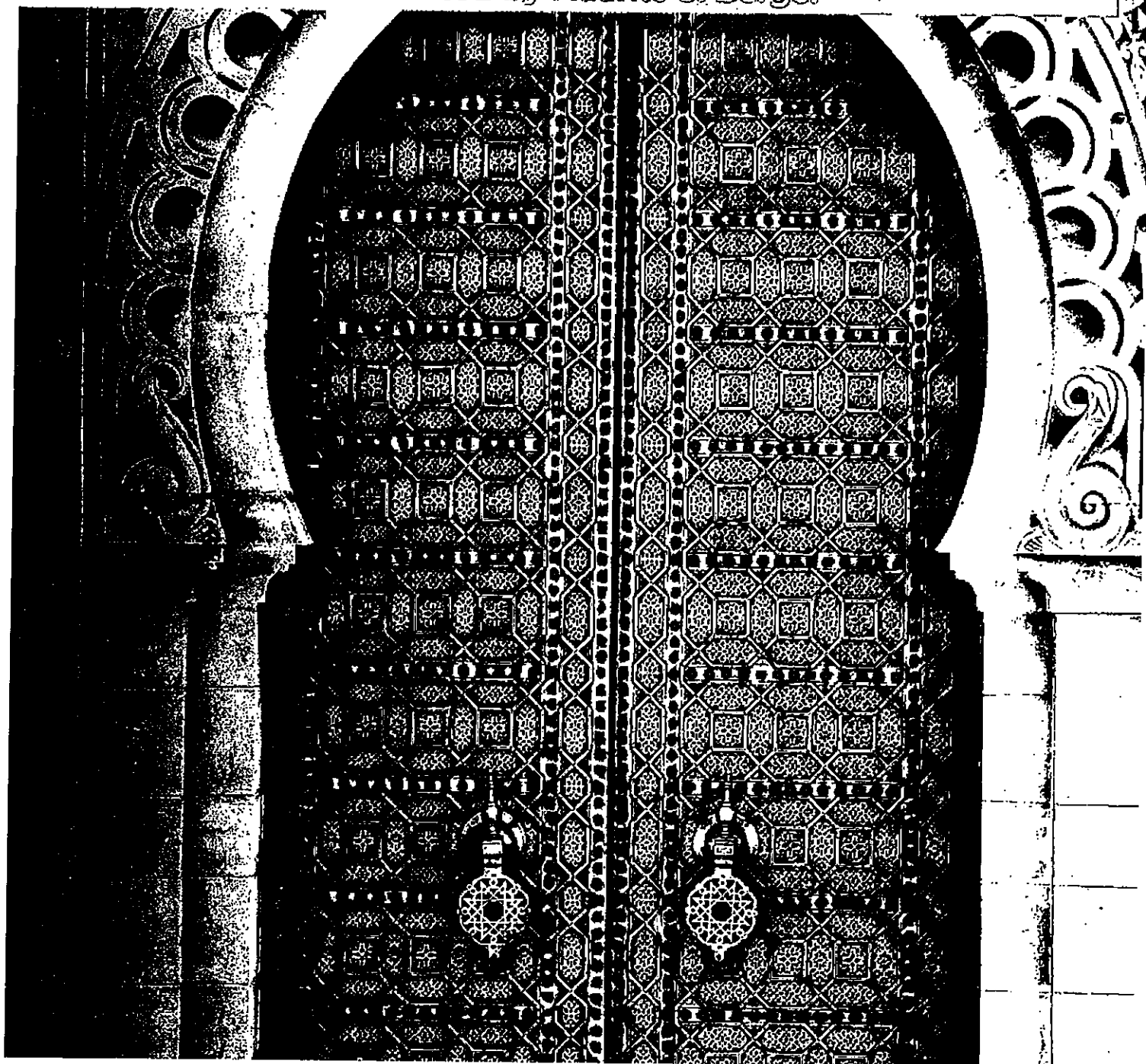


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# APPLYING SHARIA IN THE WEST

Politics, Pluralism and the Future of Islamic Rules  
on Family Relations in the West

Edited by Maurits S. Berger



This volume provides new insights in the concept of shari'a in the West, and sets out a framework of how shari'a in the West can be studied. The premise of this volume is that one needs to focus on the question 'What do Muslims do in terms of shari'a?' rather than 'What is shari'a?'. This perspective shows that the practice of shari'a is restricted to a limited set of rules that mainly relate to religious rituals, family law and social interaction. The framework of this volume then continues to explore two more interactions: the Western responses to these practices of shari'a and, in turn, the Muslim legal reaction to these responses.

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# Applying Shari'a in the West

Facts, Fears and the Future of Islamic  
Rules on Family Relations in the West

*Edited by Maurits S. Berger*

Leiden University Press

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## Introduction

### Applying Shari'a in the West

Maurits S. Berger

How can we make sense of the new phenomenon of shari'a in the West? In 2003, a respectable institution such as the European Court of Human Rights ruled that 'sharia clearly diverges from [the European] Convention [of Human Rights] values'.<sup>1</sup> But equally respectable authorities, such as the Archbishop of Canterbury and the Lord Chief Justice of England and Wales, argued in 2008 that shari'a does not necessarily have to contradict Western legal and political values.<sup>2</sup> Clearly, the presence of shari'a in Western societies is of increasing concern among Europeans, North Americans and Australians. Crucial questions remain unanswered, however: what *is* shari'a, especially in a Western context, and what are these Western values it is diverging from, and why is that so? Is shari'a indeed applied in the West, and by whom? And if so, is shari'a a static notion or does it adapt to Western values or structures?

A body of literature on the issue of shari'a in the West is gradually emerging, focusing primarily on the ways private international law deals with shari'a and on the compatibility (or lack of compatibility) between shari'a and Western legal concepts.<sup>3</sup> This volume will contribute to this academic discussion by taking the *practice* of shari'a by Muslims in the Western legal context as the basis for analysis. Two assumptions underlie this approach. First, it is futile to study shari'a in the West as an autonomous and holistic notion, because this overlooks the realities of its practice on the ground. The fact is that while shari'a as a concept of divine rules has developed over centuries of scholarship into an autonomous 'Islamic' legal system, the practice of this system has become fragmented in the Western context, and perhaps even distorted, because it has had to accommodate the dominant Western legal system. Second, we can only understand the interaction between these two legal systems if the notion of a Western 'legal system' is seen in the much wider context of the social, political and cultural values upheld by Western societies. These values, together with preconceived Western notions of shari'a (the 'fears' mentioned in the subtitle of this volume) have an impact on the practice of shari'a.

Based on these premises, the discussion in this volume is divided into three sections. The first section contains descriptions and analyses of, on the one hand, the practice of shari'a and in particular that of Islamic family law within the legal frameworks of a selection of Western countries; and, on the other hand, national responses to these particular forms of shari'a. In the second section, a number of thematic issues that recur in the country studies will be addressed. The third section contains contributions on the need and modalities for adaptation by either Western or Muslim legal systems, so as to accommodate each other.

Before we discuss these sections in more detail, however, we must first address a fundamental question: what do we mean by shari'a?

### What do Western Muslims Mean by Shari'a?

Rather than defining shari'a as a legal discipline of Islam,<sup>4</sup> or as a set of practices and laws applied in foreign countries,<sup>5</sup> our interest is primarily in what Muslims in the West mean and want in terms of rules prescribed by Islam. This starting point warrants two remarks. First, it explains why we prefer to use the term 'shari'a', not 'Islamic law', in this volume: while the latter is confined to the domain of 'law' in the legal sense, which concerns certain relationships between people or between people and the state, 'shari'a' denotes the much wider domain of rules pertaining to *all* relationships between people (including those of a social and moral nature), as well as the rules governing the relationship between man and God (such as prayer, burial, slaughter, and so forth). As we will see below, only by taking this wider perspective on 'shari'a' can we obtain a clear view of what Muslims in the West do and want in terms of religious rules.

