

The Application of Shari'a Law in Europe: Reasons, Scope and Limits

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I Introduction

Islamic norms were applied in Europe since the establishment of Muslim realms in the Middle Ages until the end of the Ottoman Empire. Within the European Union only in Greece the Muslims of Turkish and Bulgarian origin in Thrace are still living under traditional Shari'a rules. The starting point concerning the application of norms today is the fact that it is upon the ruling law of the land solely to decide whether and to which extent 'foreign' norms might be applicable in Europe. This is a kind of meta-rule all over the world in every legal order whatsoever. Thus the legal system is not 'multi-cultural' as far as it concerns the decisive exercise of legal power. Nevertheless, within this framework there is a broad range of freedom to follow religious and even legal rules different from those of the majority. Social and cultural difference is an integral part of European societies since a long time.

As it comes to Muslims in Europe, the current perception of them being a homogeneous group of people with a strong religious affiliation and uniform approaches to their religion is simply wrong. There is a lot of pluralism among them, and a lot of conflicts as well, which mostly are not rooted in religious grounds. Thus, the Muslim communities in Europe are not unified at all. 'Turkish', 'Arab', or 'Bosnian' mosques can still be found, where only believers of a certain ethnic background use to pray.

Many Muslims in Europe tend to seek practical solutions for organizing their lives in accordance with the demands of European legal orders and the commands of their religion. It is only within the last few years that Muslims have also tried to formulate theoretical statements to clarify their positions and possible conflicts between legal and religious rules, and to find adequate solutions for possible conflicts.¹ Furthermore, a considerable number of Muslims are not particularly interested in performing religious practices, while not denying their Muslim identity as such. Others are attached to sufi (mystic) beliefs and practices, considering the

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1. Excellent studies of present developments are presented by Wasif Shadid and Sjoerd van Koningsveld, 'Religious Authorities of Muslims in the West: Their Views on Political Participation', in: id. (Eds.), *Intercultural Relations and Religious Authorities: Muslims in the European Union*, Leuven a.o. 2003, p. 149, and by Jacques Waardenburg, *Muslims and Others: Relations in Context*, Berlin et al. 2003, p. 241, 308 and 336.

‘superficial’ rules of mediaeval fiqh (Islamic jurisprudence) to deserve little importance. Nevertheless, an obviously increasing number of Muslims is eager to achieve more certainty in defining their position as European Muslims. The crucial question for them is to define Muslim identity – including the practical fulfillment of Islamic rules – within the framework of European legal orders and societal needs.²

With regard to that question, we have to differentiate between religious and legal issues. The former are regulated by the European and national constitutional provisions. The scope of these rules are not restricted to private worship, but also grants an adequate (not an unlimited) protection of religious needs in various aspects of public law (from building mosques up to social security issues) or private labour law. Nevertheless, there are some differences in the application between several European countries. This is due to differing convictions regarding the degree of distance between the state’s activities and religions should be. Therefore it is not allowed for officers or even for pupils in France according to recent legislation to show ‘ostensible’ religious symbols like the headscarf in schools, whereas in Britain this is allowed for these groups, and even for teachers. It is mainly in the sphere of religious rules – concerning the ‘ibādāt (dealing with the relations between God and human beings) and the non-legal aspects of the mu’āmalāt (concerning the relations between human beings) – where a European Shari’a within the respective constitutional frameworks is possibly developing.³

2 The application of legal Shari’a rules in Europe

2.1 Introduction

As it comes to the application of legal rules, the conflict between possibly contradicting rules of the law of the land and the law of religious/cultural origin has to be solved. In the field of law, most of the existing legal orders have a territorial basis: everyone within the territory of a specific state has to abide by the same laws. Only the state can decide whether and to what extent ‘foreign’ law can be applied and enforced on its territory. Thus the legal system is not ‘multi-cultural’ as far as it concerns the decisive exercise of legal power. Therefore, the application of foreign legal provisions – including Islamic ones – is an exceptional case. However, this does not mean that foreign legal principles and cultural influences are kept out. Nevertheless, the constitutional principles of the inviolability of human dignity, democracy, the rule of law with the binding force of all state power, separation of powers, majority rule and minority protection, as well as the essential elements of constitutional civil rights, such as the equality of the sexes, freedom of opinion, religious freedom and protection of marriage and family etc., are among the basic prin-

2. Cf. Rohe (Guest Ed.), ‘Shari’a in Europe’, *Die Welt des Islams – International Journal for the Study of Modern Islam* vol. 44 no. 3 (2004), (Special issue); Rohe, *Muslim Minorities and the Law in Europe – Chances and Challenges*, New Delhi 2007.

3. Cf. Rohe, ‘The Formation of a European Shari’a’, in: Rohe, *Muslim Minorities and the Law in Europe – Chances and Challenges*, New Delhi 2007, p. 39.

principles which cannot be dispensed with. Within this framework, foreign legal provisions can be formally applied on three different formal legal levels. Besides that, the state has no control on informal ways of application as long as its bodies are not called upon by one of the parties involved.

