

# Germany (Also Taking into Account Other European Countries)

## 1 Introduction

Germany, like other European countries, now has a stable Muslim population. They number ca. 3.8–4.3 million, around half of whom have German citizenship.<sup>1</sup> Among them we find every hue of religious affiliation, Sunni, Shi'ite, Alevi and Ahmadi, more and less devout believers, some focussed on scripture, others adhering to mysticism or strong popular beliefs, people of very diverse levels of education, cultural background and individual convictions. Their views and living environments are usually influenced more by non-religious factors such as immigrant background, linguistic competence and education or employment than by religious attitudes. This variety is occasionally in contrast with the uniform image of public perception which tends to focus overall on the more traditionally inclined Islam professed by many Arab or Turkish immigrants, or those with Turkish roots. The secular attitude of many Muslims, and the Alevis in particular, is often overlooked precisely because it is comparatively inconspicuous in normal everyday life.

The question that arises is whether and to what extent Islamic norms could be applied in Germany and other European countries. While there are many differences in details,<sup>2</sup> it is possible to observe shared principles; the situation in Germany is consequently typical of Europe as a whole in many respects.

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1 Bundesamt für Migration und Flüchtlinge/Deutsche Islamkonferenz, *Muslimisches Leben*, 59 ff., 81.

2 Cf. e.g. Rohe/Elster, *Zur öffentlich-rechtlichen Situation von Muslimen in ausgewählten europäischen Ländern*, in: Bundesministerium des Innern/Sicherheitsakademie Wien, *Perspektiven und Herausforderungen in der Integration muslimischer MitbürgerInnen in Österreich*, Vienna, Mai 2006, 51pp; the contributions in Aluffi Beck-Peccoz, Roberta/Zinconne, Giovanna (eds.), *The Legal Treatment of Islamic Minorities in Europe*, Leuven 2004; Fournier, *Muslim Marriage in Western Courts*, 2010; Büchler, *Islamic Law in Europe?*, 2011; Ferrari, Silvio/Pastorelli, Sabrina (eds.), *Religion in Public Spaces. A European Perspective*, Farnham/Burlington 2012; Bowen, *Blaming Islam*, 2012; Rohe, *Sharia and the Muslim Diaspora*, 261 ff. For Europe-wide actual reports cf. Nielsen, Jørgen et al. (eds.), *Yearbook of Muslims in Europe*, vol. 1 (2009–).

Every legal system with territorial applicability requires absolute precedence within its territory and has the autonomous determining power of whether, and to what extent, 'foreign' norms can be allowed. As regards validity, there is thus no plurality of norms along the lines of legal multiculturalism.<sup>3</sup> Someone who tries to establish a parallel or opposing legal system would be, in Heiner Bielefeldt's words, be pursuing an anti-constitutional project, which cannot be permitted by the secular rule of law.<sup>4</sup>

341 The legal system in a democratic state committed to human rights must offer a stable and fundamentally constant framework for profitable coexistence and, if necessary, must enforce this with official sanctions. On the other hand, being a liberal system it cannot be employed to simply prohibit everything some or many citizens disapprove of or reject on moral or socio-political grounds, as such matters ought to be subject to a *societal* debate. Furthermore it must always be taken into account to what extent the 'non-legal' – for instance religious – basis for norms is contrary to applicable law, or whether it is situated within the established legal context and thus is not in opposition to it.<sup>5</sup> This also applies to large numbers of Islamic norms.

There is a fundamental difference between the implementation of religious norms on the one hand and legal ones on the other. From the Muslim point of view both are instances of applying Islamic rules. From the point of view of the state, however, religious norms come under the freedom to practise religion as guaranteed by the constitution. Legal norms, being foreign law, may be applied to some extent on the basis of the respective German laws. In my view, however, they do not enjoy the same protection of the freedom of religion, as under a secular rule of law the delimitation of competences between law and religion is the preserve of the legislative authority rather than the religious communities. Consequently there is a fundamental separation of law and religion.

