the lack of proper feedback from them forces the government to stumble in the dark. Some seem bent on addressing the problem by introducing a more strict form of separation and ensuring that some aspects of Sharia do not get out of hand. While such efforts are legitimate, their effectiveness is questionable. As in Canada, the UK seems to fail in protecting all the interests involved through separation alone.

#### **4. ACCOMMODATIVE EFFECTS OF SHARIA'S SEPARATION FROM THE STATE – TRANSFORMATIVE SPACE**

The most important point of junction between the previously analyzed two models of separation between Sharia and the state is that they both accommodate Sharia by allowing the individual believers to practice it. In Canada, this process is for the most part deprived of any civil effect.<sup>72</sup> The UK is by contrast offering flexibility and civil effect to those who meet the conditions of the civil law. However, much like in Canada, religious law is applied in an informal fashion, within tribunals administered by religious communities themselves, which I term community-based tribunals. These for the most part do not seek recognition of civil effect for their decisions.

The basic consequence of both models is nonetheless the same: a Muslim should be able to submit herself to a religious tribunal of her choosing for the matters she picks and, should she wish to stop with the exercise, should at any time be free to do so. Indeed, contrary to the image of a Sharia tribunal as a horrible dark dungeon where limbs are cut off and stoning is administered, some do navigate the waters of religious law and preserve their own interests in the process.<sup>73</sup> Separation furthers this development by establishing the essentials, the transformative space which allows Sharia to be freely applied and changed if so desired by the believers themselves. This zone is comprised of three effects produced by separation in relation to religious law.<sup>74</sup> Firstly, it stops the state from uncritically imposing the will of majority onto those who would have Sharia applied (4.1). Secondly, it gives the individual believer a choice between human rights (or, more broadly, secular law as a whole) and religious law, which includes the possibility for each believer to combine both where possible (4.2). Finally, separation prevents the state from mixing the religious law with its secular force and thereby petrifying it (4.3).

72 Amien, W., op. cit., p 403. (noting that some limited venues to introduce religious law into civil marriage, such as premarital contracts, remain available)

73 Shah, P., *Between God and the Sultana? Legal Pluralism in the British Muslim Diaspora, in Sharīʿa as Discourse: Legal Traditions and Encounter with Europe*, Surrey, Ashgate Publishing Limited, 2010, p. 123.

74 Note that these effects have been more or less neatly separated for the purposes of the analysis that is to follow, but may in practice be very much interrelated and difficult to uncouple from each other.

#### ***4.1. Separation moderates the majoritarian pressure***

Religion does not exist in isolation and neither do the norms of its laws. They are unavoidably affected by their surroundings. At the simplest level, the very existence of a religious rule in a society different to its place of origin may cause the norm to adapt. One notable example relevant to the topic of this paper is polygamy. It is sometimes referred to as an unacceptable rule that subjugates women. However, the new circumstances brought about by the upward movement of British Muslim women changed its original meaning, enabling women to use it for their own advantage.<sup>75</sup> The modification may be surprising, but some change is nonetheless to be expected. After all, a religious norm is in such cases a transplant and a transplant does not have to work at its destination in the way it did in the original environment.

The effect of the broader society on religious norms is more complex than this, however. Sharia's surroundings in a Western liberal democracy are not static. They may actively require religious norms to change and adapt to the demands of the majority. As a result, the state may regulate the position of Sharia in a particular manner. The pressure that is thereby exerted on religion has already been thoroughly examined. Here I only recapitulate the main findings of those studies and relate them to Sharia's position. Most notably, Asim Jusić argues that the state regulates non-mainstream religious groups in accordance with their position in the social strata. The key factors are their "potential for "disloyalty"" and the distance from the mainstream. What is in the mainstream depends on what has been socially and legally defined as such, while the distance from it is "perceived and socially constructed".<sup>76</sup> Hence, the pressure that emerges is partly a legal construct and partly a social entity. Consequently, law alone cannot remove it. On the contrary, misguided attempts to do so might only distort its effect.

For example, even if Sharia would be codified by the state and introduced as a fully fledged system of laws, it would still clash with sentiments and interests of some citizens. They might be against state enforcement of a religious norm generally or might want a different iteration of it applied. They would nevertheless be pressured to adapt to the newfound situation.

Additional difficulties may emerge from this situation. Namely, in addition to provisions most common in secular law, such as imperative rules, religious

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75 The structure of the Muslim population in the UK is becoming increasingly complex, with women getting more education and better-paid employment options. At the same time, there is a shortage of eligible men to marry. Hence, several women may agree to religiously marry the same man so as to avoid tying themselves down to a mate incompatible with their own goals. (High-flying Muslim Career Women Willing to 'Share Husbands' Because of a Lack of Suitable Men, MailOnline, March 11, 2012, <http://www.dailymail.co.uk/news/article-2113366/Muslim-women-share-husbands-lack-suitable-men.html>.)

76 Jusić, A., *Non-mainstream Religious Groups: Perspectives from Economics and Social Psychology*, Doctoral Thesis (S.J.D.), Central European University: Department of Legal Studies, available in full at: < <http://goya.ceu.hu/record=b1160687~S0> >, 2011, pp. 141–142.

laws contain recommendations and other, more nuanced norms.<sup>77</sup> These are hard to properly translate into national law. It is likely that attempting to do so would oversimplify religious law on one level and disfigure it for believers on another. The approach to personal law systems during the era of colonialism outlines the problem and its negative consequences well.<sup>78</sup> In short, it is logical to conclude that attempting to override separation by introducing religious law does not eradicate the pressure emerging from difference. Instead, it only gets moved around and may potentially get disfigured.

Similar criticism could be directed at attempts to befriend particular, more moderate Muslim communities and to then use them as conduits for promoting government's policies. This tendency is particularly prominent in the case of the United Kingdom,<sup>79</sup> while Canada does not seem to advocate such techniques. The European Court of Human Rights has, indeed, shown some trepidation when state involvement in the structure of religious communities is concerned.<sup>80</sup> This is understandable. Once a state singles out a particular group or a segment of it, it can no longer be considered just a part of the religious scene.

Specifically, the chosen group is standing on the threshold between two fires, the state on the one hand and other religious communities on the other. Its marriage with the state may well cost it its authenticity and influence with other believers. On the other side, it needs to pay more attention to what it does, so as to avoid falling foul of the state. At the end of the day, the religious community may be seen as the extended arm of the state that corrupts the traditional values. In a way, it becomes a part of the majority's pressure. Its only difference to the usual pressure is that it has a familiar, religious face.

