APPLICATION OF SHARI'A RULES IN EUROPE—
SCOPE AND LIMITS

BY

MATHIAS ROHE (guest editor)
Nürnberg

I. Introduction

The presence of Muslims in Europe dates back to the Middle Ages. Despite this fact, a stable presence of significant Muslim groups—now an overall estimated number of 10-15 million—in western, central and northern Europe is a relatively new phenomenon. Millions of Muslims voluntarily stay in European countries whose majority population is non-Muslim. This presents a new situation for Muslims as well as for the countries they are living in and the societies they are part of.¹ Most of these Muslims were born and grew up in Europe, or at least intend to stay here permanently. The former idea of a temporary stay for work or educational purposes turned out to be an illusion. Therefore, the days of provisionary solutions in the organisation of individual and social life are over. More and more Muslims try to define their identity and their status in European societies. At the same time, European legal orders have to cope with this new religious identity in its various dimensions.

When it comes to the situation of Muslims in Europe, one first has to keep in mind that the major problems concerning the life of Muslims do not concern their belief as such or their religious needs. These problems concentrate on issues such as the lack of knowledge of the dominant language, a widespread lack of higher

education and comparatively high degrees of unemployment. Besides that, one should avoid to consider Muslims (as well as Non-Muslims) to be always unanimous in their opinions. There is a lot of pluralism within Muslim groups, and a lot of conflict as well, which for the most part are not rooted in religion. The Muslim communities in Europe for example are not unified at all; there are still “Turkish”, “Arab”, or “Bosnian” mosques to be found where only believers of a certain ethnic background usually pray.

Many Muslims in Europe still tend to seek practical solutions for organising their lives in accordance with the demands of European legal orders and Islamic religious commands. It is only within the last few years that Muslims have also tried to formulate theoretical statements to clarify their position with regard to possible conflicts between legal and religious norms, and to find adequate solutions for such conflicts. 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 and consider the 'superficial' rules of mediaeval *fiqh* (Islamic jurisprudence) to deserve little importance.

Nevertheless, a clearly 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 fulfilment of Islamic rules which are part of the *shari’ā*—within the framework of European legal orders and societal needs.

II. What is *shari’ā*?

In a literal sense as well as according to a qur’anic verse (XLV:18), *shari’ā* (*ṣari’ā*) means “the path which has been prepared, the

---

divinely appointed path". Technically, there are two current definitions remarkably differing from each other and often causing misunderstanding in public discussion. In a broader sense, sharî‘a refers to any kind of religious and legal rule prescribed by Islam. This includes rules concerning the duties of worship or alms-giving as well as those regulating contract, family or penal law. Most of the Non-Muslims in Europe as well as many Muslims especially from Turkish origin would understand the term sharî‘a in a narrower sense, confining it to the legal rules regulating personal status, family and inheritance and corporal punishment. Whereas the observation of rules concerning prayer, fasting etc. usually does not cause any problems, the application of the latter would lead to serious conflicts. This is due to the fact that the legal discrimination between the sexes or between religions which is still to be found in the traditional formulation and interpretation of legal rules, clearly contradicts the human rights Provisions in European constitutions and the ECHR. The same holds for the draconic forms of corporal punishment for certain offenses which is still practiced in a number of Islamic countries. There is a widespread fear that the Muslim presence in Europe could lead to the (re-)introduction of such a kind of rules in the long run. Therefore, two general aspects should be kept clear from the beginning: First, the fundamental principles of democracy, the rule of law, the protection of human rights are not submitted to any legislator possibly intending to reduce or to abolish them (cf. e.g. Art. 79 sect. 3 of the German Constitution). Second, the vast majority of Muslims in Europe supports rather than rejects these principles. Regrettably, there is a number of

---


4 In many Islamic countries legal reforms aiming at improving the legal status of women and of Non-Muslims have been promulgated or are in course. Nevertheless, it was only the Turkish legislator who abolished such discriminating rules almost in total (cf. Christian Rumpf, Einführung in das türkische Recht, München 2004, p. 128).


6 It should be noted that the very same kind of rules was part of European legal orders for centuries, especially those discriminating between the sexes.
extremists who oppose the European constitutional orders verbally or even by using violence. Of course, they have to be subjected to all security measures granted by constitutional security laws. Nevertheless, there is a huge number of sharīʿa provisions which does not contradict European laws, and which therefore may be fulfilled according to the constitutional guarantees of religious freedom or within the framework of the existing laws. One should always keep in mind that it is solely upon the ruling law of the land to decide whether and to which extent such provisions might be applicable in Europe. This is a kind of meta-rule governing the application of “foreign” provisions all over the world in every legal order whatsoever.