2.2 Private International Law (Conflict of Laws)

Private International Law (the rules regulating the conflict of laws in matters concerning civil law⁴) is a possible level of direct application of Islamic legal rules. In the area of civil law, the welfare of autonomously acting private persons is of prime importance. If someone has organized his/her life in accordance with a certain legal system, this deserves protection when the person crosses the border. In addition to that, the mutual readiness to apply foreign legal rules in private law is a strong means to intensify desirable international contacts. Thus, for centuries the idea of 'comity of nations' developed by the 'Dutch school'⁵ has been used to explain this phenomenon. However, it is also within the interest of the legal community that in certain matters the same law should be applicable to everyone resident in a particular country. This would be especially the case in matters touching the roots of legal and societal common sense, like the legal relations between the sexes or between adherents of different religions. The question as to whether foreign or national substantive law should be applied must therefore be determined, and this is done by Private International Law provisions (conflict of laws), which weigh up the relevant interests.

As it comes to the areas of family law and the law of succession, the application of legal norms in European countries is often⁶ determined on the basis of nationality of the persons involved rather than by their domicile.⁷ Other than in Canada or in the US⁸, European courts are therefore often obliged to apply Islamic legal rules. In this respect it may generally be stated that Islamic law until today has a strong position especially within these areas. This can be explained by the fact that Islamic law in this area has a multiplicity of regulations derived from authoritative sources (*Qur'an* and *sunna*). Furthermore, a powerful lobby obviously tries to preserve this area as a stronghold due to religious convictions as well as for reasons of income and the

4. Of course, in the sphere of public law and especially of penal law, foreign law is not applicable. Public law regulates the activities of the sovereign himself; and penal law has to define rules which are necessary to grant a minimum consensus of common behaviour in the relevant society.

5. Especially Paul (1619-67) and Johannes (1647-1714), Voet and Ulrich Huber (1636-94); cf. Kegell/Schurig, *Internationales Privatrecht*, 9. ed. München 2004, p. 175.

6. Cf. Ali Mezghani, 'Le juge français et les institutions du droit musulman', *J.D.I.* 2003, p. 721, 734. In some cases like divorce, France (cf. art. 310 C.c.) has chosen domicile to be the relevant connecting factor rather than nationality (with the exception of the French-Moroccan Treaty of 10.08.1981). Thus, possible conflicts of law are avoided as far as it concerns persons domiciled in France; cf. Deprez, 'Au carrefour du droit comparé et du droit international privé: quelle place pour le droit musulman?', in: Flory/Henry (Eds.), *L'enseignement du droit musulman*, Paris 1989, p. 17, 50 s.

7. For further details cf. Rohe, 'Islamic Law in German Courts', *Hawwa* 1 (2003), p. 46.

8. Cf. Foblets/Overbeeke, 'Islam in Belgium', in: Potz/Wieshaider (Eds.), *Islam and the European Union*, Leuven/Paris/Dudley 2004, 1, 25; Rude-Antoine, 'La coexistence des systèmes juridiques différents en France: l'exemple du droit familial', in: Kahn (ed.), *L'étranger et le droit de la famille*, Paris 2001, p. 147, 161.

exercise of power (which was very similar in Europe in former times). The Tunisian lawyer Ali Mezghani states that '[i]n Islamic countries, it is difficult to deny that family law is the site of conservation.'⁹ This is true despite the fact that in several Islamic countries reforms have taken place and still are in progress.¹⁰

However, the application of such provisions must comply with the rules of public policy. If the application of legislation influenced by Islamic law would lead to a result that is obviously incompatible with, for example, the main principles of German law, including constitutional civil rights, the provisions in question cannot be applied. The main conflicts between 'Islamic' and European legal thinking in family law concern the constitutional (and human) rights such as equality of the sexes and of religious beliefs and the freedom of religion including the right not to believe. Conflicts mainly arise from provisions reflecting classical Islamic Law, which preserve a strict separation between the sexes with respect to their social roles and tasks as well as the far-reaching legal segregation of religions under the supremacy of Islam.

This does not mean that, according to German Private International Law, we would have to weigh foreign legal rules with regard to their justice in general. The leading principle of modern Private International Law is to generally acknowledge the equality of legal orders from every origin whatsoever. Thus, we have to keep in mind that the public policy within the framework of Private International Law does not have the function of controlling foreign legal provisions on the basis of their compatibility with corresponding domestic provisions. Public policy prevents the application of foreign rules only if this application would lead to a result, which is obviously incompatible with the main principles of the respective European law including the constitutional civil rights. Furthermore, public policy is only concerned if the case in question has a sufficient connection to the respective European legal order,¹¹ which usually would be so according to German law if one of the parties is a German citizen or has a German domicile.

To give a practical example of the difference between the two positions from a German legal point of view:¹² The husband's unilateral right to divorce (*talaq*) without giving reasons obviously contradicts the constitutional equality of the sexes (Art. 3 GG) as well as the special protection of marriage and family (Art. 6 GG). A *talaq* performed in Germany would be void (cf. Art. 17 sect. 2 EGBGB);¹³ according to German law, exclusive competence to dissolve marriages belongs to the Family Courts. The same is true for divorces abroad, if the German rules of Private Interna-

9. Mezghani, 'Le juge français et les institutions du droit musulman', J.D.I. 2003, p. 72.

10. Cf. Rohe, *Der Islam – Alltagskonflikte und Lösungen*, 2. ed. Freiburg/Br. 2001, p. 53 and 112; for recent interesting developments in the Maghrib cf. Foblets/Carrier, *Le code marocain de la famille*, Bruxelles 2005; Nelle, 'Neue familienrechtliche Entwicklungen im Maghreb', StAZ 2004, p. 253.