In spite of differing specific forms concerning some details, the rule of law limits the implementation of religious as well as legal norms. Neither is the freedom to practise religion above other fundamental rights that might be in conflict with it, nor would permitting foreign legal norms without restriction be compatible with the principle of European rule of law. Here we can determine shared principles under an *ordre public* that comprises all areas of the law, unifies fundamental substance and ensures its equal application to all citizens and others present within the territory.

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3 For different models of organising normative pluralism in Europe cf. Rohe, Family, 49 ff.

4 Bielefeldt, Muslime im säkularen Rechtsstaat, 96.

5 Cf. only *op. cit.*, 97 ff.

The general rule is that the more the public interest, or third party interest, is affected, and the less weighty the individual concern based on a religious or other specific norm, the more important does uniform application of the law, also as regards substantive norms, become. On the other hand, individual concerns based on these specific norms are accorded more importance the weightier they are and the less they affect the public interest, or that of a third party.

Even in cases of high individual urgency there are limits to the application of foreign norms. These limits are drawn by the legislative authority which has to find the balance between the interest in uniform implementation of the law and the safeguarding of law and order on the one hand and the interest in private-autonomous liberty and variety on the other. In a polity based on the rule of law and committed to human rights this delimitation must remain static at its core. Where less weighty matters are at stake, extra-legal considerations and information may in due course lead to different emphases. One instance illustrating this kind of development is the area of legally accepted opinions concerning forms of non-marital and same-sex partnerships which have changed fundamentally over the course of a few decades, as have those concerning divorce.<sup>6</sup>

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## 2 Applying Islamic Religious Norms in Germany and Europe

### a *Public Law*

The implementation of religious norms can be discussed only cursorily in a book dealing with issues of Islamic law. Religious norms – for instance as regards rules for prayer and fasting – enjoy the protection of the freedom of religion, which includes the active practice of religion, visible in public.<sup>7</sup> All religions are to be treated equally in this respect; there are no ‘foreign’ religions deserving a smaller degree of protection according to the constitution. This freedom is limited by other, conflicting fundamental rights, including the inviolability of human dignity as set down in Art. 1 of the German constitution (GG).

Much ink has been spilt over the relation between the different fundamental rights guaranteed by the constitution. Konrad Hesse’s ‘practical concordance’

6 Cf. BGH NJW 1964, 976, or BGH NJW-RR 2007, 145, 148 on prohibition of divorce being contrary to the *ordre public*.

7 Cf. e.g. BVerfG BVerfG NJW 1995, 2477, 2478; BVerfG NJW 2003, 2815, 2816; BVerwG NVwZ 2012, 162 (ritual prayer in school).

provides the appropriate guideline.<sup>8</sup> The fundamental rights acquire significance as defensive rights and participation rights benefiting Muslims in relation to the state, as well as in the form of 'objective values', and with indirect effect under private law. There is potential for conflict in this area, e.g. as regards some Muslim attitudes to gender relations and interaction with non-Muslims, including apostasy from Islam. In some cases the relationship with the democratic rule of law may require clarification (see 4 below regarding Muslim fundamental attitudes).

Freedom of religion is an individual right; and to a certain, constitutionally regulated, extent also a collective one. Besides special norms such as Art. 7 para. 3 GG or Art. 140 GG in connection with Art. 136–139, 141 WRV, the freedom to practise religion according to Art. 4 GG is particularly relevant in the context of applying Islamic norms. It relates to a multitude of areas such as e.g. prayer, building mosques and call to prayer, clothing customs and fasting, dietary rules, burial regulations and naming laws, but also spiritual guidance for the military and for prisoners, education and even social, tax, alien and citizenship legislation.<sup>9</sup>

Freedom of religion also has limits that may be seen as the effects of a broadly interpreted *ordre public*. Within the area of applicability of public law we will have to distinguish according to how close the implementation of religious ideas is to government action. Thus permitting animals to be slaughtered without stunning them first, or the dead to be buried without a coffin, is much less closely linked to government action than Islamic religious education lessons at state schools.