III. Levels of application of sharīʿa rules

With regard to the application of Islamic rules in Europe, we have to distinguish between religious and legal issues. Religious issues are regulated by the European and national constitutional provisions granting the freedom of religion. It is mainly in the sphere of religious rules—concerning the ʿibādāt (dealing with the relations between God and human beings) and the non-legal aspects of the muʿāmalāt (concerning the relations between human beings)—where a European sharīʿa is possibly developing.7

1. Religious provisions

Applying religious provisions is fundamentally different from applying legal norms. This is due to the fact that in most European states religious freedom is far-reaching. European constitutions, like article 9 of the ECHR, guarantee that people will not be deprived of the basic requirements for complying with the

demands of their religion. No Muslim will be prevented by the state from adhering to the ‘five pillars’ of Islam, for example. Everybody may consult renowned Muslims or Muslim institutions for advice in religious matters, which opens up broad space for actively practicing one’s religion privately as well as in public.

Religious freedom in this sense includes all kinds of religions, not only those of the majority of the population or the established ones. Furthermore, according to these provisions religion is not restricted to the private sphere; its manifestation in the public sphere is protected as well. Nevertheless, there are some differences of application between several European countries. This is due to differing convictions as to how far the distance between the state’s activities and religions should be. France or Switzerland for example have chosen a strict separation between state and religion. Therefore, it is not allowed for officers or even for pupils in France according to recent legislation to show ostensible religious symbols during their working times e.g. in schools.

The situation in Germany is somewhat different. The most important provision to regulate religious affairs is article 4 sections 1 and 2 of the German Constitution. This article—as well as article 9 of the ECHR, which is less far-reaching in granting rights—is not limited to private religious conviction. It also grants the public manifestation of belief, and the state is obliged to take care that this right is not unduly limited. Of course there are legal limits to any rights including religious ones. Nobody for example would be allowed to threaten others on religious grounds.

Furthermore, article 3 section 3 of the German Constitution prescribes that no one may be discriminated against, or given preferential treatment, on the basis of his religious belief.

These legal provisions prove that the secular legal orders in Europe do not refuse religion and are not at all anti-religious (lā-
as is often wrongly assumed. On the contrary, they open a broad space for religious belief and practice. It is only that the state itself has to be neutral and is prevented from interference with religious affairs. The most important result of this legal secularism is the equivalence of religions, including the freedom not to adhere to any religion or the freedom to change one’s religion. According to unanimous conviction in Europe, this neutrality is a prerequisite for true religious freedom which cannot be dispensed with. A prominent French Muslim accordingly calls this a “positive neutrality” (i.e. towards religions).

One practical example for the scope and limits of religious freedom in Germany concerning Muslim religious practice is halāl slaughtering. Halāl slaughtering is allowed in most of the member states of the European Union (except Sweden) since a long time. In Germany, this was different until recently, when the Federal Constitutional Court decided on 15 January 2002 in a landmark decision that the freedom of religion includes the right for Muslims to slaughter animals according to their imperative religious commands. This includes forms of slaughtering without a pre-stunning of the animals, which is generally forbidden by the Animal Protection Act. According to article 4a of this law a religious community may apply for a licence to carry out the slaughtering according to such imperative commands. It should be mentioned that the Jewish community had the licence to slaughter without pre-stunning according to their religion until the takeover of the Nazi government in 1933 and again since the defeat of the Nazis in 1945. Concerning Muslims there were two problems to be solved. First, some courts did not consider the Muslim applicants to form a religious community in the legal

---

10 Cf. Heiner Bielefeldt, Muslime im säkularen Rechtsstaat, Bielefeld 2003, p. 60 for critical Muslim voices.
11 For the intrinsic connection between full religious freedom and secularism cf. Bielefeldt, n. 10, pp. 15.
sense. They held a—legally wrong—concept of a religious community which implied a structure similar to Christian churches. Muslims, who historically were not used to develop comparable structures, would then be excluded to exercise obvious religious rights for such superficial reasons. The Constitutional Court therefore stated that a group of persons with common beliefs organised in forms whatsoever could fulfil the prerequisites of the law in that respect.

Second, the question was raised whether there are in fact imperative rules in Islam for slaughtering animals without pre-stunning. According to a fatwa (legal expert opinion) issued by the mufti of Egypt in the 1980es of the 20th century and others\textsuperscript{15}, the methods of slaughtering common in Europe would be acceptable to Muslims. Therefore, rules of slaughtering without pre-stunning were denied to be imperative.\textsuperscript{16} This approach, however, was not in consistence with the demands of the state’s neutrality towards religions. The state as well as the courts are not entitled to decide in the case of several contradictory religious doctrines which of them is to be held as being “true” and therefore binding. It is up to the believers themselves to decide whom to follow. The Constitutional Court pointed out that in order to obtain the required licence it will be sufficient if the demanded method of slaughtering has reasonable religious foundations. In my opinion this was the most crucial point to the judgment with far-reaching consequences for the status of Muslims in Germany as a whole: For the first time it was made clear that it is solely upon the Muslims in Germany to decide on their creed and needs.

