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Sharia on the fringe: How can separation from the state transform religious law?

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Abstract

This thesis discusses the role of separation from the state in the possible transformation of Muslim religious law (Sharia), particularly its family law provisions. The arguments are built upon a comparison of three jurisdictions that have advocated separation of Sharia from the state: Canada, the United Kingdom and the work of the European Court of Human Rights. It is demonstrated that separation allows application of Sharia as long as its norms remain within the private sphere. In doing so, separation itself does not transform Sharia. Instead, it generates what I term "the transformative space" within which Muslim religious law may change through the agency of its adherents. I argue that in order to maintain and improve the space it generates, separation needs to remain a way to practically arrange the state's relationship with the religious without catering to views for or against any religion. Insofar as it moves from this position, becoming a tool for different ideologies, it is more likely to corrupt or abolish the transformative space and cause a range of difficulties.

Dedicated in loving memory of my grandmother Jelena,
for helping me appreciate even thick and boring law books,
and for being there when we needed her the most.

Acknowledgments

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1. Introduction

*"Banish wisdom
and discard knowledge, and people will
benefit a hundredfold."*

~ Lao Tzu[1]

The debate on the position of Muslims in Western liberal democracies is complex and encompasses many issues. This thesis focuses on a segment of the discussion, deeply intertwined with religious freedom: the place Muslim religious law, Sharia, holds in the West. Literature on the subject is extensive and will be discussed throughout the arguments that are to follow. In order to place this thesis in its broader context, however, it bears sketching an outline of the debate.

The scepticism towards the presence of Sharia in a liberal democracy seems to be omnipresent, particularly in relation to its (in)compatibility with human rights.[2] Consequently, restrictions on applying Muslim religious law are considered justified.[3] It is hoped that a careful approach to Sharia would result in a better protection of human rights. While it would

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[1] Lao Tzu, *Tao Te Ching* (Hertfordshire: Wordsworth, 1997), 19.

[2] John Witte, Jr. and Joel A. Nichols, "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): 122–135; Denis MacEoin, *Sharia Law or One Law For All*, ed. David G. Green (London: Civitas, 2009), http://bit.ly/nclPB1; Ian Leigh, "Balancing Religious Autonomy and Other Human Rights Under the European Convention," *Oxford Journal of Law and Religion* 1, no. 1 (2012): 1–17; Robin Fretwell Wilson, "Privatizing Family Law in the Name of Religion," *William & Mary Bill of Rights Journal* 18 (May 2010): 925–952; Samia Bano, "In Pursuit of Religious and Legal Diversity: a Response to the Archbishop of Canterbury and the 'Sharia Debate' in Britain," *Ecclesiastical Law Journal* 10, no. 3 (2008): 283–309; Faisal Kutty, "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): 559–602; Arsani William, "An Unjust Doctrine of Civil Arbitration: Sharia Courts in Canada and England," *Stanford Journal of International Relations* XI, no. 2 (Spring 2010): 40–47; Jean-François Gaudreault-DesBiens, "Constitutional Values, Faith-Based Arbitration, and the Limits of Private Justice in a Multicultural Society," *National Journal of Constitutional Law* 19 (2005): 155–191.

[3] Lisbet Christoffersen, "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), 73 (noting the doctrinal zeal with which restrictions to Sharia are suggested).

be difficult to summarise all the suggestions I have been able to analyse in a couple of introductory sentences, the one characteristic most of them share is that they advocate the separation of Sharia from the state.[4]

In this, it is presumed that separation does something to religious law that makes it less threatening to human rights and the liberal legal order as a whole. What that "something" is, however, normally remains unclear.[5] Some clues may be had from the recently defended doctoral thesis of Asim Jusić that deals with regulating non-mainstream religious groups.[6] While his analysis is not focused on Sharia in particular, it clearly unearths a number of useful concepts I will be drawing on in the later stages of this thesis. I am taking a similar approach to the theories of some other authors that touch upon the position of Sharia and can be used to make sense of the way it is taking within the framework of a liberal democracy.[7] In doing so, I systematically map out the process Sharia undergoes in jurisdictions that separate it from the state.

More specifically, I argue that separation from the state does not throw Sharia into stasis nor does Muslim religious law get locked away from those whose interests may be harmed. Instead, it is left to believers to apply Sharia, although for the most part without state sanction. This gives them an opportunity to navigate between secular law and religious norms.

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[4] The term „state" in this thesis does not denote a subunit of a federation, as is commonly the case in the US. Instead, I use it as a synonym of the term „government", meaning the administration of a particular country, including its judicial, executive and legislative branches of power.

[5] Diletta Tega, "Cercando Un Significato Europeo Di Laicità: La Libertà Religiosa Nella Giurisprudenza Della Corte Europea Dei Diritti [Searching for a European Meaning of Secularism: Religious Freedom in the Jurisprudence of the European Court of Human Rights]," *Quaderni Costituzionali* 4 (December 2010): 800 (arguing that the increased pressure emerging for the growing Muslim presence highlighted the need for understanding the separation between the state and religion better).

[6] Asim Jusić, "Non-mainstream Religious Groups: Perspectives from Economics and Social Psychology" (S.J.D. thesis, Central European University - Department of Legal Studies, 2011) (unpublished, on file with the author and available in full at http://bit.ly/O1zX3w).

[7] Ayalet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001); Martha C. Nussbaum, *Women and Human Development* (Cambridge: Cambridge University Press, 2000).

By creating this space, separation is generating opportunities for transforming religious law. However, it in itself cannot force a transformation of Sharia.

Given the time and space constraints of this thesis, my analysis is of a restricted scope in two respects. Firstly, I primarily discuss three jurisdictions that have had a chance to develop both practice and theory on the position of Sharia within a liberal democracy. Secondly, the thesis is predominantly focused on a single segment of Sharia, its family law provisions. In the paragraphs that follow, I explain each of those two restrictions in turn.

As far as the jurisdictions chosen are concerned, I analyse Canada, the United Kingdom and the jurisprudence of the European Court of Human Rights (hereinafter, the ECtHR). The choice was motivated by several factors. Most importantly, all three jurisdictions have faced claims for recognition of Sharia. All three responded by keeping it away from the state. Nevertheless, they all have a slightly different approach to religion. Canada maintains its government separate from any religion. The UK keeps its established Church of England and exercises separation in regard to all other religious organizations, although, as I discuss later on, with some British twists.

The ECtHR, as the judicial body of the supranational Council of Europe, does not bind the states to a particular model of religion-state relationship. However, it does encourage the separation of the state and Sharia through the human rights protection standard it enforces.[8] Part of it has been obvious from the ECtHR's case law, while the other part may be deduced from the existing decisions that do not tackle Sharia directly. In any case, notwithstanding its different and supranational character, the case law of the ECtHR actually converges with the separation from Sharia advocated in other jurisdictions which, as I discuss later on, is not entirely unproblematic.

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[8] For a comprehensive analysis of the church-state regime being constructed by the Court, see Carolyn Evans and Christopher A. Thomas, "Church-State Relations in the European Court of Human Rights," *Brigham Young University Law Review* 2006 (August 16, 2006): 699–726.

This thesis is also restricted in terms of its subject matter. Sharia is a big, amorphous term. Generally speaking however, a difference can be drawn between Sharia as a set of divine, unchangeable principles[9] and their human interpretation, *sunna* or, speaking more broadly, *fiqh*.[10] When I use the term "Sharia" in this thesis, I refer primarily to that human interpretation of its rules, unless a different meaning follows from the context.

In doing so, I do not conceptualize Sharia as a set of monolithic norms, nor do I engage philosophical or theological discussions on whether Muslim religious norms can coexist with the secular law on some sort of a glum, abstract plane.[11] The analyses that frame the discussion in this manner, while undoubtedly insightful, only justify separation but do not drill deep enough to look at what it may do to religious law in practice. They also fail to acknowledge that individual believers actually practice religious norms in daily life and do not phone a religious authority every time they need to apply them. In other words, it is ignored that believers do not necessarily have to adhere to the written word of religious law in practice. This thesis, on the contrary, constructs its arguments around the respect for the understanding of individual believers, rather than limiting itself strictly to "Sharia by the book".

To specify the scope of this thesis further, I do not discuss all possible areas which Sharia can touch upon. Doing so would be an interesting endeavour, given that Sharia is comprehensive and can potentially be involved in many areas of believer's life.[12] However, it is beyond this thesis to tackle such a task properly. Hence, I have focused on Sharia family

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[9] Contrary to popular belief, only a limited number of those are actually contained in the Quran. (Mark van Hoecke, "Islamic Jurisprudence and Western Legal History," in *Shari'a as Discourse: Legal Traditions and Encounter with Europe* [Surrey: Ashgate Publishing Limited, 2010], 46).

[10] In this sense, since Sharia is a system of religious norms, the understanding the believers have about its content is also covered by the term. (Maleiha Malik, "Muslim Legal Norms and the Integration of European Muslims," *EUI Working Papers - Robert Schuman Centre for Advanced Studies, MUSMINE - Muslim Minorities in Europe* 29 [2009]: 2).

[11] See, for example, J Budziszewski, "Natural Law, Democracy, and Shari'a," in *Shari'a in the West* (New York: Oxford University Press, 2010), 181–206.

[12] Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1982), 1.

law norms. The reason for making this decision is that, by and large, it is family law that is the most controversial and significant aspect of Sharia in the West. It is, as I discuss later on, the set of norms for which some Muslim groups unsuccessfully demand additional recognition in Western liberal democracies.

An additional reason to focus on family law in exclusion to, say, Sharia criminal law, is that there is an almost pathological obsession with Muslim responses to crimes in the Middle East. The fixation is so great that a discussion on issues related to gender equality and family law under Sharia in London necessarily veers into a debate on stoning in Saudi Arabia.[13] Simply put, there is a conflation between Sharia in the West and Sharia in the East. This approach not only muddies the waters, but actually contributes very little to our understanding of the way separation and Sharia work in tandem. Hence, I have opted for a strong evasion of this discourse.

In principle, I do not move this thesis beyond the restrictions detailed above. However, I may for the sake of argument draw in some examples from one of the jurisdictions unrelated to the three I am primarily focused on. In terms of the subject matter, there are some excursions I make from time to time. Most importantly, I touch upon the issue of the Muslim headscarf and issues of religious symbolism in general, as they are in some contexts closely connected to the position of Sharia in Western liberal democracies. Furthermore, in terms of Sharia criminal law, I take up apostasy and blasphemy in a very limited sense, enough to corroborate my basic line of argument, which remains focused on family law norms. Finally, I draw some extremely limited parallels to other religious law systems, such as Jewish Law (*Halacha*) or Canon Law.

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[13] An example is the One Law for All report that, despite its efforts to stay objective, cannot avoid strongly associating Sharia with extreme criminal sanctions imposed in the countries where Sharia is the state law, such as Afghanistan (One Law for All, *Sharia Law in Britain: A Threat to One Law for All & Equal Rights* [London: One Law for All, June 2010], 4–5).

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My arguments are divided into three chapters. In the **first chapter**, I introduce the notion of separation of the state and religion, contrasting it to Sharia. I look at the response mounted by Canada, the UK and the ECtHR to claims of Sharia's greater recognition in the context of a liberal democracy. I argue that all three jurisdictions answered by enforcing separation. Nonetheless, the separation imposed leaves some room for Sharia to be applied informally.

This situation is the subject of analysis in the **second chapter**. I determine that, while the solution imposed by the three jurisdictions meets the goals of separation generally, there are some areas that remain problematic. Most notably, the room left for religious law can be misused, patriarchal interpretations of Sharia being imposed on individual believers. The clash between their human rights and religious law is left to them and it is expected that they will abandon the practice they disagree with on their own volition.

In the **third chapter**, I look at how leaving the resolution of those issues to individual adherents of Sharia creates conditions for a change in religious law. I argue that separation projects a "transformative space" that enables the religious norms to change in practice. However, this solution is not without its problems. Most notably, as the space created is closely tied to separation, any defect in enforcing it might adversely affect the space. I explain that, in order to avoid such difficulties, separation needs to stay firmly grounded in secularity. A case study in civil effect of Muslim marriages is used to demonstrate both the problems that can otherwise emerge, as well as some ways to address them.

2. Religion-state separation is applied to Sharia

"Fire and water," he said, "don't really mix.
You could say they're incompatible.
But when they do love each other,
they love passionately."

~ Cornelia Funke[14]

There is no single position a government can take in regard to religion in general and Sharia in particular.[15] Given the complexity of the matter, this is not the place to delve into a general discussion on the various possible religion-state relations. It is nevertheless essential to locate the position of the jurisdictions studied here in terms of Sharia before going into any detail as to its appropriateness and effect. In this sense, the one regularity that can be noticed in all three jurisdictions is that Sharia and the mechanisms used to apply it are separate from the state.

In this chapter, I look at this response and its background, thereby setting the stage for the rest of the thesis. I first examine what separation is and how claims for recognising Sharia challenged its role (2.1). I then briefly explain how separation was used in trumping Sharia's challenge in Canada, the United Kingdom and under the auspices of the European Court of Human Rights (2.2) In conclusion, I argue that separation is the common response to Sharia in the jurisdictions studied here and that it places Sharia's norms into the private sphere, denying them state sanction. Chapters that follow will analyse the situation in more detail.

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[14] Cornelia Funke, *Inkspell* (New York: Scholastic Inc., 2005), 487.

[15] Durham and Scharffs, for example, visualize the range of possible relationships between religious communities and the state as a continuum. (W. Cole Durham, Jr. and Brett G. Scharffs, *Law and Religion: National, International and Comparative Perspectives*, 1st ed. [Chicago: Aspen Publishers, 2010], 114–122) In some countries, such as Egypt, Sharia is upheld as the official source of law and is one with the state. Some other jurisdictions, such as India, recognise Sharia as one of the enforceable personal law systems. In Western liberal democracies, however, some form of separation appears to be omnipresent.

2.1 Sharia challenged religion-state separation

Separation of religion and state is hardly a novelty. It is predominantly a Western development, although it also emerged in more distant civilizations, such as India.[16] Simply put, as its name implies, separation means that the religious and the governmental do not interfere with each other. However, defining separation like that is far too simple to be of any use, since what exactly "interference" means can vary from one legal order to the next. Indeed, the problem with trying to specify separation is precisely in the variety of nuances it assumed in practice. For example, generally speaking, it is practiced by both Canada and the UK, although with the obvious exception of the Church of England in the latter.[17] However, it may work differently in a jurisdiction that still maintains a state church than it does in Canada, where no religion is preferred. Then again, separation in both of those countries may differ from its varieties as applied in France or, say, Croatia.

Under the circumstances, defining specificities of separation *in abstracto* is a difficult task, one that I do not plan to undertake in an exhaustive manner. At the end of the day, such an endeavour is not required for the purposes of this thesis. Instead, what the arguments that are to follow require is an explanation of the background of separation and its rationale in general terms. This will help in thinking about some of the concerns that arise out of the challenges Sharia sets before it, and will also play an important role in contextualizing the responses of the jurisdictions studied here to the Muslim religious law. In that sense, I first discuss the background of separation and how it affected the relationship of the state and

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[16] Veit Bader, "Religion and the Myths of Secularization and Separation," *RELIGARE Working Paper No. 8* (March 2011): 20.

[17] This glaring exception to separation has been steadily losing support, with commentators noting that the House of Lords is the only relevant actor keen on keeping it in its current form. Indicative of the described trend is the refusal of the former British Prime Minister, Gordon Brown, to exercise his power to appoint bishops. (Iain Mclean and Scot M. Peterson, "Secularity and Secularism in the United Kingdom: On the Way to the First Amendment," *Brigham Young University Law Review*, no. 3 [2011], after footnote 75).

religion (1.3.1). Next, I explain how the increasing demands to recognise Sharia (appeared to) threaten the established results of separation (1.3.2).

2.1.1 Outlining the background and the workings of separation

The best way to understand the underlying philosophy of separation is to look at what exactly it is meant to prevent and how it goes about its goal. To begin with, separation emerges against the background of religious persecution that was made worse by the interference of the state into religion and vice-versa (2.1.1.1). Separation tackled this problem by ensuring that the two are kept at a distance. In this, it not only ensures religious freedom, but also shapes religion indirectly. Therefore, it in itself is a form of interference into the religious (2.1.1.2).

2.1.1.1 Looking at the separation's background

This thesis is not the place for a long discussion on various historical titbits from the long existence of separation. It is instead enough to note that the history of religions is strongly marred by the persecution of those who did not adhere to a particular creed.[18] The hunt for the different was all the worse when the state and religion were allowed to interfere with each other indiscriminately. Such a situation was abused both by religion and the state.

For one, the privileged religious organisation had the power of legitimate coercion at its beck and call and was not hesitant to use it.[19] Heretics were defined and exterminated, the power of the single religion increased and freedom of religion for everyone else restricted or fully denied. For example, Christianity, today for the most part considered the incarnation of

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[18] Michel Rosenfeld, "Can Constitutionalism, Secularism and Religion be Reconciled in an Era of Globalization and Religious Revival?," *Cardozo Law Review* 30, no. 6 (June 30, 2009): 2333.

[19] The example of the immediate post-establishment period in England being the case in point. (Julian Rivers, *The Law of Organized Religions* [Oxford: Oxford University Press, 2010], 10).

Western virtues, started to persecute heretical movements as soon as it fused with the Roman Empire.[20]

The government itself was not an innocent party in the marriage of religious and the secular either. It endangered the autonomy of religions. The incentive to do so is great, since religions can serve as ramparts for criticising the government, pointing out its moral and other faults. Religions can inspire their adherents to support a particular regime or to do their best to bring it down. Just as the state wields the physical coercive power, religion may have potent spiritual authority. As such, it is an attractive target for the government wanting to gain greater control over the population.

In this sense, enveloping religion in the mantle of the state can have several effects. It can take out religion's revolutionary potential, essentially pacifying it and making it a vessel in which the state can combine spiritual force with the governmental policy.[21] Religion's teachings may get petrified and instrumentalised, with only one, governmental version being established. One example of attempting to do this happened in Yugoslavia, when the communist regime attempted to separate the Croatian Roman Catholic Church from its Roman headquarters. That would establish a separate Catholic Church, under the greater influence of the state and would weaken Catholicism.[22] Another, more extreme historical example is the UK and the period after establishing the Church of England, which was riddled with persecution of other religions and followed by a unity between the state and the Church

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[20] For example, the Gnostic sects, an offshoot of the original Christian movement, were almost prosecuted to extinction. Their traditions that survived to this day are kept by minorities that have enormous problems in keeping their identity from completely dying out. (Nathaniel Deutsch, "Save the Gnostics, The New York Times," *The New York Times*, October 6, 2007, http://nyti.ms/QVsHKv <last accessed 15/7/2012>).

[21] Ran Hirschl, *Constitutional Theocracy* (Cambridge, Massachusetts: Harvard University Press, 2010), 13.

[22] The plan never worked and the regime eventually changed its hostile attitude towards religion generally. The laws passed in the 1950s enabled the Roman Catholic Church to restore its full activity later on. (Ivo Goldstein, *Hrvatska Povijest [Croatian History]* [Zagreb: Novi Liber, 2003], 324).

that lasts to this day.[23] In such a situation, the state gains a spiritual weapon, but religion is in danger of losing everything else.

Perhaps the most important thing that can be lost is authenticity. Once a religious organization moves too close to the state, government officials might start "prostituting" it for political purposes. This is not necessarily done without the consent of the clergy, either. In fact, if a religious community is allowed to remain too close to the state, religious officials are more likely to "act like lazy monopolists" and focus all their efforts on pleasing those in power.[24] Two consequences may arise as a result. First, the mission drift of religions is encouraged as caring for the spiritual well-being of the community is overlooked.[25] In the best case, the religion may just lose some of its transcendental potential and might seem like just another public service, whose remaining spiritual autonomy needs to be preserved through special arrangements with the state.[26] In the worst case scenario, the religion loses its transcendental dimension altogether or keeps it and overwhelms the government, using it as a weapon against the different.

The second problem that arises out of a close bond of a religion with the state is that one religion is preferred over the others, constraining the free competition between different religious ideas.[27] In a way, a more or less subtle atmosphere of oppression is created, since a differentiation between more and less legitimate beliefs is fostered. The resulting monopoly

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[23] Rivers, *The Law of Organized Religions*, 10.

[24] Hirschl, *Constitutional Theocracy*, 56.

[25] A theory developed according to which believers are repelled from the religion that develops too close of a bond with the state. While this may indeed be the case, it should be pointed out that the theory is not without its critics, who note that it oversimplifies the problem. (Jonathan Fox, "World Separation of Religion and State Into the 21st Century," *Comparative Political Studies* 39, no. 5 [2006]: 541).

[26] One example being the exemption added to the 1998 Human Rights Act that is supposed to ensure that the 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. One problem that could have emerged for example, is for the Church to be forced to wed same-sex couples. (David Feldman, ed., *English Public Law* [Oxford: Oxford University Press, 2004], 486).

[27] Jónatas E. M. Machado, "Freedom of Religion: A View from Europe," *Roger Williams University Law Review* 10, no. 451 (Spring 2005): 532.

could indirectly affect the amount of choice in religious matters. In more extreme cases, it might even place into question the freedom to choose ones beliefs without coercion.[28] This is not just a matter affecting the individual's world of beliefs. A systematic policy directed at bending the minds of the population to the same mould eventually destroys the plurality of ideas. In this sense, the market of religious thought fails to produce "quality goods"[29] and is entrapped by a government-sanctioned monopoly.

In conclusion, past experience demonstrates that the interference of the state with religion and vice-versa brings about a series of difficulties. Not only does religious freedom to some degree turn into a fiction. Religion itself, boosted by its marriage with the state, effectively becomes a source of divisions and oppression. Those problems were tackled by turning to separation.

2.1.1.2 The inner workings of separation

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.[30] Generally speaking, therefore, religion as a transcendental concept was not to have anything to do with the reason-based state. Instead, religion was to be confined to the private sphere and removed from the powers the government has over the public sphere.[31] Exceptions to this divide were to be given so that religion may to an extent be practiced on the

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[28] This aspect of religious freedom is so important that Article 9 of the ECHR expressly provides that the right to change one's religion or belief is protected. Such a right is transposed into the British legal system through the 1998 Human Rights Act. The Canadian Charter includes freedom of religion as one of the fundamental rights. Case law recognises freedom to change ones religion as an essential aspect of this right (e.g. *Diogo Cichaczewski and Gloria Daniels V. The Minister of Citizenship & Immigration and the Minister of Public Safety & Emergency Preparedness, 2007 FC 882* (2007)).

[29] For a similar argument from the US First Amendment perspective, see J. David Holcomb, "Religion in Public Life: The 'Pfefferian Inversion' Reconsidered," *Journal of Law and Religion* 25 (2010): 57–96.

[30] Frances Raday, "Secular Constitutionalism Vindicated," *Cardozo Law Review* 30, no. 6 (2006): 2770; Saba Mahmood, "Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation," *Public Culture* 18, no. 2 (2006): 524.

[31] Michel Rosenfeld, "Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism," *International Journal of Constitutional Law* 6, no. 415 (October 2008): 2333.

public square. One such example would be a public school that allows its pupils to wear the symbols of their respective religions in class.[32] In this manner, the state guaranteed religious freedom for the individual, giving her the right to take up, abandon and practice religious belief or to abstain thereof.

It would be unrealistic to claim that separation achieves its aims by introducing a neat cut between religion and the state. Absolute separation, in fact, is a myth.[33] As the religious and the secular always work within the same society, it is inevitable that they will repeatedly encounter each other in all kinds of situations. The likelihood for those interactions is all the greater given that the institutions of the state are practically omnipresent.[34] Separation can then only make the government's meetings with the religious more predictable and easier to handle, ensuring that they do not revert to the dangerous marriage that reared its head throughout history.

Hence, rather than blocking the paths between the state and religions or leaving them wide open, separation reshapes them by imposing rules. Those should on the one hand limit the state and at the same time be relatively palatable to different religions. One way to achieve those aims is to base the rules on certain principles, such as equality and non-discrimination.[35] Indeed, in some jurisdictions that do not provide for separation explicitly in their constitutions, as is the case in Canada, principles of equality and prohibition of governmental

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[32] For example, English law lets schools decide whether to allow wearing headscarves to the student population Nonetheless, making such concessions can in itself be quite a contentious issue. See: 'R (Shabina Begum) v The Headteacher and Governors of Denbigh High School, *(2006) UKHL 15*'.

[33] Iain T. Benson, "Living Together with Disagreement: Pluralism, the Secular, and the Fair Treatment of Beliefs in Canada Today," *Ronning Centre Forums - II* a presentation at The Chester Ronning Centre for the Study of Religion and Public Life - Camrose, Alberta (2010): 7.

[34] Meena K. Bhamra, *The Challenges of Justice in Diverse Societies: Constitutionalism and Pluralism* (Surrey: Ashgate, 2011), 45.