When limiting actions motivated by religious considerations – also when weighing them against the conflicting fundamental rights of others – the principle of proportionality must be observed with great care. Thus when a mosque is being built, structural safety is indispensable. The neighbourhood will, however, be obliged to accept a certain degree of inconvenience, as it is not a factory or a residential building but one with a religious purpose. As regards the administration of cemeteries, coffining or calculating the period of rest of the dead, Muslims' needs must be restricted only within the limits of justifiable

8 Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed. 1995, marginal n. 72.

9 Cf. e.g. Bielefeldt, *Muslime im säkularen Rechtsstaat*, esp. 85 ff.; Muckel/Tillmanns, *Die religionsverfassungsrechtlichen Rahmenbedingungen*, 234 ff.; Coumont, *Islam und Schule*, 240 ff.; Rohe, *Der Islam*, 133 ff.; id., *On the Recognition*, 145 ff. For a basic overview of religious constitutional law see e.g. von Campenhausen/de Wall, *Staatskirchenrecht*, 4th ed. Munich 2006.

requirement. Burial laws have been changed accordingly within the last years in several states.<sup>10</sup>

When defining the extent of freedom of religion the *ordre public* displays a certain fluctuation range. It was frequently pointed out that the requirements for time off school for religious reasons were much more stringent for Christians than for Muslims in the past. This might be due to the fact that for a long time Islam was associated in Germany with a temporary 'guest status' ('Gastarbeiter', guest workers); Muslims were a marginal group who were not perceived to have significant bearing on society as a whole. In keeping with this perception the children of these guest workers received supplementary lessons in their native language, to prevent them being alienated from their cultural and linguistic background. Nowadays, however, it is understood that people with a migrant background will increasingly live in Germany for longer periods, and that more of them will become German citizens. Consequently their circumstances are an elementary part of society as a whole, and the balance between the tasks of society as a whole, such as state education and freedom of religion, may be redefined in the sense of opening equal space and drawing equal limits. The tendency of more recent court judgments follows these lines.<sup>11</sup>

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On the other hand establishing religious infrastructure is simple normality for those Muslims who do stay, and enjoys protection under the freedom of religion. The debates, some of them highly emotional, concerning the building of mosques show that there is a considerable need for information on the principles of the German constitutional system throughout society as a whole.<sup>12</sup>

## **b** *Penal Law*

Special considerations apply in the field of penal law. Its norms are the *ultima ratio* safeguarding peaceful coexistence and, consequently, law and order. They can only fulfil their function to secure the peace if the norms of penal law apply

10 Cf. the reports on Germany by the author in Nielsen (ed.), *Yearbook of Muslims in Europe*, 2010–.

11 Cf. e.g. BVerwG NVwZ 2014, 81 regarding the duty of a schoolgirl to participate in mixed swimming classes as long as she can wear a 'burkini' covering the whole body; VG Hamburg judgment of 12 Jan. 2004 (15 VG 5827/2003), NordÖR 2004, 412, concerning the rejected exemption from sex education lessons. The judgment was welcomed by Muslim (ZMD; cf. 'Zentralrat begrüßt Hamburger Urteil', *Islamische Zeitung* 02/2004, 15) and Turkish ('Türkische Vereinigungen begrüßen Urteil zur Sexualkunde', *Frankfurter Allgemeine Zeitung*, 22 Jan 2004) associations. In more detail Rohe, *Muslime in der Schule*, 257 ff.; Rohe, *Muslimische Schülerinnen im Schwimmunterricht*, *Schulverwaltung* 12/2013, 338–340.

12 Cf. Rohe, *Shariah in Europe*, 656 ff., esp. 667 ff.

throughout the territory without restriction, i.e. regardless of the residence status or the personal beliefs of all persons present in the country.