In this scenario, the threat from the state is increased. Not only may it appear to threaten the traditional with majoritarian values that may be perceived as blasphemous and immoral, but it may be seen as twisting the holy doctrine to trick the righteous. The conflict between the religious and the secular then gets an additional dimension, as the state is no longer just the state. It assumes an almost mythical character - it becomes a force of darkness that tempts the righteous

77 Woodman, G. R., *op. cit.*, 34.

78 For example, Emon explains how the French in Algeria simplified the native personal legal systems by codifying them, ignoring the richness that followed their usual application by the native peoples. Similar arguments are made in the context of the British administration of India's personal laws. (Emon, *op. cit.*, p. 17; Tagari, H., *Personal Family Law Systems - a Comparative and International Human Rights Analysis*, *International Journal of Law in Context* 8, no. 2 [2012]: 237).

79 Morris, R. M., ed., *Church and State: Some Reflections on Church Establishment in England*, London, The Constitution Unit, Department of Political Science - University College London, 2008, p. 11.

80 Evans, C., *Freedom of Religion Under the European Convention on Human Rights*, New York, Oxford University Press, 2001, p. 720. It should be noted that Islam is a far less institutionalized religion than Judaism or Christianity. (Rohe, M., *op. cit.*, p. 334.) Attempting to establish a hierarchy by privileging some Muslim organisations where there should be only pluralism in the eyes of the believers may therefore turn out to be highly problematic.

believer.<sup>81</sup> As the religious path is often considered difficult, going contrary to the mundane and the sinful, fighting against heresy of the state becomes a fitting challenge for the devout. It is not difficult to move from this point into additional problems that are, in the end, caused entirely by the state getting involved into religious matters.

Hence, rather than attempting to alter the pressure by force or manipulation, the right approach is to moderate it. This is precisely what separation achieves. It guarantees religious freedom of individuals and leaves with them the right to abandon the practices they disapprove of. In doing so, it prevents the majority from imposing their will onto those who want to adhere to religious laws. Of course, the majoritarian pressure is still there. As Jusić argues, it can impose two basic responses to religious practices it considers unacceptable: distancing and the stronger condemnation, or “disloyalty”.<sup>82</sup> Some of these may be sanctioned by the state. In terms of Sharia, an example of condemnation could be the deprivation of civil effect of a Sharia-compliant prenuptial contract or criminalising child marriages. Nevertheless, the responses of the majority are not unbounded. They are only supported by the state up to a certain limit and according to the rules set by the state limited in its power, not by every whim of the majority. Beyond this, the believers retain their right to adhere to whatever version of religious law they choose.

Therefore, the state practising separation becomes a bulwark against the extremism that would otherwise be much more likely to enter the scene. In this manner, it plays a key role in ensuring the transformative space in which religious law can operate. Namely, with the pressures of the majority held at bay, secular law and the religious law are free to interact without one immediately overwhelming the other. Interesting hybrid solutions may be the long-term result. For instance, the interaction between the secular law and Sharia in the UK resulted in a form of marriage contract useful for both the Muslim communities and the state. It not only follows religious requirements but is also tweaked to ensure that the bride remains well protected.<sup>83</sup> Similar solutions would likely be harder to achieve if the state

81 Such a temptation is not unique to one sole religion. In Christianity, the Bible warns of false Christs, Jesus himself being tempted with worldly riches and power he had to reject. The mundane is in certain religions, such as Buddhism or Gnosticism, seen as an illusion that needs to be overcome. It is often presented as the opposite of the spiritual, its deception so great that it uses spiritual and religious themes to trick the believer. For example, Gnosticism teaches that the material world is a prison, ruled by a false deity, and that liberation from it through knowledge and understanding is essential to salvation. Having this point in the religious teachings could also make conversion to a different religion difficult, as the believer needs to take special care in making sure that she is not being tricked. If she is, and she succumbs, her immortal soul might be doomed.

82 Jusić, A., op. cit., p. 11.

83 Grillo, R., *Cultural Diversity and the Law: Challenge & Accommodation*, MMG Working Paper - Max Planck Institute for the Study of Religious and Ethnic Diversity 09-14 (2009), available at: [http://www.mmg.mpg.de/fileadmin/user\\_upload/documents/wp/WP\\_09-14\\_Grillo\\_Cultural-Diversity-and-the-Law.pdf](http://www.mmg.mpg.de/fileadmin/user_upload/documents/wp/WP_09-14_Grillo_Cultural-Diversity-and-the-Law.pdf), p. 25.



was attempting to override separation and give full force to every demand of the majority or a particular religious group.

In sum, Muslim communities may face demands from confronting those who are different, including the majority that may have a completely different view on religion. As a result, they may feel pressured to change in the face of those who do not share their beliefs or may, at the very least, re-examine their convictions. Perhaps this is an unavoidable consequence of life in a plural society. Nevertheless, separation ensures that this natural pressure is not abused and mutated by the state wanting to impose a particular understanding of the “good life” to minorities.

The end result is that Muslims are exposed to difference. However, it is not allowed to overwhelm them as it would be in case of a government that violates separation and fully espouses the understanding of a particular religion or the democratic majority. By the same token, Muslim communities are not allowed to impose themselves onto others. As some have emphasized, the key is in maintaining a balance between the two sides, instead of conceptualizing them as opposites that necessarily have to cancel one another out.<sup>84</sup> Separation then becomes an art of maintaining a perpetual creative tension.

#### *4.2. Separation provides the believer with a choice*

In the previous section, I have argued that separation tempers the societal pressure applied to Muslims, but does not remove it. Instead, the pressure exists parallel to Sharia. In the first place, this provides a reference point. It helps both sides face the different and by consequence should assist them in understanding their own characteristics better. Whether this chance is taken up appropriately is an interesting debate, but will not be tackled in this paper.<sup>85</sup> Instead, here I prefer to point out a second dimension of Sharia's coexistence with what I termed the majoritarian pressure. Namely, the fact that the two exist next to each other gives the believer a choice. On the one hand, the pressure of the different is not just an abstract force, as its significant exponents are the secular law in general and human

84 An-Na'im, A. A., *Islam and the Secular State*. Cambridge, Harvard University Press, 2008, p. 268; Xanthaki, A., *Multiculturalism and Extremism: International Law Perspectives*, In Religion, Human Rights and International Law, Leiden-Boston, Martinus Nijhoff Publishers, 2007, p. 463.

