

**THE INSERTION OF ISLAMIC LAW IN THE EUROPEAN  
SYSTEM OF LAW AND THE INFORMAL SETTLEMENT  
OF DISPUTES OF MUSLIMS IN GERMANY**

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It gives me great pleasure to appear for the first time in this city of ancient and excellent academic repute. My deep appreciation to RIMO, and congratulations to reaching its 20 birthday, a tribute to the Dutch pragmatic cooperativeness.

I may not personally correspond to the stereotypes you have in your heads about Germans, but I am a German citizen, naturalized, a wonderful word. I am now part of the local natural scenery. I grew up in a Muslim community in Central India and have been teaching Islamic and comparative law for over 17 years in central Europe. I have published several articles on the subject.

As the title of my lecture indicates, the first part shall deal with the formalities of the application of Islamic laws and the second part with the informal.

The application of Islamic law in central Europe in particular arises in all areas of law: administrative, internal revenue, and personal status and inheritance.

But there are basically only two categories of Islamic law decision-making by the courts in central Europe. In the first category of cases, the court is called upon to decide whether it will itself apply and interpret Islamic law directly instead of local national law. Examples of this category come mainly from divorce and custody or inheritance cases. In the second category, the court has to decide whether it will recognize Islamic law as applied and interpreted by a private party claiming the benefits or obligations of Islamic law. This is, for example, the case when women demand the right to wear the *hijab* in public work places or when a husband wishes to claim his second wife in a polygamous marriage for tax benefits.<sup>1</sup>

In both categories of Islamic law decision-making, the parties may be central European citizens or non-citizens.

Until recently the vast majority of court cases fell in the second category, that is, application of Islamic law as a foreign law for non-

citizens residing in Europe. This derives from the continental legal tradition of *lex sanguinis* as opposed to the *lex domicilis* as one finds in the USA and the UK. One can debate whether the *lex sanguinis* approach in itself hinders the integration of Muslim immigrants or not. Certainly Muslims whom I have interviewed who are not citizens are taken aback when they are informed that they are still subject to their national Islamic law. They find themselves sometimes in a schizophrenic situation in more than one way. They are subject to the local criminal and administrative law, but remain subject to foreign personal status law, the law of their country, in family and inheritance matters regardless of how long they have been absent from "home" or *Heimat*. Many, an Iranian for example, who fled the orthodox clerical regime of Iran in the 1980s and adopted central Europe as the land of freedom from theocracy, find themselves much to their horror still in the clutches of the Iranian Shiite laws when they come before courts in Germany because of family disputes. The judge, as one young Iranian told me, acts in effect as a proxy for the distant *qādī*. I might add that it is equally a tremendous surprise to the locals, the average non-Muslim Christian central European citizen, when informed that Islamic law is applied by European courts.

In what percentage of reported and unreported cases the central European courts have to apply Islamic law I have not yet calculated in fact yet. As to the nature of the Islamic law to be applied, it is hardly the classical Islamic law as we know it, which the judges have to acquaint themselves with. They have to deal with the national intricacies and customary variations of Moroccan, Jordanian, Egyptian, Pakistani, and Tunisian family law statutes and court decisions. This is a whale of a job that is more demanding than I think most European judges and lawyers realize. Islamic law has far more depths than many of them are willing to delve into.

There is only one Islamic country whose laws Germany is obliged to apply according to treaty. That is Iran. Since 1929 Germany and Iran guarantee mutual application of the personal status laws for their respective citizens, that is, Iranian judges have to acquaint themselves with German law and apply it to German citizens living in Iran and vice versa German judges are to apply *shari'a* law to Iranians living in Germany.<sup>2</sup>

My survey of court cases involving the application of *shari'a* in personal status matters has shown that the majority of cases involve Iranians. The treaty with Iran has had an impact in one regard compared to cases involving no treaty. This has been in regard to the principle of

*ordre public*. As you well know, an exception is made to the application of foreigners' law if it is found to violate the *ordre public*, that is the basic sense of local justice and fairness and basic principles. I will give you an example. The Bundesgerichtshof (BGH) had to decide in 1992<sup>3</sup> about the custody of the children after the divorce of two Iranians. The husband demanded that he be awarded custody as Iranian law would have allowed. At the first instance he lost. At the second appellate instance (Oberlandesgericht, OLG), the father won. One reason the court gave was that not to apply Iranian law would endanger the mutuality of the treaty agreement, implying that rights of German citizens in Iran might be put in danger of not having their rights properly applied. The point of such a treaty, as the court explained, is to prevent having a foreign legal culture and way of thinking imposed on persons who retain their citizenship and religious faith in the midst of strangers.