As a consequence religious norms which conflict with objects of legal protection can be implemented only within very narrow limits, and only if their impact is negligible and does not go beyond what is 'socially adequate' or at least justifiable. One instance of this is the circumcision of boys customary in Judaism and Islam.<sup>13</sup> In this case the requirements are that it must be conducted by an expert according to the medical state of the art and that the legal guardian/s – or, depending on his intellectual capacity, the boy himself – must agree with legal effect.<sup>14</sup> In 2012, the German regional court of Cologne<sup>15</sup> ruled that male circumcision in a particular case concerning a Muslim boy is punishable under German penal law, even if performed in accordance with medical standards of care. This decision went against the unanimous opinion of the judiciary<sup>16</sup> so far, which had held this procedure to be lawful. It was based on short and poorly balanced reasoning, simply stating that the parents cannot validly consent to the harm caused to the child. The court made no attempt whatsoever to weigh the parents' motivation of integrating the child into a religious community according to their definition of the best welfare of the child with the (relatively minor) violation of the integrity of the child's body. This decision caused uproar in the Jewish and Muslim communities and was rejected by most of the political parties and by leading politicians including the Chancellor.<sup>17</sup> The German legislator amended German family law (para. 1631 d Civil Code) to clarify the situation.<sup>18</sup> The ongoing debate shows an increasingly aggressive secularist tone condemning any religious rites as backward and irrel-

13 Cf. e.g. Beulke/Dießner, '(...) ein kleiner Schnitt', 338 ff. with further references including opposing opinions; cf. also OVG Lüneburg FEVS 44, 465 ff.; OVG Lüneburg NJW 2003, 3290 regarding social security covering expenses for the celebration.

14 The OLG allowed damages to a boy whose father, despite not having care and custody of the child, had arranged for him to be circumcised without the consent of the mother (who had care and custody of the child).

15 LG Köln decision of 7 May 2012 (151 Ns 169/11), LG Köln JZ 2012, 805.

16 According to German law of social welfare, the state even has to finance the costs of a decent celebration of the circumcision in case of need, cf. Administrative Court Frankfurt/Main (NJW 2007, 3580), Appeal Lüneburg FEVS 44, pp. 465.

17 Cf. the report 'Umstrittene Rechtslage: Kanzlerin warnt vor Beschneidungsverbot', Spiegel online 16 July 2012, available at [www.spiegel.de/politik/deutschland/bundestanzlerin-merkel-warnt-vor-beschneidungsverbot-a-844671.html](http://www.spiegel.de/politik/deutschland/bundestanzlerin-merkel-warnt-vor-beschneidungsverbot-a-844671.html), accessed 30 January 2014.

18 According to OLG Hamm (FamRZ 2013, 1818, 1819f.) the child has to be informed and consulted about the act in a way appropriate to his age and state of development.

evant in a secular society.<sup>19</sup> This debate was exemplary for Europe in the sense that an increasing anti-religious sentiment is not ready to accept anymore that the socialisation within a religious group may be decided first and foremost by the parents of a minor for his best welfare, which is still the case under Art. 6 of GG.

On the other hand, penal law may provide protection from crimes committed on religious grounds, in particularly grave cases even across national boundaries. Thus for instance the Spanish parliament has enacted a law which makes the brutal female genital mutilation practised mainly in some parts of Africa a crime, even when parents take their children to another country for them to undergo the procedure, and then return to Spain.<sup>20</sup> This custom is basically not an Islamic rule,<sup>21</sup> even though it is practised in some Islamic countries and regions especially in West and East Africa, and occasionally justified on religious grounds.<sup>22</sup> The fact that the Coptic Christians of Egypt also practise this custom provides additional evidence of its pre-Islamic origin.<sup>23</sup>

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Granting a more extensive 'cultural privilege' beyond minor offences would not be compatible with the fundamental principles of penal law. It is true that