11. Cf. BGHZ 120, p. 29, 34; OLG Muenchen, IPRax 1989, p. 238, 241; OLG Saarbruecken, FamRZ 1992, p. 848; KG NJW-RR 1994, p. 199; OLG Duesseldorf, FamRZ 1998, p. 1113, 1115.

12. For further examples cf. Rohe, *The Application of Islamic Family Law in German Courts and its Compatibility with German Public Policy*, in: Basedow/Yassari (Eds.), *Iranian Family and Succession Laws and their Application in German Courts*, Tübingen 2004, p. 19, 24 ss.

13. Cf. OLG Frankfurt a.M., die Präsidentin, StAZ 2001, p. 37 (concerning a similar Japanese case).

tional Law would lead to the applicability of German family law in the case in point (e.g. in cases of common German nationality or a common German domicile; cf. Artt. 17 sect. 1, 14 sect. 1 No. 1, 2 EGBGB, § 1564 BGB).¹⁴ However, a *talāq*, which is valid under a foreign legal order applicable to it according to the German rules of Private International law, may be accepted under certain circumstances. There is still a certain variety among judicial decisions, but in general we can say that the *talāq* would be accepted, if the prerequisites for a divorce according to German law are fulfilled,¹⁵ e.g. if the spouses have lived separately for more than a year and if the wife was adequately informed about the *talāq* (which sometimes doesn't occur). It is still unclear how to perform the divorce in German courts if Islamic law is applicable. Some courts reject any kind of pronouncing a *talāq* as a prerequisite for the following declaration of the divorce by the court, to avoid the application of rules contrary to the equality of the sexes and the human rights of the wife (which is supposed to be treated like an object, not as a subject of law in these cases).¹⁶ The Kammergericht (Court of appeal) of Berlin even refused to grant jurisdiction to an Iranian wife seeking a divorce, leaving aside the generally applicable German provisions on jurisdiction. The reason was the court's opinion that the pronouncement of the *talaq* could not be dispensed with by the substantive Iranian law to be applied, and that a non-religious German court could not take part in such proceedings;¹⁷ moreover, such a German decision would not be recognized in Iran and would therefore be useless.¹⁸ To my opinion, the court wrongly understood the character of Islamic (Iranian) legal rules and institutions: the *talāq* might be regulated by legal provisions rooted in the Qur'n. Nevertheless, the pronouncement of the *talāq* and its control by a court is a legal act without any religious components as far as it concerns the participation of the court or the legal consequences in this world.¹⁹ The Federal Supreme Court has righteously set aside this judgement for similar reasons.²⁰ Other courts would simply substitute the husbands pronouncement of the *talāq* by the court's own decision, e.g. by classifying it as a mere procedural issue on which the law of the court in charge has to be applied or by applying the rules of public policy in that respect.²¹

14. Cf. only BGHZ 110, 267, 276 (a Thai case); Staudinger/von Bar-Mankowski, Art. 17 EGBGB n. 116 with further references.

15. Cf. OLG Koeln, FamRZ 1996, p. 1147; BayObLG, NJW-RR 1998, p. 1538; OLG Duesseldorf, FamRZ 1998, p. 1113; OLG Koeln, FamRZ 2000, p. 895; OLG Zweibruecken, NJW-RR 2002, p. 581; AG Hamburg, FamRZ 2000, p. 958; AG Kulmbach, FamRZ 2004, p. 631; dissenting AG Frankfurt a.M., IPRax 1989, p. 237. In OLG Frankfurt a.M., die Präsidentin, StAZ 2003, p. 137 the question of public policy is not raised, perhaps due to the fact that the wife did not object the recognition of the Pakistani (private) divorce in Germany.

16. Very clear in this sense AG Frankfurt a.M., NJW 1989, p. 1434.

17. This opinion was shared by an Iranian Muslim defendant in a divorce case, who rejected to be divorced by another institution or person than a Muslim scholar or a person appointed by him; the OLG Stuttgart dismissed this claim (cf. OLG Stuttgart, FamRZ 2004, p. 25).

18. Cf. KG, IPRax 2000, 126 with a critical note Herfarth, *ibid.*, 101. Cf. also the similar Ontario decision in *Khaddoura v. Hammoud* (1998), 168 D.L.R. (4th) 503 (Ont. Gen. Div.), 507.

19. Cf. also OLG Stuttgart, FamRZ 2004, p. 25: even the German-Iranian agreement on residence permits to apply the *lex fori* on procedural questions including the character of courts.

20. Cf. BGH, IPRax 2006, p. 346. For Ontario cf. now the similar decision Ontario Court of Justice in *Khan v. Khan* (2005 ONCJ 155) [2005] O.J. No. 1923 sect.. 31 ss.

21. Cf. OLG Duesseldorf, FamRZ 1998, p. 1113.

On the opposite, the *talāq* will not be accepted if the wife was not informed about it and was not able to present her opinion on it.²² Some courts would even refuse to recognise such a *talāq* if the substantive prerequisites for a divorce according to German family law would be fulfilled.²³

2.3 'Optional' civil law

A further area of – indirect – application opens up within the framework of the so-called 'optional' civil law. Private autonomy is the core value of the liberal European Civil law orders. Thus, in matters exclusively concerning the private interests of the parties involved, these parties are entitled to create and to arrange their legal relations according to their preferences. Legal rules regulating such matters are 'optional' within a certain framework.