The intention of the law to protect animals as far as possible was not neglected in this decision: Only persons who are known to be capable to slaughter animals in a decent manner like butchers are likely to obtain a licence to do so. Two federal organisations of Muslims in Germany then created a joint commission to work

\textsuperscript{15} Statements of the mufti of Egypt and president of the al-Azhar University dated 25.2.1982 and the Islamic World League in Jidda 1989 and other authorities; cf. OVG Hamburg NVwZ 1994, pp. 592, 595 s.

\textsuperscript{16} Cf. BVerwG, BVerwGE 99, p. 1; see also BVerwG NJW 2001, p. 1225.
out a paper on the details and to co-operate with the relevant bodies of administration.

To my personal regret there is an ongoing and at times very emotional discussion on this judgment. The protection of animals—a very important issue for vast groups of citizens—is considered to be consecrated for “mediaeval religious practices”. It did not even help that the Constitutional Court itself referred to the lack of evidence for greater pain for animals by expert slaughtering without pre-stunning in comparison with the current methods of slaughtering, not to speak of the really cruel methods of transportation of animals for slaughter throughout Europe. In the meantime, the Court of Appeal in administrative cases of Hessen decided that a Muslim butcher may successfully apply for the permission to slaughter animals on Muslim holidays at times when such word is generally forbidden. It should also be mentioned that there is an interesting discussion on the need of slaughtering without pre-stunning among Muslims themselves.

Another practical example concerns Muslim female employees wearing the veil (headscarf). In a number of cases, employers forbade women who by their functions had to deal with the public (e.g. in warehouses, offices etc.) to wear the headscarf during their work. In a recent case in the state of Hessen, a Muslim employee working in a department store in the countryside was given notice to terminate the contract due to her refusal to work unveiled. There was a generally accepted rule within the company that everybody had to wear “decent” clothes which would not offend customers. The employer stated that he himself did not care about the veil, but that there was some evidence that the mainly conservative customers would not accept to be served by a veiled clerk and would certainly change to competing warehouses. The appeal of the employee against the notice was dis-

---

There was considerable and to some extent understandable irritation among Muslims concerning this decision. But it has to be taken into consideration in such cases that it is the state alone who has to grant religious freedom according to the Constitution. In the field of private law, however, the constitutional rights exert a so-called “indirect” influence on the rules of law. This means that they have to be taken into account without being enforced in a direct and far-reaching manner as would be the case in conflicts between individuals and the state. In these private cases there are two conflicting constitutional rights: the freedom of religion in favour of the employee and the freedom of personality which allows to begin and to end contractual relations according to personal interests.

Nevertheless, the Federal Labour Court finally accepted the appellant’s claim. It stressed the great importance of religious freedom which cannot be ruled out by mere suppositions of possible economic disadvantages to the detriment of the employer. Even in case of proven disadvantages, the employer would first have to consider whether the employee could be occupied in a less sensitive place before being entitled to terminate the contract. This judgement was affirmed by the Federal Constitutional Court.

Furthermore, in a movement of anti-discriminatory legislation the European Union promulgated a directive on employment law which forbade discriminatory measures based on religion. This directive is strongly supported by Muslims in Germany. One should not to be too optimistic about its possible results. Employers who continue to refuse the employment of veiled women would cer-

21 BAG NJW 2003, p. 1685.
22 BVerfG NJW 2003, p. 2815.
tainly find ways not to employ them or to finish their contracts for other, legally “acceptable” reasons. Others could hesitate to accept any application of Muslim women, being unveiled or veiled, in order to avoid any kind of problems in the future. A solution to this problem is probably not to be found in the sphere of law. This problem will last as long as the headscarf is regarded by large parts of society, including many Muslims, as an instrument of suppression of women and of religious fundamentalism which both run against the democratic and humanitarian values of the legal order.

Religion has its effects even on the law of social security. Courts have held that in the case of financial need social security funds have to pay for the costs of a boy’s circumcision\(^24\), for the ritual washing of the body of a deceased Muslim\(^25\) or for the burial of the deceased at a Muslim cemetery in the state of origin including the costs of transport if there is no Muslim cemetery available in Germany.\(^26\) On the other hand, the Administrative Court of Mainz dismissed the claim of a Muslim woman wearing a niqāb (which leaves only the eyes visible) for public assistance. The reason was that this special kind of clothing would prevent her from finding an employment, and that she did not produce any explanation for the necessity of wearing it.\(^27\)

Furthermore, the German Social Security Act treats polygamous marriages as legally valid provided that the marriage contracts are valid under the law applicable to the formation of these contracts.\(^28\) The reason for this treatment is that it would not help the second wife or further wives who may have lived in such a kind of marriage for a long time to deprive them of their marital rights such as maintenance etc. In this sense, article 34 section 2 SGB I (Social Code I) which contains provisions on social security systems regulates the per capita-division of pensions among

