

THE RECEPTION OF MUSLIM FAMILY LAW IN WESTERN LIBERAL STATES

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For: The Canadian Council of Muslim Women

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THE RECEPTION OF MUSLIM FAMILY LAW IN WESTERN LIBERAL STATES

Pascale Fournier¹

I. Introduction

Issues of personal status are of crucial importance for Muslim women because they often remain the last bastion of male dominance.² As a result of considerable immigration from Muslim countries and subsequent family reunifications, legal terms and concepts rooted in the Sharia (Muslim law)³ have been “transplanted”⁴ into Western states through one of two routes. First, through international private law rules, which often directly incorporate foreign (Islamic) norms; or, second, through secular domestic laws. In this paper, I analyze the extent to which French

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² See HIJAB, Nadia, “Islam, Social Change, and the Reality of Arab Women's Lives”, in Yvonne Yazbeck Haddad & John L. Esposito (eds.), *Islam, Gender and Social Change*, 1998); AL-HIBRI, Azizah Y, “Marriage Laws in Muslim Countries: A Comparative Study of Certain Egyptian, Syrian, Moroccan, and Tunisian Marriage Laws”, 4 *Int'l Rev. Comp. Pub. Pol'y* 227 (1992).

³ By Sharia (Muslim law), I mean Islamic rules considered by its adherents as based upon Islamic divine revelation. In this paper, I have focused more specifically on the recognition of Islamic marriages and polygamy, the Mahr (dowry) and the talaq divorce. I have excluded from the scope of this paper child custody and inheritance issues.

⁴ The metaphor of “legal transplant” has been used by Alan Watson when analyzing the importation of foreign legal practices in comparative law. See WATSON, Alan, *Legal Transplants: An Approach to Comparative Law* 21 (2d ed. 1993); Alan Watson, “Legal Transplants and Law Reform”, 92 *Law Q. Rev.* 79 (1976).

and German courts and public policies have recognized (or rejected) Muslim family law in matters of personal status. Although the French and German states follow assimilationist and anti-diversity policy models, at the legal and judicial level courts have demonstrated a degree of responsiveness to accommodate some aspects of Muslim religious traditions while rejecting institutions deemed contrary to the French or German “public order”. In addition, this paper will analyze the official demand for state recognition of Muslim family law that was put before the British government and ultimately rejected in the name of gender equality. The paper will also provide conclusions regarding the impact of these so-called transplanted Islamic legal rules on Muslim women, in particular in relation to their equality rights as residents and citizens of Western states.

II. The Case of France

II.1 Multiculturalism and the “Assimilation” Model in France

The most important feature of current French politics is its neo-republican discourse on French identity,⁵ in which membership in the national community involves an absolute commitment to the Republic and to its core values of *égalité* (equality) and *laïcité* (the separation of state and religion). This republican model was forged in the context of the 1789 French Revolution, as a direct reaction to the historical French struggle against its own Monarchy, ruling aristocracy and religious establishment.

⁵ Leruth, Michael F. 1998. “The Neorepublican Discourse on French National Identity” *French Politics and Society* 16 (4): 49-60.

In France, this traditional model of individual assimilation⁶ is explicitly affirmed by two legal documents. First, by Article 1 of the *Constitution of October 4, 1958*, which holds that “France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.”⁷; and, second, by *the Separation of Churches and State Act 1905*⁸, which states that there is no recognition and no direct public funding of any religion in France. Consequently, France does not allow the State to officially support any exemption for or special representation of immigrant or national minorities.⁹ While strategies are employed for individual integration into the French state, the formation of ‘communities’ of immigrants is highly

⁶ Tagnieff, Pierre-André. 1995. “L’Identité Nationale: Un Débat Français.” *Regards Sur l’Actualité* 209-210: 13-28.

⁷ *Constitution du 4 octobre 1958, Article 1* : “La France est une République indivisible, laïque, démocratique et sociale. Elle assure l’égalité devant la loi de tous les citoyens sans distinction d’origine, de race ou de religion. Elle respecte toutes les croyances.”

⁸ *Loi du 9 décembre 1905, Loi concernant la séparation des Eglises et de l’Etat*. Article 2 reads :

La République ne reconnaît, ne salarie ni ne subventionne aucun culte. En conséquence, à partir du 1er janvier qui suivra la promulgation de la présente loi, seront supprimées des budgets de l’Etat, des départements et des communes, toutes dépenses relatives à l’exercice des cultes.

Pourront toutefois être inscrites auxdits budgets les dépenses relatives à des services d’aumônerie et destinées à assurer le libre exercice des cultes dans les établissements publics tels que lycées, collèges, écoles, hospices, asiles et prisons.

Les établissements publics du culte sont supprimés, sous réserve des dispositions énoncées à l’article 3.

⁹ However, there are some exceptions to this rule. As correctly suggested by Brigitte Basdevant-Gaudemet, in “Islam in France”, *The Legal Treatment of Islamic Minorities in Europe*, Peeters: 2004, at 59:

“Equally, although there is no direct funding of religions from the public budget, public communities are not prohibited from granting subsidies to cultural or social institutions of a religious nature, and religions can also benefit from major forms of indirect aid in the form of tax deductions, in the context of private denominational schools, or by other means.”

discouraged.¹⁰

Despite this official separation between state and religion, it becomes less and less plausible to define French society in culturally homogeneous terms. Throughout France, more and more Muslims¹¹ are expressing and demanding recognition of their religious particularity. Daniël Hervieu-Léger has correctly emphasized the novelty and urgency of the dilemma raised by the “question of Islam”:

“...one of the most decisive changes that have occurred since the beginning of the 1980s has been the transformation of a society in which cultural homogeneity seemed assured within the normative space defined by the great republican referents, to a multi-cultural society...The question of Islam, which has become the second religion in France after Catholicism—ahead of Protestantism and Judaism—constitutes the highly sensitive point of crystallization of a problem that is much more vast: the question of the relation between particularity and universality in the very definition of French identity.”¹²

In this context, the Muslim population in France is seeking public policy recognition of cultural diversity. It began the project of establishing Islamic

¹⁰ Safran, William. 1991. "State, Nation, National Identity, and Citizenship: France as a Test Case." *International Political Science Review* 12 (2): 219-38.

¹¹ Estimates from 2004 show over 5 million Muslims in France, which is about 8% of the French population. That is the highest percentage of Muslims in a Western European country. See Brigitte Basdevant-Gaudemet, *Supra*, note 9, at 62.