[35] Heiner Bielefeldt, *Report of the Special Rapporteur on Freedom of Religion or Belief* (United Nations - General Assembly: Human Rights Council, December 22, 2011), para. 60, 62.

coercion in religious matters generate its effects.[36] The idea behind such an approach to religion-state relations is not new. Emperor Asoka, during whose reign separation started to develop in India, probably put it best when writing that:

> All, whatever be their faith, must learn that the king, dear to the gods, attaches less importance to charity and to objective religious practices than to the desire of seeing the essential doctrines and respect for all beliefs reign.[37]

It should be acknowledged that even such seemingly objective and idealistic starting points do not eliminate the possibility of a bias, nor is advantaging a particular religion *per se* prohibited by international law.[38] This argument has several facets. On the most basic level, the state in a sense always depends on its population and can never be fully free from the will of the majority.[39] At the very least, its institutions need to speak the language the citizenry will understand, relating if needed to the values they can identify with. This provides even more incentive for the government to use the possibility left by the international law. Namely, laws adopted by a secular state may favour the traditional or more prominent religions. For example, the government may provide special benefits, such as religious education in state schools, only to large religions, that have proven to benefit the society.[40]

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[36] Waheeda Amien, "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), 409.

[37] Luigi Luzzati, *God in Freedom: Studies in the Relations Between Church and State*, trans. Alfonso Arbib-Costa (New York: Cosimo Classics, 2006), 50.

[38] Iain T. Benson, "Notes Towards a (Re)definition of the 'Secular'," *University of British Columbia Law Review* 33, no. 520 (2000): 521; Alexandra Xanthaki, "Multiculturalism and Extremism: International Law Perspectives," in *Religion, Human Rights and International Law* (Leiden-Boston: Martinus Nijhoff Publishers, 2007), 466–467; Javier Martinez-Torrón and Rafael Navarro-Valls, "The Protection of Religious Freedom in the System of the Council of Europe," in *Facilitating Freedom of Religion or Belief: A Deskbook* (Leiden: Martinus Nijhoff Publishers, 2004), 216; *Darby v Sweden, [1989] ECommHR No. 11581/85* (1989), para. 45 (the European Convention on Human Rights does not prohibit favouring a particular religion).

[39] Abdullahi Ahmed An-Na'im, *Islam and the Secular State* (Cambridge, Massachusetts: Harvard University Press, 2008), 89.

[40] However, the application of the criteria the states use to benefit only some religious communities needs to be backed up by "an objective and reasonable justification" (*Savez Crkava "Riječ Života" and Others V. Croatia (app. No. 7798/08)* [2010], para. 85, 91).

Finally, religions themselves leave a trace on the way a particular society operates.[41] Sunday became the weekly day of rest owing to the predominant influence of Christianity, although with time it lost those religious connotations for the general populace. Nevertheless, the state may be required to accommodate those whose religion dictates that other days of the week are nonworking.[42] This brings about new challenges for the government's relationship with the religious. In dealing with those problems, it is certainly helpful for the state to rely on separation and ground itself on something more than a doctrine of a particular religion. This should reduce the chances of foul play in the always tense relationship of the secular and the religious. Consequently, the chances for a conflict should also reduce.

Be that as it may, narrowing the passage to the state by imposing rules means that religion cannot pass with its full grandeur to the other side. Instead, it is forced to adapt to the newfound conditions if it wants to use the passage to reach the state. Some of its force has to be left behind. This is not to say those parts of the religious "entity" are destroyed. However, they cannot find their place on the other side of the passage moderated by separation. A concrete example of how the reshaping role of separation works in the context of Islam is the British headscarf case, *Begum*. [43]

A school allowed its pupils to wear a headscarf, as long it was a specific form of it, intended to be a part of the required school uniform. The uniform was in fact the result of a painstaking compromise that involved the headmaster of the school, herself a Muslim, negotiating with local Muslim communities and parents. Shabina Begum, one of the pupils and the appellant in the case, having worn the agreed-upon garb for a couple of years, decided that a more conservative version of the mentioned religious clothing is called for by her religion. However, the school did not allow the change. The appellant then refused to go to

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[41] Olivier Roy, *Secularism confronts Islam* (New York: Columbia University Press, 2007), 10.
[42] *R. V. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295* (1985).
[43] *R (Shabina Begum) v The Headteacher and Governors of Denbigh High School, (2006) UKHL 15*.

school. Following the deadlock, the case found itself before the British judiciary. In the final instance, the House of Lords found that the school properly exercised its authority when it refused Shabina the right to wear the more conservative form of religious garb.

Arguably, the prohibition was necessary to protect the freedom of religion of other girls, who could have felt forced to wear a more conservative item of religious clothing themselves.[44] Notwithstanding this concern, it is interesting to observe the mechanism at play here. The school, acting in line with the discretion it had under the law, determined that a certain form of religious clothing can be allowed. Any more extreme manifestation of Muslim beliefs made through clothing was barred from accessing the public sphere. The applicant could then either change locales or renegotiate and reconsider her own identity, in order to be able to pass the passage moderated by separation.

Briefly put, separation prohibits the religious from advancing whatever claim it wishes on the state and vice-versa. It does this by reshaping the channels to the power of the state, meaning that religion, even if it is tempted to do otherwise, cannot expend its strength on trying to reach outwards, towards the government. In doing so, separation preserves the authenticity of a religion by forcing the religious communities to direct their strength inwards, towards their doctrine and believers. The greatest strength of religion is then in affecting the population, rather than the government directly. This does not necessarily weaken religion, but might have the effect of strengthening it. Some Christian thinkers have already praised separation for this property, noting that it forces believers to be authentic and more active in actually putting their religion to practice.[45] Therefore, separation might well give more power to religion than it would have were it focused on fraternising with the secular powers.

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[44] Boris Johnson, "The Shabina Begum Case Never Had Anything to Do with Modesty, The Telegraph," *The Telegraph* (London, March 23, 2006), http://bit.ly/ng946G. <last accessed 15/7/2012>; Bhamra, *The Challenges of Justice in Diverse Societies: Constitutionalism and Pluralism*, 145 (demonstrating that it is the identity of the students that was endangered, which was a risk not properly recognised in the decision of the House of Lords).

[45] Pavle Kufrin, "Kršćanstvo i Sekularizacija u Viziji Željka Mardušića [Christianity and Secularisation as Seen by Željko Mardušić]," *Nova Prisutnost* 9, no. 2 (2011): 487–492.

Nevertheless, while separation seeks to avoid interference of the state into the religious and vice-versa, it in itself is clearly a form of interference. It does have the advantage of being more controlled and predictable than the direct bonding of the state and the religious. However, the state still draws the line of (un)acceptability of religious beliefs. It strives to distinguish the private sphere, in which religion is more or less at liberty to reign, from the public sphere, where religion is not as free to do what it wants. It sets up rules of behaviour. Depending on the government, a religious symbol may, for example, be worn on the street or in the privacy of one's home. However, wearing it at work may be completely out of bounds, particularly if one is a civil servant.

In making those rules, the state is giving form to acceptable manifestations of religious belief. In defining the private sphere and exceptional circumstances in which religion can step out of it, the state is participating in shaping religion. With this, it is also affecting the identity of the individual believer. Figuratively speaking, privacy may be imagined as a sea, and the public space as its surface. Should religious beliefs be too heavy, they may not be able to reach the surface, but will stay in the depths. The believer then needs to make sure they can manage their beliefs properly, leaving some of the material behind to the extent they need to reach the surface. Otherwise they would be relegated to privacy along with their beliefs.[46] For example, if the state prohibits the headscarf altogether, the woman may be forced to stay at home all the time.[47] The manifestation of her belief is too heavy for the public space. Hence, she has to renegotiate this aspect of her identity or move to a community that arranges the passage for religious beliefs differently. An arrangement placing such requirements before the believer, however, is not without its challenges. In this thesis, the focus is on Sharia.

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[46] Rosenfeld, "Can Constitutionalism, Secularism and Religion be Reconciled in an Era of Globalization and Religious Revival?," 2336.

[47] I am grateful to Professor Renáta Uitz for bringing the point that served as the basis for this example to my attention.

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2.1.2 Sharia as a challenge to separation

Sharia is in itself not difficult to perceive as a challenge to the separation-based religion-state regime. As I contended earlier, the key characteristic of the latter legal order is that the state is setting up rules and determining the role of religion. Religion is thereby interfered with, albeit in an indirect way and according to more or less impartial rules. In any case, it is the state that does the interfering. On the other side lies Sharia, which is not altogether comfortable with rules being set by the state.[48] Instead, if adopted as a fully fledged parallel legal system, it adopts an inverted perspective. Religion and law are one, a single whole superior to the state.[49]

Therefore, it is expected that religion will be the one doing the interference with the state, boosted by the law that is based on its foundations. Religion sets up the rules, and the state follows and enforces them. In this scenario, Sharia threatens the supremacy of the state in matters of law, it competes with the secular.[50] If it prevails, it tends towards imposing itself on all Muslims, and possibly beyond, whether one wants it applied or not. At the very least, it again asserts religion as a cause of treating citizens differently and dividing them before the law.[51] Hence, it could be easily argued that Sharia cannot be introduced as an alternative legal

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[48] Prakash Shah, "Religion in a Super-Diverse Legal Environment: Thoughts on the British Scene," in *Law and Religion in Multicultural Societies* (Copenhagen: Djøf Publishing Copenhagen, 2008), 69. Of course, this argument has to be qualified, since Islamic teachings are complex and can be interpreted in a number of ways. Therefore, a different understanding of the religion-law-state triangle cannot be completely ruled out.

[49] Sherman A. Jackon, "Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?," *Fordham International Law Journal* 30, no. 1 (2006): 165; van Hoecke, "Islamic Jurisprudence and Western Legal History," 53. (noting that the Islamic equivalent to Western legal philosophy merely applied "classical Greek logic to legal categories", resulting in a system where religious texts are the chief sources of law)

[50] Ran Hirschl and Ayalet Shachar, "The New Wall of Separation: Permitting Diversity, Restricting Competition," *Cardozo Law Review* 30, no. 6 (2009): 2536.

[51] In this regard, it is particularly significant that Sharia is a system of personal laws, rather than territorial, hence emphasizing the danger for creating a form of personal federalism within contemporary democracies. (Christoffersen, "Is Shari'a Law, Religion or a Combination? European Legal Discourses on Shari'a," 71; Anver Emon, "Islamic Law and the Canadian Mosaic Politics, Jurisprudence, and Multicultural Accommodation," *U Toronto Legal Studies Research Paper* No. 947149 [2006]: 19).

order by a state enforcing separation, as that would be akin to mixing two opposing forces in the same house. Simply put, it could be the beginning of the end for separation as we know it and, consequently, would threaten to reintroduce problems separation was meant to avoid.

This, however, is a rather extreme scenario. Perhaps an antechamber could be built in the house of the state, where Sharia could be brought in and contained. It would not be an equal competitor, but a restrained guest. However, while this solution does reduce the risks I just outlined, it brings about its own set of problems. Most importantly, it does not fully remove the danger that the government will get entangled in religious issues. The only difference is that, in this situation, religion is the one endangered the most by the government's advances.

To begin with, it should be acknowledged that the government could limit the introduction of Sharia into the legal system. For example, rather than supporting an array of state religious courts, the state could allow only the enforcement of arbitration awards issued by a private tribunal according to Sharia. However, even in this case, the application of Sharia would have to be supervised.[52] This is particularly so given that some of its interpretations are clearly at odds with the human rights guarantees common in the jurisdictions in which Muslims asked for an increased role of Sharia.[53] The details of the incongruity mentioned will be discussed in more detail in the second chapter. For now, it is sufficient to note that some were concerned allowing Sharia more room would automatically lead to subjugation and discrimination of those too weak to resist its influence.[54] Hence, the state might be called upon to prevent such outcomes.

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[52] *Serif V. Greece (app. No. 38178/97)* (1999), para. 50 (suggesting that the supervision of the state may be necessary in regard to the exercise of additional privileges, such as religious adjudication, granted to religious communities).

[53] Lorraine E. Weinrib, "Speech, Religion, and the Traditional Family," in *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (Utrecht: Eleven International Publishing, 2007), 180.

[54] According to Buchler, the risk for this occurring is increased because some of the human rights guarantees provided by liberal democracies are relatively recent and are still fragile even to challenges that do not involve religious law. Gender equality is a particularly good example. (Andrea Buchler, "Islamic Family Law in Europe?

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The state could rise to the challenge by making sure that the decisions made by Sharia tribunals are in line with the secular law and refuse to give civil effect to those that are not. Furthermore, unless it wants to further private justice, the state may be required to enforce the decisions of religious courts. While such a situation may seem fairly innocuous in matters such as the division of matrimonial property, it is problematic from the viewpoint of religious freedom.

Namely, it creates situations where government might again negate the effects of separation. After all, religion is a highly complex matter, in which two different members of the same community can find at least one point of contention. In this regard, Islam itself is just as complex as any other religion. Moreover, the situation is all the more challenging given the great pluralism that exists within Sharia itself. It contains four different schools of interpretation.[55] Within those schools, naturally, there may be various currents of thought that interpret individual institutes of religious law differently. After all, the believers themselves may add to or subtract from Sharia's body of norms through their own interpretations.

Hence, should the government start making decisions as to the acceptability of individual interpretations; it would necessarily affect the complex pluralism found within Islam. It would antagonise some and favour others by issuing decisions that may be in line with the national law, but completely out of place in the context of the religious system concerned. One example in the context of Sharia is the British case of *Uddin v. Choudhury*,[56] where the court decided on religious obligations of the spouses that were undergoing a divorce. In doing so, the court, while following the opinion of an expert witness, actually reached a decision contrary to the one made earlier by religious officials before which the

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From Dichotomies to Discourse - or: Beyond Cultural and Religious Identity in Family Law," *International Journal of Law in Context* 8, no. 2 [2012]: 197).

[55] Ido Shahar, "Legal Pluralism and the Study of Shariʻa Courts," *Islamic Law and Society* 15 (2008): 117 (noting the separation into four schools and the lack of scholarly work on its significance).

[56] *Uddin V. Choudhury, EWCA (Civ) 1205 (2009).*

couple got a religious divorce.[57] Generally speaking, the situation is problematic, as it could signify the beginning of the process at the end of which the state actively participates in shaping religious law. It could also provide the means for religious norms to infiltrate the secular law. Separation is then under significant stress.

In such a case, the state is before a very difficult task of having to take upon itself the role of a religious arbitrator, with the potential of "killing" some meaning of a religious norm and upholding others that may be acceptable to the judge, but not necessarily to the understanding of different believers.[58] A vivid example, not directly related to Sharia, can be found in *Grant*,[59] a case decided by the Canada Federal Court. It had to rule on whether Sikh members of the Royal Canadian Mounted Police (RCMP) had the right to wear turbans as a part of their uniform. The case initiated a public discussion on the significance of the turban. There was no agreement among the Sikh on whether wearing one is an obligation in Sikh teaching that can be accommodated by the state as if it indeed were a binding requirement.[60] Hence, the national judiciary had the final word. Needless to say, such involvement of the secular into the religious is a threat to religious freedom on the one hand and the distance of the state from the religious on the other.

It is perhaps unsurprising that, under the circumstances, the jurisdictions studied in this thesis did not try to bring Sharia into the house of the state, nor did they actively engage the task of building a space where religious law may be restrained and controlled. Instead, a seemingly simplistic approach is chosen. Sharia is left in front of the door, separation being enforced in relation to it. Taking such a stance towards Sharia has been seen as necessary in

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[57] For an analysis of the court's findings in the case, see John R. Bowen, "How Could English Courts Recognize Shariah?," *University of St. Thomas Law Journal* 7, no. 3 (2011): 411–435.

[58] For a detailed application of this argument in the context of the national judiciary and religious symbolism, see Brett G. Scharffs, "The Role of Judges in Determining the Meaning of Religious Symbols," in *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden-Boston: BRILL/Martinus Nijhoff, 2012) (forthcoming: draft chapter on file with the author).

[59] *Grant V. Canada (Attorney General), 1994 CanLII 9274 (FC)* (1994).

[60] A useful summary of all arguments is provided in the decision of the Canada Federal Court. (ibid., para. 44).

order to maintain a democratic state.[61] The second half of this chapter looks at how exactly the three jurisdictions studied here put it into practice as a response to Sharia's challenging presence.

2.2 Separation's responses to the challenge

Demands to allow more room for Sharia are far from an old topic. In July 2011 Australian Muslim communities addressed the Prime Minister Julia Gillard, asking for a "tweaking of the family law to take account of Sharia".[62] While there was no explicit refusal, the government did make it clear that in case the two laws conflict, the Australian law prevails. It was argued that any room Sharia may require can be ensured through the existing secular laws.[63] Furthermore, at the time of writing this thesis, an intense anti-Sharia campaign is active throughout the United States.[64] On the European soil, a government minister of Germany's Rhineland-Palatinate was heavily criticised for suggesting that introducing some aspects of Sharia family law may be desirable.[65] At the end of the day, all those responses to Muslim religious law put an emphasis on separation and are very much similar to the reaction of the three jurisdictions studied in this thesis.

While each of those adopted slightly different positions on Sharia, all three are fundamentally enforcing separation. The methods they have used may be different, but

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[61] An-Na'im, *Islam and the Secular State*, 293 (affirming that a degree of separation is indispensable to enable proper discourse over religious matters).

[62] Chris Merritt, "Sharia Law at Work in Australia," *The Australian*, July 20, 2011, http://bit.ly/rnHjjA. <last accessed 15/7/2012>

[63] For example, in a child custody case, the judge could consider the issue of religion as one relevant factor in reaching the decision. However, there is no telling if the judge will actually consider the element of religion. Even under the presumption that this is done, it is not clear how that is going to weigh in on the final decision and if the interpretation of the religious dimension of the case will be adequate.

[64] The campaign is prompting some to stand up against what they see as an attack on Islam and religious freedom. For a report on the situation, see Jaweed Kaleem, "Sharia Law Campaign Begins As Muslim Group Fights Bans," *Huffington Post*, Spring 2012, http://huff.to/zwCYCC. <last accessed 15/7/2012>

[65] "Sharia in Germany?: Politician Blasted for Support of Islamic Law," *Spiegel Online International*, March 2, 2012, http://bit.ly/QtwKJM. <last accessed 15/7/2012>

ultimately all of them rejected any greater possibility of granting Sharia more room or are in the process of doing so. Borrowing from Peter H. Schuck's work on limits of the law,[66] I have categorised the responses in Canada and the UK as top-down (1.3.1) and bottom-up (1.3.2) respectively. The position of the European Court of Human Rights, by contrast, while not spelling out an altogether clear standard, does imply a measure of separation required to maintain human rights (1.3.3).

2.2.1 Top-down (Canada)

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 the Muslim community. The plan was to have it in the province of Ontario, where legislation on arbitration left open the possibility to arbitrate family disputes according to religious law. The very idea caused a furore that swept across the country, even the province of Quebec, where no family law arbitration was ever allowed.[67]

The Ontarian government first attempted to address the concerns 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. As some have noted, this is likely due to the private nature of arbitration making comprehensive research harder.[68] Nonetheless, Boyd recommended that religious arbitration may be kept as long as additional safeguards are

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[66] Peter H. Schuck, *The Limits of Law: Essays on Democratic Governance* (Boulder, Colorado: Westview Press, 2000), 419–455.

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

[68] Weinrib, "Speech, Religion, and the Traditional Family," 182.

provided in order to protect more vulnerable parties (e.g. women).[69] This hardly appeased the objectors to religious arbitration.

Eventually the Ontarian government decided to prohibit any religious arbitration by way of Family Statute Law Amendment Act of 2006.[70] The decision of Canadian authorities was logical in the circumstances, for at least two reasons. 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.[71] Such a direct claim of not just interference, but of primacy of religious over the secular could have then only resulted in an equally resolute retort of the government, reaffirming the dominance of the secular law.[72] The room for a more nuanced discussion was thus most probably hard, if not impossible to maintain. The second circumstance that was likely to contribute to the decision of the government in Ontario was Canada's multicultural nature.[73] Its policies tend towards inclusion, rather than separation and particularisation of different social groups.[74] Therefore,

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[69] I discuss some of the measures suggested in the context of arbitration as an alternative dispute resolution mechanism in the second chapter. For more detail on Marion Boyd's concrete recommendations , see Marion Boyd, *Executive Summary of the Report "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion"* (Ontario: Ministry of the Attorney General, December 2004), http://bit.ly/JRyQWY.

[70] '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."

[71] Ayalet Shachar, "Religion, State and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies," *McGill Law Journal* 50 (2005): para. 19; Lee Ann Bambach, "The Enforceability of Arbitration Decisions Made By Muslim Religious Tribunals: Examining the Beth Din Precedent," *Journal of Law and Religion* 25 (2010): 411.

[72] Ministry of the Attorney General, "McGuinty Government Declares One Law for All Ontarians: Only Canadian Law to Apply to Family Law Arbitrations," *Ontario.ca*, November 15, 2005, http://bit.ly/NeGFV6. <last accessed 15/7/2012>

[73] 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".

[74] Faisal Bhabha, "Between Exclusion and Assimilation: Experimentalizing Multiculturalism," *McGill Law Journal* 54 (2009): 53.

the very idea of adopting a system of religious law that might lead to singling out a particular group of citizens on the basis of their religion was likely to have been suspicious at the outset.

However, determining that there was a circumstance making the ban more likely or more justified says little of the effect the actual prohibition has in terms of separation of Sharia and the state. In analysing this aspect of the Canadian encounter with Sharia, I termed the Canadian approach top-down, as the measure imposed is a blanket ban. The government puts in place a unified standard by determining that no religious arbitration whatsoever is permitted and religious communities, Muslims included, are thereby expected to keep the respective part of their religious identity and practice private.

The Ontarian approach has its positive and negative sides. Its advantage is that it unquestionably maintains the coherence of the legal order. Sharia is not uplifted to the level of the national law, nor is it given any lesser level of recognition by the government. Legal pluralism[75] may still exist in the private sphere, but it cannot formally compete with the national law and thereby create divisions on the grounds of religion. In this sense, the approach applied in Ontario undoubtedly addresses the challenges Sharia places before the legal order as a whole.

However, legal pluralism cannot be wished away. While the state may refuse to grant it some official status, it remains a social fact. As such, religious law continues its existence and can still play a substantial role in the life of Muslims. It can be applied in private, much as

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[75] Legal pluralism itself is a demanding topic that would require much additional space I currently do not have at my disposal. However, it is a matter that cannot be fully ignored in the context of the topic I am dealing with, either. Roughly speaking, legal pluralism can be defined "as the condition in which a population observes more than one law" (Gordon R. Woodman, "The Possibilities of Co-existence of Religious Laws with Other Laws," in Law and Religion in Multicultural Societies (Copenhagen: Djøf Publishing Copenhagen, 2008), 26.) For the purposes of this thesis, 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 a more general discussion on legal pluralism, see the work of John Griffiths. (John Griffiths, "What Is Legal Pluralism?," *Journal of Legal Pluralism* 24, no. 1 [1986]: 1–55).

any other religious practice could be.[76] It can also be used against a devout Muslim who is not in a position to resist the pressures of the community. The likelihood of this scenario occurring was, after all, one of the key arguments against allowing Sharia arbitration to continue.[77] However, it seems separation as applied in Canada does little to avert the risk that remains. It pushes the possible abuse into privacy, but does not tackle it. Instead, it is expected that the informal tribunals that may still operate in particular communities take a hint and ensure their workings are in line with the requirements of the national law.[78] In this sense, the top-down approach does not in itself entirely ensure the protection of human rights.

The top-down approach is underprotective in yet another sense. Specifically, it concludes that Sharia is necessarily oppressive and is always forced upon women. In this, it ignores that there are women who wish to have Sharia applied and at the same time seek to avoid being abused through its power.[79] Instead of outright rejection of their interests, they could possibly use some support.

The way the possibility of such a support was denied in Canada is problematic for two additional reasons, both of which are related to the government's measure being a ban that singles out only religious arbitration. Firstly, the Ontarian authorities prohibited only religious

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

[77] Natasha Bakht, "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): 9.

[78] 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, *The Challenges of Justice in Diverse Societies: Constitutionalism and Pluralism*, 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 that self-understanding. Consequently, since a religious community does consist of human beings who may carry such attachments, there is little reason to think a ban will 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. .

[79] Boyd, *Executive Summary of the Report "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion,"* 1; Cassandra Balchin, "Having Our Cake and Eating It: British Muslim Women," *openDemocracy*, February 1, 2011, para. 23, http://bit.ly/LIHsAI. <last accessed 15/7/2012>

family law arbitration. 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.[80] A prohibition specified in this manner may be vulnerable on Charter grounds. Namely, the prohibition of Sharia arbitration 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.[81] 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.

Finally, the Ontarian ban targets only arbitration, but leaves wide open other channels through which religious law may be introduced. For example, some commentators have insightfully noticed that it is still possible to use institutes such as domestic contracts to legally bring Sharia concepts into marriage.[82] Granted, this might leave greater oversight with the government and create less opportunity for abuse and entanglement of the state and religion. Nevertheless, it also shows that an outright ban might not be protective enough when it comes to human rights. Hence, one wonders whether their protection is really the immediate concern of the top-down approach or is there something else in the background.

In conclusion, the Canadian example demonstrates that separation is applied to Sharia adjudication. The specifics of the solution applied in Ontario reveal a blanket, top-down ban that does indeed uphold some of the objectives of separation I have discussed earlier. Nevertheless, human rights remain something of a sore spot. The United Kingdom replicates the same problem despite the ostensibly different approach to Sharia.