85 For example, Mancini implies that the learning opportunity coming from facing what is different is not being used appropriately. She argues that the headscarf controversies reflect a projection of the improperly resolved gender equality issues onto the Muslim population, which effectively becomes tagged with the Western “baggage” of inequality. Hence, Muslims turn into scapegoats for the faults of Western societies. Similarly, Olivier Roy notes that “Islam is a mirror in which the West projects its own identity crisis”. Calo also suggests that a part of the problem in understanding the Muslim identity as an opposition to the European secular values. (Mancini, S., *Patriarchy as the Exclusive Domain of the Other: The Veil Controversy, False Projection and Cultural Racism*, *International Journal of Constitutional Law* 10, no. 2 [2012]: pp. 411–428; Roy, O., *Secularism confronts Islam*, New York, Columbia University Press, 2007, p. xiii; Calo, Z. R., op. cit., p. 104).



rights in particular. Those are, in a sense, the language of the state. Sharia, on the other hand, is the language of a religion or, at least, a particular understanding of it.

The language analogy is particularly apt, although not entirely exact.<sup>86</sup> Languages are fully ordered creatures insofar as they are confined to grammar books and dictionaries, where multiple meanings of words and the ways to use them can be neatly defined. However, once they step out of the boundaries of academia into practice, all hell breaks loose as words are liberally used in all kinds of ways, not all of them within the strictures of formal rules. In the resulting chaos, individual speakers pick and choose. Sometimes mixing several languages is an everyday activity. Teenagers, for example, may use foreign words as an act of rebellion. Natives might reject any foreign language whatsoever, priding themselves on their own traditions. They may also struggle with a foreign language, finding it hard to stop “thinking” in their own language and just embrace the logic that organizes the words of a foreigner. In all the confusion, linguists may be making efforts to ensure that two idioms are not mixed, that the purity is maintained.

The described situation is similar to the relationship of religion and its laws, Sharia in particular, with human rights and, more broadly, secular law. It may be easily assumed that, since the two sides are separate, they must also be impossible to mix. After all, they have different sources, work in different ways and, plainly, seem to be two opposing forces that cannot be brought together no matter how much one tries.<sup>87</sup> However, this dichotomy, while more applicable to the relationship of the government with religions, has been thoroughly debunked on the level of individual citizens.<sup>88</sup> In real-life situations, Muslims do not just choose between one and the other. The two may be mixed.

Human rights can be used to negotiate a different application of Sharia or, if this is not possible, provide a lever to abandon it altogether. Some examples have been reported in the literature. In the context of Canada, for example, Fournier refers to a case of a woman who invoked norms of the secular legal order to resist her family’s demand to adhere to a disadvantageous application of Sharia.<sup>89</sup> The case reminds of an important point: human beings are not either believers or citizens, but are both at the same time. They live their everyday lives and adapt their religious identity in the process.

86 Choosing between different languages does not normally cause harm. However, making a choice between the secular and religious laws may deprive one of health, property and, in extreme circumstances, even life.

87 There are, however, several interesting similarities between secular law and Sharia. For an analysis of the parallels between the two, see van Hoecke, M., *Islamic Jurisprudence and Western Legal History*, in *Shari’a as Discourse: Legal Traditions and Encounter with Europe*, Surrey, Ashgate Publishing Limited, 2010, pp. 45–55.

88 Bhabha, F., *Between Exclusion and Assimilation: Experimentalizing Multiculturalism*, *McGill Law Journal* 54 (2009), p. 75; Quraishi, A., *What If Sharia Weren’t the Enemy?: Rethinking International Women’s Rights Advocacy on Islamic Law*, *Columbia Journal of Gender and Law* 22 (2011), after footnote 7.

89 Fournier, P., *Calculating Claims: Jewish and Muslim Women Navigating Religion, Economics and Law in Canada*, *International Journal of Law in Context* 8, no. 1 [2012], p. 62.

For instance, a woman wanting to get divorced under Sharia may sacrifice her *mahr*<sup>90</sup> and give a divorce herself. She may also reinterpret her own identity and simply reduce the importance of her religious marriage in her own mind, staying a Muslim without adhering to Sharia's rules on divorce. She may, finally, perform an overhaul of her religious identity, abandoning Islam or religion altogether. In making any of the possible choices, she may invoke secular law generally and human rights specifically if she finds it necessary.

Of course, the choice argument is far more complex. Separation is providing more room for individual's decisions, but this is not to say the space is always usable by all. The community, the family, material conditions in which one lives, and, indeed, one's own understanding of life and choice may restrain the believer. In a word, there is a difference between having options and being able to live them out. As Martha Nussbaum eloquently puts it, "The person with plenty of food may always choose to fast, but there is a great difference between fasting and starving".<sup>91</sup> She suggests approaching the problem by looking at whether the society promotes or hinders particular capabilities of each individual, such as their physical integrity or emotions.

It would be beyond the scope of this paper to analyse this suggestion in full detail, as my primary goal here is to look at what separation in itself does to religious law. It is therefore sufficient to note that separation in itself does not ensure that a choice can be exercised; its reach is more modest. It creates a framework and provides a choice. In doing so, it may even further certain, but not all "capabilities" as Nussbaum uses the term.<sup>92</sup> For example, having a state that is separate from religious law does not automatically improve women's economic status to the point where they can make decisions with full autonomy. However, it is easier to develop one's own thoughts about religious law if there is a feasible alternative to it and it may consequently be easier to change one's religious belonging if this is desired. Therefore, separation is friendlier to particular capabilities, such as individual's thinking, feeling and affiliation.

By contrast, in jurisdictions where separation is not exercised, even these fundamental capabilities may be curtailed. For example, in Israel, one does not have

90 In this paper, I use the terms dower, dowry and mahr as synonyms, all denoting the sum of money or other valuables the woman receives in line with her marriage-related rights under Sharia. I do not refer to a similar payment that may be made by the wife or her family to the husband, which is traditional in some cultures. Note that there is a lack of consensus in the literature over the way the payment of the husband to his wife under Sharia is called. Some variations include maher or mahar. I have used mahr as it seems to be most prevalent alternative.

91 Nussbaum, M. C., *Women and Human Development*, Cambridge, Cambridge University Press, 2000, p. 87.

92 On page 5 of her *Women and Human Development*, she defines capabilities as "what people are actually able to do and to be - in a way informed by an intuitive idea of a life that is worthy of the dignity of the human being". For a list of capabilities identified by Nussbaum, see *ibid.*, 78. Those include, among others: bodily health and integrity, emotions and thoughts, practical reason.

a real choice between a religious marriage and a secular marriage. If the couple would like a secular marriage, they have to leave the country to get it and then have it recognised under the Israeli law.<sup>93</sup> Consequently, the very exercise of one's fundamental freedoms is made harder if not impossible to expect.<sup>94</sup> Separation, while it cannot in itself ensure all the material conditions one needs to be autonomous in religious matters, certainly creates a more conducive environment for one's identity. At the very least, it furthers certain capabilities that the fusion of the state and religious law endangers.