The second remark concerns the approach taken to assessing the nature and scope of shari'a in the West. By posing the question, 'What do Muslims *do* in terms of shari'a?' rather than 'What *is* shari'a?', we adopt a legal-anthropological approach that takes Muslims as its reference point, rather than an abstract notion of shari'a.<sup>6</sup> Such an approach is necessary if we want to develop a proper understanding of shari'a in the West. To reflect upon whether shari'a is a violation of European Convention principles or might be in compliance with English law may lead us into an empty academic discussion if the specific rules of shari'a that are being discussed are not actually adhered to by Muslims in the West. It is clear that shari'a punishments are contrary to Western values, as is the notion of a theocracy, but what is the use of discussing these legal notions if they deviate from what Muslims in the

West are striving for? We must therefore move away from shari'a as a form of theological-legal scholarship, and first determine what rules are adhered to by, or otherwise relevant for, Muslims in the West.

From this perspective, it is striking that so little is known about what Muslims in the West mean by shari'a. To my knowledge, only three surveys have been conducted among Muslims in European countries, and one among Muslims worldwide, in which Muslims were asked for their opinion on 'shari'a'. The latter survey was a 2008 Gallup poll representing 90 per cent of Muslims worldwide, in which 'shari'a' ranked highest – together with 'democracy', one should add – on the list of what Muslims wanted.<sup>7</sup> Of the other two surveys, one was conducted in 2004 in the Netherlands, and found that 51 per cent of the Dutch Muslims interviewed favoured a Muslim political party, and 29.5 per cent thought that its political programme should be based on shari'a.<sup>8</sup> (The subsequent newspaper headlines that 'one third of Dutch Muslims favour sharia' were therefore entirely wrong). A British poll of 2006 found that 40 per cent of British Muslims support shari'a law being introduced in pre-dominantly Muslim areas in Britain,<sup>9</sup> while a British study of 2007 found that 28 per cent of British Muslims would prefer to live under shari'a law.<sup>10</sup> What is of interest to us here is that none of these surveys defined shari'a, nor asked their respondents to do so, therefore leaving us ignorant of what Western Muslims mean by shari'a. However, based on what we know from existing studies and from the following chapters, we can deduce three possible answers to this question, each leading us in a different direction:

### SHARI'A: A VIRTUOUS ABSTRACTION

The first answer to what Muslims might mean by 'shari'a' in a Western context is shari'a as a slogan or an abstraction with a virtuous connotation. Shari'a stands for 'the law of God', or 'all that Muslims need', and, effectively, for everything that is 'good' for Muslims. We might compare the use of this abstraction with that of 'justice': it is perceived as virtuous and necessary, but few people will be able to provide a full definition of the concept, particularly when it comes to putting it into practice. We can observe a similar attitude among devout Muslims towards shari'a: it is something virtuous and they want it to be applied in their lives, even though they do not know exactly what shari'a means in practice. Although this notion of shari'a is thus of little use to those who want to define it as a set of rules, it is precisely this notion that makes shari'a such a powerful force in the minds of many Western Muslims. Indeed, it might explain the high percentages in the abovementioned surveys:

when asked about shari'a, what devout Muslim would give a negative response?

#### SHARI'A: FOREIGN NATIONAL LAWS

Muslims living in the West who are also nationals of their country of origin sometimes have the national family law of this latter country applied to them as a matter of private international law: a Pakistani couple in England might be divorced in accordance with Pakistani (Muslim) family law, a divorce pronounced in Iran in accordance with Iranian (Muslim) family law might be recognized in Germany, and a polygamous marriage that is legally concluded in Morocco might be recognized (but not enforced) in the Netherlands. While national Western courts are less and less inclined to apply foreign national laws to residents with a foreign nationality, these residents continue to navigate their way through a legal labyrinth for the practical reason that they often retain strong ties with their countries of origin.

Therefore, the Western Muslims who maintain that Western courts should apply 'shari'a' or 'Islamic law' in their case are in fact referring to the Islamic nature of their national law, rather than to the complex system of Islamic scholarly jurisprudence. Strictly speaking, this is not 'shari'a' as described in the vast corpus of Islamic legal jurisprudence, but national laws that have drawn upon that corpus and modelled the selected rules into a format – a legal code – that is unknown in shari'a. Several of the following chapters will touch upon this particular application of shari'a. However, our interest in this volume is not in shari'a as foreign national law being applied in Western courts by virtue of private international law. Our focus is on indigenous practices of shari'a in the West: what is it that Western Muslims do and want in terms of shari'a? And that is the third notion of shari'a, as we will see below.

#### SHARI'A: THE PRACTICES AND DESIRES OF WESTERN MUSLIMS

Only limited research has been undertaken into manifestations of shari'a in the West, and that research which does exist mostly follows the conventions of the respective academic discipline: social scientists tend to look at social factors, including radicalization and religious ritual; lawyers tend to examine family law;<sup>11</sup> and Islamic finance has been the domain of practising lawyers and bankers, rather than scholars.<sup>12</sup> The study of *fatwas* and the '*fiqh* for minorities' (*fiqh al-aqalliyat*) might yield novel insights into changing concepts in Islamic jurisprudence,<sup>13</sup> but research has hitherto failed to indicate the extent to which

these changes are actually embraced by Muslims in the West. The overall picture of shari'a in the West is therefore fragmented in qualitative terms (the interpretation and manifestations of shari'a) and almost non-existent in quantitative terms (the actual practice of shari'a and how many Muslims adhere to this).

However, based on the research that has been done so far, and as is confirmed in the following chapters, we may build up a general picture of shari'a as practised in the West. Devout Muslims in the West are indeed committed to living in accordance with shari'a, but this is limited to the following domains:

- religious rules, such as those pertaining to prayer, fasting, burial, and dress code;
- rules relating to family law, in particular those pertaining to marriage and divorce;
- rules relating to financial transactions, in particular the ban on interest or usury;
- social relations, in particular gender relations and relations with the non-Islamic environment.

Three observations can be made with regard to these four domains of shari'a rules. First, this collection of rules appears quite haphazard, both in scope and in content. From an Islamic legal-theological perspective, however, this set of rules has an internal logic, because all of these rules share a high ranking in the hierarchy of Islamic rules prescribed by classical orthodoxy: they are explicitly mentioned in the Qur'an, by the Prophet, or by scholarly consensus, and are therefore the first to be followed by any devout Muslim.

The second observation is that of the abovementioned rules, only those related to family law and the prohibition of usury or interest can be considered 'law' or 'legal rules', according to modern standards. The other rules pertain to religious rituals or social conduct and, as such, are mostly outside the scope of legislation in Western countries (except, for instance, when national burial or slaughter laws seek to accommodate religious practices).

Finally, these domains of shari'a pertain to Muslims' daily lives, and appear to have little to do with political views on the need for an Islamic restructuring of Western societies. Of course, such views do exist among some radical Muslims, just as there are Muslim extremists who interpret shari'a as a call for militant action against alleged Western injustices. We must emphasize, however, that our goal here is to gain a general impression of what the majority of devout Muslims in the West desires and practises in terms of shari'a.

### Shari'a Practices in a Western Legal Framework

We now come to the next step in our discussion, which is how Western legal systems respond to these shari'a practices. This is the starting point of this volume. In the first chapter, Mathias Rohe provides the scope of the discussion by presenting a comprehensive overview of all the reasons that give rise to a need or obligation to apply rules of shari'a. He distinguishes between the 'external reasons' produced by Western legal systems, such as private international law or the English legal accommodation of Islamic finance, and the 'internal reasons' produced by Muslims themselves, such as a religious, legal or cultural need to have shari'a applied. We will see this dual perspective recurring in the subsequent country studies.