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[80] *Arbitration Act, 1991*, 1991, http://bit.ly/KTjFIv, Article 1.

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

[82] Amien, "Muslim Private Laws (MPL) in Canada: A Case Study Considering the Conflict Between Freedom of Religion and Muslim Women's Right to Equality," 403.

2.2.2 Bottom-up (the United Kingdom)

The UK deals with separation of Sharia from the state in a different way than Canada. I have termed this British way of doing things the "bottom-up" approach. The best way to sum it up would be to say that it is a reflection of British pragmatism.[83] In plain terms, it is opposed to the Canadian approach in that it does not yet involve a blanket prohibition of religious arbitration. Should the legal system notice a particular disconcerting practice, it will prohibit it, 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.

British case law reveals the way bottom-up approach works. One particular example is the *Lebanon case*, in which the House of Lords refused to apply Sharia norms on child custody, finding them incompatible with British law.[84] As Malik has noted, in doing so the Lords did not seek to characterise Sharia in a particular manner at all. They only curtailed an unacceptable application of it.[85] Similar interventions have occurred before the lower instances of the judiciary as well.[86] 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.

Much like the top-down approach, the experience-based bottom-up application of separation has positive and negative sides. The most obvious positive feature is that it avoids

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[83] Christopher McCrudden, "Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The JFS Case Considered," *International Journal of Constitutional Law* 9, no. 1 (2011): 7.

[84] *Em (Lebanon) (Fc) (Appellant) (Fc) v Secretary of State for the Home Department Appellate Committee, [2008] UKHL 64* (2008).

[85] Malik, "Muslim Legal Norms and the Integration of European Muslims," 24.

[86] *KC and NNC v City of Westminster Social and Community Services Department, [2008] EWCA Civ 198* (2008) (marriage invalid due to disability, the involvement of Sharia was not criticised, nor the fact that it sanctions marriages concluded over the telephone).

condemning Sharia as necessarily oppressive at the outset. This does not unnecessarily antagonise the proponents of this religious law system. The British approach also transfers the control over the position of Sharia in society over to Muslims, as it is the way they apply Sharia that will ultimately determine whether the government will move in and issue prohibitions or stay out of the situation. Treating Sharia like this certainly ensures greater respect of religious freedom and Muslim traditions. At the same time, it leaves the government room to curtail practices that might threaten human rights or the integrity of the legal order.

However, the social atmosphere which encouraged this deferential scheme is also the source of problems for the bottom-up system. Namely, the incremental approach could be said to have been possible precisely because the British Muslim population is not making particularly strong claims for a greater recognition of Sharia. Specifically, it is true that British Muslims were discussing possible ways to have Sharia applied within the framework of British laws since 1985.[87] However, in doing so they never suggested that Muslim religious norms ought to dispute or compete with the national legal order.

Consequently, the challenge against the superiority of the secular law was at the very least not as obvious as it was in Canada. 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 almost former Archbishop of Canterbury, Rowan Williams.[88] It was he who was heavily criticised for his suggestion that the existing Sharia tribunals should be more "integrated" into the British legal system.[89] The Muslims themselves, however, were drawn in only subsequently.

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[87] Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States* (Aldershot, Hants, England; Burlington, VT: Ashgate, 2005), 63.

[88] The full presentation is available at: Rowan Williams, "Archbishop's Lecture - Civil and Religious Law in England: a Religious Perspective" (presented at the Temple Festival lecture series, Royal Courts of Justice, February 7, 2008), http://bit.ly/l2xJRw.

[89] For an analysis of the Archbishop's views, see Budziszewski, "Natural Law, Democracy, and Shari'a," 206.

The reason why the British Muslim population is generally not so vocal could be that Muslim religious norms are perceived as private and as such wholly disassociated from the state. There are multiple reasons for this attitude. Yilmaz, for instance, counts among those the distrust towards secular institutions and their perceived lack of legitimacy and avoidance of public embarrassment that could occur if family matters would be brought before a court of law.[90] Disillusionment is certainly another powerful factor, since the Western societies are seen as corrupt and fallen, Sharia becoming the "ethical reservoir" in a barren desert.[91] Additionally, Menski argues that a reason why Muslims do not turn to the British legal order is that they have developed a hybrid law of their own (i.e. the *angrezi shariat*), whereby they combine the openings left by the British secular law with their religious norms.[92] Thus, Muslims may not feel the need for a secular family law at all.

Additionally, it is likely that the British past colonial experience with personal law systems shaped the relationship of at least some Muslim immigrants with the British national law. Namely, as a colonial superpower, the UK had ample opportunity to get itself acquainted with the personal law systems that existed in the various colonies under its power. Indeed, it had a powerful influence on how those systems operated.[93] For the needs of this thesis, it is sufficient to note that the UK allowed native courts to continue operating with authority in certain areas and incorporated domestic norms of some other areas into its secular law.

Most notably, marriage and family law matters were left to personal religious laws, while commercial laws were modified and updated in order to ease the extraction of

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[90] Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States*, 62.

[91] Machado, "Freedom of Religion: A View from Europe," 467.

[92] Werner Menski, "Immigration and Multiculturalism in Britain: New Issues in Research and Policy," *KIAPS: Bulletin of Asia-Pacific Studies* XII (2002): 56.

[93] 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" (Prakash Shah, "Thinking Beyond Religion: Legal Pluralism in Britain's South Asian Diaspora," *Asian Law* 8 [2006]: 243).

resources.[94] It is no surprise, then, that at least some immigrants from the former colonies arrive to the UK with the understanding that marriage is a personal matter with which the government has little, if anything to do.[95] After all, they are allowed even to arbitrate in order to resolve family law issues, which they may take as a confirmation of their expectations.[96] Consequently, they will naturally gravitate towards their religious communities when it comes to family matters.[97] At the same time, they are less likely to challenge the superiority of the national law by attempting to assert a stronger link of religious norms with the state.

They are also less likely to invoke the power of the national law when they could use its protection.[98] 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 they face in the contemporary British society.[99] One example of this occurring is the low

[94] Bowen, "How Could English Courts Recognize Shariah?," 415.

[95] For example, Hindu population would often get married only before the members of their religious community, but would not perceive the need to marry before secular law. The problem with this, of course, is that no marriage exists under national law and no rights that would otherwise emerge from it can be claimed by the spouses. The British courts worked around this issue by using tools such as the presumption of marriage, attempting to establish the connection between the spouses notwithstanding the lack of a secular act of marriage. (*Chief Adjudication Officer V. Bath, [1999] WL 819134* [1999]) Nevertheless, this is hardly a reliable solution. At the end of the day, couples are still exposed to substantial uncertainty caused by the lack of a civil effect of their marriage.

[96] Gillian Douglas et al., *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* (Cardiff: Cardiff University, June 2011), 18; Prakash Shah, "A Reflection on the Shari'a Debate in Britain," *Studia z Prawa Wyznaniowego [Studies of Ecclesiastical Law]* 13 (2010): 11.

[97] Bowen, "How Could English Courts Recognize Shariah?," 416 (drawing a comparison to France, which in its colonies did not rely on personal law systems, meaning that those who arrived from the colonies never really understood issues such as marriage as being something the state would not be interested in).

[98] This may be particularly troubling given that the number of cases decided by informal Sharia tribunals multiplied exponentially in the past five years (Divya Talwar, "Growing Use of Sharia by UK Muslims," *BBC News UK*, January 16, 2012, para. 10, http://bbc.in/ybOvsn. <last accessed 15/7/2012>).

[99] 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. (Werner Menski, "Law, Religion and Culture in Multicultural Britain," in *Law and Religion in Multicultural Societies* [Copenhagen: Djøf Publishing Copenhagen, 2008], 47).

registration rate of Muslim marriages before the national law.[100] 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, unlike Canada, allows religious arbitration in certain matters (for instance, divorce is excluded), but does not attempt to provide sufficient safety measures to protect weaker parties.[101] This is particularly dangerous in light of the research that has demonstrated a number of British Muslims prefer interpretations of Sharia that are not in line with the one prevalent in "mainstream legal practice".[102] However, since Muslims prefer informal, mediation-like tribunals to arbitration,[103] the state most probably has no reliable data or strong motivation to do anything about the possible holes in the arbitration system. The ultimate result is a closed-down set of private religious tribunals that the state knows very little about, with practically redundant 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 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

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[100] 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. (Neil Addison, "Sharia Is Not the Problem Here," *The Guardian* [London, July 8, 2010], http://bit.ly/bA4D0B).

[101] Balchin, "Having Our Cake and Eating It: British Muslim Women," para. 24.

[102] Maria Reiss, "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): 741.

[103] 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).

currently in place, she tabled a bill aimed at extinguishing aspects of the arbitral proceedings that she felt were problematic for women's rights.[104] The bill is still in the House of Lords at the time of writing this thesis 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 Canada, Baroness Cox claims that her aim is to protect the rights of women.[105] However, the provisions she envisages would achieve this goal are mere prohibitions that are, similarly to their Canadian counterparts, based on scant empirical data.[106] Unlike the Ontarian ban, the proposed bill is not just a blanket prohibition of religious arbitration. As is the case in Ontario, it does prohibit arbitration in family law matters.[107] It is questionable how much this is necessary since the arbitration system is not really used by the Muslim tribunals in the UK.

However, in addition to this more general measure, the Bill pinpoints particular actions, such as pretending one is a judge who can make a binding decision.[108] In this respect, it is more aggressive than the Canadian prohibition, as it singles out particular aspects of religious proceedings that may be seen as problematic.[109] 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.

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[104] "Use of Sharia 'Courts' Increasing in UK," *The Christian Institute*, January 18, 2012, http://bit.ly/xLKZph. <last accessed 15/7/2012>

[105] "Muslim Women's Advocate Backs Bill to Tackle Sharia," *The Christian Institute*, July 5, 2011, http://bit.ly/O3vpba. <last accessed 15/7/2012>

[106] Nesrine Malik, "What Is Lady Cox's Bill Really About?," *The Guardian* (London, June 20, 2011), http://bit.ly/jKow3B. <last accessed 15/7/2012>

[107] Caroline Cox, *Arbitration and Mediation Services (Equality) Bill [HL]*, 2010, sec. 4(2).

[108] Ibid., sec. 7(2).

[109] Amassing prohibitions in this manner has been recognised as a clear attempt to extinguish religious norms in question. (Gordon R. Woodman, "The Possibilities of Co-existence of Religious Laws with Other Laws," in *Law and Religion in Multicultural Societies* [Copenhagen: Djøf Publishing Copenhagen, 2008], 32).

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.[110] However, it is not certain how those 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.[111] It is hard to see how this bill could change this and why should the possibly oppressed members of the Muslim communities be particularly encouraged 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. Yet, the lack of reliable empirical data, fostered by the refusal of Muslims to peruse the arbitration possibilities left to them by national law, forces the government to stumble in the dark. Some seem bent on addressing the problem by reinforcing 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.

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[110] Cox, *Arbitration and Mediation Services (Equality) Bill [HL]*, sec. 4.
[111] Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States*, 80.

2.2.3 Implied separation (European Court of Human Rights)

As I pointed out in the introduction, the ECtHR maintains a drastically different approach to separation of religion and state than is the case with the other two jurisdictions. Generally speaking, it does not explicitly impose any form of religion-state relationship to the Member States of the Council of Europe.[112] This is logical given the nature of the ECtHR. It is a judicial organ of a supranational organisation. As such, while not being directly bound to a specific nation and its traditions, it remains indirectly affected by them, its legitimacy hinging on the approval of the Member States.[113] Hence, a rather broad margin of appreciation is granted to the national authorities when it comes to their relationship with the religious.[114] In effect, this means all different national traditional relationships to religion are affirmed as long as the state can guarantee equal freedom of religion to everyone.[115] The debate on how much that is generally possible will not be addressed here.[116]

Instead, I argue that, while the ECtHR does not explicitly lay out a comprehensive doctrine of a permissible religion-state relationship, it is implying quite a clear position on the separation of Sharia from the state. In fact, in approaching the problem from the viewpoint of

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[112] Françoise Tulkens, "The European Convention on Human Rights and Church-State Relations: Pluralism Vs. Pluralism," *Cardozo Law Review* 30, no. 6 (2009): 2577. Separation is brought up in a limited and non-binding sense in some recommendations of the Council of Europe's Parliamentary Assembly, a political body. See, for instance, Council of Europe - Parliamentary Assembly, *Recommendation 1804: State, Religion, Secularity and Human Rights*, 2007, para. 4 (defines separation as a "shared value"); Council of Europe - Parliamentary Assembly, *Recommendation 1720: Education and Religion*, 2005, para. 1 (noting, in relation to separation, that the beliefs of each individual are their own "personal matter").

[113] The public outrage following the Lautsi I decision and the effect it had are sufficient proof of its fragility. Some of the responses are summarised in Thiago Alves, "A Tale of Two Courts - Part One: Understanding Lautsi V. Italy," *Human Rights Forum*, April 28, 2011, bit.ly/MRYcyM. Addison, Neil. "Sharia Is Not the Problem Here." *The Guardian*. London, July 8, 2010. http://bit.ly/bA4D0B. <last accessed 15/7/2012>

[114] Carolyn Evans, *Freedom of Religion Under the European Convention on Human Rights* (New York: Oxford University Press, 2001), 143.

[115] Joseph H. H. Weiler, "State and Nation; Church, Mosque and Synanogue-- The Trailer," *International Journal of Constitutional Law* 8 (April 2010): 162.

[116] The current Special Rapporteur on Freedom of Religion, for example, notes that uplifting a religious community to the status of a state church creates a number of complications and that it is "difficult, if not impossible, to conceive of an application of a concept of an official "State Religion" that in practice does not have adverse effects". (Bielefeldt, *Report of the Special Rapporteur on Freedom of Religion or Belief*, para. 66).

human rights, the ECtHR actually establishes a framework that strongly converges with Canada and the UK. However, given the supranational character of the ECtHR, its work has repercussions beyond the boundaries of one state, which might, in the future, make its way of justifying separation from Sharia the norm for a greater number of European states and, possibly, beyond. This is particularly troubling given the defects the supranational, implied separation from Sharia is exhibiting.

Some of those faults are evident from the decision in which the ECtHR established that a degree of separation between the state and Sharia is practically mandatory: *Refah Partisi v. Turkey*.[117] Refah Partisi (the Welfare Party) was a political party growing in influence to the point of assuming power. It advocated, *inter alia*, the introduction of Sharia in the form of the so-called *Millet* system.[118] There was a danger that attempting to bring in a religious law in this manner would result in inequality of citizens before the law. The applicable norms would be determined by one's religious affiliation. To top it off, some of the leading members of the party apparently argued that the secular legal system should be abolished, advocating the use of force if necessary.[119] To sum it up, it would seem that the secular state was faced by a claim even more extreme than the argument put forward by some Muslim groups in Canada. Not only was religious law supposed to compete with its secular counterpart, but should have completely replaced it.

This was certainly the interpretation of the Constitutional Court, construed in the light of the Turkish concept of secularism, *laiklik*.[120] The Court consequently dissolved the Welfare

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[117] App. nos. 41340/98, 41342/98, 41343/98 and 41344/98 (hereinafter, *Refah*).

[118] See the summary of facts in the Grand Chamber decision (*Refah Partisi (the Welfare Party) and Others V. Turkey [GC] (app. Nos. 41340/98, 41342/98, 41343/98 and 41344/98)* [2003], para 11/3).

[119] *Refah Partisi and Others V. Turkey (app. Nos. 41340/98, 41342/98 and 41344/98)* (2001), para. 25.

[120] Ahmet T. Kuru explains that its meaning is disputed. The conservatives consider that it should be construed as to be more benevolent towards religion, while Kemalists interpret it as requiring exclusion of religious from the public sphere. While conservatives have won majorities in the parliament, Kemalists retain control over the military and the courts, which they use to thwart plans of religious dominance. (Ahmet T. Kuru, "Laiklik," *The Oxford Encyclopedia of the Modern Islamic World (ed. John L. Esposito)* [Oxford: Oxford University Press, 1995], 375–376).

Party and the case found itself before the ECtHR, which found no violation of the Convention.[121] The case was decided on the basis of freedom of association (Article 11 of the Convention) and contained a number of troubling points.[122] Nevertheless, the initial decision was substantially affirmed by the Grand Chamber.[123] In doing so, the ECtHR confirmed that Sharia should be separated from the state.

The chief concern appears to be the form in which Sharia was supposed to be introduced. In this regard, the ECtHR argues that a plurality of laws Refah planned for Turkey was particularly intense, as religious law would have had a destructive impact on secular laws. For example, it would endanger the right *not* to hold a particular religious belief and bring about discrimination on the basis of religion.[124] In other words, Sharia would oppressively dictate the workings of the government and society.[125] Whether this would actually occur is a questionable matter. As Gadirov notes, legal pluralism need not have such an extensive and deep effect.[126] Nevertheless, it seems that the ECtHR found just the risk of such developments sufficient to warrant the prohibition of a political party.

Conceding that the threat for an "intense" form of legal pluralism might have been realistic, one wonders if the ECtHR would be more benevolent to a less intrusive way of introducing Sharia. Given the negative and superficial, one-sided characterisation of Sharia

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[121] For an overview of the arguments utilized by the ECtHR, see Christian Moe, "Refah Partisi (The Welfare Party) and Others V. Turkey," *The International Journal of Not-for-Profit Law* 6, no. 1 (September 2003). Full text of the article is available at the Journal's website, <http://bit.ly/Le5rl1>.

[122] For a number of insightful analyses of the defects in the reasoning, see Dominic McGoldrick, "Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws," *Human Rights Law Review* 9, no. 4 (November 12, 2009): 612–618; Ann Elizabeth Mayer, "The Dubious Foundations of the Refah Decision," in *Islam, Europe and Emerging Legal Issues* (Surrey: Ashgate, 2012), 209–235; Christian Moe, "Refah Revisited: Strasbourg's Construction of Islam," in *Islam, Europe and Emerging Legal Issues* (Surrey: Ashgate Publishing Limited, 2012), 235–271.

[123] The Grand Chamber reached its decision on 13 February 2003 (the Third Section decided the case on 31 July 2001).

[124] *Refah Partisi and Others V. Turkey (app. Nos. 41340/98, 41342/98 and 41344/98)*, para. 49.

[125] According to the ECtHR, such a scenario would not be in line with the Convention even if the democratic majority would want to see it happen (ibid., para 43).

[126] Javid Gadirov, "Freedom of Religion and Legal Pluralism," in *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Antwerpen - Oxford: Intersentia, 2007), 94.

generally, however, any more lenient attitude seems unlikely. Namely, the ECtHR found that Sharia is a "stable and invariable" system of rules, in itself contrary to the very idea of pluralism, the latter requiring a continuous development.[127] The ECtHR, therefore, adopted a historical definition of Sharia, describing it as a stagnant set of norms.[128] It appears to extend its characterisation of Sharia as unchangeable to both the Divine principles at its foundations and their human interpretation (*fiqh*). In the same paragraph, the ECtHR noted that such a static legal system is comprehensive, involving some particularly problematic areas, including women's rights.[129] In sum, Sharia is seen as absolutely unchangeable and necessarily permeating the whole life of individual believers.

The sweeping claims made in *Refah* as to the invariability and comprehensiveness of Sharia are not entirely accurate. Indeed, Muslim religious norms may be hard to escape and change if they become one with the state, as I will argue in the chapters that follow. However, they do not necessarily have to have those characteristics on their own. The situation may be different if religious norms are willingly and informally applied by believers themselves. It was a mistake on the ECtHR's part not to nuance its argument to make this clear, leaving instead the impression that all Sharia is bad just for being Sharia.

Essentially, it seems that the characterisation of religious norms set out by the ECtHR lays down the groundwork for liberal restrictions on any form of religious adjudication employing Sharia. The most likely restriction is a denial of civil effect to the decisions made by religious tribunals. First of all, in *Refah* the ECtHR found that requiring the recognition of religious law by granting civil effect to it is not a valid claim that can be made on the basis of

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[127] *Refah Partisi and Others V. Turkey (app. Nos. 41340/98, 41342/98 and 41344/98)*, para. 72; *Refah Partisi (the Welfare Party) and Others V. Turkey [GC] (app. Nos. 41340/98, 41342/98, 41343/98 and 41344/98)*, para. 123.

[128] To this position is opposed the ahistorical understanding of Sharia, which takes a more teleological approach, attempting to interpret the meaning of religious norms in regard to the circumstances in which they are applied. (van Hoecke, "Islamic Jurisprudence and Western Legal History," 46).

[129] *Refah Partisi and Others V. Turkey (app. Nos. 41340/98, 41342/98 and 41344/98)* (2001) - Third Section, para 72. This characterisation was effectively affirmed by the Grand Chamber, in paragraph 123 of its decision.

religious freedom.[130] Therefore, granting civil effects to religious law generally may be likened to specific special privileges that may be awarded to religions, such as civil effects of a religious marriage.[131] In granting them, the state enjoys a great deal of discretion.[132] This, combined with the negative characterisation Sharia received in *Refah*, makes it particularly probable that the most acceptable form of religious adjudication under the Convention is the informal Sharia tribunal, stripped of any civil effect.[133] In this sense, the ECtHR converges with Canada and the UK.

The convergence of the supranational separation with the essence of the bottom-up and top-down systems is also a junction in problems. Much like the separation on the national level, the ECtHR leaves much room for restrictions but does not say how this affects religious law or its applicability beyond the public sphere. Furthermore, the basis for the ECtHR's much criticised approach to Sharia is formed by a number of rather biased claims about the nature of Muslim religious norms. In other words, just as the restrictions on religious adjudication in Canada and the UK involved little empirical data, the ECtHR's approach suffers from a lack of analysis of all the issues involved.

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[130] Christoffersen, "Is Shari'a Law, Religion or a Combination? European Legal Discourses on Shari'a," 61; *Refah Partisi*, para. 128.

[131] *Şerife Yiğit V. Turkey [GC], (app. No. 3976/05)* (2010), para. 102.

[132] The state in this regard may develop criteria that favour some religions over others, as long as they are properly applied to all (see supra, footnote 40).

[133] If the civil effect is granted, it is likely that the state would have some obligations in ensuring that decisions based on religious law are not enforced without possible appeal to procedural safeguards of the secular law being open to those who participated in religious proceedings. If the state was to directly enforce religious laws without questioning what was applied and how, it might become the extended hand of the religion in question. Separation would then be abolished and religious law would in a way become united with the state. Therefore, the state may have to treat religious law as a foreign legal system that cannot be enforced unless it is in line with the requirements of public order. The ECtHR found that such is the obligation of the state in terms of Canon Law, given that Vatican as an international entity is not a party to the Convention. (*Pellegrini V. Italy (app. No. 30882/96)* [2001], para. 40) However, there is no reason why a similar reasoning could not be employed in case a state decided to give Sharia some civil effect. Religious law is, after all, separate from the state in the jurisdictions I focus on and as such may be treated similarly to a foreign legal order.

In fact, the superficial characterisation of Sharia is reminiscent of the headscarf controversies decided both before and after *Refah*.[134] Since the focus of this thesis is not on religious symbols, I do not go into the detail of those cases. It is sufficient here to note that restricting the use of the headscarf was considered to be necessary in order to protect the rights and freedoms of others and the public order. The justifications invoked by the ECtHR were rather insubstantial. For example, in *Dahlab v. Switzerland*[135] and *Sahin v. Turkey*,[136] the headscarf was characterised as "hard to square with gender equality"[137] and seemingly imposed on women, i.e. having a coercive character.[138] No actual empirical verification of the claims made by the states in question and upheld by the ECtHR was provided. It was almost as if the headscarf was being scrutinised just for its connection with Islam, the anti-Islam bias being the main ground for deciding that the Convention was not violated.

It is questionable to what extent can separation from Sharia truly remain separation if the criteria for restriction are based on a bias, giving too much leeway to the state. On its face, it does seem to sit rather uncomfortably with the ECtHR's affirmation that the state is not allowed to examine the legitimacy of religious belief.[139] Indeed, while the ECtHR has in practice explained that the state should neutrally arbitrate religious differences in a plural society, the whole concept of neutrality was heavily criticised. In effect, it was convincingly explained that it only serves as a facade for a majoritarian bias.[140] The overall application of

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[134] Particularly in the Turkish context, the headscarf is interpreted as being closely connected with the claims for legal pluralism. As weak as this connection is, the ECtHR never disproved Turkish claims that allowing the headscarf may amount to a „plurality of statuses"(para. 94 in Refah). If anything the connection was actually affirmed (para. 121 in Refah).

[135] App. No. 42393/98 (hereinafter, *Dahlab*)

[136] App. No. 44774/98 (hereinafter, *Sahin*)

[137] *Dahlab*, para 34

[138] *Sahin,* para 98; *Dahlab*, para 34

[139] See, for example, *Schüth V. Germany (app. No. 1620/1603)* (2010), para. 58.