Therefore, separation, besides ensuring that the majority's pressure is moderated by limiting the state, secures an element of choice for the believer. It by no means represents a complete solution, but it does promise more freedom than is the case in a jurisdiction where separation is not exercised. The last effect by which separation contributes to an environment conducive to the change in Sharia follows from the choice argument. Namely, by allowing the believer to take control over the way religious law is interpreted and applied, separation avoids its petrification.

#### ***4.3 Separation prevents Sharia's petrification***

The third effect of separation is attached to the previous one. If religious law is left to the believer and her choice, it may as a corollary be freer to develop and change. By contrast, were religious law integrated with the state, it would be more or less stunted in its development. This follows from the nature of the state and law themselves. Namely, it has been pointed out that contemporary states, at least in the circle of Western liberal democracies, aim to make their laws as predictable and stable as possible. Law remains a traditional system, its response to external changes being often delayed and characterised by various formalisms and procedural requirements that have to be met.<sup>95</sup> Historical experience at the times of British colonial conquest demonstrates that these characteristics were detrimental for development of religious law. By codifying its provisions, the British froze certain aspects of Sharia in time.<sup>96</sup> In a word, their changes were made more difficult as the characteristics of the national legal order encompassed them as well. Religious law then becomes more petrified.

93 I am grateful to Professor Brett Scharffs for bringing this point to my attention.

94 In Israel, the close state relationship with religions produces other difficulties not directly relevant for this paper. For instance, Failing reports on the so-called "clothes inspection movement". Orthodox Jewish women are now expected to wear clothes that closely follow the standards set by a group of ultra-conservative women. Not doing so results in abuse against the offender. (Failing, M. A., Finding a Voice of Challenge: The State Responds to Religious Women and Their Communities, Southern California Review of Law & Social Science 21 (2012), p. 154) As a result, certain fundamental capabilities may be constrained, such as bodily integrity and affiliation.

95 Nikola Visković, *Teorija Države i Prava* [Theory of State and Law], Zagreb, Birotehnika, 2001, p. 152.

96 An-Na'im, A. A., op. cit., p. 289.

Some groups may find such a development particularly helpful. If a religious norm can move from being a purely religious mandate into a practice sanctioned by the state, it is possible to entrench specific forms of religious adjudication or religious norms. In this manner, a religious rule may be shielded from the space separation leaves for a transformation of religious law. Simply put, a traditional practice may become more immune to the changes in practice. For instance, the Ismaili community, which has in the UK emphasized its “enthusiasm” for maintaining dispute resolution in their own groups,<sup>97</sup> may feel that a state recognition of those mechanisms would put them on a firmer ground. As a result of the stronger grounding, it may be harder to argue that religious adjudication is a matter of personal choice and that individual believers have a right to interpret Sharia as they see fit. Consequently, voluntary use of religious law would not really be placed on a firmer ground, as some have claimed.<sup>98</sup> While religious law itself would be better grounded, there is a palpable risk that its use would be less voluntary. In such scenarios, the state actually goes beyond the permissible granting of civil effect to religious norms, violating separation.

The risk depends on the way the state chooses to bond with religious law. In this regard, Woodman helpfully differentiates between institutional and normative recognition of religious norms.<sup>99</sup> Simply put, institutional recognition would involve granting religious institutions the jurisdiction to decide on particular disputes. Establishing a governmental religious court would be the most extreme example. One consequence of its existence is a certain petrification of religious law. Namely, a particular strand of religious law may be endorsed or empowered as a result of institutional recognition since the understanding of a specific community, rather than individuals, may come to the forefront. Interpretations of individual believers may then be discarded as unauthentic, making change of religious law harder in practice. Naturally, this can happen even with informal tribunals led by religious communities and the pressure they exert by themselves, but having the state as the sponsor of religious bodies complicates matters further. It closes the gap between the religious and the secular and, with it, the manoeuvring space for individuals.

The second form of recognition, normative, may bring about a similar risk. In these cases, the secular law absorbs certain religious norms, making them the law of the land. Naturally, much depends on which norms are adopted and in what manner. For instance, allowing Muslim marriages to be registered with civil effect should be uncontroversial.<sup>100</sup> Providing that Muslim women may inherit only a half of what is inheritable by men, however, is a different matter altogether. Once such recognition

97 Jivraj V. Hashwani, [2010] EWCA Civ 712 (2011), para 14.

98 Witte Jr., J., and Nichols, J. A., op. cit., p. 127.

99 Woodman, G., op. cit., p. 33.

100 That is, of course, as long as the requirements for granting such civil effect are not different than those applied to all civil marriages. For example, allowing minors to get married in a way that is sanctioned by Sharia would be problematic, as well as imposing more strict requirements for civil effect of Muslim marriages than is the case with secular marriages or marriages entered into by members of other religions.

occurs, what the individual believer may feel about religious law and its place in her existence becomes less relevant. In such cases, invoking ones human rights may be less effective, as the religious is interlaced with the secular.

Examples of this problem cannot be observed in any of the jurisdictions studied thus far. However, some other countries, such as Egypt or Iraq, do adopt Sharia as a principal source of state law, commingling it with what would otherwise be understood as secular law. A case in point is the Egyptian constitutional declaration, which in its latest iteration perpetuates the rule established by earlier constitutional documents, entrenching “the principles of Islamic Sharia which include its overall evidences and jurisprudence rules and established sources in the Sunni canons” as “the main source of legislation”.<sup>101</sup> In such cases, the secular law is not as such distinct from religious law, leaving less if any room for individual believers to manifest their own understanding of religious norms.

For example, El Menyawi points out that, in Egypt, the *khul* divorce, given by women, traditionally required the consent of the husband in order to be effective. In addition, as is usually the case with *khul*, the women who give it have to renounce their dowry. After a reform, the consent requirement was removed. Needless to say, this stirred up quite a controversy.<sup>102</sup> It also did not change the fact that, in giving the *khul*, women inevitably had to give up their *mahr*, endangering their financial stability.

This example demonstrates that, because Sharia is in effect state law, the changes that had to be made to it were more limited and painstaking.<sup>103</sup> It is logical to assume that the difficulties would be reduced were each individual believer the one to decide whether *khul* should require consent or surrendering the *mahr*, without the decision being interfered with by the state. In cases where this intrusion does occur, it seems that changing religious law becomes an extensive, controversial project that is more likely to involve the whole state.