As an example we may note the fact that various methods of investment are offered which do not violate the Islamic prohibition of usury ('riba', which according to traditional views means the general prohibition of accepting and paying interest²⁴). Concerning project finance, Islamic legal institutions like the murabaha or the mudaraba can be used.²⁵ These are certain forms of partnerships intending to attract capital owners to participate instead of merely giving credit, the latter bearing the risk of contradicting the riba-rules. Commerce and trade have already responded to the economic/legal needs of traditional Muslims. German and Swiss banks, for instance, have issued 'Islamic' shares for investment purposes, that is to say share packages that avoid companies whose business involves gambling, alcohol, tobacco, interest-yielding credit, insurance or the sex industry, which are illegitimate in Islamic law.²⁶ In the UK a special concept of 'Islamic mortgages' was developed, which allows Muslims willing to purchase chattel to avoid conflicts with provisions concerning riba (when paying interest on 'normal' mortgages).²⁷ The 'Islamic' mortgage consists of two separate transactions aiming at one single result. Until recently each transaction was subject to taxation. Now a reform took place of which the key issue was to abolish the double 'stamp duty', because it prevented Muslims from economically successful engaging in real property due to the formal system of taxation without a sufficient substantial reason. Even the German state of Sachsen-Anhalt has recently placed an Islamic bond ('sukuk',²⁸ 100M Euro for the begin-

22. Cf. BayObLG, IPRax 1982, p. 104; OLG Stuttgart, IPRax 2000, p. 427; a very complicated, but informative (Iranian) case is OLG Frankfurt a.M., NJW 1990, p. 646.

23. Cf. OLG Stuttgart, IPRax 2000, p. 427; OLG Stuttgart, FamRZ 2004, p. 25; the opposite view is to be found in OLG Koblenz, NJW-RR 1993, p. 70.

24. Cf. Saeed, *Islamic Banking and Interest. A Study of the Prohibition of Riba and its Contemporary Interpretation*, Leiden/New York/Köln 1996; Iqbal, *Islamic Banking and Finance*, Leicester 2001.

25. Cf. Klarmann, *Islamic Project Finance*, Zurich/Bâle/Genève 2003; Bälz, 'A Murbaha Transaction in an English Court', ILAS 11(2004), p. 117; Ehrler/Fritsche (Eds.), *Handbuch Islamic Banking*, 2. ed. Pfäfersikon 2005.

26. Cf. Venardos, *Islamic Banking and Finance*, New Jersey et al. 2005, p. 70.

27. Cf. Iqbal Asaria, 'Islamic home finance arrives on UK's high streets', *Muslim News* 25 July 2003 (no. 171), 6.

28. It is based on a combination of leasing contracts concerning the state's real property; cf. 'Finanzmarkt: Islam-Anleihe aus Magdeburg', *Die Bank* 01.01.2004.

ning), based on a Dutch foundation.²⁹ For traditionally orientated Muslims, the offer of such forms of investment in Europe is of considerable importance. According to my knowledge many of them have lost huge sums of money in the past to doubtful organisations from the Islamic world bearing a ‘religious’ veil, or to similar organisations based in Europe.³⁰

In the field of Matrimonial law, tendencies of implementing Islamic norms into optional law can also be identified in Germany in connection with matrimonial contracts.³¹ Thus, in Germany contractual conditions regulating the payment of the ‘Islamic’ dower (‘mahr’ or ‘sadaq’) are possible and generally accepted by the Courts.³² Other contractual regulations, especially those discriminating against women, could be void according to sect. 138 German Civil Code (protection of good morals).³³ There are no court decisions on such issues so far published or known. However to my knowledge some German notaries refuse to assist in formulating wills which contain the classical Islamic regulation on half-shares for female heirs.³⁴

2.4 Incorporation of Islamic legal provisions

In addition to general rules of Private International law and optional civil law, a few European states introduced Islamic legal provisions concerning family and succession matters to be applied to the Muslim population. In Britain Muslim institutions may apply for being entitled to register marriages. Furthermore, according to the Divorce (Religious marriages) Act 2002, courts are enabled to require the dissolution of a religious marriage before granting a civil divorce.³⁵ The Adoption and Children Act 2002 amended the Children Act 1989 by provisions (sect. 14 A ss.) introducing a ‘special guardianship’ as a legal means of parental responsibility besides adoption which is prohibited by classical Islamic law.³⁶ In Spain, since 1992 Islamic rules regulating the contracting of marriages can be applied to Muslims.³⁷ In order to ensure the necessary legal security there are compulsory provisions for the registration of these marriages.³⁸ This kind of ‘legal segregation’ is very much

29. Cf. ‘Sachsen-Anhalt bereitet erste islamische Anleihe vor’, *FAZ* 06.11.2003, 31; ‘Anlegen mit Allahs Segen’, *Handelsblatt* 14.07.2004, p. 29.

30. Cf. the reports on doubtful investments in Turkey supported by certain organisations in ‘Neuer Markt auf Türkisch’, *Spiegel online* 29.01.2004 (called on 29.01.2004 under <http://www.spiegel.de/0,1518,283591,00.html>).

31. Cf. Rohe, n. 10, p. 125 s., 130.

32. Cf. BGH, *NJW* 1999, p. 574; OLG Celle, *FamRZ* 1998, p. 374.

33. § 138 sect. 1: ‘A legal transaction which offends good morals is void’; cf. Rohe, ‘Islam und deutsches Zivilrecht’, in: Ebert/Hanstein (Ed.), *Beiträge zum Islamischen Recht II*, 2003, p. 35, 51.