¹² Hervieu-Léger, Daniël, “The Past in the Present: Redefining Laicite in Multicultural France ’ in: Berger, Peter (ed.), *The Limits of Social Cohesion*, London : Westview Press. 1998. p. 39.

organizations—at present, there are 1560 such organizations, *the Paris Mosque*¹³, *The Union of Islamic Organizations in France*¹⁴ and *the National Federation of Muslims in France*¹⁵ representing the three largest ones. After several attempts to address the “Islam question” in France, the Minister of the Interior launched a vast consultative exercise in 1999 among the main national Islamic institutions, as well as several mosques. This process culminated in December 1999 in the ratification of a solemn declaration by the Muslim community: *The Principles and Legal Foundation Governing the Relations between Muslim Religious Practice and Public Authorities*. Brigitte Basdevant-Gaudemet, specialist of the relations between Islam and the French State and director of the Research Centre of Law and Religious Societies (Centre for centre de recherche Droit des Sociétés Religieuses (DSR) de la Faculté Jean Monnet (Sceaux)), has reviewed the main aspects of this declaration:

“(I) Religious associations: Muslims are invited to “set up a single national body to represent the Muslim religion, in the same way as other religions present in France”.

(II) Mosques: mayors are invited to seek solutions comparable, for example, with those used for the Chantiers du Cardinal association, or to make municipal premises available to Muslim associations as they do to political parties, trade unions and other associations.

(III) As regards ministers of religion, this is said to be a question of internal organization of the religion in which the State cannot intervene. However, the text states: “unless good grounds to the contrary exist, they shall be recruited and paid in future by the associations who employ them. It would be desirable for a majority of them to hold French nationality and to have a cultural and

¹³ See <http://www.mosquee-de-paris.org>.

¹⁴ See <http://www.uoif-online.com>.

¹⁵ See <http://www.france5.fr/cdanslair/D00063/308>.

religious level appropriate to their duties”.

(IV) Chaplains must be appointed by “the union of Muslim cultural associations”.

(V) Private Muslim educational establishments are subject to the same rules as other private educational establishments.

(VI) As regards dress codes, the text states that “signs of membership of a religion shall not be displayed, under the circumstances stated in EC case law”. As regards dietary rules, the authorities may offer special meals (the text only refers to a possibility; the courts may be required to rule in future on whether this is optional or compulsory). Ritual slaughter must comply with “the conditions imposed by legislation and by animal protection, public health and environmental protection regulations”. Here again, the text implies the desire to respect Muslims’ dietary rules.

(VII) In the case of places of burial, the text states that Muslim plots “have been allowed”, which suggests that their legality may be disputable. In the event of doubt as to whether the deceased was a “Muslim”, it is up to the religious authority, not the mayor, to give a ruling.

(VIII) During religious festivals, “public employees may be granted leave of absence, subject to the exigencies of the service, to take part in the ceremonies celebrated on the occasion of the main festivals of their religion”. This provision grants a long-standing claim by the Muslim community.”¹⁶

In May 2003, A *French Council of the Muslim Religion* was set up in France to officially represent Islam in France¹⁷, with a Regional Council in each of the 25 French regions. The underlying assumption on the part of the French state is that Muslims

¹⁶ See Brigitte Basdevant-Gaudemet, *Supra*, note 9, at 66.

¹⁷ Its structures are composed of a General Assembly, a Board of Directors and a Bureau.

should accept the norms governing religious practices within the French tradition of *laïcité*. This commitment to secularism is so crucial that France entered a reservation with the Secretary General of the United Nations with respect to Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR), which reads: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”¹⁸ Practically, this reservation means that France has no commitment to foster special cultural rights.

On the other hand, and as a result of stipulations of international private law¹⁹ and bilateral agreements²⁰, France must apply the laws of the foreigner's country of citizenship in matters of family law, more specifically in relation to disputes over “the status and capacity of persons”. This is true in so far as doing so does not

¹⁸ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

¹⁹ Code Civil, Article 3, al. 3 (inséré par Loi du 5 mars 1803 promulguée le 15 mars 1803) : Les lois concernant l'état et la capacité des personnes régissent les Français, même résidant en pays étranger.

Code Civil, Article 310 (inséré par Loi n° 75-617 du 11 juillet 1975 art. 1 Journal Officiel du 12 juillet 1975 en vigueur le 1er janvier 1976):

Le divorce et la séparation de corps sont régis par la loi française :

- lorsque l'un et l'autre époux sont de nationalité française ;
- lorsque les époux ont, l'un et l'autre, leur domicile sur le territoire français ;
- lorsque aucune loi étrangère ne se reconnaît compétence, alors que les tribunaux français sont compétents pour connaître du divorce ou de la séparation de corps.

²⁰ For example, see Convention entre la République française et le royaume du Maroc relative au statut des personnes et de la famille et a la coopération judiciaire, Décret n° 83-435 DU 27 mai 1983, (publié au J.O du 1er juin 1983, p. 1643). Article 5 reads : « Les conditions du fond du mariage tels que l'âge matrimonial et le consentement de même que les empêchements, notamment ceux résultant des liens de parenté ou d'alliance, sont régies pour chacun des futurs époux par la loi de celui des deux Etats dont il a la nationalité. »

contravene French public order²¹ or violate an international convention to which France is a party.²² These rules of international private law that incorporate Muslim family law at the domestic level to non-French citizens living within France are of crucial importance, as only one out of four million Muslims living in France have obtained French citizenship.²³ Hence, faced with matters of private law involving Muslims who are living in France under the citizenship of a Muslim state, French judges have had to decide upon the legality of institutions such as Islamic marriages and polygamy, the dowry (*Mahr*), and the *talaq* divorce. I will address these in order.

II.2 *The Position of France with regard to Islamic Marriages and Polygamy*

In France, a religious Islamic marriage has no enforceable legal effect if the wedding took place on French soil. Not only is polygamy an impediment to obtain French nationality²⁴ but article 147 of the French *Civil Code* specifically holds that a second marriage cannot take place unless the first one has already been dissolved.²⁵

²¹ See Rude-Antoine, Edwige, ed. 1992. *L'Immigration Face Aux Lois de la République*. Paris: Editions Karthala ; Jean DEPREZ, « Droit international privé et conflit de civilisations. Aspects méthodologiques. Les relations entre systèmes d'Europe occidentale et systèmes islamiques en matière de statut personnel », *Recueil des Cours de l'Académie de droit international de La Haye*, t. 211 (1988. IV), at 1.