In summary, separation reduces the difficulties that surround the change of religious law by keeping the state out of it. The administration of Sharia is left to believers, which makes them freer to make decisions as to the way religious norms should be interpreted. Naturally, in terms of Sharia, this is not without difficulty, but the possibility is there. Attempts to officially introduce religious law could be seen as efforts towards circumventing such an option and immunising Sharia from change. They should therefore be approached with caution, so that the pressure

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101 Constitutional Declaration of Egypt, Available at < <http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?CatID=2666>>, 2013, art. 1.

102 El Menyawi, H., *The Gift of Ambiguity: Strategising Beyond the Either/or of Secularism and Religion in Islamic Divorce Law*, in *Islam, Law and Identity*, Oxford, Routledge, 2012, p. 105.

103 In making this claim, I also acknowledge that a significant factor contributing to the difficulties were the traditions established in the Egyptian society. Those were for sure likely to exert an additional pressure against a change. (For an argument on how tradition may affect a change in law, see Jusić, A., op. cit., p. 84.)

generated by the surrounding society and the choice left to Muslims in how to address it are not unduly interfered with.

### **5. ADDRESSING THE LIMITS OF SEPARATION WITH REGARD TO THE TRANSFORMATIVE SPACE**

The discussion thus far demonstrated that the narrative describing separation as an obstacle to accommodation is unfounded, particularly when it comes to religious law, especially Sharia. Rather than a hurdle to be overcome, separation here plays a key role in the proper accommodation of religious difference; it is a vital base for constructing a truly plural society. It obligates the powers that be to leave more room for a dialogue within the civil society and in this manner allows for creative solutions to emerge, with due respect both to the freedom of individuals and the fundamental values of the legal system and society itself. In order to achieve this, separation between the state and the religious law maintains a conflict of opposites, but in itself normally does not force the encounter towards a particular resolution.

Nonetheless, the foregoing discussion also revealed a less than idealistic face of separation. While it provides the foundation for changes in religious identities of individuals, it does not guarantee that this groundwork will be of use to them. While it is a foundation for treating claims to recognise Sharia appropriately, it does not replace the walls or the roof of the project. This is most evident with the choice argument presented above. The effects of separation are therefore limited.

That separation is limited in this case is perhaps unsurprising. The models of separating Sharia from the state that are currently in place are essentially based in the same logic which shaped the separation of religion from the state generally, namely that religion ought to be a private affair in the sense that individuals should decide on their own religious belonging and ideas by themselves. This logic, however, carries in itself the seed of its own destruction. By vesting individuals with the space to express their religious sensitivities and join with others to do so, separation sets the stage and opens up room for development of new religious ideas which then attract adherents. Once they become entrenched enough, these teachings may gain a life of their own, sometimes with large and well organised groups disseminating them. Over time, they may become less flexible and more dogmatic. What individuals feel may be less relevant. How well they adhere to the accepted creed may be all that matters.

In time, therefore, a religious community and the understanding of religious doctrine it advocates are made stronger. What the group understands to be the true way trumps individual interpretations, which pale in comparison to the force of the shared creed. This collective understanding interjects itself between the state and the citizen, calling to obedience all those who wish to be saved. The state normally should not interfere as it is restricted by separation and religious freedom. Perversely, however, it may actually violate separation, not in order to support anyone's rights



*per se*, but because it is tempted by well established religions. The power the latter hold within the most intimate recesses of the believer's identity, well beyond the reach of the secular law, may for the government represent the proverbial forbidden fruit.<sup>104</sup> The state may thus find itself bonding with the traditional and well-established religious thought, further amplifying its reach and reducing the impact of less prominent strands of understanding, particularly individual initiatives to make a difference in the field of religion.<sup>105</sup> It may also choose to assault religion, striving to eradicate its influence and diminishing religious freedom in the process.

Even if the state does not interfere in the way described above and upholds separation instead, an individual choice may be made more difficult by the powerful influence exerted by the religious group. This may hold particularly true for tightly knit immigrant communities, offering the most familiar environment for those who still feel that the West is alien and even fallen from the right way. Rejection from the only known sanctuary may leave the believer deprived of what she knows as stable and true, possibly leaving her economically disadvantaged and vulnerable in the process as well. In order to avoid becoming a pariah in what is perceived to be an unforgiving world, the believer may thus forego the possibilities opened by separation or may be forced to do so by those whom she holds dear.

Against this background, it is clear why some scholars have been arguing that the burden individual believer suffers must be alleviated and that the state should introduce a variety of measures to make the choice individuals make more feasible, mending the weaknesses of separation. However, these authors tend to deal with separation as something that is to be overcome and do not factor its transformative space into the equation.<sup>106</sup> Consequently, their suggestions may twist the zone

104 It has been noted that the state may perceive religion as a retort in which spiritual force can be added to the secular power. (Hirschl, R., *Constitutional Theocracy*, Cambridge, Harvard University Press, 2010, p. 13) By engaging in this dangerous ritual, however, religion may end up drained of its spiritual lifeblood. Protecting its remaining spiritual autonomy may then require special arrangements with the state. One example coming from the UK is the exemption added to the 1998 Human Rights Act. It is supposed to ensure that the established Church of England is not forced to act contrary to its teachings. This is possible in theory since the Church is considered a public authority by law, meaning that its work requires it to adhere to the standards of the European Convention on Human Rights. A particular concern has been the possibility that the state forces the Church to wed same-sex couples. (Feldman, D., ed., *English Public Law*, Oxford, Oxford University Press, 2004, p. 486).

105 As the recent US controversy over the religious symbolism found in a city crest demonstrates, sometimes the traditional thought becomes so well entrenched that it is impossible to claim it is not normal for it to be expressed publicly and in a way which creates a bond with the state. (Weber, K., *Atheists order Florida court to remove 131-year-old city seal due to cross symbol: Legal group says court decision would be "subjective"*, <global.christianpost.com>, 27 September 2013, available at: <http://global.christianpost.com/news/atheists-order-florida-city-to-remove-131-year-old-city-seal-due-to-cross-symbol-legal-group-says-court-decision-would-be-subjective-105398/>)

106 For example, Shachar identifies separation of Sharia and the state with "relegating these religious traditions to the margins, labeled as unofficial, exotic or even dangerous (unrecognized) law". (Shachar, *Privatizing...*, cit., p. 593).



generated by separation and make harder a change in accordance with the will of individual believers. Some schemes are more risky than others, however, and it is the task of this part of the paper to single them out. In this manner, we may better understand how to expand the agency of individual believers to the fullest.