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- 19 Cf. the lucid essay of Heiner Bielefeldt, UN special rapporteur for freedom of religion and belief and full professor at the University of Erlangen-Nürnberg, 'Marginalisierung der Religionsfreiheit?', available at [www.polwiss.uni-erlangen.de/professuren/menschenrechte/UN%20Sonderberichterstatter/bielefeldt\\_beschneidungsurteil\\_vorabfassung.pdf](http://www.polwiss.uni-erlangen.de/professuren/menschenrechte/UN%20Sonderberichterstatter/bielefeldt_beschneidungsurteil_vorabfassung.pdf), accessed 9 February 2014.
- 20 Cf. 'Scharfes Gesetz in Spanien gegen Mädchen-Beschneidung', *Neue Zürcher Zeitung*, 24 June 2005, 2. Cf. also the first Swiss case concerning the matter, 'Sechs Monate auf Bewährung für Genitalverstümmelung', *Neue Zürcher Zeitung*, 12 June 2008.
- 21 For modern views cf. Muslim Women's League, 'Female Genital Mutilation', 1999, viewed on 29 August 2014 at <http://www.mwusa.org/topics/violence&harrassment/fgm.html>, 4; Shamiri, Yemen, 9,5 Ban on women's circumcision, *Yearbook of Islamic and Middle Eastern Law* 7 (2000–2001), 344; in more detail Marion Rosenke, *Die rechtlichen Probleme im Zusammenhang mit der weiblichen Genitalverstümmelung*, Frankfurt/Main 2000, 59 ff.
- 22 This kind of justification is also found in e.g. a book by Abu Bakr Abdu'r-Razzaq, *Circumcision in Islam*, London 1998, transl. Aisha Bewley, ed. by Abdalhaqq Bewley and Muhammad 'Isa Waley, London 1998, 62 f., 100 f. and *passim* (purchased in an Islamic bookshop in London 2004).
- 23 Cf. 'Beschneidung bei Mädchen erlaubt', *Frankfurter Allgemeine Zeitung*, 25 June 1997, 9; 'Die Prominenz begehrt gegen die Islamisten auf', *Süddeutsche Zeitung*, 5/6 July 1997, 14; 'Ägypten verbietet weibliche Beschneidung', *Süddeutsche Zeitung*, 20/21 July 1996, 1; 'Die Frauen und Mädchen schützen', *Frankfurter Allgemeine Zeitung*, 12 Nov. 1998, 14.

penal law's constitutionally laid down emphasis on culpability can give rise to the consideration that criminal actions 'acceptable' in certain cultural or religious environments show the perpetrator's culpability in a gentler light, or that they do not comply with subjective elements of a crime such as murder due to 'base motives'. There have indeed been occasional rulings, not only with respect to Muslims or Orientals but also Italians or Eastern Europeans, which display this kind of view.<sup>24</sup>

This does, however, overlook the limits of the subjectivisms to be considered, and invariably conflicts with the function of penal law detailed above. The parallel problem of the criminal liability of perpetrators motivated by religious reasons provides supporting evidence: their blindness for the law does by no means exempt them from punishment.<sup>25</sup> In addition a cultural or religious reservation in penal law presumes that crimes such as so-called 'honour killings' are viewed sympathetically throughout certain population groups. This is evidently incorrect: even in states where such crimes are committed comparatively frequently we find embittered resistance, not least, in fact, by faithful Muslims, against granting the criminals any legal privileges. The debate on domestic violence, which has been conducted in the Turkish press for some time, displays very clear tendencies in this context. Large parts of the population consider these crimes at best 'customary wrongs', for which of course no allowance must be made. A diverging view would, after all, relegate entire parts of the population to being potential victims meriting reduced protection. This result would be similarly contrary to the basic function of penal law. Consequently the Bundesgerichtshof (Federal Supreme Court) has revised judgments along those lines and emphasised that the standards for judgments must be those applied to the entire society under the rule of law, not the views of a group which does not recognise the moral and legal values of this society.<sup>26</sup> In addition, however, it pointed out correctly that the motive does not necessary have to be sought in particular cultural concepts, but may be due to universal factors such as rage, anger or desperation.<sup>27</sup>

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24 Cf. Britz, *Kulturelle Rechte*, 38 ff.; Rohe, *Auswirkungen der Migration*, 75 ff. with further references.