²² In matters of family law, France has ratified the *Convention of 24 October 1956* on the law applicable to maintenance obligations towards children (Hague Conference on Private International Law), the *Convention of 2 October 1973* on the Law Applicable to Maintenance Obligations (Hague Conference on Private International Law) as well as the *Convention of 14 March 1978* on the Law Applicable to Matrimonial Property Regimes (Hague Conference on Private International Law).

²³ Brigitte Basdevant-Gaudemet, "Le statut juridique de l'Islam en France", *Revue du Droit Public* (RDP), Numero 2, 1996, at 355.

²⁴ C.E. 11 March 1988, Min. Aff. Soc. Et de l'emploi c Diagne, R. Tables; C.E. 28 July 1989, Keita; C.E. 15 January 1990, Cissoko.

²⁵ Code Civil, Article 147 (inséré par Loi du 17 mars 1803 promulguée le 27 mars 1803): On ne peut contracter un second mariage avant la dissolution du premier.

Consequently, even between partners whose countries of origin permit polygamy, no polygamous union can be legally recognized in France²⁶. The second marriage will be declared absolutely null.²⁷ It is on this basis that courts have at times denied benefits to Muslim women living under a polygamous marriage in France. In 1992, for example, the *Cour d'Appel de Versailles* refused social security benefits to the second wife of a Muslim husband²⁸ and in 1988 the *Cour d'Appel d'Aix-en-Provence* similarly denied a Muslim woman her alimony on the ground that she was the second co-wife and that polygamy was considered contrary to French public order.²⁹

However, if the Islamic ceremony was conducted in the country of citizenship of the spouses, the marriage is considered to have some legal validity under French law as long as it does not violate French public order.³⁰ The *Cour de Cassation*³¹ repeatedly held polygamy not to be a *prima facie* violation of French public order under those circumstances³², even though the very same union would have been

Code Civil, Article 184 (Loi du 17 mars 1803 promulguée le 27 mars 1803), (Loi du 19 février 1933), (Loi n° 93-1027 du 24 août 1993 art. 31 Journal Officiel du 29 août 1993):

Tout mariage contracté en contravention aux dispositions contenues aux articles 144, 146, 146-1, 147, 161, 162 et 163, peut être attaqué soit par les époux eux-mêmes, soit par tous ceux qui y ont intérêt, soit par le ministère public.

²⁶ Paris Court of Appeal, 8 December 1992, *Dalloz*, 1994, J. 272 and Cour de Cassation, 1ère Chambre Civile. Date decided: 15 March 1988, *Gazette du Palais*, 1989-1-374.

²⁷ See TGI de la Seine, 21 June 1967, in *Rev. crit. DIP* 1968, p. 294 note Battifol, H.; Cour d'appel de Reims, 19 January 1976, in *JDI* 1976, p. 916 note Fadlallah, I.; Cour d'appel de Dijon, 1ere ch., 23 May 1995, in *JCP* 1996, IV, 176.

²⁸ Cour d'appel de Versailles, 2eme ch., 18 June 1992, inédit, in *Juris-Data*, # 044362.

²⁹ Cour d'appel d'Aix-en-Provence, 6eme ch., 19 May 1988, inédit, in *Juris-Data*, # 045979.

³⁰ Monéger F., "La Polygamie en question", in *JCP* 1990, I, 3460.

³¹ Cass. Civ. 1ere ch., 19 February 1963, in *Revue Critique de Droit International Privé*, 1963, p. 559 et Cass. Civ. 3 January 1980, in *Revue Critique de Droit International Privé*, 1980, p. 331, ss.

³² The expression "ordre public à effet atténué" has been used by the courts. Rude-Antoine,

declared absolutely null if contracted in France. Consequently, health insurance benefits can be paid to a woman who is registered by her husband as a dependent, regardless of whether her marriage is considered legally legitimate.³³ If the first wife already received social security benefits, the second cannot claim them too³⁴, unless the first wife no longer lives in France³⁵. Hence, Muslim husbands were forced to pay child support even though the marriage from which the children resulted was solely a religious marriage rather than a civil ceremony.³⁶

Until 1980, the reunification of polygamous families was prohibited in France: the French government would deny permanent residence cards to the wives and children of men who had already arrived in France with another wife and their children. In the landmark *Montcho* case of 1980,³⁷ however, the *Conseil d'Etat* granted for the first time permanent residency status to the second wife of a man from Algeria, thus giving significance to the right to family reunification. The court reasoned that, for the narrow purpose of social security benefits, polygamy was a different, but nonetheless legitimate form of marriage. What is evident, though, is that the French government has recently reacted against the expansion of polygamy on French soil. According to new legislation passed in August 1993, a polygamous

Edwige. 1997. *Des Vies et des Familles. Les Immigrés, la Loi et la Coutume*. Paris: Editions Odile Jacob, at 211; Rude-Antoine, Edwige. 1990. *Le Mariage Maghrébin en France*. Paris: Éditions Karthala, at 138-9.

³³ Rude Antoine, Edwige, *Supra*, note 21, at 120.

³⁴ C. Cass. Ch. Soc. 1 March 1973, *Revue Critique de Droit International Privé*, 1975, 54.

³⁵ C. Cass. Ch. Soc. 8 March 1990, *Revue Critique de Droit International Privé*, 1991, 694.

³⁶ See Benali c. Makhoulouf, *Revue Critique de Droit International Privé* 87:652. Cour de Cassation, 1ère Chambre Civile. Date decided: 3 June 1998 and Consorts Abdallah c. M. Y. --Abdallah et autres, *Revue Critique de Droit International Privé* 87:602, Cour de Cassation, 1ère Chambre Civile. Date decided: 25 February 1997.