34. The validity of wills does not depend on such assistance according to German law of succession.

35. Cf. Lord Nazir Ahmad, ‘Notes on the Judicial Situation of Muslims in the United Kingdom’, in: Schneiders/Kaddor (Eds.), *Muslims im Rechtsstaat*, Münster 2005, 72; Khaliq, ‘Islam and the European Union: Report on the United Kingdom’, in: Potz/Wieshaider (Eds.), n. 8, p. 219, 246 ss.

36. Cf. Qur’an surah 33, 4. s; art. ‘tabanni’ in: *wizārat al-awqāf, al-mawsū‘at al-fiqhīya* vol. 10, Kuwait 1987; for present legal orders in the Islamic world cf. D. Pearl/W. Menski, *Muslim Family Law*, 3rd ed. London 1998, ch. 10-25 ss.

37. Cf. Mantecón, ‘L’Islam en Espagne’, in: Potz/Wieshaider (Eds.) (n. 8), p. 109, 130 ss.

38. Cf. Article 59 Código Civil in conjunction with the administrative provision of the general directorate of the Civil Registry and the Notary from 10 February 1993.

limited, concerning mere formal regulations without any relevant material quality. Interestingly, also in Spain the legislator has amended art. 107 Código Civil regulating the right to divorce. The amendment enables women resident in Spain to get divorced even if the law of origin or of their matrimonial home prevents them from doing so. The legislator has stated expressly that this amendment was to solve problems to this respect especially regarding Muslim women.³⁹

Within the European Union only in Greece the Muslims of Turkish origin are still living under traditional Shari'a rules for historical reasons,⁴⁰ while the Turkish Republic has continuously reformed its civil laws and since 2002 introduced the legal equality of sexes in family law.⁴¹ This can hardly serve as a model for Europe. Despite widespread tendencies in the Islamic world aiming to improve women's rights, many legal orders in this region are still far from the legal standard of equality of sexes and religions achieved in Europe. It would simply be unacceptable to implement such rules into the existing systems.

Nevertheless, in Britain the Union of Muslim Organisations of UK and Eire has formulated a resolution demanding the establishment of a separate Muslim family and inheritance law automatically applicable to all Muslims in Britain.⁴² The underlying idea might be found in the legal situation on the Indian subcontinent – being the prevailing region of origin of Muslims in Britain – which was and still is ruled by a system of religious separation in matters of family law.⁴³ The same is true for most of the Islamic states in past and present. But introducing a religiously or ethnically orientated multiple legal system into Europe does not represent a realistic or even desirable option:⁴⁴ such systems may be helpful and historically even exemplary in the past, if they granted rights and freedoms for minorities, which would otherwise be lost. However, this will always result in problems in the form of an inter-religious conflict over laws as it can be seen outside Europe. Besides that, freedom of religion contains the freedom to change one's religion or not to belong to any religion. This freedom would be unduly constrained by forcing people into a legal regime defined by religion. Furthermore, there is no uniform Islamic legal system of substantive rules to be identified. The Turkish Republic, being the state of origin of the Muslim majority in Austria and Germany as well as in other parts of Europe completely abolished the Shari'a rules, and the vast majority among them would heavily reject the re-introduction of such rules in European countries. The same is true for France. Instead of that, Muslims are entitled to create legal relations according to their religious intentions within the framework of optional civil law.

39. BOE 30-09-2003, Ley Orgánica 11/2003, de 29 de septiembre, de medidas concretas en materia de seguridad ciudadana, violencia doméstica e integración social de los extranjeros, p. 4.

40. Cf. Tsitselikis, 'The Legal Status of Islam in Greece', in Rohe (guest Ed.), n. 2, p. 402.

41. Cf. Rumpf, *Einführung in das türkische Recht*, 2004, p. 112.

42. Cf. Poulter, 'The Claim to a Separate Islamic System of Personal Law for British Muslims', in: Malat/Connors (Eds.), *Islamic Family Law*, London a.o., reprint 1993, p. 147.

43. Cf. Levy, *The Multiculturalism of Fear*, Oxford 2000, p. 180; Poulter, n. 42, p. 148; Lord Nazir Ahmad, n. 36, p. 71, 74 referring to the respective demands of the UMO and the Muslim Council of Britain.

44. Cf. Rohe, 'Religiös gespaltenes Zivilrecht in Deutschland und Europa?', in: De Wall/Germann (Eds.), *Festschrift Link*, Tübingen 2003, 409.