25 Cf. only Schönke/Schröder/Lenckner, *StGB*, § 46, marg. n. 15 with further references.

26 BGH NJW 2006, 1008, 1011 with further references; cf. Valerius, *Ehrenmord*, 912, 914 ff. with further references.

27 BGH NJW 2006, 1008, 1011 f.

c *Civil Law*

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In the area of civil law religious norms can become indirectly legally relevant not only because they are protected by specific anti-discrimination laws<sup>28</sup> but due to the fact that the fundamental right to freedom of religion set down in Art. 4 GG can develop formative effect with regard to legal relationships governed by civil law. Just like the other constitutional fundamental rights, freedom of religion originated as a subjective defensive right.<sup>29</sup> It is in addition an element of the objective legal system and thus affects circumstances governed by private law such as e.g. employment contracts. According to the prevalent opinion it has 'indirect effect on a third party'.<sup>30</sup>

Employees are able to some extent and depending on the circumstances of the individual case to refer to the effect of freedom of religion when arranging the terms of their employment. In mutual consideration with the respective requirements of the employer it is thus possible to effect the observation of prayer times or holidays, or to defend oneself against being given notice due to exercising such freedoms.<sup>31</sup> The protection of such concerns provided by the European anti-discrimination guidance 2000/78/EG as implemented by the Allgemeines Gleichbehandlungsgesetz (AGG) goes further still.<sup>32</sup>

Of course the legal protection of the freedom of religion in this context cannot possibly be as extensive in this context as it would be with reference to the state. Private persons – including employers – are also protected by fundamental rights and thus able to pursue their business interests according

28 Cf. ArbG Hamburg judgment of 4 Dec. 2007, Az. 20 Ca 105/07 of 4 Dec. 07 (regarding damages for the exclusion of a Muslim job applicant for the position of social education worker with the Diakonisches Werk der Evangelischen Kirche in Deutschland paid out of the public purse).

29 Cf. Zippelius, *Bonner Kommentar* (Loseblattsig.), Art. 4, marg. n. 63.

30 While the legal construction of the consequences has been very controversial in recent years (cf. e.g. *Münchener Handbuch zum Arbeitsrecht*–Blomeyer, 2nd ed. 2001, § 48, marg. n. 42 with further references; Hans Hanau, *Der Grundsatz der Verhältnismäßigkeit im Privatrecht*, Tübingen 2004, esp. 51 ff. with further references), its results have not.

31 Cf. e.g. BAG NJW 2003, 1685, 1687 and BVerfG NJW 2003, 2815; LAG Düsseldorf JZ 1964, 258; LAG Hamm NJW 2002, 1970; LAG Hamm NZA 2002, 1090, 1092; a comprehensive overview may be found in Hoevels, *Islam und Arbeitsrecht*, 2003.

32 Cf. Rohe, *Schutz vor Diskriminierung aus religiösen Gründen im Europäischen Arbeitsrecht – Segen oder Fluch?*, in: Rüdiger Krause/Winfried Veelken/Klaus Vieweg (eds.), *Recht der Wirtschaft und der Arbeit in Europa*, *Gedächtnisschrift für Wolfgang Blomeyer*, Berlin 2004, 217 ff.; ArbG Berlin 28.03.2012, NZA-RR 2012, 627 (the claimant was granted damages under the AGG for having been rejected by a dentist because she was wearing a headscarf).

to their own freedom of decision.<sup>33</sup> There are of course restrictions due to the abovementioned third-party effect of the fundamental rights. They affect e.g. the interpretation of what constitutes ‘important grounds’ on which a notice that does not observe the contractual period or the term of notice could be justified.