As I said at the start, up until recently most reported court cases on the application of Islamic law in central Europe involved non-citizens. This is changing. As a few more Europeans become Muslims and more immigrants adopt central European citizenship, judges are faced with more cases of the second category, that is, of having to recognize private persons' own interpretations of their religious Muslim law. In other words, the judges are being confronted with deciding whether to recognize Islamic social practices or not. These cases are highly controversial. One can question whether some of the administrative authorities challenging the application of Islamic practices and the courts deciding on these challenges are making legal mountains out of social molehills.

But certainly in the first category of Islamic law cases in which the courts interpret and apply Islamic law to the parties concerned, the large majority of parties are still non-citizens. I have found one recent reported case (Bamberg OLG 1997)<sup>4</sup> in which the parties were converted Muslims. The dispute concerned the payment of the *mahr*, the dowry of about 10.000 Euros, upon divorce. The couple had stipulated that amount as the *mahr* when they got married. The court had to decide whether it should apply the Islamic law of *mahr* as the law of the contract as simply treat it as a matter of an agreement under the law of the land or as an arrangement of post-divorce maintenance.

As this reported case shows, one of the major difficulties for central European courts in applying Islamic law lies in the classification system that the conflict of laws imposes. The first step the courts have to take is to ask how the action being brought is to be classified. Let us take the

*mahr* cases to illustrate this point. Is a *mahr* dispute an action in divorce? Is it a claim that derives from marriage without community of property? Is it an action in post-divorce maintenance? Is it an action in contract? Is it a debt action? The answers to these questions are necessary because they determine the law that will be applied, i.e. that of nationality of the parties or that of the marital domicile or the law of the domicile of the claimant if maintenance is at stake. In other words, is it the foreign law or the local central European law that will govern the case? Secondly, the nature of the action will determine which court has jurisdiction over the matter: the family law courts or the civil law division. Procedurally this can make a huge difference.

The courts do not all agree, for example, on how to classify *mahr*. Some say it is a debt claim (OLG Zweibrücken, 1986).<sup>5</sup> Others say that it is a divorce action (Amtsgericht (AG) Frankfurt 1988).<sup>6</sup> Others say that it is a contractual claim (OLG Bamberg 1997,<sup>7</sup> BGH 1986).<sup>8</sup> One court (Bremen OLG 1980)<sup>9</sup> has ruled that it can only determine what kind of legal institute *mahr* is by determining what social function *mahr* serves in Islamic law and society. What is striking, however, is that the courts have not delved consistently into the issue of whether they should base their classifications of a legal institute like *mahr* on how it is classified in the foreign law being applied. For example, if *mahr* is covered in Jordan as part of the Family Law Code, is this to be taken a given that *mahr* is a marital matter and not a contractual matter? Or does the central European court have to look at how the *shari'a* jurists and *fuqahā'* have classified *mahr* as a civil contractual or debt matter in order to better interpret the Jordanian statute (1970 Gutachten)?<sup>10</sup> I am afraid that even if the *shari'a* jurists were consulted, the European courts might be disappointed if they seek a social function explanation of something like the *mahr*, for social explanations are not the approach classical Islamic jurists take as a rule.