The next six chapters are country studies that give an impression of the scope and modalities of the religious legal needs of Muslims in the West, and Western legal possibilities and responses to these needs. The six studies demonstrate that we may, for a variety of reasons, divide what we have so far called 'the West' in three regions, namely America and Australia, North Western Europe, and South Eastern Europe. Each of these regions has a different historical, social-economical and legal relation with Islam and Muslims.

#### THREE WESTERN REGIONS

Among the Western legal systems, those of America and Australia perhaps allow Muslims the most freedom to apply forms of shari'a, particularly in family law. This can be partly attributed to the fact that the Muslim communities in these countries are often middle or upper class, and are therefore more prone to taking an intellectual and activist position regarding shari'a. The responses, however, are quite different. In their chapter on America, Bryan S. Turner and James T. Richardson conclude that regardless of 'liberal' problems with religion and public concern vis-à-vis potential radicalism among Muslims in America, the vast majority of Muslims in America are finding ways to adjust to American secularism, while also expressing their religious identity in various ways. In the chapter on Australia, on the other hand, Jamila Hussain and Adam Possamai reflect on 'the new Australian conservative modernity' which is a combination of resurgent social values of Christian conservatism, active government priorities of disengagement and a rapidly expanding culture of surveillance and obedience. In this new phase of modernity, the authors argue, a process of de-legitimization of diversity is occurring, especially with regard to Muslims.

The chapters on the North Western European countries of the Netherlands and the United Kingdom illustrate how different the circumstances of the Muslim communities in these countries are from those in America and Australia. While they all are migrants or of migrant origin, the Muslim communities in the Netherlands and the United Kingdom are mostly lower-class, and lack political or religious unity and leadership. In his chapter on the United Kingdom, Jørgen Nielsen describes how in their need for unified regulation of family law, Muslim communities in the United Kingdom have been hindered by internal divisions and disagreements on the interpretation of that law, resulting in the emergence of various 'Sharia councils'. Nielsen argues that these tensions among Muslims living in Europe can be attributed to Europe's imperial past, and that the arguments about the place of shari'a in Europe therefore have a deep symbolic meaning that is associated with minority identity, and which can only be overcome after a long period of negotiation and trial and error. While this process has been going on in the United Kingdom for at least three decades, the development of any form of unified Islamic family law or of councils that might provide guidance or rulings on shari'a is still in its infancy in the Netherlands, as becomes clear in Susan Rutten's chapter. Moreover, the Dutch political climate has become such in the past decade that any initiative is met with hostility and political, as well as legal, objections. Insofar as Dutch Muslims want to undertake initiatives in this direction, they will therefore do so mostly within the context of the Dutch legal system, which, according to Rutten, may be well equipped to cope with legal and religious pluralism and consequently with shari'a, although some human rights issues remain to be resolved.

The chapters on the South East European countries of Albania, Kosovo and Greece bring us into an entirely different context. First and foremost, the Muslim communities in these countries have been living there for more than five centuries and have a long history of institutionalization. This history was cut short with the implementation of communist rule after 1945, but it has gradually re-emerged since the fall of communism and the Yugoslav wars of the 1990s. Remarkable in this respect are the cases of Albania and Kosovo, the only countries in the West with Muslim majority populations. Besnik Senani describes how these countries are struggling to accommodate secularism to Islamic identity, with the clear aim of being as 'European' as possible. In doing so, some political leaders in Kosovo and Albania have gone so far as to distance their national culture from Islam, sometimes even claiming more proximity to Christianity than to Islam. Angeliki Ziaki describes a very different situation in Greece, even though this coun-



try shares a historical Ottoman legacy with Albania and Kosovo. The Muslim minority lives in the most eastern part of Greece, where, as enshrined in the 1923 Lausanne Treaty, it has historically been allowed a high degree of religious autonomy. This includes having its own *muf-tis*, who preside over shari'a courts that have exclusive jurisdiction in family law matters. Although some observers criticize this situation as 'neo-milletism', alluding to the *millet* system under Ottoman rule, Ziaki argues that it is possible to achieve a symbiosis between Greek secular and Islamic law.

#### SHARI'A IN THE WEST

When surveying these studies, one of the most noticeable findings is that practices of shari'a are adapted to the legal, social, political and historical contexts of each Western country, creating a diverse picture of 'shari'a in the West'. For example, the strict distinction between a civil and religious marriage, as is legally prescribed in most Western countries, can create a legal social and political grey zone where choices between the two are made: are the two marriages to be conducted separately and if so, in what order, and what is the status of a civil or religious marriage if only one has been concluded and not the other? These questions are not pertinent to Muslims, but to people of all faiths who want to marry religiously. In countries like the United States, Australia, United Kingdom, Spain or Sweden the conflict has been resolved by allowing the two ceremonies to converge. In countries like the Netherlands, France and Germany, on the other hand, the distinction between religious and civil marriage is strictly adhered to as a principal matter of separation of state and religion.

Another example where national context and history make a difference in the reception of shari'a is that of the Islamic institutions where decisions regarding shari'a are taken, in particular regarding family law matters. These institutions, known as Sharia boards, courts, councils or tribunals, may be integrated into the formal judiciary system (as is the case in Greece), or may operate in an informal manner (as is already the case in many Western countries with regard to Jewish and Catholic 'courts'), or may operate between formal and informal domains by means of arbitration (as in the United Kingdom and, until 2007, in Ontario, Canada).

And, as a final example, we might mention the allowances made for social conduct, in particular the use of religious dress. Here we see an interesting difference between the United States and Western European countries: while both regions adhere to similar notions of secularism

and liberty, the manifestation of religion – including that of Islam – in the public and political domain is much more accepted in American society than in European society. This particular form of secularism is clearly much stronger in Western Europe and consequently has its effects on the public manifestations of Islam. We will return to this subject below.

When we turn our view to the Muslims in the West, perhaps the most conspicuous commonality that emerges from the six chapters is that there is no enforcing agency with respect to shari'a other than Muslims themselves. Applying and enforcing shari'a is mostly a matter of voluntary willingness to submit to these rules, whereby social actors – one's peers, family, or the Muslim community – may add a degree of pressure or coercion. Enforcement of shari'a may also result from Muslim communities having organized themselves, either to coordinate certain services for their community or to act as intermediates with the government. In the case of America and Australia, Muslims have established organizations that act as lobby groups, scholarly councils or advisory boards. Efforts to create similar unified initiatives have failed in the United Kingdom, resulting in a large number of councils that act primarily as tribunals aimed at solving marital and other disputes among Muslims. If we move to the European continent, the Netherlands serves as an example of a Western European country where such councils do not exist (and are considered undesirable from a political perspective), but where the government has been active in coaxing the Muslim community to organize itself as a representative community. This governmental engagement is representative for most North Western European countries where Muslim communities, until now, are still divided and therefore relatively powerless and without much of a representative constituency. In South East Europe, we see yet another form of organization: here, the Muslim community has historically been granted specific autonomous privileges by the state to regulate certain affairs internally, such as religious education, mosque construction, and family law, and often receives financial support by the state to do so. If we juxtapose all these Western practices of shari'a in the West we may conclude that shari'a mainly manifests itself within the boundaries set by the freedom of religion, and the state's involvement is therefore limited accordingly.

This brief overview might prompt the conclusion that there are many different forms of shari'a in the West, due to the differences in Western legal systems. This is not entirely correct. In the first place, there are no different 'forms of shari'a'; instead, within a single concept of shari'a, we have identified four domains of rules practised by devout Muslims, and within each of these domains we observe modalities in the ways

they are practised. These modalities may be the result of internal differences regarding interpretations of shari'a, or the consequence of what a national legal system allows or disallows with respect to a particular Islamic practice. In the latter case, there may be differences between Western legal systems, but these differences lie in the details. In terms of legal principles, Western countries' legal systems hold a majority of their principles in common. The overriding principle is that of the freedom of religion, even though Western states may differ as to how they regulate their involvement with these institutions. Therefore it is not necessarily the principles of legal systems that have created the diversity of shari'a in Western countries, but the cultural and social context in which these principles are embedded. This is the subject of the second section of this volume.