\(^{24}\) OVG Lüneburg FEVS 44, p. 465.
\(^{26}\) See OVG Hamburg NJW 1992, p. 3118, 3119.
\(^{27}\) VG Mainz 26.02.2003 (Az. 1 L 98/03.MZ)—not yet published.
widows who had lived in a polygamous marriage.29 On the other hand, a second marriage which is valid according to the law of the spouses’ country of origin has to be considered as equivalent to a re-marriage after the death of the spouse; therefore the surviving husband who entered into the second marriage is not entitled to receive a widower’s pension according to article 46 SGB VI (Social Code VI)30. However, German law differentiates between mainly private aspects of marriage and predominantly public ones, especially those relating to the immigration law. The latter would not provide more than the first wife with marital privileges within its scope of application, e.g. concerning residence permits.31

Even in the field of penal law, religious aspects may be taken into account within a very limited space. The most important example is male circumcision as practiced by Muslims and Jews. According to German law, the act of circumcision has to be considered as bodily harm but can be justified by its religious motivation.32 Of course there is a strict limit to such a justification: it is restricted to minor cases of interference with corporal integrity. Thus, heavy injuries like the inhuman mutilation of females can in no way be justified by any reason and should be severely punished.33

In general, the basic right of religious freedom cannot to be exercised without restriction, particularly when religious practice has an effect on the social environment. For example, freedom of belief does not justify the religious indoctrination of pupils.34 Nor does the protection against blasphemy (e.g. provided by article 166 of the German Criminal Code) entitle the victim to take the law into his/her own hands. Furthermore, the state’s neutrality towards all religions has to be respected. There is no space here

29 The English solution differs fundamentally from the German one. None of the widows is legally accepted as such, cf. Court of Appeal in Bibi v. Chief Adjudication Officer [1998] 1 FLR 375.
30 Hessisches LSG 29.06.2004 (L 2 RA 429/03), not yet published.
31 Cf. OVG Koblenz 12.03.2004 (10 A 11717/03), not yet published.
32 Cf. Rohe, n. 1, p. 208 with further references.
for a detailed discussion of this subject, but it is worth mentioning that a prominent Muslim functionary in Germany has declared Germany to be "more Muslim than Saudi-Arabia". To sum up, European law is consistent and immutable in those of its principles which are based on democracy and human rights. At the same time and on the same grounds it leaves broad space to the Muslims for the exercise of their religious freedom. As Tariq Ramadan has written for Europe in general: "Muslims can freely practise their religion (the totality of the *ibādāt* and a part of the *mu`āmalāt*); the laws generally protect their rights as citizens or residents as well as believers belonging to a minority religion; they are also free to speak about Islam and to organise religious, social or cultural activities and nothing prevents Muslims from being involved in society or participating in social life...".

2. Legal provisions

In the field of law, the principle of legal territoriality prevails all over the world. Therefore, the application of foreign legal provisions—including Islamic ones—is an exceptional case. Islamic law is applicable in Europe on three different levels, with significant differences in detail. The fact that the relevant legislator of the state of domicile reserves the ultimate right to decide whether and to which extent 'foreign' legal provisions can be applied is common to all three levels.

a) Private International Law (Conflict of Laws)

Private International Law (the rules regulating the conflict of laws in matters concerning civil law) is a possible level of direct

---


37 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.
application of Islamic legal rules. Today, there is no legal system that refuses the application of foreign legal rules in general. In the area of civil law, which essentially regulates the legal relations between private persons, the welfare of those persons is of prime importance. If someone has organised his/her life in accordance with a certain legal system, this should be protected even if or when the person in question changes his/her place of abode. Accordingly the law of the state of origin, which is known, should continue to be applied when the person crosses the border. In addition to that, the mutual readiness to apply foreign substantial law is a strong means of intensifying desirable international contacts. Thus, for centuries the idea of ‘comity of nations’ has been used to explain this readiness. In certain matters, however, it is also within the interest of the legal community that 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 substantial 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.38

When it comes to the areas of family law and the law of succession, the application of legal norms in Germany and in other European countries is often determined on the basis of the nationality of the persons involved rather than by their domicile.39 It may generally be stated that Islamic law has an especially strong position within these areas in this respect.40 This can be explained by the fact that Islamic law has a multiplicity of regulations con-

cerning these fields which are derived from authoritative sources (Qur’ān and Sunna). Furthermore, a powerful lobby obviously tries to preserve this domain as a stronghold for religious convictions as well as for reasons of income and of power (which was very similar in Europe at the time when the churches where in solely charge of the administration of marriage). The Tunisian lawyer Ali Mezghani (‘Ali al-Mizghani) states that in “Islamic countries, it is difficult to deny that family law is the site of conservatism.”  

This is true despite the fact that in several Islamic countries reforms have taken place and still are in progress.  

However, the application of such provisions must comply with the rules of the relevant national public policy. The application of legislation influenced by Islamic law can cause legal problems, if it leads to a result that is obviously incompatible with, for example, the main principles of German law, including constitutional civil rights (article 6 EGBGB). In such cases the provisions in question cannot be applied. The courts then should try to fill the existing gap by other provisions of the relevant foreign law, if their application would lead to a result in consistence with German public policy.  

b) Optional civil law

A further area of—indirect—application opens up within the framework of the so-called ‘optional’ civil law (public law and especially penal law are, of course, not optional).