To start with, all suggested safeguards discussed below can be arranged along a spectrum, in accordance with their mode of functioning. On the one side are those measures that seek to empower individual believers to make their own choices when it comes to Sharia. In other words, these safeguards boost the capabilities of each citizen to define their identity autonomously. The state here only provides the tools for citizens to use, but does not actively involve itself in their application.<sup>107</sup> On the other side of the scale are those safeguards that are not really safeguards in the proper sense of the word, but channels through which the state to some extent dictates the developments in the transformative space. The use of such methods can be confused with the first group as it may sometimes appear that they work in the same way. However, they actually do not strengthen the individual, but seek to direct the conflict towards a particular solution, thereby diminishing the creative role of individuals in constructing their own identity.

An illustrative example of a suggestion leaning strongly towards the latter end of the spectrum may be found in “Multicultural Jurisdictions”, the seminal work of Ayalet Shachar. In it, she argues against the traditional divides between public and private, religious and secular, advocating instead for a model of “transformative accommodation”.<sup>108</sup> Rightfully pointing out that human beings may be both citizens and believers, she suggests that different matters, such as marriage, be divided along the so-called sub-matter lines, so that they are both under the jurisdiction of the state and the religious community. The believer can then move between the two.<sup>109</sup> This is made possible by the so-called “reversal points”, junctures at which the believer may safely opt out of religious law and for secular law and vice versa, on the basis of her interest.

While Shachar’s argument is undoubtedly convincing, there are several weaknesses worth addressing from the viewpoint of the transformative space. As Maleiha Malik notes, by employing the concept of “reversal points”, Shachar assumes that it will be possible to pinpoint concrete spots where the believer may shift between one jurisdiction and the other. This is not necessarily the case. There might be considerable controversy over the content and the workings of religious law within a community, let alone between different groups. Furthermore, there may be issues over whether the believer is able to phase out religious law at any

107 I depart here from Ayalet Shachar, who claims that these measures are a form of state oversight, *ex ante* supervision. (ibid., 600).

108 Shachar, A., *Multicultural Jurisdictions: Cultural Differences and Women’s Rights*, Cambridge, Cambridge University Press, 2001, p. 242.

109 For a detailed application of her argument in the context of religious arbitration in Canada and religious adjudication more broadly, see Shachar, A., *Religion...*, cit.; Shachar, A., *State...*, cit.

point and matters related to the way the group usually operates. The state would then have to make a particular assumption about the way the group it is interacting with functions and the way religious law is applied.<sup>110</sup> It is questionable whether this state-developed notion would rise to the challenge and be favourably reflected in a negotiation process or its results.

Even more importantly for this paper, it is dubious whether engaging in such a project would be compatible with separation in the long run. After all, the state would inevitably have to choose a number of representative organisations to negotiate with. Given that Sharia is particularly pluralistic,<sup>111</sup> there is no guarantee that the communities chosen would be representative (and, indeed, that the agents of the chosen communities would be representative). As a result, the regime of transformative accommodation might actually favour only some, possibly entrenched understandings of religious law, while all others would be in an unprivileged position.

The transformative space would to some extent be warped on at least two counts. Firstly, particular groups are favoured over others, along with their understanding of religious law, meaning that the moderating effect of the transformative space becomes split. Two layers of religious law application are fostered. One is the negotiated, public stratum, which conforms to the conditions determined by the state in its interaction with religious communities. Underneath it lays the obfuscated, hidden area where religious law may be applied differently.

The second danger for transformative space lies in establishing reversal points. In order for them to exist, religious law would have to be settled to some extent. The state in the process of negotiation would have to direct the contents of religious law in a particular way to make this possible. Differences over conflicting alternatives may have to be pre-emptively resolved. Individual believers would then be constrained in their ability to develop different interpretations of religious law. This makes the transformative accommodation approach a particularly risky venture.

The other side of the spectrum offers more moderate and acceptable suggestions. These aim at slightly tilting the balance between the religious community and its individual members in favour of the latter. One particularly popular recommendation is to introduce religious arbitration with special safeguards, similarly to what has been advocated by Marion Boyd in her report to the Ontarian government.<sup>112</sup> The most powerful argument for safeguarded arbitration is that it reduces the cost individual believers may face when wanting to opt out of informal, community-based tribunals administered by their communities. In plain terms, it is very probable that they would have an easier time choosing a religious arbitration

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110 Malik, M., *Minority Legal Orders in the UK*, London, British Academy: Policy Centre, 2012, p. 38.

111 Shahar, I., *Legal Pluralism and the Study of Shari'a Courts*, *Islamic Law and Society* 15 (2008), p. 117.

112 See *supra*, p. 9.

tribunal than a secular, national court.<sup>113</sup> For one, they would not be required to sacrifice the application of religious law, which respects their desire to conform to religious mandates. Secondly, the religious communities to which they belong may for the same reason provide less resistance to the believer seeking assistance beyond the flock.

Naturally, there may be some concerns related to the effectiveness of introducing religious arbitration generally. As the British example shows us, the mere existence of official channels through which a claim to apply religious law may be directed does not mean that they will be used. However, this is not say that they would never be employed in any circumstances whatsoever, nor is the degree to which this is done a problem for separation itself. The state may still attempt to introduce religious arbitration with a network of supportive measures.

A more pressing concern from the transformative space perspective stems from the combined, centaur-like nature of safeguarded religious arbitration. Namely, because of its general features, arbitration should normally fall into the end of the spectrum supporting individual initiative. It is basically a tool by which the parties to a dispute may ensure the legally binding force of their accord outside the framework of the national judiciary.<sup>114</sup> Therefore, arbitration by its very nature corresponds to the features of the first category. However, religious arbitration need not remain within its constraints. Depending on the supporting measures added to it, arbitration may move closer to the other extreme of the spectrum and may as such be used by the state to ensure a greater impact over the developments in the transformative space.

Generally speaking, two suggestions are made as to protective measures that ought to be introduced along with religious arbitration, neatly summed up by Ayalet Shachar. One is really a group of preconditions for civil validity of the decisions rendered by the tribunal. Examples include education of arbitrators in matters of secular law (particularly its fundamental values), obligation of arbitrators to maintain a case file, obligatory legal counselling for those who intend to avail themselves of religious law. The other proposal is that some form of oversight is established over religious arbitration tribunals, with a system of mandatory judicial review being a concrete suggestion.<sup>115</sup> Problematically, neither measure factors in the transformative space, which may lead the safeguarded arbitration project to knotty results.