### Western Responses: Law Versus Culture

The country studies clearly show that the conflicts arising vis-à-vis practices of shari'a in the West are not only legal in nature. On the contrary, very few shari'a practices are a violation of the law; they are more often a violation of what we suggest to call 'culture', which we define as all norms relating to political, cultural, social or other normativity shared by the majority of society. While the legal response to shari'a practices is simply 'this is (not) allowed under law', the cultural response can be summarized with the maxim, 'this is (not) the way we do things here'.

Most cultural contestation occurs in the domain of religious behaviour, particularly in Western European countries. Examples include the headscarf, the face veil (*burqa* or *niqab*), religious dress, and the refusal to shake hands with the opposite sex. Sometimes such responses are brought to court or to the legislature and may, when accepted, then become part of the legal response: a behaviour that is considered 'not the way we do things here' is then turned into 'this is not allowed under law'. In the particular case of Islamic rules, however, the prohibition of a certain dress or behaviour that is culturally deemed undesirable may contradict fundamental legal freedoms. The French law of 2011 banning the face veil illustrates this dilemma: on the one hand, the State Council, adhering to the legal response, advised against such a ban on the basis of the principle of personal autonomy, which allows a woman to freely wear what she wishes;<sup>14</sup> and, on the other hand, the legislature, adhering to the cultural response, deemed open-faced encounters in public a matter of 'social contract' that warranted legislation.<sup>15</sup>

Another issue that gives rise to public indignation is that of Islamic family law. In her chapter on Islamic marriage in the Netherlands, Annelies Moors provides an interesting insight into how religious marriage – which is allowed in Western legal systems as a matter of personal freedom – has come under scrutiny for political and security reasons, because it has become associated with a deliberate attempt on the part of Muslims not to participate in Dutch society. On the other hand, in chapter 9, Nadjma Yassari demonstrates how and why German courts have been quite willing to hear cases on the issue of the bridal gift (*mahr*), which is one of the conditional elements of Islamic marriage.

All of the country studies provide additional examples of this dichotomy between 'bad shari'a' and 'good shari'a'. While Islamic dress, the building of mosques and the use of Islamic family law tend to give rise to controversy, Muslim initiatives to construct Islam-compliant financial instruments (banks, mortgages and insurance) are often applauded. The United Kingdom has been a European frontrunner in adapting national fiscal and financial laws to facilitate these new developments, partly to meet the needs of British Muslims, but also to remain compatible with the expanding international market of Islamic finance. To refer again to the ruling by the European Court of Human Rights: clearly not all 'shari'a' conflicts with European human rights values, just as not all 'shari'a' is considered undesirable in a Western context.

It is clear that a large part of the discussion on shari'a is fuelled by pre-conceived notions about its nature and what Muslims might (secretly) want. The cultural bias vis-à-vis Muslim practices is highlighted in the contribution by Fournier and Reyes on honour crimes in Canada. Although honour crimes are not specifically 'Islamic' – a point frequently made by Muslim scholars – it is a practice that tends to take place among certain ethnic communities from Muslim countries and as such presents an interesting case study. Just like shari'a, honour crimes are branded in the West as foreign and therefore different. While this may indeed be the case in quite some aspects, the authors point at the *a priori* rejection of these institutions as alien practices. The authors argue that the rulings by Canadian courts in honour crime cases focus on the cultural "Other" but fail – or refuse – to see the similarities, not only between these crimes and those committed in Canada with similar honour intentions, but also in the legal origins of these crimes in the national laws of both Western and Muslim countries.

The legal – cultural dichotomy perhaps provides the key to understanding the conflicting reactions to 'shari'a': the West has produced legal systems that may allow for certain practices, Islamic practices included, but at the same time, the West has preserved a cultural her-

itage that may conflict strongly with these very same practices. This explains much of the confusion arising in discussions on shari'a. For instance, the law may explicitly allow the building of mosques, even though there is nationwide opposition. Similarly, the law may protect people's freedom to meet and greet each other how they wish, but not joining mixed-gender social gatherings or refusing to shake hands may be considered an insult by local custom. On the other hand, legal and cultural responses may also concur: Western laws allow interest-free finance, and its Islamic version is accepted in most Western countries. No wonder that Muslims in the West are often bewildered about what they are allowed to do, and what not. Which brings us to the third section of this volume: do Muslims adapt their interpretations of shari'a to the many Western legal and cultural responses, or is perhaps adaptation needed from the part of the Western legal systems?

### Adaptation in Western or Muslim Legal Systems?

Some of the country studies in this volume touch upon the issue of Muslims adapting their Islamic rules to Western legal requirements, or the necessity of adapting Western legal systems to the needs of Muslims. In this third section of the volume, Marie-Claire Foblets explores the need for and potential of Western legal systems to accommodate Islamic rules: *should* Western legal systems do so and, if so, *can* they do so? She answers both questions with a cautious affirmative (compare Mathias Rohe in chapter 1, who holds the opposite view). Given the fact that religious demands are an emerging societal phenomenon in the West, Foblets argues, it is the state's duty to offer adequate responses. These responses should preferably embrace diversity from the perspective of freedom of religion or of thought, guaranteed as a fundamental right of individuals. Moreover, since these religious demands are very often visibly connected to those of identity, they must therefore be handled sympathetically and with respect for their significance to those concerned. In order for a Western legal system to make the necessary accommodation to religious diversity, the principle of the autonomy of the will should be taken as the starting point. This will allow for the incorporation of religious rules in civil law, more freedom of choice in private international law, and religious arbitration.

The two other contributions to the third section discuss the reverse situation, that is, the need for and potential of Islamic legal practices to adapt to the Western legal systems in which they operate. The two contributions take different positions. Zainab Alwani and Celene Ayat

Lizzio argue against providing a singular, comprehensive model for the integration of Islamic values within largely secular systems, but instead advocate the need to look for similarities in the aims of both (Islamic) religious and (Western) civil law. According to these authors, it is entirely counterproductive to advocate norms drawn directly from pre-modern Muslim legal discourses without a full consideration of their outcomes and effects in specific European contexts.

Abdullah Saeed continues this latter argument with his discussion of the novel development of shari'a rules that are adapted to their Western context, the so-called '*fiqh* for minorities'. This new discipline of Islamic legal scholarship is based on the argument that living in accordance with shari'a should improve a Muslim's life. If the strict application of shari'a rules makes his life harder – for example, if the Muslim had to fast for a disproportionately long time somewhere in the far North of Europe, or was prevented from rising up the social ladder due to the prohibition of a mortgage, preventing him from buying a house – then, according to minority *fiqh*, shari'a itself demands that its rules be adapted. Saeed argues that this new scholarship must be repositioned within the broader debate on the reform of classical Islamic law that applies to all Muslims, not only those in the West. According to Saeed, such repositioning requires that temporary and ad hoc solutions be replaced with a more principled discourse of reform, leading to real change and new understandings of how Muslims should practise Islam in today's world, regardless of where they are located.

### Conclusion

This volume does not only provide new insights in the concept of shari'a in the West, but also provides a framework of how shari'a in the West can be studied. The premise of this volume is that one needs to focus on the question 'What do Muslims *do* in terms of shari'a?' rather than 'What *is* shari'a?' Taking this perspective provides us with two insights: first, the practice of shari'a is limited to a limited set of rules (mainly related to religious rituals, family law and social interaction) and, second, most of these rules do not pertain to the Western definition of 'law'. The framework of this volume then continues to explore two more interactions: the Western responses to these practices of shari'a and, in turn, the Muslim legal reaction to these responses.