2.5 Alternative Dispute Resolution

Other than in Ontario/Canada,⁴⁵ there are no arbitration rules in Europe permitting arbitration in family law matters, except issues solely relating to monetary aspects. Nonetheless, within the scope of private autonomy, the parties concerned are free to create legal relations (limited by public policy) and to agree on the ways and results of non-judicial dispute resolution. In matters of family law, relatives will often be consulted first. As it comes to Muslim immigrants, various research projects in Europe in recent years clearly demonstrate that considerable groups of them maintain the structures of family life current in their countries of origin.⁴⁶ Some of them are reluctant to use the legal remedies provided by the law of their state of residence because they believe that they are bound to legal orders different from the law of the land. Others are simply unaware of the fact that in certain matters including family law (e.g. with respect to contracting marriages and divorce) the formal legal rules of the state of domicile/residence have to be observed; otherwise the intentions and acts of the parties involved are not legally enforceable. Thus, a marriage contracted solely according to traditional Islamic rules may be socially accepted within the community, but it deprives the spouses from legally enforceable rights in the state of domicile with respect to maintenance or inheritance usually connected to marriages. On the other hand, these women cannot obtain a divorce in states courts because they are not regarded as to be married according to the law of the land. Therefore they seek 'internal' solutions within their community.⁴⁷ In some cases immigrants have complained that they do not feel being understood in states courts with regard to their special conditions of living and loyalties within extended families. Besides that, some religious extremists and traditionalists openly argue that Muslims should not accept the legal norms and judgments of 'infidels'. They should instead of that establish their own bodies of dispute resolution and elect their own judges.⁴⁸ Would then extra-judicial dispute resolution create a viable solution for weighing up the relevant interests of the parties involved in a manner consistent with the community's standards as well as with the indispensable principles of the law of the land?

45. Cf. Rohe, 'Muslim Identity and the Application of Islamic Norms in Canada' (forthcoming). The author expresses his deep gratitude to the Thyssen Foundation for financing his research in Canada and India during his past sabbatical.

46. Cf. Badawi, in: King (ed.), *God's Law versus State Law*, London 1995; Simonet, 'L'étranger entre deux droits: les facteurs d'adhésion des populations étrangères aux systèmes judiciaire et juridique français', in: Kahn (Ed.), n. 8, p. 118, 139 ss.; Rude-Antoine, n. 8, p. 161.

47. Cf. Shah-Kazemi, *Untying the Knot. Muslim Women, Divorce and the Sharia*, London 2001, p. 47.

48. Cf. Ibn Baz/Uthaymeen, *Muslim Minorities – Fatawa Regarding Muslims Living as Minorities*, Hounslow 1998, esp. p. 71; The Fiqh Council of the Muslim World League on its 16. session in Mecca, reported in 'A message from Muslim scholars to Muslim Minorities in the West', *Daawah* No. 4 1422 A.H./Feb. 2002, 8, 11. See also the comments of the Muslim lawyer Khaled Abou El Fadl, *Speaking in God's Name. Islamic Law, Authority and Women*, Oxford 2001, p. 269 s.; 170: 'I confess that I find the virtual slavery imposed on women by the C.R.L.O. (the Saudi-Arabian Permanent Council For Scientific Research and Legal Opinions, the author) and like-minded special agents to be painfully offensive and unworthy of Shar'ah. To claim that woman visiting her husband's grave, a woman raising her voice in prayer, a woman driving a car, or a woman traveling unaccompanied by a male is bound to create intolerable seductions, strikes me as morally problematic. If men are morally so weak, why should women suffer?'

In general, there is a remarkable shift towards means and bodies of extra-judicial – alternative – dispute resolution (ADR) in many countries. The advantages of this instrument are obvious. The necessary confidence in persons resolving conflicts and in the quality of their decisions may increase when they are explicitly and unanimously chosen by the parties involved. In addition to that, ADR may provide a relatively fast, cheap and confidential dispute resolution. Specific reasons for ADR with respect to religious or other minorities with an immigration background were already mentioned. Muslims adhering to the rules of traditional Muslim family law would possibly feel ‘respected’ by society as a whole.

The key prerequisites for a successful and fair ADR are an agreement of the parties involved to prefer ADR voluntarily and for common reasons, and qualified arbitrators or mediators applying norms which equally consider the legitimate interests of either party. The question remains if the mere existence of such an agreement is sufficient. Certainly, within the scope of private autonomy agreements between adult and mentally healthy persons are supposed to be valid and fair unless there is any specific evidence for the contrary. However, in the context of migration and societal segregation, formal freedom to agree or not to agree can be factually restricted to only one option, if the relevant party has to expect substantial disadvantages in social life in case of choosing the ‘wrong’ option. In addition to that, according to oriental traditions the ‘weaker’ party usually is not in the position to reject proposals given by the elder (male); therefore, silence does not necessarily mean consent.⁴⁹

Thus, if such factual pressure on the weaker party is not a merely theoretical threat, the official recognition of communitarian bodies for ADR and their decisions could prevent the weaker party from the protection granted by the law of the land and enforced by official courts. Formal equality under conditions of material inequality usually leads to the preservation of inequality. As it was mentioned above, despite various reforms in several Islamic states Islamic Law of personal status does not grant equal rights for females and non-Muslims. We should certainly reject the simplifying picture of Muslim women being suppressed and powerless victims in general. The German Supreme Court has clearly stated that there is no room for the presumption of Turkish wives living in a ‘typical Muslim marriage’ to be deprived from autonomous decision-making in daily life.⁵⁰ Nevertheless, remaining problems, often caused by cultural motivation, are obvious and openly discussed among Muslims themselves. The commissioner for women’s affairs of the Central Council of Muslims in Germany has stated in an interview:⁵¹ ‘Islam is not in need of a commissioner for women’s affairs. It is not Islam who suppresses women, but men. And therefore Muslim women are indeed in need of a commissioner for women’s affairs.’ In addition to that, it has to be noted that Shari’a and ‘Islamic family law’ is far from being a clear and consistent body of rules in practice. Different legal schools

49. This was already acknowledged by many Muslim legal scholars in the Middle Ages discussing the question whether consensus (as a legal-religious source) can be achieved without explicit statements; cf. Jokisch, ‘Ijtihad in Ibn Taymiyya’s Fatawa’, in: Gleave/Kermeli (Ed.), *Islamic Law. Theory and Practice*, London a.o. 1997, p. 119, 126 with further references; Salqini, *Usul al-fiqh*, Damascus 1984, p. 85.