So after laying this background by way of introduction, allow me to turn to the question of *ordre public* and Islamic law. I maintain that there are two different approaches taken depending on the category of decisions about Islamic law. In the first category of decision-making, that is, when the courts have to apply Islamic law as a foreign law, the courts have been generous on the issue of *ordre public*. They have hardly found Islamic law repugnant to *ordre public*, whether in matters of *talāq*, *mahr*, or *hadāna*, custody of children awarded to fathers. The parties have argued at various times that these institutes are contrary to *ordre public*, but these arguments have been by and large ignored. We shall go into these cases in more detail later. In the second category of decisions-

making about the application of Islamic law, that is, the courts are confronted with whether to recognize a social or socio-legal practice of Muslims, *ordre public* is not as such a matter of interpreting a statute. *Ordre public* is an implicit issue. The practice is found for all essential purposes as violating basic legal principles of the local society and legal culture. It is not right, for example, for a school teacher to wear a *hijāb* in public service because this violates the principle of religious neutrality.

As for *ordre public* when Islamic law is applied as a foreign law, let us examine more closely the arguments put forth by the parties and the courts.

In regard to *mahr*, the German husband of an Iranian wife argued once that the *mahr* is repugnant to *ordre public* (OLG Köln 1983)<sup>11</sup> as an unjust enrichment of the wife. The court rejected this view on the ground that it ran against precedent. The courts had long been convinced that *mahr* was not a brideprice and could legitimize it on the basis of functional arguments. The *mahr*, it was said served a useful financial function in a family law system that did not allow a divorcee to get post-divorce alimony. The court did not want to revisit these arguments. There is no evidence in the reported decision that the lawyer of the husband brought forth arguments that such a view of *mahr* would not hold water with classical *shari'a* jurists.

In regard to Islamic rules that discriminate against women, most of the courts have no problems by and large when applying Islamic law as foreign law. For example, in a succession case (OLG Hamm 1992),<sup>12</sup> the deceased was an Iranian Bahai. The court applied Islamic Iranian law. In effect, it implicitly decided that it had to respect the Islamic law which refuses to recognize the Bahai as a religious community with the right to apply its own non-Islamic law, as do other religious communities in Iran, even though this is against the principles of religious tolerance in central Europe. The surviving German widow, however, seems not to have complained about the issue. She complained about the paucity of her Qur'anic share in the estate, only 1/8 compared to the 1/4 her husband would have received as a widower if he had survived her. She argued this violated the basic constitutional right to gender equality. The court was not impressed. It had no problem with the Qur'anic differential. It argued that the husband had more financial duties than the wife. In effect, the court would not recognize that the wife's contribution to raising the children and doing housework was the equivalent in financial terms to the husband's contributions to the family. No Islamic law was cited to support the court's position. Only the judge's patriarchal logic was on

display.

In *ṭalāq* cases the same issue of gender discrimination has been raised. The majority of courts have no problem with allowing *ṭalāq* even though it is acknowledged that the wife does not have an equivalent right to divorce without reason. I know of only one reported decision to the contrary (Frankfurt AG 1988).<sup>13</sup> In that case the husband (Iranian) had delivered a *ṭalāq* to his wife, also an Iranian Muslim. Both applied to have the *ṭalāq* recognized by the state court as divorce. The court refused on the ground that *ṭalāq* violates *ordre public*. It violates the basic principles of gender equality. The wife had no right under Islamic law in Iran to also pronounce *ṭalāq*. Not even the wife's right to *khul'* divorce is quite the equivalent of *ṭalāq*, for the current interpretations of *khul'* in the Islamic world require that the wife give a ground for wanting divorce, that is, that she is unhappy with her husband and it would be hardship to remain married to him. Furthermore, she has to her divorce sanctioned by a court. In the case of *ṭalāq* the husband does not have to condition his *ṭalāq* on the basis of unhappiness with his wife.

In an important case of post-divorce custody (BGH 1992),<sup>14</sup> the first instance court found that giving the Muslim father preference in custody was against *ordre public*. It could not be presumed that giving custody to the father was in the best interests of the child and the burden of proof could not be placed in effect on the mother to show the contrary. The court used its own powers to prove that it was in the best interests of the children to stay with the mother. When the father appealed, the higher court gave him custody. The court said that the principle of gender equality is not enough to justify repugnance to *ordre public*. When the mother appealed to the next highest level, the court ruled that this was not a matter of gender equality. At stake was the constitutional principle of the best interests of the child: which parent would be best for realizing the child's constitutional right to development of its own personality. But the court did suggest a possible compromise solution: The father could be awarded control over the finances of the children while the mother had actual custody of the children. What was left open was whether a court may define what is necessary for the development of the personality of a child to fit into a Muslim community differently than what is necessary for the personality of a child who develops in a non-Muslim community. Which parent would best help a child to develop notions of gender equality might be a consideration in such cases. So the issue of gender inequality in Islamic law of custody has been skirted by the courts and not confronted head on.