³⁷ C.E., 11 July 1980 : *AJDA* 1980, 523, OBS. Mm. Feller et Pinault; *Rev. crit. DIP* 1981, 658, note J.M. Bischoff.

marriage no longer entitles the husband to bring his second wife and their children to France. The children resulting from polygamous marriages who live abroad without their father can join him in France only in the event of the death of their mother in their home country. *The Act of 24 August 1993*, s. 30 thus reads: "When a polygamous foreigner resides in French territory with his first spouse, the benefit of family reunification cannot be granted to another spouse. Unless this other spouse is deceased or has lost her parental rights, her children cannot benefit from family reunification either."³⁸ This legislation has been attacked by many immigrant organizations for its unfair treatment of Muslim women who, faced with the impossibility of legally living with their husbands, will often enter the country illegally and thus be placed in the most vulnerable position.³⁹

II.3 *The Position of France with regard to Mabr (the Dowry)*

In order for a marriage to take place, the Muslim husband has to pay the woman her *Mabr* immediately upon the marriage as an effect of the contract, unless the wife agrees to defer payment of some or the entire amount to a future time.⁴⁰ The *Mabr* is the exclusive property of the wife and was institutionalized in the *Sharia* to

³⁸ *Loi 93-1027 du 24 août 1993 relative à la maîtrise de l'immigration et aux conditions d'entrée et de séjour des étrangers en France*, J.O. 29 août 1993, J.C.P., 1993.i.66371: "Lorsqu'un étranger polygame réside sur le territoire français avec un premier conjoint, le bénéfice du regroupement familial ne peut être accordé à un autre conjoint. Sauf si cet autre conjoint est décédé ou déchu de ses droits parentaux, ses enfants ne bénéficient pas non plus du regroupement familial."

³⁹ F.K. 2000. "Les Familles Polygames en France Mises au Pied du Mur Eclairage." *SDA-Service de Base Français*, 12 January; Turpin, D., "La réforme de la condition des étrangers par les lois des 24 août et 30 décembre 1993, et par la loi du 25 novembre 1993 », *Revue Critique de Droit International Privé*, Jan-Mar 1994, pp. 1-61; See Gillette-Frénoy, Isabelle. 1993a. *La Polygamie en France et le Rôle des Femmes*. Paris: Edition G.A.M.S., at 36; Gillette-Frénoy, Isabelle. 1993b. "La Polygamie en France Pratiquée par les Immigrants d'Afrique Subsaharienne, et le Rôle des Femmes." *L'Ethnographie* 89 (2): 131-69.

⁴⁰ Khadduri, *Origin and Development of Islamic Law*, at 142.

ensure her financial independence in case of a divorce or upon the death of her husband.⁴¹

In compliance with international private law rules, French courts have routinely enforced the Islamic institution of *Mahr*,⁴² even though only a few cases have come before the French courts. As Jean Déprez has written: “La dot demeure néanmoins une pratique relativement répandue dans les familles immigrées, quelle qu’ait été le mode de mariage conclu, mais elle n’intéresse l’ordre juridique français qu’occasionnellement, en cas de litige porté devant le juge relativement à son paiement ou éventuellement sa restitution. La jurisprudence est rare.”⁴³

II.4 *The Position of France with regard to the Talaq Divorce*

According to Islamic law, a husband's pronouncement of the word "*talaq*"⁴⁴ three times will immediately dissolve the marriage. As a general rule, French courts do not recognize the "*talaq*" as a legitimate form of divorce,⁴⁵ as it is considered contrary to French public order in general and to the principle of gender equality in

⁴¹ *Ibid.*

⁴² Cassation Chambre 01, 4 April 1978, 1978-000137 and Cassation Chambre 01, 2 December 1997, 004835. See also Rude-Antoine, Edwige, *Le Mariage Maghrébin en France*, *Supra*, note 32, at 140; Rude Antoine, Edwige, *L'Immigration Face Aux Lois de la République*, *Supra*, note 21, at 124.

⁴³ Jean Perez, « Statut personnel et pratiques familiales des étrangers musulmans en France. Aspects de droit international privé », in Foblets, Marie-Claire, ed. 1996. *Familles- Islam - Europe. Le Droit Confronté au Changement. Musulmans d'Europe*. Paris: L'Harmattan, at 68.

⁴⁴ The *talaq* divorce in classic Muslim Sunni law dissolves the marriage through the oral pronouncement by the husband of " *talaq, talaq, talaq*," literally translated as "I divorce you, I divorce you, I divorce you."

⁴⁵ Déprez, Jean, « Statut personnel et pratiques familiales des étrangers musulmans en France. Aspects de droit international privé », *Supra*, note 43, at 57-81.

particular. However, due to bilateral agreements with Morocco and Algeria, courts have granted legal effects to the *talaq* in the 1980s and 1990s, as long as the “*talaq*” was pronounced abroad and that both the husband and wife were present before the French court to attest to this fact.⁴⁶

III. The Case of Germany

III.1 *Multiculturalism and the “Ethnocultural Differentialist Self-Definition” Model in Germany*

Germany has historically characterized itself as a nation based on common blood decent, thus resisting the social integration of culturally different individuals and groups.⁴⁷ It is important to note that the idea of German nationhood was partly formed in opposition to Napoleon, an external threat, whereas the idea of French nationhood was forged internally in the struggle against its own Monarchy and religious establishment. It may be because of these differences that Germans could not easily accept that a foreigner (*Ausländer*) could be a citizen. In direct opposition to the state-centred French nationhood which used citizenship to assimilate its immigrants into French society, the *Volk*-centred idea of German nationhood⁴⁸

⁴⁶ Déprez, Jean, « Statut personnel et pratiques familiales des étrangers musulmans en France. Aspects de droit international privé », *Supra*, note 43, at 85; El-Husseini, Roula. 1999. “Le Droit International Privé Français et la Répudiation Islamique.” *Revue Critique de Droit International Privé* 88 (3): 427-68.

⁴⁷ Brubaker, Rogers, *Citizenship and Nationhood in France and Germany*, Cambridge, MA and London, England: Harvard University Press, 1992, at 82.