[140] Sylvie Langlaude, "Indoctrination, Secularism, Religious Liberty and the ECHR," *International and Comparative Law Quarterly* 55 (October 2006): 933; Tulkens, "The European Convention on Human Rights and Church-State Relations: Pluralism Vs. Pluralism," 2584 (explaining that a neutral state can still favour some religions over others).

neutrality in the cases involving Muslim and Christian symbolism confirms this characterisation.[141]

Against this background, laws like the one prepared by baroness Cox in the UK may be in line with the Convention. This may be true even if the laws single out Sharia and not other religious systems, such as Canon Law or Halacha. After all, in *Dahlab*, it was perfectly permissible to forbid wearing the headscarf in schools, but allow teachers to wear crucifixes as jewellery.[142] Similarly, laws of some religions may be seen as more problematic and imposing than those of another. This is particularly likely to remain in line with the Convention give the broad margin of appreciation commonly granted in religious matters.[143]

The separation from Sharia proposed by the ECtHR is not problematic just on account of its openness to bias, but also because of its supranational influence. The fact that improperly justified restrictions of religious freedom were considered to be in line with the Convention allows national authorities all over Europe to introduce similarly questionable measures. For instance, the Madrid Administrative Court recently found that a school was justified in expelling a pupil for refusing to remove the headscarf.[144] In so finding, the Court did not analyse any of the circumstances in the case before it. Instead, it practically copied the

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[141] See, for example, the decision of the ECtHR in *Lautsi V. Italy [GC] (app. No. 30814/06)* (2011), hereinafter *Lautsi II*. The decision of the Chamber was reversed, the Grand Chamber finding that having a crucifix in the classroom does not violate the Convention. In making this argument, the ECtHR relied, among others, on the claim that the crucifix is a passive symbol, as opposed to a more active one, presumably a headscarf (para 72). However, it rather inadequately explains what "passive" means. In the same paragraph, the ECtHR also explained that it cannot say whether the crucifix has a coercive effect on the children exposed to its presence Again, however, its explanation is rather unpersuasive. For instance, one of the ways the Grand Chamber justified its decision was the "classroom pluralism" argument. Specifically, as other religions could be brought up and represented within the confines of the classroom, there was less damage from the crucifix hanging from the wall. However, that argument fails to note that the crucifix is in all classes, one with the wall of the classroom. It is constitutive of the educational environment, while other religious symbols, such as the "active" headscarf, come and go, along with religious festivities that may be held from time to time.

[142] Carolyn Evans, "The 'Islamic Scarf' in the European Court of Human Rights," *Melbourne Journal of International Law* 4, no. 7(1) (2006), after footnote 52.

[143] The margin of appreciation is a criticised concept. It is sometimes seen as unavoidable given the dependence of the ECtHR on the approval of Member States. Some, however, have convincingly argued for more precision and scrutiny in applying the concept. See, for example, Eyal Benvenisti, "Margin of Appreciation, Consensus and Universal Standards," *New York University Journal for International Law and Politics* 31 (1999): 843–853.

[144] *Jdo. Contentcioso/Admtvo. N. 32 Madrid, Sentencia N°35/2.012* (2012).

reasoning of the ECtHR, finding that the pupil had no right to wear the headscarf.[145] While I return to this issue in the last chapter, it should be noted that the superficiality inherent in this approach is a serious threat to the separation's role in transforming religious law.

In sum, while the ECtHR seems to make rather strong statement as to the separation of the state and Sharia, the model it impliedly promotes is very much problematic. While exhibiting some of the defects of the top-down and bottom-up models, it also brings new weaknesses to the picture. Most obviously, it strongly relies on a bias, which is even more dangerous given the supranational context in which the ECtHR operates. Allowing so much space for improperly justified restriction may result in overlooking the complexity of Sharia and may prevent separation on a national level in operating properly.

2.3 Concluding remarks

This chapter had a double goal. Firstly, to introduce the notion of separation of the state and religion. In this sense, I argued that reshaping the channels between religion and the state ensures that both the religious and the governmental sphere function without one corrupting the other. The second objective of the chapter was to analyse how separation is reflected in the approach to Sharia in Canada, the UK and in the practice of the ECtHR. A couple of conclusions can be extracted from the foregoing discussion of this basic theme. Firstly, separation is applied to Sharia in all three jurisdictions. In all three jurisdictions, tribunals that remain wholly private are not forbidden by law. Additionally, under the case law of the ECtHR, Sharia tribunals may be vulnerable to particular scrutiny.

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[145] The approach taken by the Spanish court is also problematic from the point of methodology, because the decisions of the ECtHR in headscarf controversies are fundamentally based on the margin of appreciation. Proportionality was not strongly emphasized, and it is difficult to say how exactly the conflicting interests were balanced. By simply copying the resulting reasoning into the national sphere, the Spanish court practically gave a margin of appreciation to national authorities. This, as Aharon Barak notes, is beyond the power of the national judiciary. For a domestic court, the "zone of proportionality" should be the ultimate frontier. (Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* [New York: Cambridge University Press, 2012], 421) Simply put, balancing should not have been eschewed.

Yet, it is questionable whether allowing Sharia to function in private resolves all the problems separation was meant to prevent. By all means, it protects the legal order and prevents religion from abusing the state and vice-versa. However, it does not fully curtail the abusive potential of religious law. The second chapter expands on this point in more detail.

3. Separation as applied to Sharia forces the believer to decide on the bulk of Sharia's clashes with religious law

*„Religion then of every man must be
left to the conviction and conscience of every man;
and it is the right of every man to exercise it
as these may dictate."*

~ James Madison[146]

The previous chapter introduced separation of religion and state, explaining its answer to Sharia's challenge in each of the three jurisdictions studied in this thesis. Two elements emerged from the discussion and will be more closely examined in this chapter. On the one hand, all of the jurisdictions appear to be most open to having Sharia applied strictly in an informal fashion, in what I call community-based tribunals. In the first part of this chapter, I argue that is the optimal model for allowing the application of Sharia (3.1).

However, community-based tribunals are also the model in which the limitations of separation outlined in the first chapter become painfully obvious. Separation carves out an area for religious freedom, yet appears not to do enough in protecting human rights of those whose weaker position leaves them vulnerable to abuse of this opening. Most notably, in the context of Sharia, allowing religious law to be uncritically applied within the civil sector potentially opens the floodgate of gender discrimination and inequality. Separation may take a significant amount of force away from this troubling occurrence by denying religion the coercive power of the state. However, it leaves the vulnerable believer at the mercy of the pressure of their community and its practices. In the second part of this chapter, I examine what is encompassed by this risk and conclude that it is for the most part left to those subjected to Sharia to deal with it (3.2).

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[146] James Madison, "Memorial and Remonstrance Against Religious Assessments (1785)," *University of Virginia - Religious Freedom Page*, October 9, 2001, http://bit.ly/2edqoX, para 1. <last accessed 15/7/2012>

3.1 Separation establishes the optimal model for Sharia adjudication

It is by now clear that separation of religious and the governmental does not completely preclude religious adjudication. Nonetheless, there are some ways of applying Sharia that will be more in line with separation than others. Those range from completely undesirable choices to perfectly acceptable alternatives. Here I differentiate between state religious courts, arbitration tribunals and community-based religious tribunals. It will be established that, while the first model is completely contrary to the idea of separation, the other two can be introduced. Nonetheless, for the purposes of a plural society, the idea of religious arbitration, while legally possible, for the most part remains practically inadvisable. Hence, I argue that, institution-wise, the best model for religious adjudication remains the community-based tribunal, which is set up within the civil society. It maintains Sharia-state separation along with the freedom and diversity among those who would have Sharia applied. It is therefore unsurprising that such a model is the most acceptable alternative in the jurisdictions studied in this thesis.

The arguments in favour of community-based tribunals will be developed by first arguing against its competitors, religious courts endorsed by the government (2.1.1), followed by religious arbitration tribunals, which are more in line with separation (2.1.2). The last part of this subsection will then deal with community-based religious tribunals. (2.1.3).

3.1.1 Governmental religious courts – an unacceptable alternative

Among the ways to introduce Sharia, governmental religious courts figure as a particularly problematic alternative. Hofri-Winogradow differentiates three ways of establishing such institutional arrangements. Firstly, religious experts can be hired to

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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.[147] Finally, a separate branch of religious courts could be organised under the auspices of the judiciary.[148] 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.

In any case, all three forms would be difficult to reconcile with separation, as they endanger both the government and religious communities. Most importantly, neither of them ensures a workable, balanced encounter of the religious and secular laws. While family law issues will be particularly sensitive, problems could arise even in less delicate matters, such as contracts. This is because the way governmental religious courts are established and work as institutions taints the legal order as a whole.

To begin with, their incompatibility with separation is already indicated by the term "government religious court", suggesting that two opposites are here combined in a way that is to be avoided. Indeed, in all three cases enumerated by Hofri-Winogradow, the government has to either find a way to choose suitable candidates for judges or has to pick a particular religious community to which it will grant the power to adjudicate religious disputes. In other words, the secular power is required to make the direct or indirect choice between different currents within a religion. In Islam, the choice might be between diverse schools of interpretation. In this regard, the character of a candidate could also be a relevant consideration. Namely, their loyalty to the governing regime or to a certain understanding of law and society might become indispensable. It is clear, then, that the government gets

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[147] Such an idea had some supporters in the UK, but it never gained significant ground. (Sameer Ahmed, "Recent Development: Pluralism in British Islamic Reasoning: The Problem with Recognizing Islamic Law in the United Kingdom," *Yale Journal of International Law* 33, no. 491 [Summer 2008]: 494).

[148] Adam S. Hofri-Winogradow, "A Plurality of Discontent: Legal Pluralism, Religious Adjudication and the State," *Journal of Law and Religion* XXVI, no. 1 (February 2010): 104.

significant influence on which interpretation of religious law is acceptable. Consequently, religion is more likely to become a tool of daily politics or a particular ideology.

According to An-Na'im, the danger here is twofold: religious law can lose its authenticity[149] and flexibility. Regarding the first risk, I have already argued that one of the purposes of separation is making sure that religious communities keep their own voices. This is difficult to do once the secular law mixes with the religious. An illustrative example occurred before the Ontario Superior Court of Justice.[150] The plaintiff was a sexually abused Jehovah's Witness. She was advised to take the case against the perpetrator, her father, before the religious authorities. This recommendation was based on a segment of the Gospel of Matthew, which provides as follows:

> Moreover if thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother. But if he will not hear [thee, then] take with thee one or two more, that in the mouth of two or three witnesses every word may be established. And if he shall neglect to hear them, tell [it] unto the church: but if he neglect to hear the church, let him be unto thee as an heathen man and a publican. Verily I say unto you, Whatsoever ye shall bind on earth shall be bound in heaven: and whatsoever ye shall loose on earth shall be loosed in heaven.[151]

The above quote was interpreted as meaning that the religious, informal mechanisms of dispute resolution ought to take precedence over national courts. After two meetings arranged in accordance with Biblical teachings, the plaintiff's father was not punished, and the plaintiff only felt disgraced and abandoned by the community for exposing her intimate life. In the subsequent court proceedings, the judge found the religious community liable for the advice given to the plaintiff. What is more interesting for this thesis, however, is that the court found the Biblical verses were improperly applied, establishing that they are not related to serious crimes.

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[149] An-Na'im, *Islam and the Secular State*, 4.
[150] *V.B. V. Cairns Et Al, (2003) 65 O.R. (3d) 343*.
[151] 'Gospel of Matthew 18:15-18 (King James version), available at: < http://bg4.me/PFkI5H >' <last accessed 15/7/2012>

It is unclear why the judge felt the need to interpret the Scripture at all. Indeed, she herself stated that "religious beliefs should not be an absolute defense to conduct that is harmful to others".[152] Hence, the liability of the religious community could have been established in spite of any religious teachings that might have been involved. However, the judge decided to involve herself in matters of the faith, thereby bringing her own independence and impartiality into question. In doing so, she incorrectly implied that believers are not entitled to give a definite interpretation of religious teachings. Instead, the state is to give the final meaning to religious scripture. This is a clear threat for freedom of religion.

The second peril An-Na'im points out in terms of government's religious courts stems from the nature of Sharia. Namely, he argues that Sharia as such needs to be flexible, free to develop within a community of believers.[153] Anything to the contrary would certainly violate the freedom of religion. By choosing a certain person to be the judge or a specific organisation to be the authority to interpret religious law, the government is endorsing a particular version of the teachings. Sharia is restricted to a certain form and substance. This also means that any discussion on the role and content of religious law within a society is foreclosed or at least more limited. The choice is made by the government and for the people.

Furthermore, when applied by religious governmental courts, Sharia undoubtedly becomes hard, if not impossible, to "reconcile with democracy".[154] It is not that Sharia itself is somehow contrary to democracy, as the ECtHR seems to imply, but it is the way its rules are implemented that is the problem. Namely, integrating religious law in this way promises to create a conflict where only one side will win. On the one hand, the religious teaching endorsed could prevail, opening the door wide to theocracy or a regime similar to it. On the

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[152] *V.B. V. Cairns Et Al, (2003) 65 O.R. (3d) 343*, para. 151.
[153] An-Na'im, *Islam and the Secular State*, 279.
[154] *Refah Partisi*, para. 72.

other hand, the version of Sharia in question could become a mere tool for the government and lose its transcendental dimension completely. In both cases, only one religious group is endorsed and only one interpretation is more likely to prevail. Everyone else is encouraged to keep their own understanding of religious law and tenets to their private sphere.

Hence, establishing religious courts exacerbates the position of religious pluralism rather than improving it. Under the guise of tolerance and openness to religious difference, one interpretation may be chosen. Alternative ways of practising Islam and applying Sharia may be made obscure for the government and society at large due to the assumption that giving religious law so much power renders any other way of applying or interpreting it unnecessary.

Finally, should the government sponsor religious courts, it needs to be prepared to face possibly severe economic woes.[155] In Israel for example, religious courts and their officials are financed by the state.[156] This is a clear danger for religious freedom. As the state finances a religious organization, it gets to exert a greater influence over the workings of the group. Hence, disassociating religion from the government becomes even harder. Moreover, the religious bodies concerned are certainly not looked upon favourably by those who would wish to see the money spent on some other, perhaps secular purpose.

Israel is also a perfect example of other difficulties that may arise when the state sponsors religious courts. Namely, Muslim, Jewish and Christian communities all get to maintain their religious courts and apply their law in that country. Granted, their jurisdiction covers only certain issues, primarily marriage and divorce. However, their jurisdiction is at the same time exclusive and may extend to matters that are only related to family, including

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[155] I am grateful to Jalal Dakwar for bringing this point to my attention.
[156] Izhak Englard, "Law and Religion in Israel," *The American Journal of Comparative Law* 35, no. 1 (Winter 1987): 197.

property disputes between divorcing spouses and custody over children.[157] The result of this arrangement is perpetual tension. It has in recent years resulted in the establishment of non-state religious courts that struggle to take away litigants from the state courts, making the oversight of the national judiciary over disputes even less effective.[158] In sum, religious courts in Israel endanger both religious and other freedoms, in addition to undermining legal certainty and the rule of law.

It is not difficult to conclude, then, that this model of introducing Sharia does not establish a workable relationship between religious law and the state. Instead, it is an unhealthy fusion that might cause more discord in the long run. Rather than maximizing religious freedom, governmental religious courts are much more likely to restrict its scope. In doing so, they will work against the very purpose of separation and erode pluralism at the same time. This makes governmental religious courts an option that has, rightfully, not been seriously contemplated by the jurisdictions discussed in this thesis. Therefore, the right way to introduce Sharia needs to be found elsewhere. With this in mind, let us now turn to models of alternative dispute resolution, beginning with arbitration under religious law.

3.1.2 Religious arbitration tribunals – an uneasy compromise

Among the different methods of alternative dispute resolution, arbitration enjoys a great deal of popularity, particularly in comparison to the standard judicial proceedings. A number of factors make this preference obvious: in addition to being cheaper than the national court, arbitration is more expedient and, in principle, private. It is also far more flexible than the court proceedings, meaning that the parties are free to appoint the arbitrators they desire and specify the applicable procedural and substantive law. The limits to this discretionary

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[157] Margit Cohn, "Women, Religious Law and Religious Courts in Israel - The Jewish Case," *Retfaerd (Scandinavian Journal of Social Sciences)* 108 (2004): 57; In applying its jurisdiction beyond the sphere of divorce, however, the religious court must adhere to civil law. (*Bavli V. The High Rabbinical Court 48 (2) IsrSC 221* [1994]).

[158] Hofri-Winogradow, "A Plurality of Discontent: Legal Pluralism, Religious Adjudication and the State," 107.

power are few.[159] In the UK, such boundaries do not enjoin the parties from choosing religious law as applicable.

By contrast, in the Canadian province of Ontario, the parties to arbitration proper were authorized to choose religious law as applicable in family matters.[160] However, this possibility was abolished in 2005, following a heated public debate. Hence, the only religious "courts" in Canada currently operate on an informal basis.[161] Some have explained the difference in approach between the UK and Canada by pointing at the fact that Canada is a federation, a society more fragmented than the UK. On this account, it is presumed that the UK would have an easier time giving more room to difference than a delicate federation.[162] However, making this argument assumes that arbitration itself is generally a viable solution, which is questionable. I argue that its compatibility with separation is skin-deep and that long-term problems it might bring about make it a possibly substantial risk for the state.

I am not claiming that there is nothing to gain by risking the introduction of arbitration. Indeed, some of its features make it more attractive than governmental religious courts. First of all, the level of party autonomy is extremely high. For example, the 1991 UK Arbitration Act provides that the choice of the parties is limited only by what is "necessary in a public interest".[163] This concretely means that the parties not only choose that religious law is to be applied, but a particular interpretation or a version of it. Furthermore, since they enjoy a great deal of freedom in appointing arbitrators, the parties can choose those who will better

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[159] Generally speaking, parties have a wide discretion in contracting arbitration to deal with civil law matters. Understandably, criminal law is out of bounds for alternative dispute resolution mechanisms.

[160] Bakht, "Were Muslim Barbarians Really Knocking On the Gates of Ontario?: The Religious Arbitration Controversy - Another Perspective," 68.

[161] Sonia Nurin Shah-Kazemi, "Untying the Knot - Divorce and Muslim law in the UK," *Isim Newsletter*, 2001, 31, http://bit.ly/SUMPhV. <last accessed 15/7/2012>

[162] Jean-François Gaudreault-DesBiens, "Religious Courts, Personal Federalism, and Legal Transplants," in *Shari'a in the West* (New York: Oxford University Press, 2010), 171.

[163] *Arbitration Act 1996*, 1996, sec. 1(b), http://bit.ly/SUN1h2 Of course, when the "public order" restriction is viewed in light of the space left for restrictions in the practice of the ECtHR, it becomes clear that religious arbitration may possibly be subjected to intensive state interference.

reflect their understanding of Sharia.[164] Hence, the government does not get a chance to swap the parties' understanding of the religious tenets with that of its own. It can only pinpoint those elements that are contrary to the public interest and are as such unenforceable. By contrast, a governmental religious court would not provide the same degree of flexibility. Therefore, arbitration is certainly more empowering when it comes to religious freedom.

There are, however, some elements of arbitration that are more ambiguous. One example is its strong private character. This means that the proceedings and the subsequent award may not be open and available to the public without the consent of the parties. In the case of religious arbitration, privacy insulates the proceedings from the government. On the other hand, it makes any abuse of religious law easier to execute and hide. Specifically, under the shroud of privacy, the significant party autonomy can be misused by the stronger or more resourceful party to force the other side into agreeing to arbitration under fundamentally unfavourable terms.[165] In fact, Egan reports that in Canada, one of the key problems with introducing Sharia arbitration was precisely the lack of transparency of the organizations running arbitration proceedings.[166] This, naturally, boosts the argument of those who claim that allowing Sharia to be applied exposes the ill-advised believer to abuse.

Indeed, a significant concern when it comes to introducing religious arbitration is the balance between two possibly conflicting interests. On the one hand, the party to arbitration is entitled to all procedural and other human rights guarantees. On the other hand, this party at the same time strives to apply the rules set by their religion. Those might conflict with the guarantees offered by the national law. The greatest challenge is in that both of those interests

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[164] Interestingly, there are limits to this freedom specific to religious arbitration. Namely, British courts have found that choosing arbitrators does not amount to employment; hence, hiring arbitrators on the basis of religious ethos cannot be justified as a "genuine occupational requirement". However, that requirement, in itself, was found to be objectively justified given the nature of the arbitration. (*Jivraj v Hashwani, [2011] UKSC 40* [2011], para. 60).

[165] Gaudreault-DesBiens, "Constitutional Values, Faith-Based Arbitration, and the Limits of Private Justice in a Multicultural Society," 170.

[166] Marie Egan Provins, "Constructing an Islamic Institute of Civil Justice That Encourages Women's Rights," *Loyola of Los Angeles International and Comparative Law Review* 27 (Summer 2005), before footnote 63.

are incarnated in a single person, meaning that finding the right balance between the two is paramount in both protecting the procedural rights of the believers and their religious freedom. The issue of a balanced approach is particularly sensitive in cases of presumably more vulnerable members of the Muslim community, like women.[167]

Some commentators have already attempted to resolve this conundrum in a harmonious way. In his nuanced argument, Helfand points out that Sharia contains both substantive law and mandatory procedural norms.[168] This means, in concrete terms, that a stronger party (e.g. an abusive husband) does not have the full freedom of drafting an arbitration agreement that is aimed at disadvantaging the other side. By virtue of choosing religious law, the way the arbitration is going to be run is already set. A certain measure of protection against abuse is thereby intertwined with religious arbitration itself.

Having said this, the framework in question might be too vague and outdated. Namely, religious law has often been created centuries ago and is as such not always as protective as contemporary national law. In *Pellegrini*, for example, divorce proceedings conducted under canon law deprived the applicant of the fair trial guarantees she would be entitled to under Italian law.[169] In such situations, the requirements of the public order come into picture, particularly if family law matters are concerned.

Indeed, Helfand draws the difference precisely between family and financial/commercial arbitration. In the case of the latter, it is suggested that the courts fully defer to the religious law in enforcing the award. The greater leeway left to the religious is justified by a lack of public interest that would override it. In commercial disputes, after all, money is all that can be lost. By contrast, family law cases attract most public order

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[167] Shachar, "Religion, State and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies," para. 21; Ahmed, "Recent Development: Pluralism in British Islamic Reasoning: The Problem with Recognizing Islamic Law in the United Kingdom," 496.

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

[169] *Pellegrini V. Italy (app. No. 30882/96)*, para. 18.

concerns.[170] They may require that religious law be trumped, particularly when vulnerable parties are involved.[171] In terms of separation, this dichotomy suggests that the government will have a much harder time justifying restrictions to religious law in commercial disputes, as opposed to the far more sensitive, family law situations.

The problem with putting the difference into practice is that the courts remain too insensitive when it comes to religious law in general. UK courts, while not explicitly condemning Sharia, have displayed particular propensity in ignoring its very existence. One example is the case where the court refused to interpret even a commercial contract just because it mentions Sharia.[172] In another case, in which the court analysed Sharia family law, the judge refused to award the amount of damages equivalent to the dower the bride was supposed to receive.[173] Instead, the amount awarded was decreased by one pound, in order to symbolically distance the British legal order from Sharia.

In such a scenario, religious law is *prima facie* seen as an element of the private religion, and not as a normative system that can guide the resolution of certain issues within the life of believers. Shah criticises this approach.[174] It does bring religion down to an element of folklore. More importantly, religion is defined as a choice against which no protection from the state is warranted.[175] Hence, its adherents are left at the mercy of tradition. It is then far

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[170] Bowen, "How Could English Courts Recognize Shariah?," 412.

[171] Helfand, "Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders," 1293.

[172] This problem appeared before the UK Court of Appeal, in 'Shamil Bank of Bahrain EC v Beximico Pharmaceuticals Ltd and others, [2004] 1 W.L.R. 1784'. The contract in question, in addition to English law, invoked 'the principles of the Glorious Sharia'a'. The courts below refused to take this reference into account in the first place, considering it to be overly vague. The Court of Appeals criticised and overturned this approach, finding that the relevant clause can be interpreted in the context of the entire contract and without involving any issues of religious doctrine.

[173] The case is Ali v. Ali (2000), but is unreported. It is described here in accordance with the description in a piece by Werner Menski. (Menski, "Immigration and Multiculturalism in Britain: New Issues in Research and Policy," 5).

[174] Shah, "Religion in a Super-Diverse Legal Environment: Thoughts on the British Scene," 77.

[175] The British Court of Appeal explicitly brought this point home in *Nota v Nota, [1984] Fam Law 310*, 16 (1984). Referring to the applicant, the Court stated: "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."

from certain that the public order requirement will provide protection from abuse of arbitral proceedings.

Therefore, even when the government opens this new forum for believers, its usefulness can be bellied by a judiciary that suffers from a phobia of everything that is remotely connected to a religion.[176] In a well-argued piece, Witte asserts that the core issue is the lack of confidence of the national judges in the integrity of religious arbitration. As a solution, he suggests the education of religious arbitrators, so they are familiar with the public order requirements and can work within their limits. This, posits Witte, would result in a growing confidence in religious adjudication and a reduction of problems with enforcing its rulings.[177] I am inclined to agree with this suggestion. In terms of separation, of course, it would be essential for the government to offer the education 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.