On the Western side we see that there is unity on matters of legal principle but quite some diversity on the interpretation of these principles. This interpretation can be partly attributed to historical, social-

economical and legal differences among Western countries, whereby we might observe a general division into three Western regions: America and Australia, North Western Europe and South Western Europe. The diversity of Western responses to shari'a can be further explained by distinguishing between legal responses, on the one hand, and what we suggest to call the 'cultural response': while Western laws might provide general (religious) freedoms that allow Muslims to practise their shari'a rules, Western public and political discourse may oppose these practices because they allegedly contravene with cultural identity.

Muslims, in turn, react to the Western responses to the Muslim practices of shari'a rules. Some may stubbornly adhere to these rules as a matter of religious freedom, others may abandon them to avoid too much confrontation, and yet others may seek to find common ground between their religious rules and the rules of the Western societies where they live.

The framework and rich material provided in this volume will contribute to our understanding of shari'a in the West. It is a phenomenon that is relatively new and therefore still in flux. Developments succeed each other in rapid order, often highlighted by shrill debates in the public and political domain, whereby action and reaction are often hard to separate. In this respect it is important to note that much is still to be known about the actual practices and intentions of Muslims in the West with regard to shari'a before we can make final judgements about the (in)admissibility of shari'a in the West.

#### Notes

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- 2 'Islam in Civil and Religious Law in England', lecture by the Archbishop of Canterbury, Dr Rowan Williams, Lambeth Palace, 7 February 2008; 'Equality before the Law', speech by Lord Chief Justice of England and Wales, East London Muslim Centre, 3 July 2008. See for commentaries: Rex Ahdar and Nicholas Aroney (eds.), *Shari'a in the West*, Oxford: Oxford University Press, 2011.
- 3 Ahdar and Aroney (eds.), *Shari'a in the West*; Andrea Büchler, *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Laws*, Burlington: Ashgate, 2011; Samia Bano, *Islamic Dispute Resolution and Family Law*, London: Palgrave, 2011; Robin Griffith-Jones (ed.), *Islam and English Law: Rights, Responsibilities and the Place of Shari'a*, Cambridge: Cambridge University Press, 2013; Mark E. Hanshaw, *The Unfamiliar Abode: Islamic Law in the United*

*States and Britain*, Oxford: Oxford University Press, 2010; Julie MacFarlane, *Islamic Divorce in North America: A Sharia Path in a Secular Society*, Oxford: Oxford University Press, 2012; Jørgen Nielsen and Lisbet Christoffersen (eds.), *Shari'a as a Discourse: Legal Traditions and the Encounter with Europe*, Burlington: Ashgate, 2010; Matthias Rohe, *Muslim Minorities and the Law in Europe: Chances and Challenges*, Global Media Publications, 2007.

- 4 See for recent publications, e.g. Wael B. Hallaq, *Shari'a: Theory, Practice, Transformations*, Cambridge: Cambridge University Press, 2009; Muhammad Hashim Kamali, *Shari'ah Law: An Introduction*, Oxford: Oneworld Publications, 2008.
- 5 See, e.g. the twelve country studies in Jan-Michiel Otto, *Sharia Incorporated. A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, Amsterdam: Amsterdam University Press, 2011.
- 6 This legal-anthropological approach has been advocated by a few scholars, and mostly when discussing shari'a in Muslim-majority countries – see, e.g., Baudouin Dupret, 1996 'La shari'a comme référent législatif. Du droit positif à l'anthropologie du droit', *Egypte Monde Arabe* (25), pp. 121-175.
- 7 John L. Esposito and Dalia Mogahed, *Who speaks for Islam? What a Billion Muslims Really Think*, New York: Gallup Press, 2008.
- 8 'To be more exact: to the question 'should the programme of this [Muslim] party be based on shari'a?', 10.2% answered 'Yes, entirely' and 19.3% 'Yes, to some extent' (Foquz Etnomarketing, *Onderzoeksresultaten 'Politieke Voorkeuren Moslims'* t.b.v. Redactie Nova, Nicuwegcin: Foquz Etnomarketing, December 2004, pp. 10-12).
- 9 ICM Research, 'Muslim Poll – February 2006', prepared for the *Sunday Telegraph*, available on [www.icmresearch.com](http://www.icmresearch.com).
- 10 'There was a difference in age: 37% of 16-24 year olds preferred shari'a compared to 17% of 55+ year olds. See Munira Mirza et al., *Living Apart Together. British Muslims and the Paradox of Multiculturalism*, London: Policy Exchange, 2007.
- 11 E.g., Natasha Bakht, 'Family Arbitration Using shari'a Law: Examining Ontario's Arbitration Act and its Impact on Women', in *Muslim World Journal of Human Rights*, 2004 (Vol. 1, Issue 1); Samia Bano, 'Cultural Translations and Legal Conflict: Muslim Women and the shari'ah Councils in Britain' in A. Hellum, S. Ali and A. Griffiths (eds.), *Transnational Law and Transnational Relations*, Ashgate Publishing, 2011; Maurits S. Berger, 'Sharia in Canada. An example for the Netherlands?' in: *Crossing Borders*, The Hague: Kluwer Rechtswetenschappelijke Publicaties, 2005; John R. Bowen, 'How Could English Courts Recognize shari'ah?' *University of St. Thomas Law Journal*, 2010 (Vol. 7, No. 3), pp. 411-435.
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<sup>14</sup> Conseil d'Etat, *Etude relative aux possibilités juridiques d'interdiction du port du voile intégral*, 25 March 2010 (available online at: [www.conseil-etat.fr/cdec/media/document/avis/etude\\_vl\\_30032010.pdf](http://www.conseil-etat.fr/cdec/media/document/avis/etude_vl_30032010.pdf)).

<sup>15</sup> See the explanations of their respective law proposals by the Cabinet (*Projet de loi interdisant la dissimulation du visage dans l'espace public* (No. 2520, 19 May 2010)) and by the Socialist Party (*Proposition de loi visant à fixer le champ des interdictions de dissimuler son visage liées aux exigences des services publics, à la prévention des atteintes à l'ordre public* (No. 2544, 20 May 2010)).

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- 58 Turner, 'The Enclave society', 2007.
- 59 Margaret Somers, *Genealogies of Citizenship. Markets, Statelessness and the Right to Have Rights*, Cambridge: Cambridge University Press, 2008, p. 8.
- 60 Pew Research Foundation, 'Muslim Americans: No signs of growth in alienation or support for extremism', 2011, p. 4.

### 3 Australia

#### The Down-Under Approach and Reaction to Shari'a: An Impasse in Post-Secularism?

Jamila Hussain and Adam Possamai

#### The Socio-Cultural Heterogeneity of Muslims and the Implication for Shari'a

A recent report<sup>1</sup> based on a research project on the Convention on the Elimination of All Forms of Discrimination against Women reviewed official documents from 44 countries with a Muslim majority. It discovered that among these countries, there were significant differences with regard to Muslim family law. The document concluded that there is no single functioning worldwide Islamic law. Islamic family law, wherever it is practised, is based on the laws and principles set out in the Qur'an and Sunna. However, because there are multiple schools of law and different family law provisions that are influenced by local cultures where Islamic law operates, no single tradition can claim ownership of it.