50. Cf. BGH, NJW 1999, p. 135.

51. Cf. ‘Verschleiert, aber selbstbewusst’, FAZ v. 27.02.2001, p. 14.

and opinions in the past and different legislations in the present Islamic world clearly demonstrate a wide range of substantially varying rules and solutions. For example, according to Tunisian Private International Law the application of Moroccan rules of Family law (before the reforms of 2003) contradicts the Tunisian public order, notwithstanding the fact that both countries claim to have founded their Codes of Personal Status on Shari'a rules. In a broader sense, Taj Hashmi, a member of the Muslim Canadian Congress, has expressed his concern that adopting Sharia law 'may legitimize the excesses of Sharia committed elsewhere in the Muslim World', and that Shari'a in its present form is 'neither Islamic nor Canadian in character and spirit'. On the other hand, the suggested application of a 'watered down version of Muslim personal law'⁵² would lead to the question why not applying the law of the land and individually using its scope and means of private autonomy.

As it comes to the present situation in Europe, an extraordinary example of law influenced by Islam is England, where an 'angrezi shariat' (English Shari'a) is obviously developing.⁵³ This seems to be due to the fact that many Muslims in Britain still have strong family relations to their respective native countries on the Indian subcontinent governed by religiously orientated laws in matters of personal status.⁵⁴ In some cases mainly concerning family relations, they seek socially acceptable solutions for legal problems within the Muslim community by the aid of accepted mediators. The Islamic Sharia Councils in England which were established since 1980/82 seem to be examples for such a kind of mediation.⁵⁵ The Councils do not have an official function, but they are occupied especially with mediation in the area of the law of personal status. There are frequent cases in which a Muslim wife has obtained an English divorce which she now wants confirmed according to 'Islamic Law' by the pronouncement of talaq (divorce) by the husband, which leads to the general acceptance of the decision in the social environment within or outside the country. Similarly, very often husbands refuse to divorce although the wife wishes to do so while being reluctant to start divorce proceedings in the civil courts.⁵⁶ Even if the matter does not go to the civil court, the Council's decision may become important; it is not legally enforceable in England, but it seems to be recognised in the state of origin as well as within the religious community.⁵⁷ Convincing the husband to pay the mahr (dower) constitutes a further possible task for the Council. The decisions of the Council appear to be based on a relatively reform-oriented approach to the legal sources, but maintain the traditional framework of Islamic law including the unequal treatment of sexes and religions in general. Thus, the English legal system does not remain untouched by such proceedings: For example, in some Islamic states there is a possibility for wives to obtain a divorce in court on the basis of the khul', which is a contractual or statutory

52. An expression used by Syed Mumtaz Ali, the main promoter of the establishment of an Islamic arbitration board in Ontario/Canada in an Interview on February, 2, 2005 (cf. 'Sharia for Canada', called on 15.09.2005 under <http://www.abc.net.au/rn/talks/8.30/relrpt/stories/s1334120.htm>).

53. Cf. Pearl/Menski, n. 36, ch. 3-81.

54. Cf. Shah-Kazemi, n. 48; Rohe, n. 45, 409, 415 ss.

55. Pearl/Menski, n. 36, ch. 3-81 ss., particularly 3-96; Badawi, n. 47, 75; Shah-Kazemi, n. 48.

56. Cf. Ph. Lewis, *Islamic Britain*, London 1994, p. 119 regarding the circumstances in Bradford.

57. Cf. Pearl/Menski, n. 36, ch. 3-100.

right.⁵⁸ The wife, however, must then pay back the dowry which will very often have been intended to serve as an old age pension. This somehow rewards the husband's persistence in refusing a divorce, which is not acceptable according to the standard of the law of the land. Certainly, the individual personal status is a solely 'private matter'. Nevertheless, the institutions of the law of personal status and especially the balance of rights and duties among the persons involved do not only affect society as a whole, but reflect basic common convictions of this society concerning probably the most important part of social life. Therefore it is upon the local legislator to establish an order of personal status which fulfils the most prominent task of legal orders by granting peace in society.

Thus, on one hand extra-judicial dispute resolution can serve as an instrument to achieve socially accepted solutions within a community living in far-reaching segregation from society as a whole. On the other hand, members of this community who refuse to use the community's special bodies for conflict resolution may easily face reproaches of undermining the community's position, to be a 'bad' member. Accepting such communitarian bodies would thus lead to an ongoing cultural segregation and to a 'culturalization' of individuals seeking their individual ways within broader society. In addition to that, it has to be noted that Shari'a and 'Islamic family law' is far from being a clear and consistent body of rules in practice. Different legal schools and opinions in the past and different legislations in the present Islamic world clearly demonstrate a wide range of substantially varying rules and solutions. Most of the arbitrators involved follow moderate, but still traditional interpretations. This leads to results mostly placing women at a disadvantage in comparison to the existing law of the land.