⁴⁸ German nationhood is rooted in the concept of the *Volksgeist* (spirit of the people), i.e. the people as an organic cultural and racial entity marked by a common language. See Frederick Charles von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, (Abraham Hayward trans., Arno Press 1975) (1831). Savigny's theory of law was directed in part against ideas that had come to prevail in France after the French Revolution and that had spread throughout Europe: that legislation is the primary source of law, and that the legislator's primary task is to protect the "rights of man". In opposing these views, Savigny considered law to be an integral part of the common consciousness of the nation,

adopted the *jus sanguinis* principle of citizenship which emphasizes the unity of the nation and the significance of ancestry. It was until 1999, in fact, that a citizenship applicant had to provide evidence of at least one German ancestor in order to receive German citizenship, a requirement which in practice excluded immigrants from collective incorporation. However, restrictive citizenship and naturalization laws have undergone some changes in recent years. Since the introduction of the new citizenship law in 1999,⁴⁹ the importance of ancestral origin has slowly eroded and naturalization of the migrant population has begun to take place. On the basis of that law, the children of immigrants born in Germany after the year 2000 can be granted dual citizenship, that is, German citizenship and that of the parents' native country. In such circumstances, however, Germany requires that the child must renounce the citizenship of her parents' native country sometime between the ages of eighteen and twenty-three.⁵⁰

In Germany, the Muslim community counts more than 3 million members out of a total population of 82 million, of whom the majority (89 percent) are Turkish.⁵¹ Islamic groups have been trying to obtain legal status for their religious communities since the early 1970s but their petitions have until now been rejected by the courts. According to the *1949 Constitution*, religious denominations can acquire the status of public-law corporation provided that they guarantee continuity with by their by-laws and the number of their members.⁵² If these requirements are

organically connected with the mind and the spirit of the people.

⁴⁹ *Staatsangehörigkeitsrecht*.

⁵⁰ Joppke, C. and Morawska, E, 'Integrating Immigrants in Liberal Nation-States: Policies and Practices', in Joppke, C. and Morawska, E. (eds) *Toward Assimilation and Citizenship: Immigrants in Liberal Nation-States*. London: Palgrave Macmillan, 2003, 1-36.

⁵¹ Mathias Rohe, "The Legal Treatment of Muslims in Germany", in *The Legal Treatment of Islamic Minorities in Europe*, *Supra*, note 9, at 83.

⁵² This status provides far-reaching rights, such as the right to levy taxes from members of the community and to organize a parish, the right to employ people under a belief-oriented labour-law, the right to nominate members to broadcast-councils, tax reductions for

not met, these religious denominations must organize themselves as mere associations under private law. In 1977, the Islamic community in Germany applied for the status of a corporation of public law⁵³ so that Islam would be publicly recognized and acknowledged as an equal religion before the law.⁵⁴ The District Court of Baden-Württemberg rejected the application.⁵⁵ Two years later, a similar attempt was launched in Cologne with no success, although the applicants referred explicitly this time to Article 4 of the *German Constitution*, which guarantees freedom of faith and religious practice.⁵⁶ For Mathias Rohe, expert on the legal treatment of Islamic minorities in Germany, the applications made by various Muslim groups to obtain such status have been rejected on the ground that insufficient guarantees of their duration and stability were provided: “According to a decision of the conference of the state ministers of interior in 1954 the necessary stability of the community has to be proven over a period of 30 years. Up to now, the Jewish community reached this status, whereas no Muslim community succeeded in that so far. This is certainly due to the fact that there were no ideas of a long-lasting presence among larger groups of Muslims until recent times.”⁵⁷

property placed under public property law, etc. Mathias Rohe, “The Legal Treatment of Muslims in Germany“, in *The Legal Treatment of Islamic Minorities in Europe*, Supra, note 9, at 87.

⁵³ Körperschaftsstatus.

⁵⁴ See Vocking, “Organisations as attempts at integration of Muslims in Germany”, in Speelman et al. (eds), *Muslims and Christians in Europe, Essays in Honour of Jan Slomp*, Kampen 1993.

⁵⁵ Gerdien Jonker *Cultural Dynamics* Vol. 12, nr. 3 November 2000, at 313.

⁵⁶ Article 4 (Freedom of faith, conscience, and creed) reads:

- (1) Freedom of faith and conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.
- (2) The undisturbed practice of religion shall be guaranteed.

⁵⁷ Mathias Rohe, “The Legal Treatment of Muslims in Germany“, in *The Legal Treatment of Islamic Minorities in Europe*, Supra, note 9, at 87.

Gerdien Jonker, well-known scholar for her empirical work on religious minorities in Germany, has expressed the opposite view. She believes that the verdict was based not only on the fact that judges believed the applicants to be pursuing right-wing activities but also due to the impression that “‘Islam’ shaped the everyday life of its followers in a way that was not acceptable and not in accordance with the German understanding of what religion is about.”⁵⁸ Moreover, she further suggests, these court rulings were “signals toward segregation and have had a palpable effect on contemporary Islamic religious life. For those Muslims who are observant, the clash between Islamic legal concepts and German legal guidelines has resulted in social isolation.”⁵⁹ At present, no Islamic religious community has the legal status of a corporation under public law, unlike Christian churches and the Jewish community; Islamic organizations are rather considered private associations without legal standing.

As in France, stipulations of both German international private law⁶⁰ and bilateral agreements⁶¹ provide that it is not the law of domicile but rather the law of the parties' citizenship that is applicable in matters of family law. This general principle is, of course, subject to German public order⁶² and to any international conventions

⁵⁸ Gerdien Jonker *Cultural Dynamics*, *Supra*, note 55, at 314.

⁵⁹ Gerdien Jonker *Cultural Dynamics*, *Supra*, note 55, at 312.

⁶⁰ Second Chapter on International Private Law in the *Einfuehrungsgesetz zum Buergerlichen Gesetzbuche* (Article 3, EGBGB) (Prologue, the Civil Code).

⁶¹ For instance, Iran and Germany have ratified a treaty that assures the application of Iranian personal status law for Iranian citizens in Germany and vice versa for German citizens residing in Iran. See *Niederlassungsabkommen zwischen dem Deutschen Reich und dem Kaiserreich Persien* of 17 December 1929, *Reichsgesetzblatt* Jg. 1930, Teil II, p.1002, at p. 1006. Confirmed by the Federal Republic of Germany on 15 August 1955, *BGBL* Teil II, No. 19, 25 August 1955, p. 829.

⁶² See Art. 6 EGBGB and §138 sect. 1 BG, which reads: “A legal transaction which offends good morals is void”.

to which Germany is a party.⁶³ These rules are of significant importance, considering that about 8.9% of the population in Germany is made of non-citizens, including about 2 million originating from Muslim countries. The existence of these international private law rules incorporating Muslim family law at a domestic level to non-German citizens is often unknown to the Muslim community, as suggested by Christina Jones-Pauly:

“Because most foreigners in Germany—and even German citizens—are not aware of the rule that their own foreign law applies to foreigners, it can come as a rude shock for some when they have marital disputes. For example, many Iranians who had fled to Germany from the Shah's regime then from Khomeni's regime and resided legally in Germany for as long as thirty years suddenly are faced in German courts when they divorce with the application of the very Islamic laws that they wished to escape. The fact that they have retained their Iranian citizenship -- it has up until recently not been easy to obtain German citizenship -- means that they are considered "guests" in the land and guests are entitled to have their own law apply in matrimonial disputes.”⁶⁴

The task of German courts in such cases is to clarify the limits of “German public order”, a notion which may prevent the application of foreign rules but only if this application would lead to a result which is obviously incompatible with the main

⁶³ In matters of family law, Germany has also ratified the *Convention of 24 October 1956* on the law applicable to maintenance obligations towards children (Hague Conference on Private International Law), the *Convention of 2 October 1973* on the Law Applicable to Maintenance Obligations (Hague Conference on Private International Law) as well as the *Convention of 14 March 1978* on the Law Applicable to Matrimonial Property Regimes (Hague Conference on Private International Law).