In a most recent custody case last year (OLG Nürnberg 2001),<sup>15</sup> the court totally rejected a Kurdish Muslim father's argument that the principle of best interests of the child includes examining which parent is best capable of passing on the Muslim faith and the tradition of circumcision. The Armenian mother did not deny her total disinterest in religious upbringing of their three year old son. The court argued that it is not bad for a child to be raised without religion. The child could rely on public state institutions like the kindergarten and the school later on to find its own value system!

As said in the above examples of *ordre public*, these are mostly cases involving the application of Islamic law as a foreign law. In regard to the categories of cases in which an Islamic socio-legal practice is to be recognized, such as wearing the *hijāb*, we can trace a radical change in attitude. In the 1980s, Muslim women sought to have the right to take German passport photos with their *hijāb* on their head. Reported decisions from the Administrative courts show that this was allowed as long as the reason for wearing the *hijāb* was religious (Verwaltungsgericht (VG) Wiesbaden, 1984,<sup>16</sup> VG Berlin 1989)<sup>17</sup> and as long as the woman was in the habit of wearing the *hijāb* on a regular basis and could be so identified. Furthermore, in one instance Muslim girls were allowed to excuse themselves from sport in school because they had to wear the *hijāb* and special clothing for religious reasons (Oberverwaltungsgericht (OVG) Lüneburg 1991).<sup>18</sup>

Matters began to take another direction. If a Muslim schoolgirl did want to excuse herself from sport and insisted that she could still participate wearing her *hijāb* (just like Iranian girls play soccer wearing the *hijāb* and long socks), the school was given the right to prevent her (VG Köln 1992), girl in a Catholic school).<sup>19</sup> Nor were Muslim parents given the right to have separate swimming lessons for their daughters at school, that is separate from boys (VG Köln 1992, *supra*) for religious reasons. Implicitly this was too much for the *ordre public*. Here I am using that word in the broadest sense, and not in the narrow legal sense. Even the President of the Constitutional Court in Karlsruhe, Jutta Limbach, was quoted in the press as saying that the *hijāb*, the scarf, is a measure, whether seen as religious or not, which marginalises the woman.<sup>20</sup> This implies without saying it out loud that the *hijāb* is against the *ordre public* of gender equality.

It is with this in mind that I think we have to look at the most recent controversial cases in which the courts are called upon not to apply Islamic law, but to recognize or prevent certain Islamic practices whether

of citizens or non-citizens as a matter of the administrative order of the state.

One of the most extraordinary cases involved again the passport photo of a Muslim woman. The case law up to now as said permitted Muslim women who want to wear the *hijab* as religious dress to have passport photos with the *hijab*. In 2000 there arose the opposite case. Muslim women did not want to have their passport photos wearing the *hijab* while the government administrators wanted them to wear the *hijab* for purposes of getting a passport. Two Iranian women sought political asylum in Germany. They were refused and had to be returned home. But they had no passports. In order for the German police to get documents from the Iranian authorities for their return, the women had to take photos wearing the *hijab* as required by the Iranian authorities. The foreign persons police insisted that administrative law required the women to cooperate in obtaining necessary documentation. The women insisted that their religious freedom was violated if they were forced to wear the *hijab* which has been regarded by court precedent as a religious legal requirement. The administrative court (Verwaltungsgerichtshof (VGH) München, 2000)<sup>21</sup> ruled in favor of the foreign persons police. The court argued that the *hijab* is not regarded as a religious obligation, even in central Europe. Islam has only five essentials: the pilgrimage, prayer, fasting, *zakāt*, and recognition of Muhammad as the Messenger of God. Wearing the *hijab* is not among these duties. In this way the court showed that it had read all the wonderful literature that the churches and governments in Europe are publishing on what is Islam in order to educate the public. The court also rejected the argument that the *hijab* violated the principle of gender equality. The court found that a higher constitutional principle was at stake, and that was the duty to have proper documentation in order to end an illegal stay. The case went to the constitutional court sitting under the presidency of Jutta Limbach. Unfortunately (from the point of view of legal research, but not from the point of view of the women), the women solved the case by emigrating to the USA.<sup>22</sup>