Through various migration patterns, Muslims in Australia have come from over seventy different nations. Thus they come from various local cultures that have different legal provisions. This makes Muslims the most ethnically diverse religious group in Australia. Some Muslims came from countries where Islam is the religion of the majority, and others from religiously diverse countries. And, of course, we now have a growing population of Muslims born in Australia. Ethnically speaking, this is a religious group that has a wide range of experiences of Australian society, and Muslims in Australia are divided along ethnic and ideological lines.<sup>2</sup>

The shari'a is a devolved law, sensitive to local traditions, and in this sense unlike so-called Roman continental law. Unsurprisingly therefore, the detail of provisions about marriage, marital property, alimony, divorce, inheritance, custody and guardianship of children differs among the different Islamic countries and ethnic groups. The understanding of the practice of shari'a, or parts of it, in a secular society such as Australia, must thus be nuanced, taking into account the multi-

While shari'a is not officially recognized in Australia, it informs the ideas and conduct of Australian Muslims in various ways. The operation and regulation of shari'a in Australia is essentially 'underground' for Black,<sup>3</sup> or what we prefer to call an unofficial parallel system. Although shari'a has not been integrated into the legal system in Australia, it continues to be applied at a local level in Muslim communities and mosques<sup>4</sup> in certain ways and in areas of law that we will elaborate upon below. Sometimes, because of the lack of a formal mechanism of Islamic adjudication in Australia and because of the shortage of trained Muslim scholars, some women travel to their country of origin to apply to a shari'a court.<sup>5</sup> Muslims may feel more comfortable combining shari'a norms and Australian laws in their understanding of the law. Further, given the ethnic diversity of the Australian Muslim community, there is no dominant shari'a authority that can act as an overarching system and no dominantly authoritative person.<sup>6</sup> As there is no hierarchy in Islam, and as there is a divergence of opinion as to whom should administer a shari'a court,<sup>7</sup> each Muslim is free to seek guidance from any scholar of his or her choice, leading to what is called 'fatwa or forum shopping'. This shopping-around has also extended to the Internet. In 2009, Black and Hosen pointed out that requests for *fatwas* from Australia on the 'Islam Q&A' website were so numerous that Australia ranked seventh out of 128 countries in terms of the number of these demands.<sup>8</sup>

As there is no formal process for Islamic adjudication in Australia, Muslims consult *imams* to settle issues relating to divorce and other private disputes. Islamic legal processes seek consensus rather than the adversarial environment typical of Western (common) law traditions. The overriding concern of most *imams* is to save the marriage and to avoid expensive and often bitter conflicts within a divorce court. However, when a marriage has broken down, many Muslims believe that an appropriate way must be found to divorce, which fits with their faith and cultural values. Some Australian Muslims report that they would not accept the authenticity of a divorce unless it was conducted according to their religious norms.<sup>9</sup> At the same time, other Muslims are satisfied to have divorce procedures conducted according to secular law. In the past, many Muslims were confronted by a range of difficulties, including their lack of familiarity with the legal systems of their adopted countries, the previously adversarial nature of the courts administering these systems, the unsympathetic nature of some judicial officials, and the differences of law relating to property, domestic

ian family law system more 'user friendly' for all ethnic groups,<sup>10</sup> as we will discuss below.

### Shari'a in Australia

Since 9/11, and the Bali bombings in 2002 which killed 202 people, including 88 Australians, the role of Islam in Australian society has been the subject of much discussion in the public and political domain. Central to the debate about Muslim identity has been the issue of women's rights under Islam, and the role of shari'a. The debate has also concentrated on issues such as permission to establish Islamic schools, controversy about 'gang' rapes,<sup>11</sup> and shari'a as regards family law matters. The debates were occasionally sparked by controversial remarks by Muslim clerics, often involving disparaging comments about women. All these factors have resulted in some Muslims becoming victims of discrimination, harassment and racial profiling.<sup>12</sup> Debates over national security have brought into focus issues of multiculturalism and acceptance of diversity,<sup>13</sup> and, as argued below, issues of post-secularism.

While the Archbishop of Canterbury's speech in the United Kingdom<sup>14</sup> was widely reported in Australia, a full national debate about shari'a never really developed. The notion of the adoption or assimilation of shari'a was rejected outright by government ministers and spokespersons, with no explanation or discussion as to its particular attributes or how it actually operated in practice. When the Coalition Government (comprising the Liberal and National Parties) was in office in Australia from 1996 to 2007, Prime Minister John Howard attempted to gain political support by publicly condemning shari'a.<sup>15</sup> In the post-9/11 atmosphere, Howard seemed to consider that it would be unwise to be associated with Islamic values and that, in any event, it would go against his strong political lines on 'law and order' and 'Islamic threat' to say anything positive about shari'a. On assuming office in 2007, the new Labor government of Kevin Rudd was likewise not prepared to engage in a public dialogue about recognizing shari'a, or parts of it.<sup>16</sup>

Black and Sadiq<sup>17</sup> have observed mixed responses to shari'a in Australia, predominantly by non-Muslims, and they have made reference to 'good and bad shari'a'. For instance, it could be noted that while there is a public outcry over family law (see recent case studies below), there has been support for legislative change in Australia to facilitate Islamic banking and financial services. It seems that Islamic banking and finance laws are 'good' shari'a worthy of adoption, whilst personal and



itance) are not.<sup>18</sup> In the following paragraphs we will investigate what could be seen as bad in these latter cases of 'bad' shari'a.

### The Relationship Between Shari'a and Australian Law

Muslims are required by their religious law to obey the laws of the country in which they live, provided that those laws do not oblige them to do something contrary to Islam. Therefore, for the vast majority of Muslims, there is not much conflict between shari'a and secular law. For the most part, Muslims are free to follow the shari'a in their private lives, while at the same time adhering to Australian law in all the areas it covers.

This is true of family law, as well as of other aspects of life. The requirements of the Commonwealth Marriage Act 1961, which governs all marriages in Australia, are broadly expressed. Provided that the required notice is given,<sup>19</sup> the correct forms are filled in and the marriage is performed by an authorized marriage celebrant, there is no restriction at all on the time,<sup>20</sup> place,<sup>21</sup> or type of ceremony<sup>22</sup> a couple may choose to conclude their marriage. Many *imams* are authorized marriage celebrants and can conduct a marriage ceremony that is valid in both Islamic and Australian law. *Imams* cannot validly conduct polygamous marriage ceremonies, since polygamy is forbidden in Australian law. However, since the shari'a permits, but does not require, polygamy, this issue does not create any tension.

The requirements for concluding a marriage under shari'a can therefore be met within the framework of Australian law. A contract, whether oral or written, can be made. The *mahr*, an essential part of an Islamic marriage, can be paid in whatever form the parties choose. Muslims can choose not to marry anyone who is not a Muslim, or, for men, a woman who is not a Muslim, Jew or Christian.<sup>23</sup>

Traditionally, the common law in Australia did not regulate relationships within the family to any great extent. In recent times, however, laws have been introduced as deemed necessary for the protection of children, and to criminalize domestic violence. The shari'a does regulate family life to a greater extent but, as mentioned, observing Muslims can adhere to shari'a requirements in their private lives without offending against Australian law.

In the area of divorce, on the other hand, there are more zones of conflict between shari'a and Australian law. There are several different

this right to their wives), and traditionally did not require any overseeing by a court. Today, many Muslim countries require some official processes to regulate *talaq* divorce.

It is not so easy for a wife to secure a divorce unless she has it provided in her marriage contract that she retains the right to divorce herself. In Muslim countries, the wife may apply to the shari'a court for a divorce by *khul'*, in which case she normally agrees to return her marriage gift (*mahr*) to her husband in exchange for his divorce by *talaq*. Another form is divorce by *fasakh*, which is more in the nature of an annulment and depends upon establishing grounds for fault. Accepted grounds differ among the various schools. The parties may also mutually agree to divorce.

Since the introduction of the Family Law Act in 1975, divorce under Australian law has not required proof of fault, and has become a simple procedure. Muslims do obtain dissolution of civil marriages from the Family Court but must resort to shari'a to dissolve their marriages also according to religious law. This alternative can be required when a person has property or inheritance rights in an overseas country (for example, Lebanon) which does not recognize civil divorce. It is also of importance for those men and women who regard their religion as a vital part of their lives and who would not wish to depart from its teachings in matters concerning their family life.