However, even with such supporting measures in place, it is not entirely clear whether instituting religious arbitration would make Muslims more comfortable in the plural society or just create an illusion of harmony. In this sense, arbitration can bring about problems in several respects. Firstly, the different groups could eventually use the privacy of arbitration to segregate themselves from the rest of the society.[178] As I will discuss later, the dynamics within the group could force certain members of the group to arbitration and prevent them from invoking the protections afforded by the national law.[179] This can be an especially acute threat when the government is not putting in place safeguards for the weaker party (such as

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[176] Bambach, "The Enforceability of Arbitration Decisions Made By Muslim Religious Tribunals: Examining the Beth Din Precedent," 404.

[177] John Witte, Jr., "The Future of Muslim Family Law in Western Democracies," in *Shari'a in the West* (New York: Oxford University Press, 2010), 290.

[178] Mathias Rohe, "Alternative Dispute Resolution in Europe Under the Auspices of Religious Norms," *RELIGARE Working Paper* No. 6 (January 2011): 6.

[179] Bakht, "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and Its Impact on Women," 10.

mandatory review of arbitral awards in family matters).[180] Under those circumstances, arbitration can disrupt the functioning of the plural society and make oversight of possible abuses harder.

Moreover, not all additional safeguards are adequate in terms of separation. For example, measures such as mandatory judicial review generate a permanent link between arbitral tribunals and the national judiciary. National courts become *de facto* courts of second instance for religious tribunals. If the state is not careful, its judiciary may end up deciding issues of religious doctrine, moving the system closer to the government religious courts model. Also, putting mandatory review in place just for tribunals applying Sharia suggests that the abuse of other religious legal systems cannot happen and that mandatory review is as such not necessary in those cases. It is debatable whether this is the case, however.[181] Hence, the state should establish mandatory review for more than one religious community, adding to the risk of entangling itself in religious issues.

Finally, as the debates over Sharia in Canada and the UK suggest, the idea that there is a tribunal applying Sharia behind closed doors does not bring about the most tolerant responses from the rest of society. After all, the arbitral tribunal is a "special case", an isolated

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[180] In Canada, it has been suggested that introducing such supportive measures works contrary to the purpose of arbitration. Namely, it is argued that the point of submitting a case to arbitration is to reach a rapid resolution of a dispute. Measures such as mandatory reviews make this harder to achieve. However, I would argue that, while the fast and effective resolution of disputes might be paramount for arbitration generally, it is an interest that cannot be applied with equal force to the family law arbitration environment. Namely, given its sensitive nature, particularly if religious laws are applied, it is far more important to ensure that the rights of parties involved are safeguarded. After all, the parties of family disputes where religious law is applied choose arbitration primarily due to its flexibility which allows the application of religious law, and not so much because of its expediency. Furthermore, it is questionable whether the suggested measures reach beyond achieving mere procedural balance into the issues of inequality the application of Sharia as substantive law can impose on women. (Lorraine E. Weinrib, "Ontario's Sharia Law Debate: Law and Politics Under the Charter," in *Law and Religious Pluralism in Canada* [Vancouver, BC: UBC Press, 2008], 255).

[181] For instance, both Canada and the UK struggled with the abuse of marriage provisons of the Jewish law, allowing the husband to deprive his wife of the possibility to remarry. (Pascale Fournier, "Calculating Claims: Jewish and Muslim Women Navigating Religion, Economics and Law in Canada," *International Journal of Law in Context* 8, no. 1 [2012]: 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], 163).

unit granted power to adjudicate a dispute behind closed doors, making reasoned discussion about its work harder. The debate is limited to pointing out what went wrong once the tribunal issues an award that is contrary to public order. Namely, such a decision effectively becomes public if it gets reviewed before a national court. Hence, an impression may be created in the public that the tribunals only issues awards that are contrary to the public order, since all other decisions will remain unknown. Consequently, day-to-day existence of Muslim communities may be burdened with even more prejudice than before, making coexistence harder.

In conclusion, while separation can make room for religious arbitration, the effect of the latter in practice is not so clear. It would largely depend on concrete circumstances within a particular society and legal order. Generally speaking though, there is a duality within the religious arbitration proceedings, a division between the private and the public. This can to some extent be alleviated by the measures crafted to support and streamline religious arbitration, but it cannot be fully removed due to the very nature of arbitration. This divide gives protection and strength to religious law, but makes the work of the government in preventing abuse harder. At the end of the day, it may make the life of Muslims themselves unduly burdened by new controversies.

3.1.3 Community-based religious tribunals – the optimal model

If allowing arbitration tribunals to apply Sharia can have undesirable effects when it comes to separation, the final solution is to disassociate arbitration and religious law, leaving religious tribunals free to apply Sharia informally. This model is applied in practice, both in Canada, where Sharia tribunals can work only informally, and in the UK, where they *de facto* function solely in an informal fashion.[182] I have termed this last alternative "community-based

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[182] "The Muslim Canadian Congress, January 28, 2012, http://www.muslimcanadiancongress.org/; "Islamic Sharia Council (UK), at <http://bit.ly/zxliYL>", February 6, 2012, http://www.islamic-sharia.org/about-us/about-us-13.html). <both last accessed 15/7/2012>

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religious tribunals". They are more similar to mediation as they cannot issue legally binding decisions, unlike arbitration tribunals.

This is not to say any effect will be fully denied to every decision of a community-based tribunal. For example, in the UK, civil courts may refuse to finalize the divorce proceedings if the religious divorce was not accomplished.[183] This exception was motivated primarily by the legislator's desire to avoid the phenomenon of "limping" marriages in Jewish communities (i.e. cases where the wife is divorced under civil law, but cannot get a religious divorce from her husband).[184] However, the very existence of such a legal mechanism has a broader influence. It effectively motivates the British Sharia councils to keep their application of Sharia in line with the UK law, in the hopes that the civil courts will recognise a similar effect of Muslim religious divorces.[185] Therefore, while the decision of the Sharia tribunal does not have a binding effect on its own, it is not completely barred from affecting the application of the secular law. Of course, this is done according to the terms of the secular law, which reaffirms separation and consequently shapes religious law indirectly.

In any case, the main advantage of a community-based tribunal is that it is connected with and benefits the position of the believers and remains appropriately distanced from the government. On the one hand, the believers, through their religious communities, retain control over the religious teachings and the way they develop, which is in line with the

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[183] *Divorce (Religious Marriages) Act C. 27*, 2002, http://bit.ly/Pz51qN, sec. 1(1(2)).

[184] This was the problem in a landmark Canadian case, *Bruker V. Marcovitz, 3 S.C.R. 607, 2007 SCC 54* (2007). The applicant was not divorced religiously, but only before the secular law. Without a proper religious divorce, she was unable to get remarried under Jewish law. Furthermore, any children she would have had outside Jewish wedlock would be considered illegitimate. The applicant then had little choice but to turn to the national judiciary, praying that respondent be obligated to pay damages for the harm his refusal caused. While the trial judge found in favour of the applicant, the court of appeals overturned. Finally, the contentious issue found itself before the Supreme Court of Canada. The majority affirmed the decision of the trial judge, obligating the respondent to pay a substantial sum for the refusal to issue the get. Arguably, the decision of the Court was made possible largely because the spouses concluded a contract according to which the respondent was obligated to issue the get. It is questionable whether the Court would be able to award damages were there no contractual obligation that could have been enforced in the first place. In fact, as the dissents to the decision of the Court demonstrate, even with the contract the decision to award damages remained shaky.

[185] Bowen, "How Could English Courts Recognize Shariah?," 420.

concept of Sharia being a living part of the life of a Muslim. On the other hand, the government does not interfere with the religious doctrine, which means it is easier for it to maintain separation.[186] At the same time, unlike arbitration, there is no strict division between the public and the private sphere, since proceedings before community-based tribunals do not have to be as closed as arbitration tends to be.

Indeed, an arbitration tribunal is a special unit convened to resolve one particular dispute. For this reason, its interaction with the surrounding community is minimal. It can only have a limited, problematic connection with the government and that only if the arbitral award actually reaches the national judiciary. By contrast, community-based religious courts are a part of society; they are not made special by delegation of judicial power. Therefore, they have more room to present their work to the public better and may also find themselves depending more on society.

In this sense, the workings of a community-based tribunal can be likened to a non-profit organization. The latter does not depend just on the number of members and donators, but also on its reputation.[187] In a similar vein, community-based tribunals may be more careful not to antagonize the wider public by going for extremist interpretations and application of Sharia. Moreover, being a permanent organisation means that they will develop practice in applying the Sharia and may make more of an effort to publicize their findings, as they are not bound by the privacy that permeates arbitration.[188] This makes Sharia more likely to become a public matter, easier to access and discuss among the wider population.

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[186] This follows from the general features of the requirements the government has to meet in terms of non-profit organizations: it has to establish an "enabling legal framework" and refrain from unnecessary interventions. Katerina Hadzi-Miceva, "Legal and Institutional Mechanisms for NGO-government Cooperation in Croatia, Estonia, and Hungary," *International Journal of Not-for-Profit Law* 10 (August 2008), before footnote 3.

[187] Paul Wapner, "Democracy and Social Movements," *International Law and Social Movements: Towards Transformation - American Society of International Law Proceedings* 97 (April 2, 2003): para. 15, 18.

[188] An example of this can be found on the website of the UK Islamic Sharia Council, where regular seminars on the issues of Sharia are advertised and various legal interpretations are posted for convenience of the community. ("Islamic Sharia Council (UK), at <http://bit.ly/zxliYL>").

It could be argued that it is wrong to leave religious adjudication to the non-profit sector, since fundamentalist organizations could use the framework provided for extremist acts. In this regard, it should be pointed out that various programs aimed at stopping terrorism and extremism from abusing religious organizations are already in place and research demonstrates that Muslim NGO's are the ones that are upholding them the most. Indeed, the problem is more often that the measures directed against terrorism and extremism are felt mostly by those who have nothing to do with such activities and feel they are targeted just for being Muslim.[189] In any case, while terrorism and extremism are real threats, there are measures of supervision that can be employed to the entire sector, irrespective of religious background of particular organisations. They appear to be effective and raise no red flags in terms of separation.

Having said this, there are ways in which the freedom to run community-based tribunals can be misused. The result is an infringement of rights separation was meant to protect, as I discuss in more detail in the second half of this chapter. At this point, I merely provide on outline of the risks involved. For one, in cases where religious tribunals are a part of the civil sector, there are dynamics within groups that may prevent its weaker members from asserting their rights under national law, even if they are aware of those entitlements. Additionally, those running religious tribunals may not feel the need to publicize their findings and engage the wider population. In this sense, the closed nature of particular religious communities themselves may make the benefits of being in the civil sector moot. Along the same lines is another objection: religious tribunals may only strive to cater to the members of their respective communities. In this sense, they might prefer extremist interpretations if those are favoured by the community, notwithstanding the possible isolation

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[189] Tufyal Choudhury and Helen Fenwick, *The Impact of Counter-terrorism Measures on Muslim Communities* (Manchester: Equality and Human Rights Commission, Spring 2011), 9.

from the rest of society.[190] Furthermore, while it is common practice in the jurisdictions studied here that religious tribunals work within the civil sector, there is nothing preventing a particular community from just establishing the tribunal behind closed doors and applying Sharia however it sees fit.

It is Shachar's suggestion that those problems are best resolved by establishing cooperation between the government and religious communities.[191] Indeed, building bridges does appear to be necessary in order to avoid segregation and isolation of particular groups. At the same time, the cooperation needs to stay cooperation; it cannot turn into domination of the government over religion or vice-versa. In this sense, it is my suggestion that civil society offers the best environment for development of cooperation and discovery of abuse of religious teachings.

More specifically, if Sharia tribunals are given the freedom to become a part of the civil society sector, the government will treat them as any other non-profit organization. On the one hand, this is a safeguard for maintaining separation. On the other hand, religious organisations applying Sharia could qualify for governmental support, such as tax benefits, as any other organisation. They are no longer being a special case of the "Other" wanting to have their way and destroy values of liberal democracies, they may open more room for dialogue.

This is certainly not an option with the arbitration tribunals, which open to the public only when their decisions are to be repudiated before the national court. At this time, however, if coercion and abuse did happen, they are already backed up and finalized by a binding decision. Then the only thing the government can do, through its courts, is to condemn the Muslim community for the incident. Instances of abuse of religious law are

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[190] This is known in sociology as vicariousness of religion, whereby the leadership of a community is expected to practice religion in accordance with predominant understanding within a religious community. (Grace Davie, "Is Europe an Exceptional Case?," *The Hedgehog Review* [Spring & Summer 2006]: 24).

[191] Shachar, "Religion, State and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies," para. 38–40.

never really prevented.[192] On the other hand, plenty of room is left for increase in hostility and distrust.

Nonetheless, while the civil society environment offers the best potential for cooperation with the government and the broader society, it in itself does not safeguard against the abuse that might still happen. Although religious law remains restricted to the private sphere, it can potentially still wreck havoc in the life of individual believers, as the next section demonstrates.

3.2 Restricting Sharia to alternative dispute resolution mechanisms does not fully resolve its clashes with human rights

One concern that has consistently reappeared in this thesis is Sharia's track record in its relationship to human rights. In this regard, all three jurisdictions have in some way acknowledged that the latter have, at best, an uneasy relationship with religious law. For this reason, as I already demonstrated, a strong separation is applied to Sharia. Consequently, it remains confined to community-based tribunals and, in the UK, possibly arbitration. Such an approach most definitely has its merits. Yet, in this part of the chapter, I argue that separation achieves its goal only partially. I first describe the clashes that may occur although Sharia has been suppressed into alternative dispute resolution methods (which, in the jurisdictions studied here, predominantly boil down to community-based tribunals) (3.2.1). I then look at separation's response to this challenge in more detail (3.2.2). I argue that, rather than resolving all the conflicts of Sharia and human rights in the first place, separation throws the burden of tackling them onto the individual believer.

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[192] Thus, one can only feel puzzled by suggestions of some authors who claim that greater understanding is to emerge from allowing religious arbitration and having it interact with the national judiciary. (Lorenzo Zucca, "The Crisis of the Secular State -- A Reply to Professor Sajő," *International Journal for Constitutional Law* 7 [July 2009]: 513).

3.2.1 Areas where Sharia may clash with human rights

In this section, I examine the ways Sharia can conflict with human rights guarantees despite being denied state sanction. For the sake of clarity, I emphasize at this point that I do not claim any of the abuses described here are a rule or are bound to happen as soon as Sharia enters the scene.[193] Nevertheless, it is important to acknowledge that they may happen and that separation itself does not prevent them. This stems primarily from the fact that enforcing these aspects of Sharia does not really require the assistance of the state: peer pressure is enough. Hence, removing the government's power from the equation does not in itself change much for a close-knit religious community.

But I am getting ahead of myself. Before looking at the role of the state, I first discuss some of the practices that may be sanctioned by Sharia and are harmful to the interests of the believer. I do this by grouping them according to the interests that may be harmed in applying Sharia. More specifically, I first discuss gender equality (3.2.1.1) and rights of the child (3.2.1.2). Finally, Sharia maintains a couple of mechanisms, blasphemy and apostasy, that can make the change of the problematic practice harder.[194] At the same time, they curtail freedom of speech (3.2.1.3) and freedom of religion (3.2.1.4), respectively. Under the right circumstances, these two elements can make the change of a particular tradition harder and cement the oppression of the weaker individual.

3.2.1.1 Gender equality

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[193] Some authors have emphasized that whether Sharia is interpreted progressively or not depends first and foremost on the authority that does the interpreting. (Adila Abusharaf, "Women in Islamic Communities: The Quest for Gender Justice Research," *Human Rights Quarterly* 28 [2006]: 719) Nonetheless, a significant patriarchal baggage accumulated throughout the history of Sharia, making progressive interpretation harder.
[194] Weinrib, "Speech, Religion, and the Traditional Family," 180.

The clash of gender equality and Sharia law in Western liberal democracies is a topic that has been extensively covered in the literature.[195] Hence, the argument that follows will only recapitulate some of the key problems that have arisen in applying Sharia family law and the way they affect the position of women. In this sense, I discuss gender equality under Sharia in general, women's rights and obligations at the conclusion of marriage and at divorce. A large majority of the norms I am going to describe are not just problematic because of the content which is at odds with the human rights guarantees, but also because they can for the most part be applied without state intervention.

To begin with, the great incentive to keep women within the traditional group may come from their symbolic position. In a way not unknown to the Western conception of womanhood, the Muslim woman is seen as the guardian of cultural traditions which she must faithfully convey to her progeny.[196] Simply put, she becomes the key to the preservation of the traditional way of life. Her importance has the potential of disempowering her. As she has such a vital role, male members of her community will attempt to exert a greater influence

[195] See, for example: Anne Aly and Lelia Green, "Less Than Equal: Secularism, Religious Pluralism and Privilege," *A Journal of Media and Culture* 11, no. 2 (2008): 865; Bakht, "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and Its Impact on Women," 1–26; Marie A. Failinger, "Finding a Voice of Challenge: The State Responds to Religious Women and Their Communities," *Southern California Review of Law & Social Science* 21 (2012): 137–206; Pascale Fournier, *The reception of Muslim Family Law in Western Liberal States -- Report for Canadian Council of Muslim Women* (Harvard, 9 2004); Zohra Moosa, "Balancing Women's Rights with Freedom of Religion: The Case Against Parallel Legal Systems for Muslim Women in the UK," *State of the World's Minorities and Indigenous Peoples - Balancing Women's Rights with Freedom of Religion* (2010): 42–49; Sherene Razack, "Between a Rock and a Hard Place: Canadian Muslim Women's Responses to Faith-Based Arbitration," in *Law and Religion in Multicultural Societies* (Copenhagen: Djøf Publishing Copenhagen, 2008), 52–60; Reiss, "The Materialization of Legal Pluralism in Britain: Why Shari'a Council Decisions Should Be Non-Binding," 740–778; Ayalet Shachar, "State, Religion, and the Family," in *Shari'a in the West* (New York: Oxford University Press, 2010), 115–135; Shah-Kazemi, "Untying the Knot - Divorce and Muslim law in the UK," 31; Donna J. Sullivan, "Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution," *New York University Journal for International Law & Policy* 24 (1992 1991): 795–856; Abusharaf, "Women in Islamic Communities: The Quest for Gender Justice Research," 714–728.
[196] Shachar, "Religion, State and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies", footnote 6; Sullivan, "Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution," 812.

over her life and in doing so may infringe her rights.[197] One religious tool in achieving this purpose has been the tradition of modesty. It has commonly been interpreted as the obligation for the woman to be either veiled or secluded.[198] To what extent does this obligation actually obligate the woman to wear a veil or a headscarf in its many versions is a separate issue that will not be dealt with here. The origins and reasons for the practice, while an intriguing topic in its own right, will also not be discussed.

For the purposes of this thesis, it is sufficient to note that, much as any woman may choose to stay in her house or dress however she likes, a Muslim woman might want to wear a headscarf or to adopt a particularly modest lifestyle out of her own religious or other convictions. The problem occurs when this way of life is imposed upon her, which is a possibility. This is particularly so when the most stringent interpretations of Sharia are chosen and the woman is prohibited from leaving the house, getting a job or going on a trip without her husband or at least his permission.[199] The refusal to obey the tradition of modesty may then be sanctioned by domestic violence, beating included.[200] Indeed, some have made the possibility of domestic abuse the apex of their campaign against Shara.[201] In doing so, they failed to acknowledge that other religions are far from having a spotless history when it comes to gender equality.[202] In fact, the problem of domestic violence transcends religious boundaries. While religion generally may maintain and support subordination of women, a particular religion is not thereby the sole culprit.

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[197] Malik, "Muslim Legal Norms and the Integration of European Muslims," 19.

[198] Sullivan, "Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution," 824.

[199] Jeri Altneu Sechzer, "'Islam and Women: Where Tradition Meets Modernity': History and Interpretations of Islamic Women's Status," *Sex Roles* 51, no. 5/6 (September 2004): 270.

[200] Bahia G. Tahzib-Lie, "Applying a Gender Perspective in the Area of the Right to Freedom of Religion or Belief," *Brigham Young University Law Review* 2000 (September 25, 2000): 967.

[201] David P. Goldman, "The Sad Silence About Muslim Wife-Beating," *PJ Media - Voices from a Free America*, June 14, 2012, http://bit.ly/OJy78H. <last accessed 15/7/2012>

[202] For an insightful analysis on the way religion, Christianity in particular, participated in condoning the violence against women and their subjugation, see Linda L. Ammons, "What's God Got to Do with It? Church and State Collaboration in the Subordination of Women and Domestic Violence," *Rutgers Law Review* 51 (1999): 1207–1286.

In any case, an additional factor that complicates matters is the privatized nature of marriage in the West.[203] Plainly put, law might not interfere with family matters unless the problem gets out of hand. As cases of domestic violence were traditionally deemed a normal part of marital life, the state did not interfere with them. Instead, it even struggled to maintain the abusive marriage.[204] Some interpretations of Sharia replicate the problem by referring cases of family abuse to a religious body that then recommends that women attempt reconciliation.[205] Similarly to the so-called "diversion programmes" common in secular marriages,[206] this may result in chaining the woman to an abusive relationship. Hence, religious tradition may severely curtail woman's options in life, marital life in particular.

Supporting a standard case of domestic violence with a peculiar religious background is not everything, however. Some interpretations of Sharia provide that women inherit less than they would under secular law.[207] For example, while men may inherit half of the bequest, women may be entitled to a quarter. This will not be a problem where the law provides safeguards by which the court may strike down a will that deprives the woman of her share of the inheritance without a good cause. However, it may turn out to be a serious issue in countries that allow religious arbitration and weak remedies against the resulting award. For example, in the UK, cases have been reported where women were given less inheritance than they were due.[208] When a woman is not in a position to rebel against this outcome, she may find herself in dire straits with little chance of finding a way out.

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[203] Witte, Jr. and Nichols, "Faith-based Family Laws in Western Democracies?," 125.

[204] Sally F. Goldfarb, *Justice and Gender, Sex Discrimination and the Law* (Cambridge, Massachusetts: Harvard University Press, 1991), 238–240.

[205] Fretwell Wilson, "Privatizing Family Law in the Name of Religion", after footnote 38 (commenting on a case of a British Muslim who was made to "reconcile" with her abusive husband).

[206] Goldfarb, *Justice and Gender, Sex Discrimination and the Law*, 240.

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

[208] Reiss, "The Materialization of Legal Pluralism in Britain: Why Shari'a Council Decisions Should Be Non-Binding," 763.

The inequalities of women under Sharia may extend to the acts of marriage and divorce. One of the biggest reservations when it comes to marriage is that it is arranged. Hence, the bride might not have much to say about the choice of her spouse.[209] Her autonomy is even more constrained given that she is limited in the choice of her spouse, since she, as Hallaq notes, is not allowed to marry outside of Islam. On the other hand, men may marry "people of the book", i.e. Christians and Jews.[210] When combined with cultural and economic conditions in practice, Muslim women may be forced to consistently forego an important part of human existence, marriage.[211] Furthermore, even if she does marry, woman's options may be further curtailed. Namely, if the marital contract (*nikah nama*) is to be concluded between the spouses, it will not be valid unless the guardian and a witness are present in the act.[212] The bride alone may potentially have only very limited options.

This does not mean, however, that Sharia does not grant the wife any security whatsoever. Specifically, the dower (*mahr*) should provide the woman something to fall back on in case the marriage fails.[213] Additionally, it serves as a means by which marital life is

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[209] Having said that, more liberal interpretation of arranged marriages have been developing in the UK. While parents still narrow down the selection of potential spouses by choosing those that are deemed worthy, it is up to the couple to give the final word. Hence, once they are introduced by their families, it is up to them to refuse or accept the proposed marriage. (Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States*, 68).

[210] Hallaq, *Sharia Between Past and Present: Theory, Practice and Transformations*, 278.

[211] An example of this difficulty can be observed in the UK, where the "Muslim spinster crisis" is in the news. (Syma Mohammed, "Why British Muslim Women Struggle to Find a Marriage Partner," *The Guardian* [London, January 18, 2012], http://bit.ly/xF4QCP. <last accessed 15/7/2012>).

[212] The exception to the rule being the position of the Hanafi school, which allows a woman to conclude her marital contract alone. (Hallaq, *Sharia Between Past and Present: Theory, Practice and Transformations*, 273 (explaining that the purpose of the guardian is both to represent the woman and ensure, along with the witness, that the society is aware of the marriage, so no accusations of adultery are made); Reiss, "The Materialization of Legal Pluralism in Britain: Why Shari'a Council Decisions Should Be Non-Binding," 744 (noting an additional problem with marriage contracts, i.e. that they may be concluded orally, which offers less certainty than a written prenuptial agreement that exists, for example, in the English law)).

[213] In this thesis, 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.

negotiated.[214] There are two forms of this payment: immediate/prompt and deferred. The bride receives the former at the beginning of marriage and is not required to perform any marital duties before the payment is made. The deferred mahr is a larger sum, serves as a safety net of sorts and is payable only in certain cases of divorce. The dowry does not have to be a high sum. Indeed, in some cases it is symbolic, being no more than an expression of an old tradition.[215] Interestingly, however, sometimes such an interpretation of *mahr* is refused by the Sharia tribunals when they are involved in celebrating the religious marriage.

In a British case reported by Bowen, a couple wanted to pay a mahr of one pound. However, they were convinced out of this by the council celebrating the marriage. Instead, the groom was required to include in the mahr the gold that was supposed to be given to the bride as a gift. The justification was that giving a low sum disrespects the religious norm.[216] At the same time, it could be argued that increasing the dowry was a wise move made to ensure the financial independence of the wife. If the payment is higher, the husband will think twice before divorcing his wife, since releasing her equals the loss of dowry.