Civil law mainly regulates the legal relations between autonomous private persons. Their autonomy is the core value of the liberal European civil law orders, which is granted also by respective constitutional rights (cf. for Germany article 2 section 1 of

---

43 Mathias Rohe, "Islamic Law in German Courts", 1 Hawwa (2003), 46-59, at 46 et seq.
44 Cf. e.g. BGHZ 120, pp. 29, 37; OLG Düsseldorf FamRZ 1998, p. 1113.
the German Constitution). 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 only serve as a “model” which might be chosen or applied in cases where the parties are satisfied with them. In other words, they are “optional” within a certain framework. Such optional rules are especially to be found in the sphere of contract law including matrimonial contracts.

As an example we may note the fact that various methods of investment are offered which do not violate the Islamic prohibition of usury (ribā, which according to traditional views means the general prohibition of accepting and paying interest).

Concerning project finance, Islamic legal institutions like the murābaha or the muḍāraba can be used. 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 ribā rules. Even the establishment of Islamic hedge funds is actually discussed.

Commerce and trade have

---


already responded to the economic and 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.\textsuperscript{49} Profits made are not paid out but are immediately re-invested.\textsuperscript{50} Stock exchange values are measured by the Dow Jones Islamic Market Indexes\textsuperscript{51} or the FTSE Global Islamic Index.

Even the German state of Sachsen-Anhalt has recently placed an Islamic bond (\textit{sukūk}\textsuperscript{52}, 100m Euro for the beginning), based on a foundation to be established in the Netherlands.\textsuperscript{53} For traditionally oriented Muslims the offer of such forms of investment in Europe is of great 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” garb, or to similar organisations based in Europe.\textsuperscript{54}

In the UK, a special concept of “Islamic mortgages” was developed, which allows Muslims willing to purchase chattel to avoid conflicts with provisions concerning \textit{ribā} (when paying interest

\textsuperscript{49} Cf. “Islamischer Aktienfonds in Deutschland”, \textit{Freitagsblatt} 2/2 Februar 2000, p. 13.
\textsuperscript{51} The Dow Jones Islamic Market Indexes include the DJ Islamic Market Index, the DJ Islamic Market US Index, the DJ Islamic Market Technology Index, the DJ Islamic Market Extra Liquid Index, the DJ Islamic Market Canadian Index, the DJ Islamic Market UK Index, the DJ Islamic Market Europe Index, and the DJ Islamic Market Asia/Pacific Index (for up to date information see \texttt{http://www.djindexes.com/jsp/islamicMarket.jsp?sideMenu=true}).
\textsuperscript{52} It is based on a combination of leasing contracts concerning the state’s real property. Muslims point out that they consider this kind of a public loan to be more appropriate for the sake of future generations than loans simply based on debts to be paid back in the future, because this asset backed loan is limited by the value of the existing assets (which will be inherited by future generations); cf. “Finanzmarkt: Islam-Anleihe aus Magdeburg”, \textit{Die Bank} 01.01.2004.
\textsuperscript{53} Cf. “Sachsen-Anhalt bereitet erste islamische Anleihe vor”, \textit{FAZ} 06.11.2003, p. 31; „Anlegen mit Allahs Segen”, \textit{Handelsblatt} 14.07.2004, p. 29.
\textsuperscript{54} Cf. the recent reports on doubtful investments in Turkey supported by certain organisations in “Neuer Markt auf Türkisch” (Michael Fröhlingdorf), \textit{Spiegel Online}, \texttt{http://www.spiegel.de/0,1518,283591,00.html}, 29.01.2004.
The “Islamic mortgage” consists of two separate transactions aiming at one single result. Until recently each transaction was subject to taxation. Recently a reform took place the key issue of which was to abolish the double “Stamp Duty”, because it prevented Muslims from successfully engaging in real property due to the formal system of taxation without a sufficient substantial reason. HSBC Amanah already offers such Islamic mortgages, and other banks are supposed to follow.

In the field of matrimonial law, tendencies of implementing Islamic norms as optional law can also be identified in Germany in connection with matrimonial contracts. Thus, in Germany contractual conditions regulating the payment of the “Islamic” dower (“mahrr” or “sadaq”) are possible and generally accepted by the courts. Other contractual regulations, especially those discriminating against women, could be void according to Article 138 BGB (German Civil Code) on the protection of good morals. There are no court decisions on such issues so far published or known. To my knowledge, however, some German notaries refuse to assist in formulating wills containing the classical Islamic regulation on half-shares for female heirs.