Some Muslim women find themselves in a 'limping marriage' after a civil divorce. When a woman cannot persuade her husband to grant her a religious divorce as well, she is then divorced according to civil law but still married according to religious law. There is no shari'a court in Australia to grant a religious divorce to such a woman, nor any central Islamic authority that might confirm her divorced status. Some *imams* feel that they are qualified to grant a divorce in these circumstances, but this is entirely at the discretion of the *imam*. There is some anecdotal evidence that some men who have promised to pay extravagant amounts of deferred *mahr* sometimes refuse their wives a religious divorce in order to avoid the obligation to make this payment. The result is that the wife cannot re-marry within her community since she is still married according to her religion, but since Islam allows polygamy for men, the husband is under no such constraint and can re-marry at will without sanction from either Australian or Islamic law.

A further problem for women is that until very recently, there had been no instance of Australian courts enforcing the *mahr*, which left the divorced wife without the financial provision she would have expected

NSW Supreme Court ordered a husband to pay his former wife the sum of AU\$ 50,000 which in their marriage contract he had promised her in the event that he initiated divorce. The court applied principles of contract law. The couple had married according to religious law only and the Family Law Act 1975 did not apply to their case.<sup>24</sup>

Rules concerning the custody of children vary considerably between shari'a and Australian family law. Under shari'a, the mother is entitled to the care and control of small children (the right of *hadhanah*). The father retains guardianship and may assume care and control of children at various ages, which vary according to different schools of thought (*madhabs*). However, in practice, it seems that these rules are not always implemented.

### Australian Family Law and Islamic Arbitration

Alternative types of dispute resolution are now well recognized in Australian family law. The Family Law Act introduced a greater emphasis on counselling in cases concerning children. In 2004, the Family Court Rules were amended to adopt a new system of case management, with greater emphasis on counselling, conciliation and arbitration in family law disputes. Parties are now obliged to explore avenues for dispute resolution before commencing proceedings in court. This procedure is in line with shari'a law, and is regulated accordingly in many Islamic family laws in Muslim countries.

The Jewish community has for many years maintained a Beth Din, a Jewish religious tribunal, in both Sydney and Melbourne, where Jewish people can seek resolution of problems involving family law. Similarly, the Catholic Church maintains its own tribunal, with power to declare annulment of marriages that are not in accord with the Catholic faith, and there are tribunals for other Christian denominations in Australia. These bodies allow those who approach them to obtain a mutually agreed settlement of their family problems, in accordance with their religious beliefs. At present, there is no national shari'a family law council or tribunal like those of the Jewish and Christian communities. The services of individual *imams* or groups of *imams* are available in this field, but these are uncoordinated and unsupervised at present.

### Recent Attempts to Bring Shari'a into the Public Sphere: Two Case Studies

#### CASE STUDY 1:

#### AUSTRALIAN FEDERATION OF ISLAMIC COUNCILS (IKEBAL PATEL)

On 4 April 2011, in response to an inquiry into multiculturalism held in that year by the Federal government, Ikebal Adam Patel, the president of the Australian Federation of Islamic Councils (AFIC), made a submission titled 'Embracing Australian Values, and Maintaining the Rights to be Different'. In this document he underlined the fact that Muslim countries differ in their use of shari'a. In his submission Islamic law is viewed as being able to change according to the requirements of different places and times. It is thus implied, without being specific enough, that Australian Muslims can adopt and adhere to the same values shared by all Australian people. Using the active involvement of the Australian government with regard to Islamic finance and halal food as examples of positive sites of cooperation (for example, the exportation of AU\$1.5 billion worth of *halal* frozen meat to Indonesia),<sup>25</sup> Patel recommended that multiculturalism in Australia should lead to 'legal pluralism'.

The Attorney-General, Robert McClelland, rejected the submission and claimed that there was no place for shari'a in the Gillard government's debate about multicultural policy or in Australian society. This claim led to the publication in *The Australian* on 17 May 2011 of an article titled 'Muslims to push for shari'a', and in the following week, thirteen articles on the topic were published in three leading newspapers, *The Australian*, *The Daily Telegraph* and the *Sydney Morning Herald*. Of these articles, eight portrayed a neutral view on the issue, four were somewhat negative, and one was somewhat positive. Of the 262 readers' comments published on the Internet sites of *The Australian* and *The Daily Telegraph*, 78 per cent were pro-secular and/or against shari'a, 6 per cent were pro-shari'a, and the rest tended to be off-topic statements without any clear meaning. Of the negative comments, 34 per cent were virulent comments and/or expressed racist tensions. Examples of comments of that type were: '[w]e have our laws in Australia to protect anyone who lives in Australia. If you don't like our laws leave, it's that simple', and '[i]f Muslims want shari'a law, they should go back to Saudi Arabia.'<sup>26</sup>

On 17 June 2011, after an interview with *The Australian*,<sup>27</sup> Ikebal Patel claimed that it was a mistake to...

the Muslim community, which was concerned by the lack of consultation with regard to his submission, and he underlined that in family matters, civil law should always take precedence.

On 24 November 2011, Luke Simpkins, Liberal MP for the Cowan electorate, claimed in the House of Representatives that a poll conducted in his electorate in Western Australia had found that almost all animals raised for meat, apart from pigs, are killed according to Islamic requirements. He argued that every business involved should clearly label halal meat. He stated:

So, when you go to Coles, Woolworths, IGA or other supermarkets, you cannot purchase the meat for your Aussie barbecue without the influence of this minority religion. You have no choice. And the point is that almost no Australians are aware of this, because it is not labeled. ... By having Australians unwittingly eating halal food we are all one step down the path towards the conversion, and that is a step we should only make with full knowledge and one that should not be imposed upon us without us knowing.<sup>28</sup>

#### CASE STUDY 2:

##### DIVORCE IN AUSTRALIA: FROM AN ISLAMIC LAW PERSPECTIVE<sup>29</sup>

In 2011, an article written by Essof, a solicitor and migration agent, sparked a national debate on Islamic divorce. According to Essof, the current informal Muslim divorce process in Australia, combined with civil law divorce requirements, allows men to distort and abuse the cultural system.<sup>30</sup> Essof does not advocate a separate legal system for Australian Muslims, but rather argues for the incorporation of the single aspect of Islamic divorce law. Islam, he argued, does not condone this behaviour. Rather, it is a consequence of the current inconsistency between civil and religious law in Australia, and of the recalcitrance of husbands who decline to finalize their religious divorces with their estranged wives. Essof acknowledges that Islamic law operates on an informal basis via *imams*, or community religious leaders, especially with regard to family law matters.

He points out that there are no existing formal structures in the Family Law Act to deal with individuals or couples seeking divorce according to an Islamic perspective. Although a Muslim man who receives only a civil divorce would be at liberty to re-marry, a Muslim woman receiving only a civil divorce, and not an Islamic one, would not, within

To address this issue, Essof proposes the establishment of a council of recognized *imams* and legal practitioners who have knowledge and understanding of divorce under both Islamic and Australian law, and the formalization of the divorce process in a way that it can be recognized under Australian law. The final recommendation of his article is the inclusion of an extra criterion in the divorce application: the applicant should be asked if he or she was married through a religious Muslim ceremony. If the applicant responds in the affirmative, then s/he is required to prove to the Registrar that the couple has been divorced under shari'a law. Contrary to Patel's retraction, wherein he stated that civil law should take precedence in family matters, the case presented here seems to advocate the reverse.<sup>31</sup>

Shortly after the publication of Essof's article, a newspaper article entitled 'Local Islamists draw on British success in bid for sharia law',<sup>32</sup> written by the same journalist who reported the retraction by Patel, claimed that Essof's article was the latest move to give shari'a priority over Australian divorce law under the guise of helping Muslim women, and pointed out that this would mean that Muslims would not be able to obtain a civil divorce unless they were first divorced under Islamic law. In this article the journalist argued that Australia had entered an 'ambitious new phase that draws on the tactics that have handed success to Islamists in Britain', thus claiming that there was a hidden agenda behind Essof's argument.