Practical legal issues usually arise when the requirements of a business come in conflict with the observation of religious rules. A very clear instance is the commandment of praying five times a day, at changing times depending on the position of the sun,<sup>34</sup> or the Friday prayer which ought to take place in the (Friday) mosque. Its particular significance is due to the fact that the entire mosque community gathers on this occasion and the prayer leader will give a sermon (*khutba*) which also deals with important community matters. Consequently people may feel a particularly urgent desire to be present.

347 Further important concerns are fasting during the month of Ramadan and the subsequent celebrations of breaking the fast, as well as the Feast of the Sacrifice in the month of Dhū l-Hijja, which also play an important social part. For some women the wish to wear a headscarf during working hours may also be relevant. Of smaller practical significance are instances of conflict with religious dietary laws such as the prohibition of consuming pork or alcohol, or the desire to go on a pilgrimage to Mecca, which is incumbent on wealthier persons. As for the dietary laws, while it may be possible to come in contact with prohibited items, consuming them does not, of course, follow; although even the contact with prohibited items may constitute a problem for some Muslims. Problems may arise concerning social welfare laws if a certain possible employment is not accepted, or terminated, due to religious reasons.<sup>35</sup>

In the concrete application of the law the issue tends to be how to balance the employer’s right to give directions in order to best implement the interests of his business against the employee’s desire to be absent from work at a certain time (possibly by allowing the latter to take annual leave at that time, or by arranging the working hours accordingly) or be exempt from certain types of work. In the end the question is whether the refusal to fulfil a set task can lead to extraordinary dismissal, and whether the employer’s requirements constitute legal grounds to justify him dismissing the employee. In a different context the question may arise of whether the religious requirements of a Muslim looking

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33 Cf. LAG Düsseldorf JZ 1964, 258; Hans Heinrich Rupp, *Verfassungsprobleme der Gewissensfreiheit*, NVwZ 1991, 1033, 1037 f.

34 Cf. LAG Hamm NJW 2002, 1970.

35 Cf. only BVerfG NJW 1984, 912.

for work can constitute grounds on which he may refuse to take a position or be refused a position. This also applies in the case of state employees.<sup>36</sup>

The deliberation of whether (objectively justifiable) business requirements or (similarly objectively justifiable) requirements of individual employees are given precedence depends on the circumstances of the individual cases. It is not possible to present details here.<sup>37</sup> It is, however, possible to refer to the legal practice in cases of conflict which dealt with the observation of Christian religious rules or convictions. Overall the employee's requirements will be accorded particular weight if the religious observation is of greater importance (there are degrees in Islam, too), if the employer was already aware of the requirement at the start of the employment and/or if he is able to allow the requirement without great difficulty. The latter will be particularly relevant if the business in case is a larger concern, and/or the work of the person involved can be fulfilled either by other colleagues or at a later time. In cases in which a change in the running of the business or the specific work required are the cause of the religious conflict, the employee's protection will be given priority.

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The requirements of the business, on the other hand, are of particular importance if acceding to the employee's wishes would cause considerable difficulties, would reduce the effectiveness of his work, or if the religious commandments cited are of lesser importance. One instance is the case of the English bus driver who insisted that he must observe the daily prayers; when he was dismissed the court declared this to be justified.<sup>38</sup> It is indeed not reasonable that public transport should come to a standstill during Islamic prayer times. After all, this does not happen in most Islamic countries, either, which allows the conclusion that observing the daily prayer times is not necessarily more important than the requirements of everyday life.