However, in case of a divorce, there may be a chance that the gifts are easier to hold onto than the actual *mahr*.[217] Hence, having expensive gifts may actually provide a greater financial security than a high dowry. This is particularly likely if the wife divorces her husband, as in that case she forfeits her *mahr* (the so-called *khul* divorce). Also, should she get a divorce before a Sharia tribunal (the *faskh* divorce), it is not certain that she will be able to get the divorce with the full mahr, particularly in light of the limited grounds for divorce.[218] Finally, rather than a safety net for the wife, the mahr can also be understood as a cause of

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[214] The use of dowry as an important bargaining instrument in the Muslim marriage is skilfully explained by Fournier. (Pascale Fournier, 'In the (Canadian) Shadow of Islamic Law: Translating Mahr as a Bargaining Endowment' in *Law and Religious Pluralism in Canada* (UBC Press 2008) 140–160)

[215] I am grateful to Dalia al-Awqati for this point.

[216] Bowen, "How Could English Courts Recognize Shariah?," 432.

[217] According to one of the plausible interpretations, adopted by the British court in Uddin, gifts given to the bride at the time of marriage are separate from mahr and as such do not fall under the same regime (*Uddin V. Choudhury, EWCA (Civ) 1205*, para 11).

[218] Fournier, "In the (Canadian) Shadow of Islamic Law: Translating Mahr as a Bargaining Endowment," 150.

discord. Namely, given that *talaq* is the most expedient way for a wife to get divorced and retain *mahr* in the process, some have resorted to violence and blackmail in order to force their husbands to grant it.[219] Additionally, according to some interpretations, the woman needs to give much more than her *mahr* in order to give a divorce. Namely, these interpretations require that the husband must give his consent to *khul*, giving him room to make excessive demands.[220] Of course, all this demeans women and puts them in dangerous situations she would otherwise avoid. It is safe to conclude, then, that mahr's strategic role can play out both for and against the wife.

One area where Sharia may introduce additional gender discrimination in terms of marriage is polygamy.[221] Namely, Muslim religious norms permit a man to marry more than one woman, while the woman is restricted to just one spouse. Naturally, such marriages are not recognised by the secular law. Nonetheless, a man can marry several women under the religious law alone and maintain it notwithstanding the lack of recognition from the secular law. This is problematic from the woman's position. Namely, UK law approaches this issue by giving the second wife the status of a cohabitant and leaving the first wife all the rights of a proper spouse.[222] It is not difficult to see how the pattern can both disadvantage some women and further gender inequality.

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[219] Fournier, "Calculating Claims: Jewish and Muslim Women Navigating Religion, Economics and Law in Canada," 53; Fretwell Wilson, "Privatizing Family Law in the Name of Religion", after footnote 24.

[220] Azizah al-Hibri, "Islam, Law and Custom: Redefining Muslim Women's Rights," *American University International Law Review* 12, no. 1 (1997): 24.

[221] It is important to recognise that polygamy under religious law may be strategically used by women to protect their own interest. For example, 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 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://bit.ly/yX5ohq. <last accessed 15/7/2012>).

[222] Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States*, 77.

One final area where Sharia family law discriminates against women is divorce. It is known that the husband can grant the divorce with more ease than the wife.[223] The situation is slightly different than in Jewish law, where permission of the husband is absolutely required for the woman to be divorced (i.e. the granting of the so-called *get*). However, economic pressure and the position of the wife may require her to stay in a marriage and be *de facto* incapable of divorcing her spouse. Moreover, in some circumstances, should she go before a Sharia tribunal to facilitate the divorce, she might find that the imam in charge refuses to oblige without the consent of her husband.[224]

One other example where the religious divorce was particularly difficult may be drawn from Canada. Jimenez describes the case of a Muslim woman who was married both under the civil law and religious law. However, the marriage fell apart. Having acquired civil divorce, she struggled to get a religious divorce as well.[225] However, in order to get a divorce, she had to give something in return for her liberty. She paid 5,000 dollars and gave up on the benefits she acquired from the civil divorce (i.e. support). In return, she managed to get a religious divorce and ensured custody over her child. However, in order to do so, she had to make an egregious sacrifice.

This example shows that, when it comes to gender equality, Sharia leaves much room for abuse. Separation does not fully address this difficulty, as is further underscored by the cases drawn from the jurisdictions that practice separation of Sharia and the state. In the next subsection, I explain how this problem extends to the rights of the child, which again involve the position of women under Sharia.

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[223] 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, "Islamic Law and the Canadian Mosaic Politics, Jurisprudence, and Multicultural Accommodation," 7).

[224] Namely, even in cases where the wife herself grants the divorce and forfeits mahr, some imams have refused to accept the divorce without the consent of the husband. Some of these cases have been reported in the media. ("BBC NEWS | UK | Some Imams 'Biased Against Women'", December 15, 2008, http://bbc.in/KElwjV).

[225] Marina Jimenez, "A Muslim Women's Sharia Ordeal, The Globe and Mail, September 8, 2005. Available at <http://bit.ly/xqWgZI>. <last accessed 15/7/2012>

3.2.1.2 Rights of the child

Closely connected to the gender equality issues and in some respects overlapping with them are the rights of the child under Sharia. Thinking of similarities between the position of women and that of children in any community reveals that children too are often considered the vessels of tradition.[226] Yet, at the same time, they are growing and developing personalities, and are entitled to form their own attitudes towards the religious. Even more than that, theirs is the right to, as they mature, increasingly take control of their own lives and direct their course as they see fit.[227] However, given the weak position of a child in the broader community, it is relatively easy for this potential to be overridden by other interests and desires, particularly those of parents. There are several areas where this may be relevant. I am not going to discuss here the position of the child in terms of choosing a religion or getting educated in the religion of one or the other parent. The issues of changing religion will be discussed at a later stage, irrespective of whether they concern children or adults. Instead, it is far more pertinent for this thesis to explain how Sharia differs from the secular law in protecting the interests of the child generally.

To begin with, secular law commonly adopts the conception of the "best interest of the child" to ensure that the weak position of the child is not abused. On an international level, it is contained in the Convention on the Rights of the Child. More specifically, Article 3 of the Convention provides that

> The best interests of children must be the primary concern in making decisions that may affect them. All adults should do what is best for children. When adults make decisions, they should think about how their decisions will affect children. This particularly applies to budget, policy and law makers.[228]

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[226] Geraldine Van Bueren, "The Right to Be the Same, The Right to Be Different: Children and Religion," in *Facilitating Freedom of Religion or Belief: A Deskbook* (Leiden: Martinus Nijhoff Publishers, 2004), 561.

[227] ibid.

[228] *UN General Assembly, Convention on the Rights of the Child*, *United Nations, Treaty Series, Vol. 1577, p 3, Available at http://bit.ly/K9Oxpf*, 1989, Art. 3. This notion is not without its problems. It has been criticised for being overly vague. See, for example, the criticism of the concept in the UK immigration setting: Rosalind

Similar notions have been adopted in jurisdictions studied here.[229] Sharia differs from both the international and national standards in this regard, as it does not adopt the standard of the best interests of the child. Instead, relatively rigid rules are adopted.[230] In some respects, these are more likely to trump the rights of the children. Two areas where that may prove to be particularly problematic are child marriages and custody.

Child marriages are not in themselves an exclusively Islamic tradition. They are still common in some parts of the world and in traditions that are not Muslim, such as Hinduism. One country that has had problems with curtailing the practice is India.[231] Some Muslim majority countries, such as Saudi Arabia, also struggle with the heritage of child marriage.[232] The problem with child marriages is further complicated by the fact that it is predominantly the girl who is getting married before she is of age.[233] In other words, there is an added element of gender inequality involved.

In terms of Islam, the practice itself actually belongs to the category of customs that, while they have developed over time, have no real basis in the Quran or the religious doctrine at all.[234] Nevertheless, the tradition that apparently links Sharia and child marriage prompted some to argue against Sharia courts on the grounds that, in

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English, "Analysis: Children's 'Best Interests' and the Problem of Balance," UK Human Rights Blog, February 2, 2011, bit.ly/hbBDrW. <last accessed 15/7/2012>

[229] An extensive overview of the Canadian legislation can be found in *Final Federal-provincial-territorial Report on Custody and Access and Child Support* (Ottawa, Canada: Department of Justice - Canada, March 8, 2012), http://bit.ly/SXlTwn. The situation in the UK is more complicated, but a summary of some of the cases that have dealt with the matter can be found at the website of Families Link International: http://bit.ly/K9SoTr. <last accessed 15/7/2012>

[230] In the UK, Sharia's rules in this respect have been characterised as incompatible with the ECtHR and as such were not given civil effect. See, *Em (Lebanon) (Fc) (Appellant) (Fc) v Secretary of State for the Home Department Appellate Committee, [2008] UKHL 64* (deciding on child custody).

[231] Although illegal, the practice is still customary and difficult to root out completely, particularly in poorer, rural regions. A young woman was recently able to get an annulment of her child marriage from the court. See "BBC News - Indian Teenager Annuls Her Child 'Marriage'", April 25, 2012, http://bbc.in/JB4o35.

[232] Angus McDowall and Summer Said, "Cleric Fights Saudi Bid to Ban Child Marriages - WSJ.com", July 29, 2011, http://on.wsj.com/nzU1Pv. <last accessed 15/7/2012>

[233] See, for example, the report of the Population Institute, available at their web-site: *Child Marriage* (Washington: Population Institute, September 2010), http://bit.ly/MXuWwm.

[234] Abusharaf, "Women in Islamic Communities: The Quest for Gender Justice Research," 722.

allowing them, the state would sanction a serious violation of children's rights.[235] Such arguments were raised in the UK.[236]

However, these arguments are problematic for two reasons. Firstly, they draw comparisons between countries such as Nigeria and Saudi Arabia, where child marriage is an entrenched tradition, and the UK, where this is not the case. Hence, establishing a practice such as child marriage will most certainly be beyond the pale and introducing it would not be a straightforward or a very likely outcome. Secondly, the connection made between child marriages and Sharia tribunals is shaky at best. Marriage under Sharia does not require religious arbitration. Hence, child marriages can occur irrespective of what is done on the issue of religious adjudication.

Granted, the existence of Sharia tribunals could be an obstacle if the child wishes to dissolve a marriage, but is not allowed to do so.[237] However, it is again fallacious to claim the problem would be fixed by merely prohibiting religious adjudication. Divorce proceedings can take place in someone's home, in total privacy, even when Sharia tribunals are officially banned. This is not to say child marriages are not a serious problem, one objectionable to Muslims and non-Muslims alike.[238] However, tackling it is not so much solved by banning Sharia, as it can survive without civil effects.

Another significant area where Sharia clashes with rights of the child is custody. In fact, the solutions imposed in this sense also endanger the rights of one parent, the

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[235] Those arguments sometimes blow the problem out of proportion as well. For example, in the UK, not that many problems relating to the clash between secular law and religious law when it comes to child marriages have been reported. (Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States*, 75).

[236] See, for example, Roddy Newman, "Will Making Sharia Court Legal in Britain Lead to Child-Marriages Amongst British Muslims?," *Islam Watch*, October 5, 2011, http://bit.ly/Kuzl57. <last accessed 15/7/2012>

[237] Such cases have been noted in reports on the practice of Sharia in the UK. (One Law for All - No Sharia Campaign, *Sharia Law in Britain: A Treat to One Law for All and Equal Rights* [London: One Law for All, June 2010], 17).

[238] Pavan Amara, "Islington Girls Forced into Marriage at the Age of Nine | Islington Tribune," *Islington Tribune*, January 27, 2012, http://bit.ly/zQY9S4. <last accessed 15/7/2012>

mother. Namely, Sharia provides which parent will have custody over the child. As in many other matters related to religious law, there is no one set of rules. The schemes depend on which school of thought is adopted.[239] Generally speaking, however, it could be said that the custody over the child is held by the mother in the earliest stage of the child's life. After the first several years, it passes to the father, first nominally then physically. At this point the mother has no right to gain access to her child at all.

Of course, custody over the child is not an absolute right even under the secular law. Nevertheless, the key distinction between deciding on the custody of the child in the cases where the secular law applies is that the child's best interest is taken into account. This provides a much more nuanced decision that takes into account relevant circumstances. For example, the House of Lords, summarising the British legislation on the matter, found that the best interests of the child require the courts to consider wishes and needs of the child, any suffering that might be imposed should the change in custody be made and the capabilities of the parent.[240] Similarly, the Canadian Divorce Act provides that decisions on custody require the courts to take into account the "condition, means, needs and other circumstances of the child".[241]

By contrast, Sharia in itself does not take these matters into account. It also provides that the change of custody is to occur every time the child reaches the right age, not just in limited cases, like divorce or inadequate care by one parent. Having said this, the British Islamic Council appears to interpret Sharia in a more progressive fashion. The aim is to consider the needs of the child and ensure that both parents retain

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[239] For a detailed discussion on the matter, see Hallaq, *Sharia Between Past and Present: Theory, Practice and Transformations*, 287–289.

[240] *In Re O and N (minors) (FC) In Re B (minors) (FC), UKHL 18* (2003), para 23.

[241] *Divorce Act, R.S.C. (2nd Supp.), C.3.*, 1985, sec. 16(8).

a share of responsibility and care for the child.[242] This applies at least when it comes to divorce.

Nonetheless, the plural nature of Sharia and the Muslim communities means that a different interpretation could be applied. This is what almost happened in a case reported by Jimenez. Namely, a woman was in danger of being forced to give up her son once he turned eight unless she got a religious divorce from her husband.[243] Furthermore, it is possible for a divorced mother to lose custody even before then, should she remarry.[244] Similar implications do not seem to attach to the father. In sum, these rules open the door both to the curtailment of the right of the child and discrimination of women.

3.2.1.3 Freedom of speech

Blasphemy is not an Islam-specific term. On the European soil, the most notorious example of blasphemy laws existed in the UK, where the common law protected only against insults directed at Christianity. Most notably, those laws have been at the root of problems in the case of a British producer and director, Nigel Wingrove, who was accused of blasphemy for creating and intending to display and distribute a movie found offensive to Christian sentiments.[245] The British blasphemy laws have since been dismantled,[246] yet the topic of is still relevant.

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[242] "Islamic Perspective on Child Custody After Divorce," *Islamic Sharia Council Website*, May 22, 2012, http://www.islamic-sharia.org/children/islamic-perspective-on-child-custody-after-divorce-3.html. <last accessed 15/7/2012> Interestingly, however, the members of the Council seem to put more of an emphasis on the rights of the father, claiming that they are usually not acknowledged enough.

[243] Jimenez, "A Muslim Women's Sharia Ordeal, The Globe and Mail, Available at <http://bit.ly/xqWgZI>."

[244] Rhona Schuz, "The Relevance of Religious Law and Cultural Considerations in International Child Abduction Disputes," *Journal of Law and Family Studies* 12 (2010): 453.

[245] *Wingrove V. UK (app. No. 17419/90)* (1996).

[246] This was done in 2008, by way of Criminal Justice and Immigration Act, and the Racial and Religious Hatred Act still provides some protection for all religions. In Canada, blasphemy similarly exists as a common law offence, but it was never used nor repealed.

The thing that may be keeping it alive the most are the occasional but intense controversies that crop up over offending Muslim sentiments. Similarly to some other elements arguably connected to Sharia, like the child marriage, even the most attentive reader will have difficulties finding a unified, clear notion of blasphemy in the actual religious texts of Islam. This is because it was constructed by jurists, on the basis of some events in the Prophet's life.[247] It is applicable to both a Muslim and an outsider, the only difference being that blasphemy triggers apostasy if the blasphemer is an adherent of Islam.[248] Therefore, blasphemy may be a serious matter for an outsider and even more so for a Muslim.

This is evidenced by the case of Salman Rushdie and his infamous Satanic Verses, as well as the upheaval over the publishing of the equally well-known Danish cartoons. Both controversies brought to the fore the discussion on drawing the line between freedoms of speech and religion.[249] It is not within the scope of this thesis to reopen those debates, nor to discuss related issues, such as religious hatred laws.[250] I have a much more modest goal. I demonstrate how blasphemy is relevant to the application of Sharia family law and Sharia adjudication in general. In my narrow scope of inquiry, blasphemy can make the change of harmful traditional practices harder, both for the believer and the person chosen as the *qadi*

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[247] Abdullah Saeed and Hassan Saaed, *Freedom of Religion, Apostasy and Islam* (Burlington: Ashgate Publishing Company, 2004), 38.

[248] An-Na'im, *Islam and the Secular State*, 121.

[249] See, for example: Klausen Jytte, *The Cartoons That Shook the World* (New Haven: Yale University Press, 2009); Talal Asad et al., *Is Critique Secular?: Blasphemy, Injury, and Free Speech (Townsend Papers in the Humanities)* (Berkeley: University of California Press, 2009); Ian Cram, "The Danish Cartoons, Offensive Expression and Democratic Legitimacy," in *Extreme Speech and Democracy* (New York: Oxford University Press, 2009), 311–331; Niraj Nathwani, "Religious Cartoons and Human Rights - a Critical Legal Analysis of the Case Law of the European Court of Human Rights on the Protection of Religious Feelings and Its Implications in the Danish Affair Concerning Cartoons of the Prophet Muhammad," *European Human Rights Law Review* 4 (2008): 488–507; Javier Martinez-Torrón, "Countervailing Duties as Applied to Danish Cheese and Danish Cartoons," in *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (Utrect: Eleven International Publishing, 2007), 233–273; Oliva Javier García, "The Legal Protection of Believers and Beliefs in the United Kingdom," *Ecclesiastical Law Journal* 9, no. 1 (2007): 66–86.

[250] For a critique of the recent developments in the UK in that regard, see Eric Barendt, "Religious Hatred Laws: Protecting Groups or Belief?," *Res Publica* 17, no. 1 (2011): 41–53.

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(judge). Specifically, it makes an open debate about Sharia less likely to occur.[251] Consequently, the chance of developing an alternative interpretation of Sharia is reduced. Indeed, the very act of criticism directed at Sharia may be a risky endeavour both for an outsider and the believer.

This follows from interpreting Sharia as the divine law that must be accepted as perfect. Logical interpretation of scripture is claimed to be inferior to the completeness of the superior, divine will.[252] If reasoning is excluded, however, one's options as to understanding Sharia in a different way are reduced. Those Muslims who do not remain within the narrower boundaries are not treated kindly. Illustrative in this sense is the case of the renowned scholar An-Na'im who, having criticised Sharia for gender discrimination, received threats and was considered a blasphemer.[253]

Part of the problem lies in the way Sharia was developed. As Emon argues, it at one point it transformed from a budding rule of law system into an inviolable ideology. This is where it for the most part remained to this day. Any criticism directed at it is easily associated with the old colonial attitude the West had, and it was, after all, from that attitude that the extremist interpretations of Sharia emerged.[254] The implication of this is that it is very difficult for anyone to criticise it without being at least shunned by some segments of the Muslim community.

For instance, the display of the Prophet Mohammed was considered to be a particularly egregious form of blasphemy, which is demonstrated by the huge firestorm following the publishing of the Danish cartoons. However, as Saba Mahmood argues, the

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[251] Neil Addison, *Religious Discrimination and Hatred law*, 1st ed. (New York: Routledge-Cavendish, 2007), 124.

[252] Islamic Sharia Council, "Deeming Shariah (Islamic Law) as Incompetent," *Islamic Sharia Council Website*, July 20, 2012, http://bit.ly/yMhKPT. <last accessed 15/7/2012>, after footnote 3.

[253] Abdullahi Ahmed An-Na'im, "Islam and Human Rights: Beyond the Universality Debate," *American Society of International Law Proceedings* 94 (April 2000), after footnote 8.

[254] Emon, "Islamic Law and the Canadian Mosaic Politics, Jurisprudence, and Multicultural Accommodation," 17.

problem was not so much the depiction of the Prophet. Rather, it was the way it was done and, most importantly, the way it was perceived by Muslims all over the world. It was seen as an attack on a way of life "against a structure of affect, a habitus".[255] Similarly, Sharia serves as an integral part of that way of life for many Muslims. Hence, criticising it could by itself amount to blasphemy, although it is unlikely to cause controversies of the same magnitude as the display of the Prophet.

Now, the disadvantaged woman may not be able to criticise Sharia because of her position and the danger she will be shunned by the community she knows, while the man may not do it because it is not in his interest. Outsiders, on the other hand, might not want to get themselves into trouble. Finally, those who apply Sharia do not have free reign in interpreting Sharia, either. Due to the already mentioned vicariousness of religion,[256] members of a particular Muslim community may expect the Sharia tribunals to adhere to a particular understanding of religious norms. Hence, if a community prefers a traditional understanding of Sharia and understands reinterpreting it as blasphemy, it is unlikely that Sharia is going to be applied progressively.

This indicates that it is within the communities of believers that the capacity for transforming and defining religion really lays, and it also shows why it is important to rely strongly on the civil society sector. It is unrealistic to expect that a number of progressive religious leaders or politicians will change anything on their own. Religion is not just an individual, but also a group enterprise. However, in developing both of these dimensions, blasphemy is certainly not a help. It is an obstacle that separation of the state and Sharia does not fully remove. Certainly, the state will not enforce it as a crime, but then again, who needs

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[255] Saba Mahmood, "Religious Reason and Secular Affect: An Incommensurable Divide?," *Critical Inquiry* 35 (2009): 849.
[256] See supra, footnote 190.

the coercive power of the state when intra-community mechanisms of enforcement work well?

3.2.1.4 Freedom of religion

The easiest way to avoid the jurisdiction of a religious court would be to change religion or refuse to have Sharia applied. However, according to the teachings of Islam, this is considered a mortal sin. While the Quran does not provide any earthly punishment for it, in some jurisdictions death penalty is the sanction imposed.[257] The most well-known example is Afghanistan, where a convert to Christianity was almost sentenced to death.[258] The chances for the same situation repeating in the jurisdictions covered by this thesis may appear slim. After all, Sharia and the state remain separate. The government will not enforce the death penalty for what is essentially a religious matter.[259] Under the circumstances, threats of apostasy may seem nothing more than what many other religions promise: hell to those who turn their back to the one true religion.

However, this is not necessarily the case. Both in Canada and in the UK, cases have surfaced where converts from Islam or those who stepped away from its traditional teachings were threatened or murdered. The UK was, for example, shaken by the case of the young Sofia Allam.[260] After she converted to Christianity, her own parents physically abused her, threatened to kill her and she was thrown out of her home.

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[257] Sherazad Hamit, "Apostasy and the Notion of Religious Freedom in Islam," *Macalaster Islam Journal* 1, no. 2 (Fall 2006): 31–38 (arguing that death penalty for apostasy, in the context of Afghanistan in particular, is inherently unislamic).

[258] Durham, Jr. and Scharffs, *Law and Religion: National, International and Comparative Perspectives*, 182.

[259] Of course, even punishment of a smaller intensity, such as physical violence, would not be enforceable. That was recently confirmed in Italy, where the Supreme Court refused the cultural defence of a father who claimed he had a right for disciplining his daughter for not memorising the Quran. ("Supreme Court Sentences non-Italian Father for Child Abuse," *Ansa.it*, March 30, 2012, http://bit.ly/HxNfC4. <last accessed 15/7/2012>).

[260] "Muslim Apostates Threatened over Christianity - Telegraph," *The Telegraph*, December 9, 2007, http://tgr.ph/dlkGR2. <last accessed 15/7/2012>

An even greater abortion of justice happened in Canada where, in January 2012, a criminal trial provided an epilogue to a gruesome honour killing committed by an Afghan family (the husband, his second wife and his son) against four innocent women (the husband's first wife and their three teenage daughters). The crime was motivated by the perceived departure of the victims from the traditional ways of Muslim religious traditions. Commenting on the outcome of the trial, the chief prosecutor, Gerald Laarhuis, stated that: "This is a good day for Canadian justice. Our democratic society protects the rights of all".[261] However, the trial is symptomatic of a legal system that does not protect the rights of all. In the particular case, it did not protect the right of women to depart from a religious tradition. It only placed a shield of privacy and separation around the abuse, effectively condoning violence that does not breach the limits of the barrier.

Additionally, the Canadian case in particular demonstrates the flexibility of apostasy in Sharia. Namely, it does not require that one fully abandons the Muslim tenets by, say, converting to Christianity. Simply distancing oneself from the precepts of Islam is enough. What this exactly means, however, is not certain. An-Na'im points out that, since there are different schools and scholars involved, what amounts to apostasy in one case and in a particular community may not have the same effect in another set of circumstances. Having doubts about the existence of Allah or the truth of Quran may suffice, for example.[262] According to the UK Islamic Sharia Council, not recognising Allah as the supreme lawgiver may also result in not being considered a proper Muslim.[263] Hence, denying Sharia superiority in one's life may plausibly amount to apostasy and, at the very least, to ostracism from the community. This will naturally discourage those who might want to exercise their religious

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[261] Frederick Reese, "Family Found Guilty in Honor Murder Case, Yahoo! Voices, January 30, 2012, http://yhoo.it/xUFAwe. <last accessed 15/7/2012>

[262] Abdullahi Ahmed An-Na'im, "Islam, Apostasy and Freedom of Belief," *Religion and Ethics - Abc.net.au*, December 22, 2010, http://bit.ly/dUtd30, <last accessed 15/7/2012>, para. 6-7.