An extraordinary example of a country undergoing Islamic legal influence is the UK, where an ‘angrezi shariat’ (English shari'a) is obviously developing. 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 oriented laws in matters of personal status.
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 Council in England which was established in 1982 seems to be an example for such a kind of mediation.\textsuperscript{63} The council does not have an official function, but is responsible for mediation particularly in the area of the law of personal status. There are frequently cases in which a Muslim wife has obtained an English divorce which she now wants to have confirmed according to ‘Islamic Law’ by the pronouncement of \textit{al¸q\textsuperscript{a}} by the husband, which leads to the general acceptance of the decision in the social environment within or outside the country.

Another situation which occurs very often is that of a husband who refuses to divorce although the wife wishes to do so while being reluctant to start divorce proceedings in the civil courts, although she could do so at any time.\textsuperscript{64} Even if the matter does not go to a 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, for example, if the council’s decision is acknowledged there to be that of an Islamic court.\textsuperscript{65} Convincing the husband to pay the \textit{mahr} (dower) constitutes a further possible task for the council. The decisions of the council appear to be based on a reform-oriented approach to the legal sources. Thus, the wife may apply for divorce for various reasons and without the consent of the husband, and a first wife is granted an unrestricted right to divorce if the husband contracts a second Islamic marriage. However, the English legal system does not remain untouched by such proceedings: In some Islamic states there is a possibility for wives to obtain a divorce in court on the basis of


\textsuperscript{64} Cf. Ph. Lewis, n. 1, at p. 119 regarding the circumstances in Bradford.

\textsuperscript{65} Cf. Pearl/Menski, \textit{Muslim Family Law}, 3\textsuperscript{rd} ed. London 1998, ch. 3-100.
the *khul’*, which is a contractual or statutory right. The wife, however, must then pay back the dower which she very often will have kept as an old-age pension. This somehow rewards the husband’s persistence in refusing a divorce, which is certainly not acceptable according to the standard of the law of the land.

Similarly, in the Canadian province of Ontario there is an ongoing conflict on the introduction of Muslim arbitrary boards in private legal matters. Muslim women organisations strongly oppose such institutions, stressing that in the field of family law and the law of succession the application of Canadian legal rules is preferable to the traditional *sharî’a* rules with their more or less rigid distinctions between the sexes. Furthermore they express their fear that if such bodies are established, women refusing to recur to them and preferring to bring their case in states courts would be considered to be bad Muslims.

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 20 February 2002 (*Islamic Charta*) that Muslims are content with the harmonic system of securality and religious freedom provided by the Constitution. According to article 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.” 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.”⁶⁹ (We are in harmony with the legal framework, we are not willing to introduce a parallel law).

c) Legal segregation with respect to religion

A few European states introduced Islamic legal provisions concerning family and succession matters to be applied to the Muslim population. Within the European Union this is the case in Greece for historical reasons (cf. the contribution of K. Tsitselikis in this volume). This has lead to a remarkable situation: while the Turkish Republic has continuously reformed its civil laws and introduced the legal equality of sexes in family law in 2002,⁷⁰ the Greek Muslims of Turkish origin are still living under traditional shari‘a rules. This can hardly serve as a model for Europe. In Spain, Islamic rules regulating the contracting of marriages can be applied to Muslims since 1992.⁷¹ In order to ensure the necessary legal security there are compulsory provisions for the registration of these marriages.⁷² This kind of legal segregation is very much limited, concerning mere formal regulations without any relevant material quality. In Britain, Muslim institutions may apply for being entitled to register marriages.⁷³ 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.

---

⁷⁰ Cf. Rumpf, n. 4, p. 128.
⁷² 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, printed in Bergmann and Ferid, Internationales Ehe- und Kindschafrecht (n. 56) article “Spanien”, (as of 31 July 1998), 24 and 55. Alternatively the formal provisions of their home rights are available to foreigners cf. Art. 50 Código civil, ibid., 23.
⁷³ Information given by solicitor Nadeem Malik, Leicester/Birmingham when I met him in Leicester in March 2002.
Also in Britain, certain Muslim groups demanded to introduce a general system of religious law in matrimonial, family and succession matters.\textsuperscript{74} This would correspond to the model prevailing in Islamic states. But the introduction of a multiple legal system based on religious or ethnic norms does not represent a realistic or even desirable option for European countries.\textsuperscript{75} Such systems may have been helpful and even exemplary in the past, as they granted rights and freedoms for minorities which would otherwise be lost. However, this will often lead to inter-religious legal conflicts as it can be seen outside Europe. The most powerful religious group will almost inevitably impose its legal system upon others. It would be impossible to establish an ultimate right to adjudicate within the framework of European constitutional law.

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 identifiable substantial rules to be identified. As it was mentioned above, there is a considerable range of varieties between the existing legal orders in Islamic states. The Turkish Republic, being the state of origin of most of the Muslims in Austria and Germany completely as well as in other parts of Europe abolished the \textit{shari'a} rules, and the vast majority among them would strongly reject the re-introduction of such rules in European countries.

Taking religious affiliation as a basis for civil legal relations would raise other serious questions besides that. Clearly, several aspects of Islamic law—in its various existing forms—would not be acceptable within the European legal-political context. Despite widespread tendencies in the Islamic world aiming at an improvement of women’s rights\textsuperscript{76}, many legal orders in this region are still far from the legal standard of equality of sexes.