⁶⁴ Chris Jones-Pauly, “Marriage Contracts of Muslims in the Diaspora: Problems in the Recognition of Mahr Contracts in German law”, forthcoming in Frank Vogel, ed., *Marriage Contracts in Islamic Law*, Harvard University Press, 2004.

principles of German law including constitutional civil rights.⁶⁵ Hence, judges in Germany have had to decide upon the legality of institutions such as Islamic marriages and polygamy, the dowry (*Mahr*), and the *talaq* divorce.⁶⁶ I will address these in order.

III.2 *The Position of Germany with regard to Islamic Marriages and Polygamy*

In matters of family law and the law of succession⁶⁷, the application of legal norms in Germany is determined by the law of nationality rather than domicile. For example, the law applicable in the divorce of a Syrian couple whose marriage was contracted in Syria will be that of Syrian/Islamic family law, which includes post-divorce alimony claims⁶⁸. The law of domicile will only apply in cases of maintenance claims for children⁶⁹ or plural citizenships of the parties.⁷⁰

Monogamy is one of the leading German constitutional principles, as made explicit

⁶⁵ For instance, constitutional (and human) rights formulated in Artt. 3 GG (equality of the sexes and of religious beliefs), 4 (freedom of religion including the right not to believe) and 6 (special protection of marriage and family).

⁶⁶ See generally Omaia Elwan, "Le droit interreligieux égyptien auprès des tribunaux allemands," in *Islamic Law and its Reception by the Courts in the West*, ed. Ch. v. Bar, (Köln et al. 1999), 53, 62ss.

⁶⁷ Art. 13 s. EGBGB: prerequisites for and legal consequences of contracting a marriage; Art. 17 EGBGB: prerequisites for and legal consequences of a divorce, legal relations between the spouses, children and other members of the family including maintenance claims among divorced persons, guardianship and custody for minors, adoption, guardianship and welfare, and hereditary relations.

⁶⁸ Article 18 (4) EGBGB.

⁶⁹ Article 18 (1) EGBGB.

⁷⁰ Article 14 EGBGB. In such cases, parties will be allowed to choose which law of citizenship should apply.

by §1306 BGB.⁷¹ It is therefore legally impossible to enter into a polygamous marriage in Germany.⁷² Similarly to France, German law is treating polygamous marriages to be legally valid as long as the marriage was concluded in a country that permits polygamy⁷³. Practically, the recognition of polygamous marriages means that Muslim women can obtain social security benefits, such as inheritance, custody rights, and child support payments.⁷⁴

As to the right to family reunification, the OVG Nordrhein-Westfalen⁷⁵ held in 1985 that a Jordanian Muslim woman was not entitled to join her husband and his first wife in Germany. In similar cases, the courts held that co-wives did not have the right to join their husbands in Germany, although once they are in the country living with their husband, no prosecution will be conducted as polygamy is not considered to be against German public order.⁷⁶

With regard to minimum ages for spouses, the regular German minimum age is eighteen years old⁷⁷, with possible exceptions from the age of 16.⁷⁸ A minimum age

⁷¹ See also Cf. OLG Hamburg StAZ 1988, 132f; AG Paderborn StAZ 1986, 45 (both to former rules identical to the present ones); MuenchKomm/Coester 3. edn. 1998 Art. 13 EGBGB.

⁷² See Rohe, M., "Islamic Law in German Courts", *Hawwa-Journal of Women of the Middle East and the Islamic World* 1(2003), pp. 46-59.

⁷³ See LG München, 235 Js 54017/95, 26 April 1996; LG Frankfurt A.m., fAMrz 1976, P. 217; LG Osnabrueck, NJW-RR, 1998, p. 582; AG Bremen, StAZ 1991, pp. 232, 233; VGH Kassel, NVwZ-RR, 1999, pp. 274-275.

⁷⁴ See Syrian Paternity Case. *VersR* 1997:863. OLG Saarbrücken - 5 U 800/95-82. Date decided: 18 December 1996.

⁷⁵ Jordanian Polygamy Case, 17 A 42/83, 7 March 1985.

⁷⁶ See Rohe, M., "Islamic Law in German Courts", *Supra*, note 72.

⁷⁷ §1303 BGB.

⁷⁸ In AG Tuebingen StAZ 1999, 301, the marriage of a sixteen year old German of Moroccan origin in Morocco was accepted as valid.

below that level would violate German public order.⁷⁹

III.3 *The Position of Germany with regard to Mahr (the Dowry)*

A number of cases have come before German courts in which the enforceability of the *Mahr* had to be decided.⁸⁰ Some have seen the reception of Mahr in Germany as “a serious “technical” problem”⁸¹ or “a jarring cacophony of judicial voices”⁸², mainly because it has been difficult to classify this legal institution under either the marriage contract (regulated by Art. 13 EGBGB) or as a means of maintenance after divorce (regulated by Art. 18 sect. 4 EGBGB). However, courts have applied Islamic religious law in most cases⁸³ and decided that the Islamic dowry was an integral part of Muslim custom. Therefore, the husband had an obligation to pay, even though *Mahr* had no equivalent in German law.⁸⁴

⁷⁹ See OLG Köln NJWE-FER 1997, 55.

⁸⁰ BGH NJW 1999, 574; OLG Muenchen IPRspr. 1985 No. 67; OLG Hamm FamRZ 1988, 516, 517; OLG Frankfurt a.M. FamRZ 1996, 1478, 1479; OLG Celle FamRZ 1998, 374, 375; OLG Köln IPRspr. 1982 No. 43; OLG Duesseldorf FamRZ 1993, 187, 188;

⁸¹ See Rohe, M., “Islamic Law in German Courts”, *Supra*, note 72, at 51.