[263] Islamic Sharia Council, "Deeming Shariah (Islamic Law) as Incompetent", after foonote 13.

freedom by either changing religion or simply refusing to accept Sharia or a particular interpretation of it.

Similarly to blasphemy, apostasy not only makes the exercise of freedom of religion harder and possibly fatal for the observant Muslim, but it also sours the relationship of the Muslims with the rest of society. Cases such as those described above are used to demonize Muslim traditions and claims are made that it is the excess of violence and cruelty that shows just how unjust and corrupt Sharia really is.[264] Yet at the same time, excesses like those galvanize the Muslim religious leaders that consider honour killings and violence against family members contrary to Islam.[265] In finality, I argue that it is fair to agree there is nothing inherently "Islamic" about apostasy. It is violence, often family violence, with a particular religious and cultural aftertaste. As the case of Ana Magaš in Croatia demonstrates, scenarios strikingly similar to apostasy can happen even in a majority-Catholic country, where a wife kill her abusive husband in self-defence and ends up being ostracised as a "bad woman".[266] In such cases, the only difference is that it is not an Islamic precept that is violated, but the need to maintain the "sacred Catholic sanctuary" of family life.

Therefore, it is not really the religious background of apostasy that is fascinating and worrying. Rather, it is the fact that all Muslims, both men and women, are exposed to additional pressure that discourages them from exercising their religious freedom to the fullest. This does not mean that they might just find it hard to avoid the effects of Sharia. This also means that everyone, men, women and children are encouraged to stay within a certain religion or, at the very least, to pay an unpleasant price to get out. Yes, there are difficult

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[264] Pamela Geller, "Rifqa Bary: Slow Motion Honor Killing," *Honor Killings: Because It's All About Women*, July 9, 2009, http://bit.ly/PptbEo. <last accessed 15/7/2012>

[265] The Canadian Press, "Shafia Murders: Imams Issue Fatwa Against Honour Killings, Domestic Violence," *The Huffington Post - Canada*, April 2, 2012, http://huff.to/M1OQHp. <last accessed 15/7/2012>

[266] Besides being subjected to open hostility from the public and having to leave the country, Ana Magaš lost the trust of her child. ("Anu Magaš Sin Ne Želi Vidjeti [The Son of Ana Magaš Does Not Want to See His Mother]," *Index.hr*, September 26, 2009, http://bit.ly/Kwafk0). <last accessed 15/7/2012>

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choices that have to be made in life. Yet, one wonders if the believer should be in the position to trade in their life or wellbeing for a chance to change their religious affiliation.

3.2.2 The extent to which separation deals with the clashes

Having reviewed the human rights problems that can arise even if the application of Sharia is reduced to community-based tribunals, I next look at the ways separation deals with them. Given that the focus of the thesis is on separation, one method is to be discarded at the outset: the government does not attempt to directly control or aggressively change religious law. Taking up such strategies would likely annul separation, combining religion and the state in a troubling manner.

The consequences of such bonds have already been touched upon in the first chapter. In the context of Islam, the effects of marrying law and religion in a theocratic or a similar regime have been thoroughly discussed by other authors in the field.[267] I do not go into detail of those studies. Instead, I prefer to briefly contrast their findings with the benefits brought about by separation in the jurisdictions studied here. In doing so, I identify the extent to which human rights are protected by separation in case the government adopts religious law within the framework of alternative dispute resolution mechanisms, particularly community-based tribunals.

Generally speaking, religious law can have an effect on the legal system as a whole and on individuals, whether they are its adherents or not. Similarly, Temperman distinguishes

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[267] See, for example: Jeroen Temperman, *State-Religion Relationships and Human Rights Law* (Leiden: Martinus Nijhoff Publishers, 2010); Hirschl, *Constitutional Theocracy*; Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (Boulder, Colorado: Westview Press, 1999); Omid Safi, ed., *Progressive Muslims: On Justice, Gender and Pluralism* (Oxford: Oneworld, 2003); Clark B. Lombardi and Nathan J. Brown, "Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law," *American University International Law Review* 21 (2006): 379–435; Hakan Yilmaz, "Religión, Soberanía y Democracia: Reflexiones Sobre El Islam y El Cristianismo [Religion, Sovereignty and Democracy: Thoughts on Islam and Christianity]," *Revista Académica De Relaciones Internacionales* 7 (2008): 319–350; Kirsten Hastrup, ed., *Human Rights on Common Grounds: The Quest for Universality* (The Hague: Kluwer Law International, 2001).

issues related to the content of the religious law that primarily target individual citizens, from more "systemic" violations.[268] Whether and to what extent will religious law actually impact those two spheres strongly depends on its place in a legal system. For instance, it is by and large settled that separation as described in this thesis puts to rest systemic concerns, such as equality before the law, legal certainty and freedom from religion. In this, it does provide a strong standard for protection of human rights.

The issues that separation does tackle successfully will not be dealt with here in great detail, as they have been discussed throughout the arguments I have made so far. Instead, a couple of cursory notes will suffice. Firstly, it is clear that relegating religious law to the private sphere, as opposed to adopting it as a parallel legal system, ensures that one state law applies to everyone, irrespective of religion.[269] Consequently, one can also with more ease know what law is applicable, how it works and what the consequences of applying it to a concrete case are. All this boosts legal certainty and further ensures equality of all those who appeal to the national law. For example, a state that applies the traditional interpretation of Sharia may disqualify women from public office just on account of their sex.[270] Doing this to someone on the basis of a religious doctrine is not possible if the government exercises separation (although gender equality may not be properly protected even then, but for reasons unrelated to separation and religious law).

Nonetheless, it could be said that separation is overprotective in one respect. While it grants religious freedom, particularly freedom *from* religion *vis-à-vis* the state, [271] it envelops a number of traditions and practices with the cloak of liberty. Some of them are not too

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[268] Temperman, *State-Religion Relationships and Human Rights Law*, 171.

[269] This can be contrasted to the case of India, where the existence of several parallel religious systems complicates matters. Interestingly, the notion of separation between the state and religions, enshrined in the Indian Constitution, is used to defend the plural legal system, rather than attack it. (Erik Reenberg Sand, "The State and Religious Laws: The Case of India," in *Law and Religion in Multicultural Societies* [Copenhagen: Djøf Publishing Copenhagen, 2008], 101).

[270] An-Na'im, *Islam and the Secular State*, 109.

[271] Temperman, *State-Religion Relationships and Human Rights Law*, 190.

compatible with human rights. This characteristic of separation is in itself not to be condemned. Religion does strongly rely on history and tradition. If the government were to fully deny those the protection of religious freedom, it would inevitably violate separation and would impair the relationship of the population with religion.

The need to maintain the integrity of religious freedom is naturally not an absolute rule – certain injurious practices need to be excluded from its scope. Child marriages and domestic violence are obvious examples. However, not every exercise of religious freedom that may be perceived as harmful to individual's interests should be restricted by the state. For example, clergy that live celibate restrain their own freedom to establish a family and have children. This does not mean that the government may outlaw celibacy and persecute those who practice it. A common solution for those types of situations is providing the believer with the right to exit.[272] Freedom of religion is just that – a freedom. Just as one is free to adopt and change beliefs, one ought to be able to stop a particular religious practice or all of them, or adapt such an exercise to the *forum internum*.

Hence, a believer can pick up a practice that limits their own interests, in accordance with her own beliefs and, arguably, autonomously. Within certain limits, she can get exempted from national laws in case this is required for her uninterrupted religious exercise. However, should she wish to stop with that same practice, change her beliefs or actions again, she is free to do so, even if it runs contrary to her old religion. In this sense, the community she belonged to should not be able to hold her back and restrict her freedom to reinterpret and, indeed, reinvent her own beliefs.[273]

In accordance with this understanding of religious freedom, a Muslim should be able to submit herself to a religious tribunal of her choosing for the matters she picks and, should

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[272] Lucy Vickers, "Two Approaches to Secularism: Organized Religion and Society," *Oxford Journal of Legal Studies* 32, no. 1 (2012): 207.

[273] See, for example, *Syndicat Nortcrest V. Amselem, [2004] 2 S.C.R. 551* (2004).

she wish to stop with the exercise, should 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.[274] This is not to say abuse is impossible. In fact, as a British scholar, Samia Bano reports, some are often not even aware of the rights they have before a Sharia tribunal.[275] Such a situation, as the previous section demonstrated, is particularly dangerous given the number of ways Sharia can be interpreted and applied to harm certain members of the Muslim community, most notably women.

The potential for abuse notwithstanding, the right to exit emerges as the only solution separation offers for the possible abuses in the private application of religious law. Even in cases of religious norms whose practice is criminalised, the believer may be required to address the authorities and thereby employ a *de facto* right to exit. In sum, the believer is expected to retreat from the exercise of religion that she disapproves of and invoke the power of the national law to help in that if necessary and possible. Beyond this, the state will essentially not interfere with Sharia, although this might mean that protection of some interests that may be injured in the process remains less than perfect.

3.3 Concluding remarks

This chapter had a double aim. On the one hand, it demonstrated that Sharia tribunals are not an anathema when it comes to separation of religions and the state. It is in fact perfectly possible to reconcile the government that does not want to get embroiled into issues of religious doctrine with Sharia. The second point this chapter demonstrated, however, is that

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[274] Prakash Shah, "Between God and the Sultana? Legal Pluralism in the British Muslim Diaspora," in *Shari'a as Discourse: Legal Traditions and Encounter with Europe* (Surrey: Ashgate Publishing Limited, 2010), 123.
[275] Bano, "In Pursuit of Religious and Legal Diversity: a Response to the Archbishop of Canterbury and the 'Sharia Debate' in Britain," 300 (commenting on cases of women who became aware they could have initiated divorce proceedings themselves only when they actually found themselves before a Sharia tribunal).

merely providing a forum for alternative dispute resolution does not resolve all problems. Even in a model that is fully in line with separation and promotes Muslims as equal citizens, there remains a gray zone. Namely, while separation protects human rights to an extent, it does not safeguard against all traditions that endanger them. Instead, the believer is expected to raise the shield of "the right to exit" against such abuses. The next chapter looks at this solution in more detail, arguing that it is the room left by the right to exit that enables the transformation of religious law. In addition, I argue that the state can take some measures to streamline the way transformative space provided works.

4. Separation's treatment of Sharia-human rights clashes allows Sharia's transformation

> *"O mankind! Lo! We have created you male and female, and have made you nations and tribes that ye may know one another. Lo! The noblest of you, in the sight of Allah, is the best in conduct."*
>
> ~ *The Quran*[276]

In this chapter, I build upon the preceding analysis of the treatment Sharia received in the jurisdictions studied here. In doing so, I address the key issue of this thesis: the role of separation in changing Sharia. I demonstrate that, while separation itself does not alter it, room is created for a change to occur. Focusing on the lack of protection against the abuse of religious law in the private sphere, identified in the second chapter, I argue that the seemingly underprotective nature of separation is in fact crucial to separation's role in transforming Sharia. It generates the space religious law needs to transform (4.1). Defects in the way separation is enforced, however, may negatively reflect on the workings of the transformative space (4.2). In conclusion, I argue that streamlining the workings of separation is essential if an optimal transformative space for religious law is to be maintained.

4.1 Separation generates the space for transforming religious law

Separation as applied to Sharia leaves out an area where the clashes of religious norms with human rights are not conclusively resolved by the state itself. Instead, a certain space of discretion is left to individual believers. Here I theorize that separation thereby generates at least three effects that further the atmosphere conducive for transformation of religious law. Firstly, it stops the state from uncritically imposing the will of majority onto those who would

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[276] Abdullah Yusuf Ali, tran., *The Qur'an: Translation* (New York: Tahrike Tarsile Qur'an, Inc., 2001), 49:13.

have Sharia applied (4.1.1). 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 (4.1.2). Finally, separation prevents the state from mixing the religious law with its secular force and thereby petrifying it (4.1.3). Those 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 disassociate from one another.

4.1.1 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. Several examples have already been elaborated in this thesis. One of them is polygamy. It is sometimes referred to as an unacceptable rule that subjugates women. However, the different conditions brought about by the upward movement of British Muslim women enabled them to use this particular norm for their own advantage, rather than being oppressed by it.[277] 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

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[277] Hence, several women choose one spouse according to their own interests, instead of one man selecting more wives (see supra, footnote 221).

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".[278] 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 clash with sentiments 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. The incentive to do so would just be moved to a different level, but it would not be removed.

Additional difficulties may emerge from this situation. Namely, in addition to provisions known to secular law, such as imperative rules, religious laws contain recommendations and other, more nuanced norms.[279] Those 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.[280] In short, it is logical to conclude that attempting to override separation by introducing religious law does

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[278] Jusić, "Non-mainstream Religious Groups: Perspectives from Economics and Social Psychology," 141–142.

[279] Woodman, "The Possibilities of Co-existence of Religious Laws with Other Laws," 34.

[280] 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, "Islamic Law and the Canadian Mosaic Politics, Jurisprudence, and Multicultural Accommodation," 17; Hadas Tagari, "Personal Family Law Systems - a Comparative and International Human Rights Analysis," *International Journal of Law in Context* 8, no. 2 [2012]: 237).

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,[281] while Canada does not seem to advocate those techniques. The ECtHR has, indeed, shown some trepidation when state involvement in the structure of religious communities is concerned.[282] This is understandable. Once a particular group is placed on a pedestal, above other Muslims, it can no longer be considered just a part of the religious community.

Specifically, the chosen group is standing on the threshold between two fires, the state on the one hand and other Muslim 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. In sum, 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, Muslim 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

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

[282] Evans, *Freedom of Religion Under the European Convention on Human Rights*, 720. It should be noted that Islam is a far less institutionalized religion than Judaism or Christianity. (Rohe, "The Current Debate on Islam," 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.

that tempts the righteous believer.[283] As the religious path is 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 that 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".[284] Some of those 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

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[283] Such a temptation is not unique to Islam. 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 trickery 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.

[284] Jusić, "Non-mainstream Religious Groups: Perspectives from Economics and Social Psychology," 11.

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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.[285] Similar solutions would likely be harder to achieve if the state 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.[286] Separation then becomes an art of maintaining a perpetual creative tension.

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[285] Ralph Grillo, "Cultural Diversity and the Law: Challenge & Accommodation," *MMG Working Paper - Max Planck Institute for the Study of Religious and Ethnic Diversity* 09-14 (2009): 25, http://bit.ly/PS0q7u.

[286] An-Na'im, *Islam and the Secular State*, 268; Xanthaki, "Multiculturalism and Extremism: International Law Perspectives," 463.

4.1.2 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 with in this thesis.[287] 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 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. 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

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[287] 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. (Susanna Mancini, "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]: 411–428; Roy, *Secularism confronts Islam*, xiii; Zachary R. Calo, "Pluralism, Secularism and the European Court of Human Rights," *Journal of Law and Religion* 26 [2010], http://ssrn.com/abstract=1754198: 104).

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 eerily 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.[288] However, this dichotomy, while more suitable for the relationship of the government with religions, has been thoroughly debunked on the level of individual citizens.[289] 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.[290] 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.

For instance, a woman wanting to get divorced under Sharia may sacrifice her *mahr* 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

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[288] There are, however, several interesting similarities between secular law and Sharia. For an analysis of the parallels between the two, see van Hoecke, "Islamic Jurisprudence and Western Legal History," 45–55.

[289] Bhabha, "Between Exclusion and Assimilation: Experimentalizing Multiculturalism," 75; Asifa Quraishi, "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.

[290] Fournier, "Calculating Claims: Jewish and Muslim Women Navigating Religion, Economics and Law in Canada," 62.

Sharia's rules on divorce. She may, finally, perform an overhaul of her religious identity, abandoning Islam or religion altogether. In making either of those choices, she may invoke secular law generally and human rights specifically if she finds it necessary.

Of course, the choice argument is more complex than I am presenting it. 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".[291] 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 thesis 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.[292] For example, having a state that is separate from religious law does not automatically improve the 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.

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[291] Nussbaum, *Women and Human Development*, 87.

[292] 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.

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 those fundamental capabilities may be curtailed. For example, in Israel, one does not have 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.[293] Consequently, the very exercise of one's fundamental freedoms is made harder if not impossible to expect.[294] 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 ones 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.

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[293] I am grateful to Professor Brett Scharffs for bringing this point to my attention.

[294] In Israel, the close state relationship with religions produces other difficulties not directly relevant for this thesis. For instance, Failinger 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. (Failinger, "Finding a Voice of Challenge: The State Responds to Religious Women and Their Communities," 154) As a result, certain fundamental capabilities may be constrained, such as bodily integrity and affiliation.

4.2.3 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, as Nikola Visković points out, 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.[295] Historical experience at the times of British colonial conquest demonstrates that those characteristics were detrimental for development of religious law. By codifying its provisions, the British froze certain aspects of Sharia in time.[296] 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.

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 insulated 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 keeping dispute resolution in their own groups,[297] 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

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[295] Nikola Visković, *Teorija Države i Prava [Theory of State and Law]* (Zagreb: Birotehnka, 2001), 152.
[296] An-Na'im, *Islam and the Secular State*, 289.
[297] *Jivraj V. Hashwani, [2010] EWCA Civ 712* (2011), para 14.

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.[298] While religious law itself would be better grounded, there is a palpable risk that its use would be less voluntary.

The risk depends on the type of recognition involved. Woodman helpfully differentiates between institutional and normative recognition of religious norms.[299] Simply put, institutional recognition would involve granting religious institutions the jurisdiction to decide on particular disputes. Establishing a governmental religious court or allowing religious arbitration to have jurisdiction in some matters are examples of such recognition. The problems they bring about have already been explained in the second chapter.[300] One consequence that was hinted at 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 community-based tribunals and the informal pressure they exert, 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 those 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 effects may not pose much of a

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[298] Witte, Jr. and Nichols, "Faith-based Family Laws in Western Democracies?," 127.
[299] Woodman, "The Possibilities of Co-existence of Religious Laws with Other Laws," 33.
[300] See supra, sec. 3.1.1 and 3.1.2.

problem.[301] Providing that Muslim women may inherit only a half of what is inheritable by men, however, is a different matter altogether. Once such recognition occurs, what the individual believer may feel about religious law and its place in her existence becomes less relevant. In those 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 three jurisdictions studied here. 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. For example, the Egyptian constitutional declaration entrenches "principles of Islamic law (Shari'a)" as "the principal source of Legislation".[302] In those 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 *mahr*. After a reform, the consent requirement was removed. Needles to say, this stirred up quite a controversy.[303] It also did not change the fact that, in giving the *khul*, women inevitably had to give up their dowry, 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.[304] It is logical to assume that the

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[301] 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.

[302] *Constitutional Declaration of Egypt, Available at <http://bit.ly/hHRZgG>*, 2011, article 2 (this provision does not appear to be altered by later amendments to the Declaration).

[303] Hassan El Menyawi, "The Gift of Ambiguity: Strategising Beyond the Either/or of Secularism and Religion in Islamic Divorce Law," in *Islam, Law and Identity* (Oxon: Routledge, 2012), 105.

[304] 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

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

4.2 Weaknesses in enforcing separation reflect on the transformative space

Given that separation is so closely connected to the transformative space, weaknesses in enforcing it may lead to anomalies in the space. Here I argue that the key challenges before the transformative space are the cases where separation distances itself from secularity (4.2.1). As a result, transformative space may get perverted and the possibilities open for a change in religious law may be made more difficult. A case study in civil effect of Muslim marriages demonstrates the validity of my argument in practice (4.2.2).

4.2.1 Distance from secularity as a weakness of separation

As the first chapter of this thesis demonstrates, separation is a fundamentally practical notion. Rather than being an ideology, it is a way of rearranging the relationship between the

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change. (For an argument on how tradition may affect a change in law, see Jusić, "Non-mainstream Religious Groups: Perspectives from Economics and Social Psychology," 84).

religious and the governmental that prevents the one from corrupting the other. It in itself does not stand for or against religion. As such, it is an expression of a broader concept of regulating the presence of religion in a way "that does not follow considerations based on the transcendental and the sacred".[305]

While Sajó calls it "secularism",[306] I prefer to adopt a different naming practice, mainly because secularism nowadays appears to be a loaded term. The crux of the problem seems to emerge from identifying it with the ideology of secularism, in itself a fuzzy concept.[307] Essentially, however, secularism in those terms is hostile to religion and has as its ultimate goal the "secularist utopia", a religion-free society.[308] Some refer to it as a Western philosophy that strives to change religion by force. Mahmood, for example, argues that it imposes a particular vision of religion, eliminating manifestations of it that are "incompatible with a secular-political ethos".[309] Others take secularism to be an institutional arrangement, but still describe it in terms of an ideology that can be interpreted more or less liberally.[310] Some think along similar lines, arguing that a successful integration of a religion into the secular framework of a state is a matter of negotiations and suffering on the part of newcomers to the religious scene.[311] They blur the line between an institutional arrangement and an ideology, essentially implying that secularism is a historical project of uncertain nature and future.

In order to avoid those confusions and the conflation of a jurisprudential concept and an ideology, I adopt a slightly different term: secularity. The precise manner in which it

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[305] András Sajó, "Preliminaries to a Concept of Constitutional Secularism," *International Journal for Constitutional Law* 6 (October 2008): 607.

[306] András Sajó, "Constitutionalism and Secularism: The Need for Public Reason," *Cardozo Law Review* 30, no. 6 (June 30, 2009): 2406.

[307] Werner Menski, "Fuzzy Law and the Boundaries of Secularism," *Potchefstroom Electronic Law Journal* 13, no. 3 (December 3, 2010): 31.

[308] José Casanova, *Public Religions in the Modern World* (Chicago: The University of Chicago Press, 1994), 19.

[309] Mahmood, "Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation," 328.

[310] Nehaluddin Ahmad, "The Modern Concept of Secularism and Islamic Jurisprudence: a Comparative Analysis," *Annual Survey of International and Comparative Law* 15, no. 75 (Spring 2009), after footnote 108.

[311] Witte, Jr. and Nichols, "Faith-based Family Laws in Western Democracies?," 132.

differs from a dogma has already been usefully discussed by Brett Scharffs. He differentiates between a position based on an ideology and that related to secularity on four, non-exhaustive grounds. Those are: "negative and positive liberty", "plurality and incommensurability of values", "thin and thick theories of the good" and "jurisgenerative and jurispathic faces of law".[312] I do not intend here to discuss all of the four areas in which Scharffs developed his argument.[313] Instead, I prefer to bring them down to a common tendency useful for the purposes of this thesis.

Namely, in all four views, as Scharffs calls them, the defining characteristic of an ideology, secularism in particular, is that it attempts to assume control over the course of the conflict of difference. It sets up a predetermined plan of action everyone must adhere to. In order to meet its demands, all have to learn what secularism is teaching and individual conceptions of the "good life" are less valued. This way of attempting to anticipate and reach a predetermined goal contributed to making secularism a highly contested concept. Of particular importance is that this approach is more prone to causing conflict. Indeed, it has been convincingly argued that

> There is a significant risk of contributing to a vicious circle of mutual fear and conflict-escalation in the event that the West continues with its self-assured – even self-righteous – promotion of secularism as a doctrine, raised above politics, as a pre-condition for politics, as the path to a peaceful, free and successful society – as something that the others just have to learn.[314]

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[312] Brett G. Scharffs, "Four Views of the Citadel: The Consequential Distinction Between Secularity and Secularism," *Religion and Human Rights* 6 (2011): 109–126.

[313] An additional way to neatly outline the difference between secularity and an ideology can be extracted from the work of Martha Nussbaum. Namely, in her book, Women and Human Development, Nussbaum draws a difference between human capabilities on the one side and functioning on the other. She argues that the state should focus on maximizing all capabilities of its inhabitants, rather than forcing them towards using their capabilities in a specific way, i.e. to push them towards a particular functioning. (Nussbaum, *Women and Human Development*, 88) Accordingly, it could be said that the state upholding secularity focuses on ensuring that its citizens have what it takes to explore their own understanding of religion, rather than forcing them to uphold a particular approach to it. This understanding of the difference between secularity and an ideology is closely related to the argument Scharffs makes using the concepts of negative and positive liberty.

[314] Ole Waever, "World Conflict over Religion : Secularism as Flawed Solution «," in *Constitutinng Communities: Political Solutions to Cultural Conflicts* (London: Palgrave, 2007), 210.

While secularism has been the example used in the literature, taking up a different ideology in its stead is hardly an improvement. Certainly, the state that uncritically adopts Christian values may set up a different set of goals than the one preferring secular ones would, but the problem remains the same.[315] The room for choice is restricted for individuals and a single, true path is more likely to be established for everyone.[316] Thus, it is not difficult to find that an ideological approach clashes with the whole idea of a transformative space and, indeed, the very notion of separation between the religious and the governmental as developed in this thesis.