\textsuperscript{75} Cf. Rohe, n. 62, p. 409.

\textsuperscript{76} Cf. Rohe, n. 1, p. 53.
achieved in Europe (cf. above). It would simply be unacceptable to implement such rules within the existing systems. Instead of that, Muslims are entitled to create legal relations according to their religious intentions within the framework of optional civil law.

IV. Conclusion

European legal orders are facing the challenges of Muslim presence in Europe with a mix of strategies ranging between the two poles of assimilation and segregation.

1. Aspects of assimilation/integration

a) The legal order which is applicable territorially in the country of immigration finally decides conflicts between its own rules and those of the immigrant’s “native” order. 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.

b) The model of legal assimilation intrinsically implies the legal protection of all citizens and residents, especially the protection of human rights including freedom of religion against state interference. To a certain extent this model also grants participation in society. This represents a system of individual rights rather than a system of personality (legal segregation according to the adherence to a certain religious community) with respect to the application of religious rules.

2. Aspects of segregation/acculturation

a) 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, which is a model of partial segregation.

b) Important parts of substantial private law (e.g. contract law including matrimonial contracts) grant freedom of legal self-determination according to individual preferences.
c) In some areas of law, a number of European legal orders integrate former „foreign” legal identities, which is a model of partial integration by legal segregation (e.g. “Islamic marriage” rules in Spain, “Islamic mortgages” in the UK, separate legal rules in Greece for Muslims in Thrace in family and succession matters).

With respect to the definition of the shari‘a by the Muslims in Europe, there are two main aspects to be kept in mind. First, shari‘a is not simply a body of legal or religious rules laid down in laws or canons of religious obligations, but rather consists of a system of identifying rules and then applying them to certain cases and situations. Even in the field of law, a large proportion of rules in both the Sunni and Shi‘i schools are founded upon secondary legal findings such as interpretation and conclusions on the base of human reasoning. The statement that only God himself can be the legislator, which has been formulated by many academic lawyers, is thus very restricted in practice. From the early times of Islam human beings interpreted the divine statutes and developed norms for their application. It may be cautiously said that there is not a single binding provision in Islamic law which can be applied without such interpretation and interpretations can change as human beings and their living conditions do.77 The plurality of opinions within Islamic law is evidence for this. Furthermore, for more than 100 years and often in older times extensive efforts have been made to create a broad forum for the application of independent legal reasoning (ijtihād)78. This has allowed a certain reserve of flexibility which is necessary for legal practice to be accumulated so that an adequate response can be made to the situation of the Muslims in the Diaspora. I would like to quote a European Muslim here:” (...) we had very vital, very alive, very evolving jurisprudential activities up to the fourth century of Islam. Then suddenly the community was declared to go braindead. No longer are we allowed to develop our

78 Cf. e.g. T. Ramadan, To be a European Muslim, Leicester 1999, pp. 82, 93.
ideas. For it became doctrine that everyone must follow one of the present current schools. I believe that our crisis starts from this point. 79

Second, sharīʿa rules are not necessarily considered to be valid and binding at every time and place, but are subject to interpretation whether and to which extent they have to be applied in time and space. Some, for example, only applied to the wives of the prophet of Islam Muhammad, others aim for the Non-Muslim population of the Arabian peninsula in the 1. century A.H. Only a relatively small number of rules is taken to be binding at any time and at any place. These rules are mostly concerning the individual relation between God and man, the core of belief itself—the so-called five pillars of Islam. But even in this field, Muslims have found and developed interpretations which are allowing them to arrange their living conditions in a society which is predominantly non-Muslim (e.g. in the field of delaying or contracting the obligatory prayers). Furthermore, these rules are not enforceable in this world and therefore restricted to rule the relations between God and man.

Concerning Muslim presence outside the “Islamic world”, in the past many Muslim lawyers advised against long stays abroad (outside the dār al-Islām), fearing that that this could prevent Muslims from fulfilling their religious duties. 80 This fear is obviously due to historical events and experiences during the Reconquista, the crusades and later hostile encounters between Christian European and Islamic powers. It is not by accident that the concept of the fundamental distinction between two opposite houses (dār al-Islām, house of Islam and dār al-harb, house of war) was mainly elaborated in these times. Similar points of view can still

79 Badawi, n. 63, p. 73.
be found today among very traditional, sometimes extremely anti-Western lawyers. The central point always seems to be the fear that the Islamic world may be weakened by migration. However, this obviously does not correspond to our present reality: according to a new survey 1/3 of all Muslims live outside Islamic states, many of them by their own choice.