⁸² Chris Jones-Pauly, “Marriage Contracts of Muslims in the Diaspora: Problems in the Recognition of Mahr Contracts in German law”, *Supra*, note 64.

⁸³ Turkish Dowry Case. *FamRZ* 1998: 623 OLG Düsseldorf. Date decided: 3 January 1997; Jordanian Dowry Case. *FamRZ* 1996: 1478. OLG Frankfurt/Main. Date decided: 29 February 1996; Turkish Dowry (Mehir) Case. *FamRZ* 1994: 899. OLG Köln—13 U 251/92. Date decided: 21 April 1993; Islamic Dowry Case. *IPRax* 8: 109. Bundesgerichtshof—IV b ZR 10/86. Date decided: 28 January 1987; and, Kenyan Dowry Case. *FamRZ* 1998: 1591. AG Würzburg. Date decided: 24 September 1997.

⁸⁴ For a detailed analysis of the reception of Mahr in German courts, see Chris Jones-Pauly, “Marriage Contracts of Muslims in the Diaspora: Problems in the Recognition of Mahr Contracts in German law”, *Supra*, note 64.

III.4 *The Position of Germany with regard to the Talaq Divorce*

Generally speaking, the unilateral repudiation of a Muslim wife by her husband by the *talaq* is considered as against German public order and, as such, is not recognized by German courts.⁸⁵ For instance, the Frankfurt First Instance Court⁸⁶ held *talaq* as arbitrary and therefore contrary to the German constitutional provisions of gender equality.⁸⁷ The most recent case is a 1998 decision⁸⁸ in which the OLG Stuttgart decided that, due to the inability of the wife to have any say in the matter, the *talaq* violated German public order. German courts will however recognize the *talaq* if the wife agrees to the dissolution of the marriage in front of a German court, as was the case in a 1992 decision in which a judge at the AG Esslingen dissolved the marriage after the husband had pronounced the *talaq* in front of him.⁸⁹

IV. **The Case of Britain: Proposal to Establish a Muslim Family Law System**

Britain has long been a country of ‘migration’, in which many different groups of people have settled. Estimated to be around two million⁹⁰, Muslims have come to form the largest minority faith community. While some degree of pluralism has been

⁸⁵ Article 6 EGBGB. See BayObLG - 3Z BR 66/93. Date decided: 13 January 1994; Appellate Decision. OLG Stuttgart - 1VA 5/86. Date decided: 11 April 1987; LJV Baden-Württemberg - 346E-325/85. Date decided: 23 May 1986.

⁸⁶ Amtsgericht.

⁸⁷ AGFrankfurt/Main - 35 F 4153/87. Date decided: 9 August 1988.

⁸⁸ 17 VA 6/98, 3 December 1998.

⁸⁹ 1F 162/92, 19 March 1992.

⁹⁰ Humayun Ansari, “The Legal Status of Muslims in the UK”, *The Legal Treatment of Islamic Minorities in Europe*, *Supra* note 9, at 256.

institutionalized to ensure the preservation of cultural identity, the trend in Britain has been to adopt a secular and universal system of family law.

In Britain, there is no strict separation between Church and State and no mechanism by which the state can legally “acknowledge” religious communities. The Church of England is the dominant religion and the special relationship between the Crown and the Church of England is symbolised by the Queen who is both the Head of State and the Supreme Governor of the Church of England. During the 1970s, *the Union of Muslim Organisations of UK* held a number of meetings which culminated in a formal resolution to seek official recognition of a separate system of Muslim family law, which would automatically be applicable to British Muslims.⁹¹ The Muslim scholars behind that initiative argued that in the context of a Western state there should be room for religious personal laws to operate side by side with the secular system of family law.⁹² In 1984, a Muslim charter was thus produced which demanded that the *Shari’a* should be given a place in personal law.⁹³ A proposal along these lines was subsequently submitted to various government ministers, with a view to having it placed before the Parliament for enactment. The demand was reiterated publicly in 1996.⁹⁴

⁹¹ See Tariq Modood, ‘Muslim Views on Religious Identity and Racial Equality’, *New Community*, Vol. 19, No. 3, 1993, pp. 513–519.

⁹² David S. Pearl, “Islamic Family Law and Its Reception by the Courts in England”, Islamic Legal Studies Program, Harvard Law School, Occasional Publications 1, May 2000, at 4.

⁹³ See Danie`le Joly, *Britannia’s Crescent: Making a Place for Muslims in British society*, Aldershot: Avebury, 1995, p. 15.

⁹⁴ Sebastian M. Poulter, *Ethnicity, Law and Human Rights: The English Experience*, Oxford: Oxford University Press, 1998, at p. 202.

However, this campaign to establish a Muslim personal law system regulating personal and family related issues was rejected by the government⁹⁵ on the basis that non-secular legal systems could not be trusted to uphold universally accepted human rights values, especially in relation to women⁹⁶: "... on human rights grounds, Muslims should not be allowed to operate a system of Islamic personal law in England because of the risk that the rights of women will be violated in a discriminatory fashion."⁹⁷ As further argued by the late Dr. Sebastian Poulter:

"While English law should broadly approach other cultures in a charitable spirit of tolerance and, when in doubt, lean in favour of allowing members of minority communities to observe their diverse traditions here, there will inevitably be certain key areas where minimum standards, derived from shared core values, must of necessity be maintained if the cohesiveness and unity of English society is to be preserved intact."⁹⁸

Moreover, given the plurality of Muslim legal views, the British state has experienced some difficulty in evaluating how such multiple versions of Muslim family law would apply at the practical level. As suggested by Humayun Ansari, "Questions such as which version(s) of Muslim law should be applied, who should interpret Muslim law and which courts, and who in those courts should be authorised to decide remain

⁹⁵ Ihsan Yilmaz, *Dynamic Legal Pluralism and the Reconstruction of Unofficial Muslim Laws in England, Turkey and Pakistan*, London: School of Oriental and African Studies, 1999, Chapter 6.

⁹⁶ Sebastian M. Poulter 'The Claim to a Separate Islamic System of Personal Law for British Muslims', eds Chibli Mallat and Jane Connors, *Islamic Family Law*, London, Dordrecht and Boston: Graham & Trotman, 1990, pp. 147–166, p. 158.