Secularity, on the other hand, is a more modest approach, which allows nuanced solutions. It does not attempt to direct the conflict involving the religious towards a specific goal. Instead, it establishes common "rules of the game" within which all are allowed to develop their own conceptions of the "good life". Therefore, it leaves more room to believers and their individual interpretations. For example, a state that does not refuse to execute an otherwise valid prenuptial contract just because its provisions comply with Sharia is more in line with secularity.[317] A similar characterisation could be made of the state that makes the civil effect of religious marriages easily accessible, not conditioning it with unnecessary registrations and state considerations of religious doctrine. As I argue in the next section, this

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[315] Hence, those who argue for a greater impact of religion in the field of human rights and the way state operates need to demonstrate how to avoid a religious partiality that comes with reconnecting human rights to their "theological roots". (For an example, see Zachary R. Calo, "Religion, Human Rights and Post-Secular Legal Theory," *St. John's Law Review* 85 [2011]: 495–520).

[316] Such developments recently overshadowed the discussion over the new Assisted Reproduction Act in Croatia, with the biggest opposition party attempting to assert the teachings of the Roman Catholic Church as the one truth. Adopting that truth in the form of a law would, however, restrict the choices open for assisted reproduction treatment to only those that are "theologically kosher". Consequently, the space believers need to interpret their own internal convictions and actually live them out in practice would be seriously endangered, not to mention what it would do to the choice of treatments infertile couples should be entitled to. (Rozita Vuković, "HDZ: 'Zakon o Umjetnoj Oplodnji Najveća Je Tragedija Hrvatskog Naroda Nakon Jasenovca i Bleiburga' [Croatian Democratic Union: The Croatian Assisted Reproduction Act Is, After Jasenovac and Bleiburg, the Biggest Tragedy of the Croatian People]," *Jutarnji List* [Zagreb, July 10, 2012], http://bit.ly/NGAgkr. <last accessed 15/7/2012>).

[317] *Khan V. Khan, 2005 ONCJ 155* (2005); *Nasin V. Nasin, 2008 ABQB 219* (2008).

allows its citizenry to more easily combine the various dimensions of their existence, rather than forcing them to choose one in exclusion of the other.

In short, secularity is much more adaptable to the demands of the transformative space. Thus, insofar as separation brings the state in line with secularity, it is more likely to project a healthy transformative space. It is then also more likely to appreciate the complexity of the human identity, the importance of which is strongly emphasized in Multicultural Jurisdictions, the seminal work of Ayalet Shachar. She argues against the traditional divides between public and private, religious and secular, advocating instead a model of "transformative accommodation".[318] Specifically, 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 and the believer can move between the two.[319] Insisting on secularity as the grounds for separation and, consequently, the transformative space, is certainly more conducive for this project.

Insofar as separation deviates from secularity as its source, however, it becomes more problematic. It becomes more an expression of an ideology and a shield for a particular vision of (anti)religiousness and less of a framework for religious difference. I have already indicated that is precisely the problem faced by the implied model of separation, propagated by the ECtHR.[320] While the opening left for such partiality has yet to become problematic in the field of religious law, it did demonstrate disconcerting consequences in religious symbolism. When the headscarf cases, such as *Dahlab* and *Sahin*, are compared to the crucifix decision in *Lautsi II*, it becomes evident that the ECtHR is furthering a biased separation that provides less protection for Muslim religious practices and more for Christian

[318] Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, 242.
[319] For a detailed application of her argument in the context of religious arbitration in Canada and religious adjudication more broadly, see Shachar, "Religion, State and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies"; Ayalet Shachar, "State, Religion, and the Family: The New Dilemmas of Multicultural Accommodation," in *Shari'a in the West* (New York: Oxford University Press, 2010), 115–135.
[320] See supra, pg 40.

ones, rather than furthering separation based on secularity proper. In its efforts to give a broad margin of appreciation to all models of relations between religions and the state, the ECtHR is opening much space to restrictions of religious freedom on the basis of anti-Muslim bias.

However, the ECtHR is a rather extreme example, made possible in large part by its supranational position and its consequential reliance on the Member States of the Council of Europe. More subtle, yet equally dangerous instances of separation deviating from secularity may be found in the practice of national jurisdictions as well. In Canada, for example, a recent settlement conference between divorcing spouses caused much ruckus.[321] The parties were discussing the obligations following their divorce, namely maintenance. The conference was administered by a judge who basically forced the husband to accept the position of the wife.

The proceedings were analysed in detail by the Ontario Superior Court of Justice, which found that the judge exerted an undue pressure on the husband. Most troublingly, rather than letting the parties agree, the judge forced his own understanding of the matter as a final solution of the case.[322] Among the mistakes the judge made in the process was his failure to inform the husband about his procedural rights, making it seem as if the submissions of the wife are the only right way to resolve the dispute and interrupting the husband mid-sentence with disparaging remarks. In regard to Sharia in particular, cutting short an oral submission by the husband, the judge noted: "We don't have people being stoned to death in this country because they happen to look at a man or they're not wearing a veil or whatever".[323] It is unsurprising that, with remarks such as this one and the behaviour that accompanied them, the Ontario Superior Court of Justice invalidated the agreement reached at the settlement conference.

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[321] Kendyl Sebesta, "Bar Divided over Judge Who 'Bullied' Litigant," *Law Times*, May 7, 2012, http://bit.ly/JQOW0w. <last accessed 15/7/2012>
[322] *Siahbazi V. Rastegar, 2012 ONSC 2384* (2012), para 15.
[323] Ibid., para. 8.

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The actions taken by the Canadian judge are also sufficient to demonstrate what happens when separation removes itself from secularity. Both the behaviour and the remarks of the judge in *Siahbazi* reflect a prejudiced attitude towards Muslim law based largely on a rather superficial assessment of Sharia in the Middle East. Due to his prejudicial reasoning, the judge was also unable to accept that the woman might not be disadvantaged just for being in a Muslim marriage. Consequently, he refused to take any document drafted under Sharia seriously, noting that it is "not worth the paper it's written on", without actually having any evidence on the matter.[324] By projecting his prejudice into the proceedings, the judge moved them away from secularity, going against separation and developing a rhetorical weapon that defined Islam and Sharia in dark undertones. This image is then used to impose a similarly biased resolution of the dispute.

Seeing those developments is not disconcerting just because of the way individual cases are decided. They may also have a broader impact on the credibility and stability of the legal order as a whole. Specifically, they may be a sign that the courts are failing to use law as the means to resolve conflict, exacerbating it instead.[325] On the one level, the way the state addresses disputes is not clear and predictable, as it hinges on ideological judgements. On another level, it is unlikely that acting like the judge in *Siahbazi* did will help build the trust of all in the institutions of the state. As Taylor notes, developing it should be the task of any contemporary state faced with the challenges of pluralism.[326] Indeed, some commentators have argued that the lack of trust in the institutions of the state is an overriding concern.[327] If, however, the state is seen as defending only Christianity, Islamophobia, or a particular, ideological understanding of the role of religion, it is less likely its work will attract the

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[324] Ibid., para. 11.

[325] Karl-Heinz Ladeur, "The Myth of the Neutral State and the Individualization of Religion: The Relationship Between State and Religion in the Face of Fundamentalism," *Cardozo Law Review* 30, no. 6 (June 30, 2009): 2446.

[326] Charles Taylor, "Why We Need a Radical Redefinition of Secularism?," in *The Power of Religion in the Public Sphere* (New York: Columbia University Press, 2011), 44.

[327] See supra, pg 30.

understanding of all. It is, on the other hand, more likely to corrupt the transformative space, as the next section demonstrates.

4.2.2 Civil effect of Muslim marriages: a look at how the weakness affects the transformative space

Religious freedom in itself does not guarantee a right to civil effect of a religious marriage.[328] States therefore enjoy a broad discretion in establishing the criteria for granting it. It may be misused in the sense that the conditions established do not have to be in line with secularity, but may end up corrupting separation. In particular, as the analysis that follows demonstrates, individual's power to navigate the space between the secular and the religious laws may be disregarded. Instead, other factors may be preferred, such as the viewpoint of a particular religious community. The reason for this preference is, as I demonstrate, the desire of the state to determine appropriate religious communities that may celebrate civil marriage, instead of constraining itself to determining whether individuals meet the general requirements for a civil marriage. Consequently, the transformative space is restricted.

My analysis of this claim starts with the requirements that have to be met for a religious marriage to have civil effects under British law. Yilmaz describes the current situation in the UK as an actual improvement from the old, nineteenth-century law. It explicitly favoured only larger communities. Namely, it required the religious community wanting to conclude marriages with civil effect to have premises dedicated only to worship. This, naturally, disqualified smaller religious groups, including Muslim communities, gathering in community centres rather than having buildings dedicated solely to religious activity.[329] The requirement has since been abolished, but in order for the marriage concluded in a mosque to have civil effect, a double registration is still required.

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[328] *Savez Crkava "Riječ Života" and Others V. Croatia (app. No. 7798/08)*, para 56.
[329] Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States*, 53.

Basically, the mosque first needs to be registered as a place of worship and only then as a place where marriages may be solemnised. While the first registration is relatively easily obtained and is not problematic, the second one is a different matter. Namely, it is required that twenty household holders consider the mosque their regular place of worship.[330] Therefore, the mosque must enjoy some support of the community. However, it is unclear why the state is requiring popularity as a precondition for a civil marriage. The only feasible justification for the measure is the desire of the state to determine appropriately stable communities. But this could be relevant when the mosque is being registered as a place of worship (e.g. for determining whether the place of worship will be used by an actual religion). It is not at all clear what it has to do with a marriage ceremony of two people who wish to choose a mosque in line with their religious sensitivities.

An additional feature of the British system is that the registration is not obligatory. The decision hangs on the will of the mosque leadership, even if signatures of householders can be easily gathered. There is, finally, an alternative to registration, although it would in all probability require those running the mosque to agree to its application. Namely, according to Yilmaz, it is possible to have an authorized representative of the registrar's office present during the ceremony.[331] Of course, this is highly suspicious in terms of separation. It is as if the ceremony needs to be to the state's liking, rather than the capability of the couple to actually get married under the civil law.

On a deeper level, the desire of the state to approve of religious communities and their rites also twists the transformative space. Namely, the British approach gives too much power to the community of believers and their leadership, rather than empowering individuals who

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[330] Roughly speaking, household holders live at a particular address and are "solely or jointly responsible for that household". (Ruqaiyyah Waris Maqsood, "Thinking About Marriage," *Ruqaiyyah.karoo.net*, October 2006, http://bit.ly/OvKTJS. <last accessed 15/7/2012>, chap. 6(c-e)) Hence, what is actually required is the approval of a very narrow circle of believers.

[331] Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States*, 71. However, the wording of sec. 46B(1)(b) of the 1949 Marriage Act suggests that an official of the local government needs to be present even if the mosque is registered.

may wish their marriage to have civil effect. Their intention to navigate the transformative space becomes harder to put into practice. More specifically, if the mosque refuses to register or it does not have the number of signatures required, the couple needs to find a mosque that is registered, go through the trouble of getting married twice or do without either the civil or the religious ceremony. The third option is particularly problematic, since it entails a sacrifice of one aspect of the believer's identity. One is married either as a citizen or as a believer.[332]

Indeed, newest empirical data indicates that Muslims will often sacrifice the secular aspect of marriage. Namely, one out of ten mosques is registered[333] for officiating civil marriages and this correlates with an estimated 75% of Muslim marriages that have no civil effect.[334] According to Addison, this is the chief problem of British Muslim women today.[335] As their purely religious marriages are not recognised by civil law, they have a harder time invoking the provisions of the national law that would otherwise be readily available to them. Therefore, they may be more locked into the religious law, making it harder for them to use the opportunities left by separation.[336] Hence, the law effectively forces a polarisation of identities,[337] which is not the point of the transformative space or, more generally, secularity.

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[332] As noted earlier, such dichotomies are strongly condemned by some. (Ayalet Shachar, "Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law," *Theoretical Inquiries in Law* 9, no. 2 [July 2008]: 578).

[333] Those mosques that are registered, however, appear to be obligated to provide only marriages with civil effects. Religious marriages on their own can be celebrated only if there is a pre-existing civil marriage. This, in itself does provide a strong protection for the rights of those who get married, but the problem is that it does not seem to be accessible enough. (See, for example, "Procedure of Civil Marriage in Birmingham Central Mosque", June 26, 2012, http://bit.ly/OoMa2e. <last accessed 15/7/2012>, para. 8, 10).

[334] Sara Khan, "Muslim Marriages Like George Galloway's Should Be Registered," *The Guardian*, May 4, 2012, http://bit.ly/KbvRF7. <last accessed 15/7/2012>, para. 2.

[335] Neil Addison, "Sharia Is Not the Problem Here." *The Guardian*. London, July 8, 2010. http://bit.ly/bA4D0B. <last accessed 15/7/2012>

[336] Note, however, that it is wrong to presume having a secular marriage is always more protective of women than just being married religiously. For example, Fournier reports a Canadian case where the husband used the fact that he was married to his wife under secular law to ask for a bigger slice of her property than he would be able to under Sharia. Namely, according to the latter, the wife in case of a divorce may take out of the marriage everything she brought in, which is not an option under Canadian civil law. (Fournier, "Calculating Claims: Jewish and Muslim Women Navigating Religion, Economics and Law in Canada," 60) Hence, a woman may decide to marry only religiously if it is in her interest, as in those cases divorcing the husband by granting the khul may end up being less expensive than having to share property under secular law. The space between the

At the end of the day, the manner in which the religious ceremony is conducted and its location are irrelevant.[338] It would be better for the government to only examine whether the couple meets the requirements for marriage (e.g. whether they are of age), which are equal for everyone. This can be achieved through a licensing system, whereby the couple that meets the requirements of the national law picks up a license at the registrar's office and incorporates its signing into the religious ceremony.[339] Once the document is signed by the couple, the witnesses and the person celebrating the marriage, it could simply be returned to the state, which would then register the marriage as valid under civil law. A similar system is already in place under British law, but it is currently conditioned by the registration of the mosque for celebrating marriages with civil effects,[340] which is a requirement that should be removed. Then it would be easier for Muslims to combine the civil and religious law to their best interest.

Besides making separation work better by moving it back to secularity, the transformative space may be protected by reducing the risk improper separation generates. This approach can be observed in Canada. To begin with, Canadian law requires a prior registration of individual ministers by the religious community in question. The criteria provided in this regard are not entirely uncontroversial. For example, the Ontario Marriage Act requires the government to determine whether or not the minister who wishes to register

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secular and the religious can then be used to formulate a premarital agreement of sorts. My point is that believers should be able to do so without the state forcing them into a particular arrangement.

[337] Similarly, Jusić observes that the law aims at taking out the voice options for non-mainstream religious communities. (Jusić, "Non-mainstream Religious Groups: Perspectives from Economics and Social Psychology," 13).

[338] Concerns about space or the manner in which a religious ritual is performed can be relevant in other cases. For example, if a religious community wishes to engage in ritual slaughter and public health concerns are involved (e.g. whether the slaughter is conducted in a hygienic manner). See, for example, *Cha'are Shalom Ve Tsedek V. France (app. No. 27417/95)* (2000).

[339] The new Croatian law on religious communities which is being drafted at the time of writing this thesis appears to be an attempt to approximate this system by abolishing the requirement that all religious communities that wish to have civil effects of marriage recognised should first enter into a contract with the state. As the law is still in its early stages, however, I am unable to discuss concrete provisions.

[340] For example, see *Marriage Act 1994, C. 34*, 1994, sec. 2.

is appointed in line with the creed of the community or that the community itself is „permanently established both as to the continuity of its existence and as to its rites and ceremonies".[341]

Similar requirements are put in place in other provinces.[342] It has been argued that most of them are very similar to those provided by Ontarian law and that the latter in practice favour larger, well-established religions.[343] This is indeed problematic in terms of separation that ought to be based on secularity.[344] Yet, the Canadian law devised a mechanism that to an extent immunises the transformative space from the damage this fault might otherwise do to marriage registration. Specifically, Canadian courts are allowed to give civil effect to religious marriage notwithstanding the lack of a proper registration, provided that several preconditions are met. Unlike a similar practice in the UK, they are more specified, meaning less room is left for the courts to abuse their discretion.[345] An example is Section 31 of the Ontario Marriage Act, which contains a so-called "savings clause", providing that

> If the parties to a marriage solemnized in good faith and intended to be in compliance with this Act are not under a legal disqualification to contract such marriage and after such solemnization have lived together and cohabited as a married couple, such marriage shall be deemed a valid marriage, although the person who solemnized the marriage was

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[341] *Marriage Act, R.S.O., Chapter M.3*, 1990, sec. 20(3)(a-c).

[342] See, for instance, the *Civil Code of Québec, S.Q. 1991, C. 64*, 1991, sec. 366(2), providing that: "In addition, every minister of religion authorized to solemnize marriage by the religious society to which he belongs is competent to do so, provided that he is resident in Québec, that he carries on the whole or part of his ministry in Québec, that the existence, rites and ceremonies of his confession are of a permanent nature, that he solemnizes marriages in places which conform to those rites or to the rules prescribed by the Minister of Justice and that he is authorized by the latter."

[343] B. A. Robinson, "Interactions of Canadian Governments with Religion," *Religious Tolerance: Ontario Consultants on Religious Freedom*, July 21, 2004, http://bit.ly/QPPI0V. <last accessed 15/7/2012>, chap. 3, para 5.

[344] The list of registered ministers, updated on a weekly basis and available at the website of Ontario's government, suggests that registration is not at all unpopular, as over 700 ministers are in the register. That says little about Muslim communities, though, as there is no way of reliably knowing which minister belongs to which denomination. ("Marriage - Religious Officials Authorized to Solemnize Marriage," *Ontario.ca*, July 4, 2012, http://bit.ly/OPbZLt. <last accessed 15/7/2012>).

[345] As I argued earlier, the British law uses a presumption that does not offer the same degree of certainty as a clearly spelled out provision (see supra, footnote 95). Also, it would seem that a short-lived marriage may not be always easy to establish under this presumption, given its heavy reliance on the time the couple spent together. (*A-M v A-M, 2 FLR* [2001], para. 34-35).

not authorized to solemnize marriage, and despite the absence of or any irregularity or insufficiency in the publication of banns or the issue of the licence.[346]

The details of the Canadian system are discussed in detail in the Canadian case law, most notably the *Isse case*.[347] The parties to the case, a couple undergoing a divorce, married only under Sharia law. The issue at hand was the validity of the religious marriage before the secular law for purposes of settling property distribution between the soon former spouses.

In applying the criteria set out above, the court found that the marriage was valid, given that both parties were aware that the law of the land does regulate the solemnisation of marriage. The fact that one party, here the husband, could have restricted the marriage to just its religious component in order to weaken the position of the wife was insufficient to deny the marriage civil effect.[348] It is sufficient for one party to be in good faith.

In sum, the Canadian law does contain certain elements that are in tension with separation based on secularity. Nevertheless, Canada found a way to reaffirm the transformative space, reducing the damage that the state might do by misusing its discretion to authorize particular religious officials to officiate marriages with civil effects. Namely, even if the state damages separation by moving it away from secularity, the national judiciary can grant the civil effect to a marriage. At the same time, the state is not authorised to force civil law onto the spouses, since they can agree to marry only under the religious law (or, at the very least, show the intention to do so). In this respect, the Canadian law certainly provides more certainty when compared to its British counterpart.

Yet, notwithstanding the beneficial effects of the Canadian approach and the fact that it seems to work in the Canadian context, it generally remains limited. It may not be a full-proof guarantee that the defects in the transformative space caused by an improper separation will be cured. Thus, a much better solution would be to look at ways separation as the source

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[346] *Marriage Act, R.S.O., Chapter M.3*, sec. 31.
[347] *Isse V. Said, 2012 ONSC 1829* (2012).
[348] Ibid., para. 24.

of the transformative space may be compromised. Fixing those ultimately has a much broader effect and is a stronger guarantee for a properly functioning transformative space. This follows from the strong connection of secularity, separation and the transformative space, which was the theme of this section.

4.3 Concluding remarks

The third chapter concludes the analysis of Sharia's position in Western liberal democracies by putting forth two points. Firstly, separation projects what I call a "transformative space". The three main effects of separation that generate the space are: moderating the majoritarian norm, giving the believer a choice, and preventing the petrification of Sharia. The transformative space that emerges by no means resolves all the underlying problems. However, it does provide a framework for a change in Sharia norms and, in so doing, furthers some of the capabilities individual believers need to make the change happen according to their own volition.

The second point with which this chapter dealt with was the weakness of the transformative space that emerges from separation. The latter does not always remain a mere institutional arrangement, but appears to be vulnerable to different ideological twists that can make it partial and weak. Those corruptions can then have an impact on the transformative space, as the case study on civil effect of religious marriages confirms. The state can either minimise the harm done, as is the case in Canada, or tackle the root of the problem. I have argued that the optimal solution for maintaining a strong transformative space is going to the core of the difficulty, ensuring that separation is clearly enforced. It needs to remain a strong expression of secularity. Other approaches, while attractive and helpful, do not remove the root of the problem and do not necessarily prevent the transformative space failing in cases not foreseen by the remedial measures provided by the state, such as the Canadian savings clause.

5. Conclusion

*"It is therefore essential for us to make sure, first,
that we approach words in a way that is beneficial to
ourselves, and second, where other people are concerned,
that we do so not because we want empty glory or public
recognition, but rather because we want to be taught and to teach."*

~ *Plutarch*[349]

The main task of this thesis was to look at the underlying logic of the seemingly simple response to Sharia's growing presence in the West: separation. While "saying no" to Sharia appears straightforward enough, my analysis of the state retorts in Canada, the United Kingdom and in the case law of the ECtHR reveals an underlying purpose to separation as applied to Sharia. Namely, in leaving Muslim religious norms to the private domain, separation also creates space for them to transform.

This central argument was developed in three chapters. In the first one, I introduced separation as the response to religious pretensions to secular power and vice-versa. I then looked at how separation is applied in the context of Sharia. Three different approaches were identified: top-down, bottom-up and implied, human rights approach. The first one is employed in Canada, where a simple, blanket ban is expected to curtail any abuses of Muslim religious norms. While it does safeguard the legal order as a whole, it substantially does not address the abuse that can still occur in the private sphere. A similar difficulty was observed with the bottom-up approach, characteristic of the UK. Moreover, while the latter allows more room for religious norms, recent developments indicate that it may yet approach the position of the Canadian model. Finally, the supranational, implied system of separation, despite its ostensible difference from the national models of approaching religion, strongly approximates the top-down and bottom-up approaches.

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[349] Plutarch, *In Consolation to His Wife*, trans. Robin Waterfield (Suffolk: Penguin Books, 2008), 24.

The convergence between the three jurisdictions was expanded upon in the second chapter. There, I looked at the features of the separation-based approaches in more detail. To begin with, they include some room for practising religious law, for which the so-called "community-based tribunal" remains the best model. Additionally, separation protects the integrity of the legal order and, with this, provides strong human rights guarantees. Nevertheless, there remains a danger that religious law may be abused, albeit without the backing of the state. The believer is expected to tackle those occurrences by abandoning a practice she finds unacceptable. She is, in a word, expected to "exit".

It is this mechanism that is subjected to analysis in the last, third chapter of the thesis. I argue that separation projects at minimum three effects. Those are: moderation of the majoritarian pressure, providing the believer with an element of choice, and preventing the petrification of religious law. All three together create what I called the "transformative space", an opening in which Sharia can change in practice. This transformation occurs in accordance with the will of the believers themselves. The state furthers the change by staying out of it. As I explain in the second half of the third chapter, this is best done by keeping separation from the religious as an institutional arrangement, an expression of what is called secularity. When the state starts removing separation from secularity, problems may start happening. The case study on the civil effect of Muslim marriages demonstrates some of the dangers that may arise. It also shows that the best way to thoroughly tackle them is to reinforce separation by grounding it in secularity.

In sum, this thesis demonstrates that separation in itself cannot force a particular change in religious law. Nonetheless, its underlying logic is transformation. Separation, after all, provides a framework for it to occur. Future research might usefully focus upon what could be done to make this structure easier to navigate. For example, it might be good to look at what can the state and society at large do in empowering individual believers to use the

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opportunities afforded to them by separation. This is particularly urgent given the ample opportunities for abuse of religious law and the limited scope of separation in preventing it. Hence, it is certainly an issue that requires more research that goes beyond this thesis and may call for a multidisciplinary approach.

In terms of law itself, constitutional law in particular, additional attention could be given to practical aspects of secularity and separation. In particular, understanding how enforcing them can go wrong in various spheres of law may deepen our understanding of the transformative effects exerted on religious law and, more broadly, religion itself. Finally, researching the position of Sharia could be benefited from a more comprehensive comparative analysis involving other systems of religious law, such as *Halacha* or Canon Law. While drawing those parallels was beyond the limitations of this thesis, focusing on developing them may shed additional light on the way the secular state works.

Fundamentally, the tale of Sharia's place in the West cannot be told without involving the state. Whatever the government does, whether affirming religious norms or striving to push them out of the picture with resounding negations, it necessarily affects them. Sharia may well be pushed to the fringes of the public space, but this does not mean it stays there unchanged and waiting for some different time. It is not a sleeping beauty that resumes her life only after the brave prince kisses her. Sharia keeps living and changing throughout, in no small part as a response to its surroundings, which include the state. Hence, understanding what actually goes on behind the scenes of "One Law for All" paradigms may prove to be essential for mapping out the path Sharia may take in Western liberal democracies.

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