Nevertheless, with respect to the legal rules of shari'a it was broadly accepted since the Middle Ages that they cannot be applied outside "Islamic" territory and that Muslims are obliged to either respect the law of the land or to leave the country and to return to countries ruled by Muslims. This view is based on the third category between dār al-İslâm and dār al-harb, the so-called "dār al-ḥad" ("house of a (peace) treaty"). Still this concept is based on the fundamental distinction between opposite camps. Thus, it may serve as a fundament for a peaceful co-existence in a diaspora situation, since it obliges Muslims not to break the law of the land as an equivalent for being granted personal security and protection by the state of residence. However, it is doubtful whether the self-definition of a "diaspora" would be very helpful for actively being part of and contributing to society as a whole. Therefore, the majority of Muslim thinkers are seeking new approaches to define Islamic life as a part of the given legal and societal conditions of life in Europe. They reject the former division between dār al-İslâm and dār al-harb, saying that in our days earth is simply "one house" for mankind as a whole, and that every Muslim is entitled to live in any part of the world and is responsible for the sake of the society he/she is living in.


stress that there is no support for the classical view, neither in the Qur'ān nor in the Sunna, and that it is no more than a construct established by the classical lawyers. Instead of that, intense international co-operation and common legal rules and values are creating completely different conditions that do not allow a concept of general hostility, as developed in the past in Europe and in the Islamic world alike to be maintained. According to them, the entire world nowadays constitutes one single camp ("dār wāhida"), one all-embracing "dār al-‘aḥd". This new approach opens a broad space for the harmonisation of the European legal framework with Islamic life in Europe.

In this sense shari‘a in Europe would mean to define shari‘a rules for Muslims here in accordance with the indispensable values of democracy, human rights and the rule of law governing European legal orders. Within the framework of these orders, Muslims have to be enabled not only theoretically to practice their believes. Thus, all Europeans should remember that freedom of religion and therefore religious pluralism is an integral part of the liberal European constitutions, and that everybody who is willing to respect the rule of the land should enjoy this freedom. The adversaries of this kind of constitutional orders are to be found among Muslim extremist groups like Khilafet Devleti, Hizb al-Tahrir or al-Murabitun as well as among right-wing or left-
wing radicals, extremist feminists, Christian fundamentalists and simple racists (who are sometimes to be found unified in strange alliances).

Let me end with the words of the former president of the European Commission Romano Prodi concerning the dialogue of cultures: “It is not the matter just to passively experience events and to accept a cultural uniformity within which the values and the will of the strongest would be imposed on the rest. The European Union, a singular example of democratic constitution and integration of different cultures, can prove that there is an alternative formula to cultural uniformity or domination: a dialogue which respects different cultures and their representatives, as long as these different cultures are ready to respect the fundamental values of man.”

87 “Valoriser l’héritage culturel commun!”, Le Figaro 04.04.2002, p. 14. This would exclude racial, religious or political hatred, also of the sort which I personally became victim of two years ago—during the days of the terrible outbursts of violence in Palestine and Israel—in a metro-station in Paris, when I was attacked by two North-African youngsters by tear-gas because they supposed me to be an American, probably because I was reading a German (!) newspaper. I have to add that this obviously has nothing to do with religion, but with mere racism.

List of abbreviations:

AG Amtsgericht (District Court)
AsylVfG Asylverfahrensgesetz (Code on the Procedure in Asylum Cases)
BayObLG Bayerisches Oberstes Landesgericht (Supreme Court of the State of Bavaria)
BGB Bürgerliches Gesetzbuch (Civil Code)
BGH Bundesgerichtshof (Federal Supreme Court)
BVerwG Bundesverwaltungsgericht (Federal Administrative Court)
ECHR European Convention on Human Rights
EGBGB Einführungsgesetz zum Bürgerlichen Gesetzbuch (Introductory Act to the Civil Code)
FamRZ Zeitschrift für Familienrecht (journal)
GG Grundgesetz (Constitution)
FPR Familie, Partnerschaft, Recht (journal)
IPRax Praxis des Internationalen Privat- und Verfahrensrechts (journal)
IPRspr. Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts (Collection of cases relating to Private International Law)
KG Kammergericht (Supreme Court of the State of Berlin)
LG Landgericht (Regional Superior Court)
LAG Landesarbeitsgericht (Regional Court of Appeal in Employment and Labour Cases)
LSG Landessozialgericht (Regional Court of Appeal in Social Security Cases)
NJW Neue Juristische Wochenschrift (journal)
NJW-RR Neue Juristische Wochenschrift—RechtsprechungsReport (journal)
NJWE-FER Neue Juristische Wochenschrift Entscheidungsdiens Familien- und Erbrecht (journal)
NVwZ Neue Zeitschrift für Verwaltungsrecht (journal)
OLG Oberlandesgericht (Regional Supreme Court)
SGB I Sozialgesetzbuch I (Social Code I)
SGB VI Sozialgesetzbuch VI (Social Code VI)
StAZ Das Standesamt (journal)
VG Verwaltungsgericht (Administrative Court)
ZIP Zeitschrift für Wirtschaftsrecht (journal)
ZZP Zeitschrift für Zivilprozess (journal)