The two case studies we have discussed offered a moderate approach to legal pluralism in the public sphere. Although we are not discussing the nature of their arguments here, we want to underline the fact that in Australia and especially in the Australian media, there has not been a public dialogue of the Habermasian type (that is, engaged in communicative action; see below) concerning the application of legal pluralism, specifically as it applies to shari'a.

#### The New Australian Conservative Modernity and Its Obstacles to Post-Secularism

The social scientist Jakubowicz<sup>33</sup> uses the expression 'the new Australian conservative modernity' to refer to the country's resurgent social values of Christian conservatism, the active government priorities of disengagement and a rapidly expanding culture of surveillance and obedience. In this new phase of modernity, there is a process of delegitimization of diversity, especially concerning Muslims – meaning

traditional hierarchy of cultural power within which diversity is only acceptable within the dominant moral order.<sup>34</sup> In this process, Fozdar<sup>35</sup> sees a retreat from multiculturalism resulting from the policies of the conservative Howard government (1996-2007). In this new Australian modernity, political leaders portray 'Christianity as the norm, as a non-migrant religion, and as the taken-for-granted foundation for the nation's values and laws.'<sup>36</sup>

However, one must be aware of the current situation in Australia with regard to its Christian heritage. Randell-Moon<sup>37</sup> and Maddox<sup>38</sup> recently demonstrated that in the Australian case (a secular liberal society where a strong division between church and state is supposedly definitive), religion still has a part to play in politics. In this 'secular' liberal culture, where religion is often actually a significant factor in voting decisions and has increasingly intruded into the public sphere since the beginning of the 21st century, one should not be surprised to witness the many social and cultural bleeds across the border between state and religion. Granted that Christianity was for many years a silent backdrop to Australian national identity, Fozdar<sup>39</sup> observes that there is now an even stronger sense of the legitimacy of the public status of Christianity, and one of the illegitimacy of other religious traditions.

Bearing in mind the relationship between the mass media and the way political agendas are constructed,<sup>40</sup> this new religious project of the 'new modernity' also affects (and/or is affected by) the media. Black and Sadiq<sup>41</sup> cite the national newspaper, *The Australian*, as highlighting 'differences' between Muslims and non-Muslims in some Muslim countries (with topics such as stoning for adultery, forced marriages and female genital mutilation), and as feeding into the fear of what shari'a family law would be in Australia if a dialogue on the subject were allowed. While there are demands from some groups in Australia for the adoption of full shari'a,<sup>42</sup> Saeed<sup>43</sup> states that the large majority of Muslims advocating the use of shari'a are only seeking its recognition in a few areas (such as marriage, burial practices, and interest-free financing) and are working towards a compromise between the demands of their religion and the Australian legal system.

Their detractors tend to present the religion of Muslims as unchanging and as representing a pre-modern and patriarchal value system.<sup>44</sup> These detractors also tend to characterize the Muslim community as bounded, fixed and stable.<sup>45</sup> This, of course, is far from being the case. Akbarzadeh and Roose<sup>46</sup> discuss three ideal types of Muslims in Australia in order to provide a lens through which to look at this religious

who engages with the secular West; and a cultural Muslim type – those who define themselves as Muslims but do not actively follow Islamic principles. Cultural Muslims often have a pragmatic approach to religion. Islam is celebrated when it helps consolidate a community, but is not allowed to interfere and interrupt the daily routine of life, which to all intents and purposes may be called secular.<sup>47</sup>

In Australia, these cultural Muslims are the silent majority of the Muslim minority group, not much engaged with advocacy for legal change. Those Muslims mainly engaged in working out shari'a in Australia in line with (and not in opposition to) the Australian legal system are of the moderate type. Some moderate Muslims are already working within a type of unofficial parallel legal system (as detailed above) in the private sphere. But when some moderate voices attempt to discuss, in the public sphere, how the two legal systems could interact, it appears the dialogue is not allowed to proceed. The 'extreme right' is already seeing the moderate Muslim as a 'Trojan horse' for radical Islamists, as if they were harbouring a hidden Islamic agenda.<sup>48</sup> It might be argued that in the public sphere, debate about the partial use of shari'a leads its detractors (who are not necessarily from the extreme right) to believe that this might be a first step towards implanting full shari'a law, as if shari'a were a homogenous and timeless law straight from the caliphate. This belief is not conducive to a fruitful dialogue about the future of religion in Australia that would be helpful in advancing a post-secular project.

By post-secularism, we refer to the process of the de-privatization of religion, and to the current dialogue about managing the presence of religious groups within secular frameworks in the public sphere. As Habermas<sup>49</sup> has underlined, the challenge today is to draw the 'delimitations between a positive liberty to practise a religion of one's own and the negative liberty to remain spared from the religious practice of the others'. In other words, how do we work with post-secular societies' religious toleration in ways that celebrate religious diversity but that do not preclude the freedom to be atheist? And, more specifically to this chapter, how far should our own and others' religious practices be implicated within the legal system?

However, as already indicated in this chapter, one should be aware of the difficulties of entering into such a dialogue. Michele Dillon, in her 2009 presidential address to the Association for the Sociology of Religion, stated quite sharply that 'independent[ly] of whether an individual is religious or not, tolerance of otherness does not come easily',<sup>50</sup> but openness to alternative beliefs is more complicated than Habermas

ist groups can live in a self-reflective manner 'is attractive but hard to imagine'.<sup>51</sup> Part of the solution for Habermas is to have neutral and secular governments that can ensure that communities of various beliefs can coexist on an equal basis. His post-secular project is based upon the notion that the state is neutral and objective,<sup>52</sup> yet we know from studies in sociology how the state usually and instrumentally serves certain groups over others, as has already been alluded to in the above discussion of Australia and its new conservative modernity.

It appears that in Australia, one aspect of the trend towards post-secularism, that is the focus on religious and legal pluralism, is not allowed to be fully aired in the public sphere, unless to be shown in a negative light. On that point, it can be argued that Australia is failing to meet or implement the post-secular project. The issue here is not solely about including shari'a in the legal system or preventing its use in the private or public sphere, but about having a fruitful dialogue of the Habermasian type in the public sphere. This is not happening in Australia's new conservative modernity.

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## 4 United Kingdom

### An Early Discussion on Islamic Family Law in the English Jurisdiction'

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#### Background

In 1975 the Union of Muslim Organisations of the United Kingdom and Eire (UMO) called a conference in Birmingham to discuss the place of shari'a family law in England. In January 1977 the UMO, together with the Anglo-Conservative Society, held a further meeting, this time in the House of Lords. The meeting discussed a number of practical issues facing Muslims, in particular those relating to schooling. But the main item on the agenda was a demand for the 'domestication' of Islamic family law for Muslims in Britain.<sup>2</sup>

In 1975 the Muslim case for the demand had been formulated by Sheikh Syed M. Darsh, an Azhar-educated Egyptian who had recently been seconded by the Egyptian authorities to the Regent's Park Mosque in London:

When a Muslim is prevented from obeying this law he feels that he is failing a religious duty. He will not feel at peace with his conscience or the environment in which he lives.... They firmly believe that the British society, with its rich experience of different cultures and ways of life, especially the Islamic way of life which they used to see in India, Malaysia, Nigeria and so many other nations of Islamic orientation, together with their respect for personal and communal freedom, will enable the Muslim migrants to realize the identity within the freedom of British society. When we request the host society to recognize our point of view we are appealing to a tradition of justice and equity well established in this country. The scope of the family law is not wide and does not contradict, in essence, the law here in this country. Both aim at the fulfillment of justice and happiness of the members of the family. Still, there are certain Islamic points which, with understanding and the spirit of accommodation, would not go so far as to create