The ruling of the administrative court has been contradicted in other cases recently dealing with the wearing of *hijab* in public institutions. While Muslim school girls are permitted to wear the *hijab* during school, their teachers are not necessarily allowed. This is a matter of state or municipal administrative law. At the moment there are different opinions. Düsseldorf has announced that it has no problem with Muslim teachers wearing the *hijab*.<sup>23</sup> But Heidelberg, Stuttgart and Niedersachsen have

problems. The city of Heidelberg refused a Turkish Muslim woman the right to wear the *hijab* while working in a municipal kindergarten (BVG 1999).<sup>24</sup> In Niedersachsen a converted Muslim woman, a teacher of art and German, was permitted at the first instance of an administrative proceeding to wear the *hijab* (VG Lüneburg 2000).<sup>25</sup> The reason was that no one should be disadvantaged in getting civil service employment because of their religious or political belief. Wearing a *hijab* would not in itself prevent the teacher from exercising her teaching duties in an objective and fair manner. Furthermore, the school is a place where children learn about a plurality of beliefs and attitudes and tolerance. It was regarded as like wearing a Jewish *kippa*. At the appellate level, this position was overturned. The appellate decision was handed down after September 11th (OVG Lüneburg 2002).<sup>26</sup> It was found that wearing the *hijab* would cause confusion and conflict among the students. Keeping order in school is more important than maintaining religious freedom. The *hijab* was designated no longer a legal religious requirement, but rather as a symbol of an extremist political position. The court even added that the *hijab* is a symbol of gender discrimination. A *hijab* wearing teacher would send the message to Muslim girls that they are inferior.

Similar rulings have been made in Stuttgart (VG Stuttgart 2000)<sup>27</sup> and Baden Württemberg (VGH Baden Württemberg, 2001)<sup>28</sup> against public school teachers wearing the *hijab*. The reasoning in these decisions differ, however, from that in Niedersachsen. The Administrative in the Stuttgart and Baden Württemberg courts stress three arguments:

- 1) The parents and students would be upset (even though it is only the school administration which has complained not the parents and students and no conflicts had occurred during her time of practice teaching).
- 2) The teacher is a civil servant and civil servants are required to be neutral and respect the rights of parents and students.
- 3) The state is not allowed to facilitate the expression of any one religious belief and the *hijab* is a demonstrative religious declaration.

A fourth reason added in Baden Württemberg was that the state constitution requires the schools to inculcate Christian cultural values, not necessarily the Christian religion, and a Muslim teacher wearing a *hijab* could not accomplish this. I do not believe that such an argument would be acceptable on human rights grounds.

What constitutes Islamic religious requirements has been expanded with the decisions allowing animal slaughtering without sedatives. Both

Muslims and very orthodox Jews (in France)<sup>29</sup> have won the right to undertake slaughtering because their religious rules require this,<sup>30</sup> even though ritual slaughtering is not listed as one of the five pillars of Islam.

What do the Muslim communities do among themselves to solve conflicts before going to court?<sup>31</sup> In regard to *mahr*, many in the convert community decide that the *mahr* has to be paid at the time of marriage. Deferred *mahr* is discouraged. In this way, should the couple divorce, the issue of *mahr* has already been solved and need not be part of the divorce litigation. When it comes to entering a temporary marriage contract, the convert community does not encourage this. Nor does the Turkish immigrant community. In the Asian immigrant community this is encouraged in order to avoid accusations of illicit relations. Among women there is little discussion about the diversity of legal opinions on women's rights in Islamic law.

### Conclusions

The application of Islamic law in Europe reveals many cracks. There is inconsistency and there is great emotion. Discrimination against women in Islamic law has been deemed constitutionally tolerable for purposes of family matters, but intolerable for purposes of preserving Christian culture. The right to employment without religious discrimination has been displaced by imagined fears of unconscious missionizing and riotous behavior in the schools. Finally, there is rather superficial knowledge of what is required in Islamic law, the penalties connected with certain behaviors, and the plurality of juristic opinions. The European courts still have to learn how to wade through the wealth of that knowledge and know how to use it in conjunction with basic principles of European legal culture.