⁹⁷ Sebastian M. Poulter, 'Cultural Pluralism and its Limits: A Legal Perspective', CRE Britain: A Plural Society. Report of a Seminar, London: Commission for Racial Equality, 1990, pp. 3–28.

⁹⁸ Sebastian M. Poulter, *Ethnicity, Law and Human Rights: The English Experience*, *Supra* note 94, at p. 391.

problematic.”⁹⁹ Judge David Pearl has expressed similar concerns: “(...) there will be in any event immense difficulties in identifying the specific family laws of the Muslim community, varying as they do between schools and between origins. There may be common denominators but by definition such principles will not be acceptable to all. Old struggles over the definition of *shari’a* and its practical application would be revived in UK, to the detriment of harmonious relations within the communities themselves.”¹⁰⁰

Because the UK legal system has viewed and treated Muslim family law as suspect, thereby refusing to give the state official stamp of approval, the Muslim community has developed a strategy whereby methods of Muslim dispute resolution would operate unofficially. In fact, the *Islamic Shari’a Council (UK) (ISC)* provides since 1982 professional conciliation services to couples on various aspects of Islamic law and has established for this purpose standard procedures, forms and certificates. This “unofficial law” method is quite prevalent, as a survey conducted in 1989 showed that in case of conflict between Muslim law and English law, 66% of Muslims would follow the former.¹⁰¹ One of the objectives of the ISC is to establish “a bench to operate as court of Islamic *Shari’ah* and to make decisions on matters of Muslim family law referred to it”.¹⁰² The ISC applies Islamic rules to deal with “the problems facing Muslim families as a result of obtaining judgements in their favour from non-Islamic courts in the country, but not having the sanction of the Islamic *Shari’ah*.”¹⁰³ It deals with more than 50 cases a year; by the mid 1990’s, the Council had dealt with some 1500 cases brought to it, mostly in matters of divorce whereby the wife had

⁹⁹ Humayun Ansari, “The Legal Status of Muslims in the UK”, *Supra* note 90, at 266.

¹⁰⁰ Judge David Pearl, , “Dispute Settlement Amongst the Muslim Community in the UK”, *Recht van de Islam 20 (2003)*, at 8.

¹⁰¹ Sebastian M. Poulter, *Ethnicity, Law and Human Rights: The English experience*, Oxford: Oxford University Press, 1998, p. 203.

¹⁰² Islamic Shari’a Council (ISC), *The Islamic Shari’a Council: An Introduction*, London: ISC, 1995, pp. 3–4.

¹⁰³ *Ibid*, p. 7.

obtained a civil divorce but the husband refused to pronounce a talaq.¹⁰⁴ What the Council attempts to do in such cases is to grant a *faskh* divorce to the wife in the form of a divorce certificate issued to the wife, but only in so far as the wife is willing to return the Mahr.

Given that Muslim women find themselves in the unfortunate financial position of losing Mahr in exchange of divorce, some scholars have condemned the existence of the *Islamic Shari'a Council (UK)* on the basis that it upholds "a disturbing reaction on the part of what might best be termed the spokesmen of Muslim male interests."¹⁰⁵ In fact, the *Nuffield Foundation* sponsored an empirical study of all matrimonial disputes and divorce cases in which the *Islamic Shari'a Council (UK)* intervened. It draws on an analysis of about 300 case files, 21 follow-up interviews with women who have used the Council's facilities, and interviews with two women's support bodies based in London. The research undertaken by Sonia Nurin Shah-Kazemi, which has been published as "Untying the Knot: Muslim Women, Divorce and the *Shariah* (2001)", reveals that Muslim women were against any official recognition of *shari'a* law in Britain but were supportive of third-party intervention in family disputes by Muslim mediators. In the author's view, "it is generally agreed that formal recognition of the *Shariah* system of laws in the UK would be problematic (...) While all agree on the need for wider dissemination of the impact that the *Shariah* has upon the family lives of [these] women, the empirical evidence of this research demonstrates that the demand for any official recognition of the *Shariah* is a minority one." Out of 308 cases examined, this research study identified 28 forced marriages.

¹⁰⁴ Judge David Pearl, "Dispute Settlement Amongst the Muslim Community in the UK", *Supra* note 100, at 6.

¹⁰⁵ See Lucy Carroll, "Muslim women and Islamic divorce in England", *Journal of Muslim Minority Affairs* 17 No 1 (1997), pp. 97-115.

V. Concluding Remarks

- Rules of international private law in both France and Germany may allow a “direct” application of Muslim family law for non-citizen Muslims. The *raison d’être* behind the existence of such rules is the respect for legal “difference” when people with a “cross-border identity” are involved. Such application can potentially lead to a discriminatory result for Muslim women: inheritance laws favouring males, financial support for wives limited to four months time, division of property against the woman’s interest and child custody given to fathers depending on the age of the child. The only way for courts to protect the equality rights of Muslim women in cases where the application of Muslim family law would be discriminatory is to use the principle of “public order” to prevent such application.
- French and German courts seem to have reached similar conclusions when clarifying the limits of French or German “public order”: religious Islamic marriages have no enforceable legal effect if the wedding took place on French or German soil; the unilateral repudiation of a Muslim wife by her husband by the *talaq* is not recognized as a legitimate form of divorce; polygamous marriages are legally valid only if concluded in a country that permits polygamy; and the Islamic institution of *Mahr* is enforceable through French or German courts.
- The question of whether to “incorporate or reject” Islamic legal rules in Western States, and most importantly the impact of this choice on the equality rights of Muslim women, is a complex one. As demonstrated in the French and German case law, the recognition of polygamy for instance may have some positive consequences for *the particular* Muslim women involved, as recognition will protect them economically instead of leaving them without any social security benefits on the part of either the State or their ex-husband. On the other hand, however, one may worry that by protecting *these particular* Muslim

women, the Western state thereby encourages and legitimates the existence of an institution—polygamy—that is regarded by many Muslim women as highly discriminatory.¹⁰⁶

- The trend in Britain has been to adopt a secular and universal system of family law. Hence, the proposal to establish a separate system of Muslim family law was rejected by the government in an aim to upholding universally accepted human rights values, especially gender equality. Although various Shari'a councils play a leading role in resolving family law disputes, a broad consultation of different Muslim groups, especially Muslim women groups, has concluded that formal recognition of the Sharia system of laws in Britain would be problematic.

¹⁰⁶ Leila Ahmed, *Women and Gender in Islam*, Yale University Press: New Haven, 1992.