Thankfully, the first suggestion or, rather, a group of suggestions, is more acceptable. Their main point is to encourage religious communities to respect the rights of individual members and avoid extremes in applying religious law in exchange for civil effect of their rulings. This, posits Witte, would result in a growing confidence in religious adjudication and a reduction of problems with

<sup>113</sup> Ahmed, F., and Luk, S., op. cit., 424–445.

<sup>114</sup> Triva, S., and Uzelac, A., *Hrvatsko arbitražno pravo* [Croatian arbitration law], Zagreb, Narodne novine, 2007, p. XXIII.

<sup>115</sup> Shachar, A., *Religion...*, cit., p. 76.

enforcing its rulings.<sup>116</sup> As a result, the stigma usually following Muslims and Sharia would be somewhat diminished. I am inclined to agree with this suggestion. In terms of separation, of course, it would be essential for the government to offer the incentivizing measures to all communities and potential arbitrators on an equal basis. In particular, no one should be singled out for adherence to a particular strand of Sharia.

It is the second suggestion that is more problematic. While not in itself contrary to separation, establishing a mandatory review process for arbitration conducted under Sharia does cause some tension in its transformative space. To begin with, mandatory review can be established as long as the courts are applying clear standards on recognition of religious law, as outlined in the first part of this paper. Still, one cannot escape the fact that by hanging the sword of the state over religious tribunals, a permanent bond is established between the secular and the religious. National courts become *de facto* courts of second instance for religious tribunals. If the state is not prepared for the continuous interface with the religious, its judiciary may end up deciding issues of religious doctrine, bringing about the creation of governmental religious courts<sup>117</sup> and diminishing both the transformative space and separation as its source. This is particularly likely if the societal prejudice towards Muslims seeps into the court's reasoning.<sup>118</sup> Thus, for mandatory review to be completely functional, Muslims would first need to be better integrated in society at large. However, if this stage is reached, one wonders whether mandatory review would be needed in the first place.

Assuming that the permanent bond between the secular and the religious is not an issue, the parties to a religious arbitration are still forced to have each and every decision of the arbitration tribunal reviewed by the national court. This is a particular problem if it is only Sharia tribunals that are included in the scheme. Especially in a jurisdiction such as Canada, which prides itself on multiculturalism and equality, it may well be unacceptable to place only one group under a particularly protective arrangement as if they were barbarians requiring special supervision.

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116 Witte Jr., J., *The Future of Muslim Family Law in Western Democracies*, in *Shari'a in the West*, New York, Oxford University Press, 2010, p. 290.

117 Generally speaking, Hofri-Winogradow differentiates three ways of establishing such institutional arrangements. Firstly, religious experts can be hired to adjudicate cases of religious law in secular courts (which, from that point onward would obviously no longer be purely secular). Secondly, judges can be educated in matters of religious law. Finally, a separate branch of religious courts could be organised under the auspices of the judiciary. (Hofri-Winogradow, A. S., *A Plurality of Discontent: Legal Pluralism, Religious Adjudication and the State*, *Journal of Law and Religion* XXVI, no. 1 (February 2010), p. 104.) However, neither option requires that the government forms new institutions to serve as religious courts. The secular power might just confer jurisdiction to the existing bodies of religious communities or make necessary changes to secular courts. This change can also be factual, when the court decides on matters of religious doctrine it is a governmental religious court, even if it exercises this role only in one concrete case.

118 See *supra*, footnote 23.

Indeed, it has been noted that the seemingly monolithic Canadian ban on civil effect of religious family law arbitration is vulnerable on Charter grounds precisely for the attempts to draw boundaries on the basis of a religious criterion. Specifically, as long as the proceedings are conducted according to “law of Ontario or of another Canadian jurisdiction” the decision made by the tribunal will have binding effect.<sup>119</sup> A prohibition specified in this manner may be vulnerable as it limits religious freedom in allowing only secular laws to be applied to arbitration. Consequently, as some have argued, fundamentalists could demonstrate that such a selective restriction was made in consideration of majoritarian religious beliefs, which are reflected in secular laws, and not because there is an actual risk of abuse.<sup>120</sup> Therefore, in the Canadian context, a complete ban on the use of arbitration in family matters, as was done in Quebec, appears to be a clearer solution. Toying with singling out only certain forms of adjudication or particular groups is a more uncertain exercise.

Additionally, singling out only Sharia adjudication is problematic for implying that Sharia is for some reason more dangerous when compared to other religious laws, such as Halacha or Canon Law. This in itself is a mistaken idea incompatible with objectively separating religious law from the state.<sup>121</sup> For instance, both Canada and the UK struggled with the abuse of marriage provisions under the Jewish law, allowing the husband to deprive his wife of the possibility to remarry.<sup>122</sup> Not even Canon Law is free from worrying abuses.<sup>123</sup> Indeed, given that religious laws were sometimes set in stone many centuries ago, their rules on procedure are an eyebrow-raising read even where their substantive provisions are unobjectionable.<sup>124</sup> Hence,

119 Arbitration Act, 1991, SO 1991, c 17, available at: <http://www.canlii.org/en/on/laws/stat/so-1991-c-17/latest/so-1991-c-17.html>, art. 1.

120 Baines, B., *Equality's Nemesis? - Queen's University Legal Studies Research Paper No. 07-05*, *Journal of Law and Equality* 5, no. 1 (Spring 2006), p. 72; Gaudreault-DesBiens, J., *Constitutional Values, Faith-Based Arbitration, and the Limits of Private Justice in a Multicultural Society*, *National Journal of Constitutional Law* 19 (2005), p. 175 (arguing against the vulnerability of the ban to a Charter attack).

121 See *supra*, pp. 5-7.

122 According to Halacha, the husband may divorce his wife without fully “releasing” her from the bonds of marriage. This is achieved by depriving his spouse of the so-called *get*. Without it, she may not remarry under Jewish law and any children she may have are considered illegitimate. She is then an *agunah*, or chained wife. Her former husband, by contrast, can religiously remarry and have children without anything chaining him to his former companion. For more information on the more innovative uses of *get* in Canada and the UK, see Fournier, P., *Calculating...*, *cit.*, p. 52; Stephen Jones, *Negotiating Islam. Dialogues Between Liberalism and Islamic Theologies in 21st Century Britain* [Doctoral Thesis (PhD), Goldsmiths, University of London. [Thesis]: Goldsmiths Research Online, available in full at <<http://eprints.gold.ac.uk/6494/>>, 2010, p. 163.