To achieve this task, the European jurists may have to be prepared to be less Eurocentric and learn from other countries which have small but important Muslim minorities, as in India, South Africa and Tanzania.<sup>32</sup> The state courts in these countries do not hesitate to actively engage in the formation of Islamic law and adapt it to contemporary circumstances as well as to subject it to constitutional principles. In Europe, this would entail a new approach to church/state relations. I am not sure Europe is prepared to go this far. Here I am being very daring. A new approach would entail a revolutionary evolution of the Christian churches, especially the Catholic church, which enjoy to this day

exemption from being subjected to some basic human rights principles, e.g. gender equality and democratic participation.

### Notes

- 1 Finanzgericht Münster, 25.03.1988, *Bundessteuerblatt* 1988 – Teil II, Nr. 10, S. 584.
- 2 See Chris Jones, "Die Anwendung des islamischen Rechts in der Bundesrepublik Deutschland", *Deutsche Richterzeitung*, August 1996, 322-328.
- 3 14.10.1992, *StAZ* 1993, 5; *IPRax* 1993, 102.
- 4 Az.: 2 UF 257/96, judgment on 13.02.97; Bundesgerichtshof, *NJW* 1999, 575.
- 5 Internationales Privatrecht: Rechtsprechung 1986, No. 150.
- 6 *IPRspr.* 1988, No. 75.
- 7 Oberlandesgericht Bamberg, Az.: 2 UF 257/96, appeal to BGH in *NJW* 1999, 575.
- 8 *IPRax* 1988, 109.
- 9 *FamRZ* 1980, 606.
- 10 IPR 1970, No. 38 (Gutachten zum internationalen und ausländischen Privatrecht).
- 11 *IPRax* 1983, 73.
- 12 *IPRax* 1994, 49; *FamRZ* 1993, 111.
- 13 *IPRspr.* 1988, Nr. 75; *IPRax* 1989, 237.
- 14 *StAZ* 1993, 5; *IPRax* 1993, 102.
- 15 *FamRZ* 2001, 1639; *NJWE-FER* 2001, 284.
- 16 *KirchE*, 22, 134 (1984).
- 17 *KirchE* 27, 17 (1989).
- 18 *KirchE* 29, 94 (1991).
- 19 *KirchE* 30, 320 (1992).
- 20 Berlin taz 22.11.2000.
- 21 *NVwZ* 2000 952.
- 22 2 *BvR* 713/00, 4.4.2001.
- 23 Internationale Rundschau der MIZ Meldungen 2560-2588, Europa-Deutschland, No. 2561.
- 24 1 *BvR* 961/99, 1 *BvR* 961/99 of 22.6.1999.
- 25 *NJW* 2001 767, Az.: 1 A 98/00 of 16.10.2000.
- 26 Az.: 2 LB 2171/01 of 13.03.2002.
- 27 Verwaltungsgericht Stuttgart, *KirchE*, Bd. 38.
- 28 Verwaltungsgerichtshof Baden Württemberg, Klägerin gegen Oberschulamt Stuttgart, Az.: S1439/00.
- 29 European Court of Human Rights, Case of the Jewish Liturgical Association Cha'are Shalom ve Tsedek v. France, Judgment 27.06.2000.

- 30 Cf. Bundesverfassungsgerichtshof, 1 BvR 1783/99 of 15.01.2002.
- 31 C. Jones-Pauly, "Marriage Contracts of Muslims in the Diaspora: Problems in the recognition of mahr contracts in German law", lecture, *The Islamic Marriage Contract. An International Conference*, Harvard Law School, January 29-31, 1999.
- 32 See for example, C. Jones, "The Law and Morality of Support in the Wider Family in Germany and Tanzania: Changing Perceptions of Family Forms", in: John Eekelaar et al., *The Changing Family/International Perspectives on the Family and Family Law*, Oxford: Hart, 1997, pp. 265-286.