It is remarkable in this context that the Central Council of Muslims in Germany declared in its charter on Muslim life in German society on February 20th, 2002 ('Islamic Charta'⁵⁹) that Muslims are content with the harmonic system of secularity and religious freedom provided by the Constitution. According to Art. 13 of the charter, 'The command of Islamic law to observe the local legal order includes the acceptance of the German statutes governing marriage and inheritance, and civil as well as criminal procedure.' In the Swiss canton of Zurich, the Union of Islamic Organisations in Zurich has expressly stated in its Basic declaration that the Union does not intend to create an Islamic state in Switzerland, nor does it place Islamic law above Swiss legislation (sec. 1).⁶⁰ The union also expressly appreciates Swiss law of marriage and inheritance (sec. 5.). Similarly, the renowned French imam Larbi Kechat has stated that 'Nous sommes en harmonie avec le cadre des lois, nous n'imposons pas une loi parallèle.'⁶¹ According to experiences in Belgium also, the vast majority of Muslim women living in between the rules of Muslim family law and

58. Cf. Rohe, 'Die Reform des ägyptischen Familienrechts', StAZ 2001, p. 193; Pearl/Menski, n. 36, ch. 3-100.

59. An English version can be found under <www.islam.de/?site=sonstiges/events/charta&di=en> (called on 30.01.2004).

60. Vereinigung der Islamischen Organisationen in Zürich (VIOZ), Grundsatzzerklärung v. 27.03.2005.

61. Larbi Kechat: 'le coran a été relevé au VIIe siècle: dans le contexte socioculturel de l'époque, entretien réalisé par Guy Gauthier', in: *Panoramiques* No. 29 (2^e trimestre - 1997), *L'islam est-il soluble dans la République*, p. 183, 189.

women's rights claims the protection of Belgian substantive law.⁶² One of the few voices publicly demanding the introduction of Islamic law and Muslim arbitration in Germany is the extremist founder of an Islamic centre in Berlin. In a book on 'The Rules of Personal Status of Muslims in the West',⁶³ he constantly declares Non-Muslims to be infidels and rejects German legal rules and judgments as 'rules of infidelity'.⁶⁴ Consequently, he urges Muslims in Germany to maintain the rules of traditional Islamic family law. He even argues that the traditional punishment for adultery – flogging or stoning to death – should be applied on Muslim women in Germany (!) who are married to a Non-Muslim, even if they are unaware of the 'applicability' of these rules in their cases.⁶⁵ He denounces the German system of social security to be an evil, because it grants wives independence from their husband's maintenance payments and thus enables them to 'disobey' their husbands.⁶⁶ The danger of empowering such persons by officially accepting them as arbitrators and opening ways for them to funds is obvious. In sum, except in the UK the European way of dispute resolution among Muslims is not communitarian, but the 'common' way of either formal judicial or simply informal dispute resolution. The range of diversity granted by the law of the land itself seems to meet the needs and creeds of the overwhelming majority of Muslims in Europe quite well.

3 Conclusion

According to European legal orders, the scope for the application of 'foreign' norms including Islamic ones is drawn by a mix of elements between the two poles of assimilation and segregation.

3.1 Aspects of assimilation/integration

The legal order territorially applicable in the country of immigration finally decides conflicts between its own rules and 'foreign' norms. This is a model of assimilation/integration on the basis of secular legal orders bound by constitutional principles with respect to the protection of Human Rights, Democracy and the rule of law.

The model of legal assimilation intrinsically implies legal protection of every person present in the respective state, especially the protection of Human Rights including freedom of religion against state interference, but to a certain extent also actively granting participation in society. This represents a system concentrating on individual rights rather than a system of personality (legal segregation according to the

62. Cf. Foblets/Overbeeke (n. 8), 34.

63. Slim Ibn 'Abd al-Ghanī al Rāfi'i, *ahkām al-ahwāl al-šakhīsiya li-l-muslimīn fī al-gharb*, Riyadh 2001; cf. Rohe, 'Islamisten und Schari'a', in: Berlin, Senatsverwaltung für Inneres, Islamismus, Berlin 2005, p. 98, 109 s.

64. Op. cit., n. 63, 618.

65. Op. cit., n. 63, 394.

66. Op. cit., n. 63, 79.

adherence to a certain religious community) with respect to the application of religious rules.

3.2 Aspects of segregation/acculturation

With respect to 'international' concepts of living, in the field of Private International Law (Conflict of Laws), especially in family law and law of succession the 'native' legal rules can be applied within the limits of public policy – a model of partial segregation.

Important parts of substantive private law (e.g. contract law including matrimonial contracts) are granting freedom of legal self-determination according to individual preferences, including religiously motivated forms of transactions. This leads to individual autonomy/segregation under the umbrella and within the frame of a uniform law.

In some areas of law, a number of European legal orders integrate former 'foreign' legal identities – a model of partial integration by legal segregation (e.g. 'Islamic marriage' rules in Spain, 'Islamic mortgages' and adoption in the UK).

Religious mediation and arbitration may prove to be helpful instruments for an efficient, individual and sustainable resolution of conflicts. Nevertheless, there are considerable disadvantages concerning the structural deficiencies in the balance of power of the persons involved and the danger of empowering extremists. They prevent the official recognition of Islamic arbitration instruments in Europe. Instead of that, Muslims should be encouraged to use the already existing instruments of private autonomy and to participate in the development of European legal orders within their indispensable frame.