123 *Pellegrini v. Italy* (app. no. 30882/96) (2001) (the Italian court affirmed the decision of the Roman Rota although the applicant was deprived of her fundamental procedural rights whilst undergoing divorce proceedings under Canon Law).

124 Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, *New York University Law Review* 86, no. 5 (November 2011): p. 1241.

in order to properly and impartially shield the core of the national legal order as is required by separation, the state would have to establish mandatory review for all kinds of religious laws. Even if the national judiciary was at the height of its impartiality and professionalism, the variety of cases that could by consequence be directed its way may push its endurance to the maximum and thereby make the transformative space more unstable, possibly endangering separation as well.

In sum, religious arbitration may be allowed and some kinds of supportive measures may be granted to facilitate its use. The British case vividly demonstrates that this is perfectly compatible with separation. However, introducing certain safeguards is harder to square with separation or its transformative space. Moreover, particular suggestions that aim at overcoming the limitations to separation, such as the transformative accommodation model, may be completely unacceptable.

In principle, therefore, the measures that are going to be most compatible with the integrity of the transformative space are those that seek to boost the agency of individual citizens without giving the state the opportunity to direct the result of its exercise. Those intending to introduce some form of support for those intending to navigate the transformative space of separation should therefore be mindful of this principle. If ignored, the measures introduced by the state may end up achieving a result opposite of what was intended and may warp the pluralism and freedom in a society instead of furthering them.

## **6. CONCLUSION**

In contrast to the simplified “public vs. private”, “religious vs. secular”, “accommodation vs. separation” scenarios, the “separation as accommodation” argument reveals a different face of contemporary responses to religious law in the West, particularly Sharia. Instead of being an effort to aggressively suppress the insufficiently traditional, separation may be seen as a vital basis for freedom and change. Both the seemingly more aggressive top-down model and the more permissive bottom-up approach let us reach this very same conclusion. Both of them can be observed as sources of the “transformative space”, empowering individual believers to make their own choices as to their religious belief, practice and belonging.

Nonetheless, the analysis developed in this paper also reveals significant gaps in the transformative space projected by separation. Separation in itself does not guarantee that individuals will be able to resist the pressures of their communities, which may in some cases result in catastrophic consequences. It is therefore understandable that some suggest measures aimed at assisting individuals to exercise their rights and avoid being pigeonholed as either dispossessed believers or secularized citizens. However, these measures should take into account the transformative space and separation itself. If they do not, the price paid for support to individuals may be too high as the very grounds for a plural society shifts and tumbles, causing additional cracks in the fabric of society.



## Summary

### **SEPARATION OF SHARIA FROM THE STATE AS ACCOMMODATION – EFFECTS AND LIMITS**

Citizens of contemporary constitutional democracies adhering to particular religions may submit themselves to laws administered by their religious communities insofar as they remain within limits outlined by the national legal order. In this paper I analyse this usual response to religious norms against the background of the growing presence of Sharia law in Canada and the United Kingdom. In particular, I argue that it creates the “transformative space”, allowing believers to determine by themselves the extent and the way in which religious law will apply to their lives. This space, however, remains riddled with limitations that have already been discussed in the existing literature. However, the authors that dealt with the problem thus far tended to overlook the nature of the transformative space as the groundwork of difference. Instead, they conceptualised it as a barrier towards diversity. I look at how this oversight might cause additional problems for the always tense religion-state relationship.

**Key words:** *religious freedom, Sharia, the secular state.*

## Zusammenfassung

### **DIE TRENNUNG DES SHARIATSRECHTES VOM STAAT ALS QUELLE FÜR DEN RAUM DER VERÄNDERLICHKEIT: AUSWIRKUNGEN UND EINSCHRÄNKUNGEN**

In modernen verfassten Demokratien ist die Anwendung des Religionsrechtes bis zu einem gewissen Grad dem Gläubigen überlassen und der Staat wird sich darin meistens nicht einmischen. In dieser Arbeit analysiert der Autor diese gewöhnliche Antwort auf Religionsnormen im Kontext der wachsenden Anwesenheit des Shariatsrechtes in Kanada und im Vereinigten Königreich. Es wird festgestellt, dass diese Antwort den einzelnen Gläubigen die Möglichkeit gibt, selbst zu bestimmen, wie und bis zu welchem Grad das Religionsrecht auf sie angewandt wird. Das nennt man den Raum der Veränderlichkeit. Viele Autoren weisen schon auf seine Einschränkungen hin. Insbesondere wird das Problem der übertriebenen Belastung des Gläubigen durch unerbittliche religiöse Tradition betont. Es wird angemerkt, dass man auf der Suche nach richtigen Lösungen für diese und andere Probleme bedenken muss, dass die Trennung von Staat und Religionsrecht und der daraus hervorgegangene Raum der Veränderlichkeit kein Hindernis für Verschiedenheiten sondern deren Grundlage sind. Die Vernachlässigung dieser Tatsache kann zu



zusätzlichen Schwierigkeiten im immer gespannten Verhältnis zwischen Gewalt und Religion führen.

**Schlüsselwörter:** religiöse Freiheiten, Shariatsrecht, säkularer Staat.

## Riassunto

### **LA SEPARAZIONE DEL DIRITTO ISLAMICO DALLO STATO QUALE FONDAMENTO DI UNO SPAZIO DI VARIABILITÀ: EFFETTI E CONFINI**

Nelle democrazie costituzionali contemporanee l'applicazione del diritto religioso è demandata entro certi confini ai singoli fedeli e lo Stato normalmente non vi s'intromette.

Nel presente contributo l'autore analizza detto usuale rimando alle regole religiose alla luce della crescente presenza del diritto islamico in Canada e nel Regno Unito. Si constata che lo stesso demanda ai singoli fedeli la possibilità di definire autonomamente le modalità e la misura in cui il diritto religioso verrà applicato nei loro confronti. Un tanto viene definito spazio di variabilità e sui suoi limiti si sono già espressi numerosi autori. In particolare modo si pone in rilievo il problema dell'eccessiva esposizione dei singoli all'inflessibile tradizione religiosa. Evidenziamo che nella ricerca di soluzioni valide atte a risolvere questi o altri problemi vi è la necessità di tenere a mente che la separazione tra Stato e diritto religioso, come pure lo spazio di variabilità che di qui deriva, non rappresentano un ostacolo alla diversità, bensì il loro basamento. Trascurare detta circostanza può condurre ad ulteriori difficoltà nel sempre teso rapporto tra potere di governo e religione.

**Parole chiave:** libertà religiose, diritto islamico, stato secolare.