A further most important concern for businesses is health and safety, for instance with regard to clothing. In cases where the employee changes his religious convictions after the start of the employment, the business requirements are likely to be prioritised at least for a certain time, too. On the other hand the employee's right to change his convictions cannot be restricted for an unlimited time, even though they may affect his fulfilling his job. Finally, the employee

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36 Regarding a practical instance from England (teacher) *Ahmad v. Inner London Education Authority* [1978] 1 AllER 574.

37 For a comprehensive overview cf. Hoevels, *Islam und Arbeitsrecht*, 2003; Frings, *Musliminnen und Muslime*, 1 ff.

38 Reported in Shadid/van Koningsveld, *Religious Freedom*, 102.

will be granted less protection if he took a job despite predictable conflicts between the job and his religious beliefs.<sup>39</sup>

Overall there is a stable base for compromise solutions. The generic Quranic statement that God does not expect humans to do anything that is beyond their abilities (sura 2:286) can be helpful in this context. Thus a Muslim in employment is permitted to 'conflate' the daily prayers at other times than those prescribed, or perform them later.<sup>40</sup> On the other hand it must not be concluded from this that performing the prayers is a concern that does not require any consideration. In the eyes of the persons affected remedial solutions due to external necessity do not possess the same quality as the originally 'commanded' procedure.<sup>41</sup>

If the participation in Friday prayers is desired, this ought to be permitted if possible. They take place during the lunch hour, a time at which a break is often planned anyway. Fulfilling a task in advance or later should usually be possible.

349 Taking part in celebrations such as at the end of Ramadan, or embarking on the pilgrimage to Mecca can usually be made possible by taking paid or unpaid annual leave.<sup>42</sup> Unwillingness to compromise on the part of individual employers is not acceptable under the law. Thus in an English case<sup>43</sup> Muslims were awarded financial compensation<sup>44</sup> after they had not been allowed to take unpaid leave to celebrate the breaking of the fast, even though this had been previously acceptable, and they had offered to work overtime to make up for the day off. Under German law, a formal warning or notice in such a case would have been illegal. A rare German case concerning a conflict between employment law and the requirements of Muslim prayer or Eid feasts dates from 1964,<sup>45</sup> indicating that mutually acceptable solutions to such potential conflicts are readily found. A new case in 2009<sup>46</sup> was decided in favour of a Muslim employee who wanted to perform the ritual pilgrimage to Mecca. Her

39 Cf. BAG NZA 1986, 21, 22.

40 Cf. Balić, *Ruf vom Minarett*, 70.

41 Similar: LAG Hamm NJW 2002, 1970, 1971.

42 Cf. Hoevels, *Islam und Arbeitsrecht*, 202 ff.

43 Ruling of the Employment Appeal Tribunal in *J. H. Walker v. Husain and others* (1996) IRLR 11.

44 The legal basis is set down in Sect. 57 (3) Race Relations Act 1976; this law was fundamentally problematic as it only covers religious discrimination if it has an ethnic aspect as well.

45 LAG Duesseldorf JZ 1964, 258.

46 ArbG Cologne (Az. 17 Ca 51/08), BeckRS 2010, 73919.

interests<sup>47</sup> were taken to be of superior importance in comparison to the needs of her employer.

As a rule it should also be possible to avoid coming in contact with pork or alcohol. Should it not be possible – for instance in production processes involving alcoholic substances or when working in catering – there is a difference between something having to be consumed or only touched in another way. Despite mental reservations, the latter is likely to be feasible. On the other hand, the employer has the duty to examine whether the contact with alcohol could be easily avoided by internal arrangements. In 2011, the German Federal Labour court (Bundesarbeitsgericht) decided in favour of a Muslim employee in a supermarket who was ordered to refill shelves with bottles containing alcohol after having worked in other parts of the market before and was dismissed when refusing the new work.<sup>48</sup> According to the court, the employer had failed to check whether the employee could reasonably have been given other duties which would not put him in conflict with his religious convictions. A British labour tribunal dismissed a similar claim by an employee in 2008.<sup>49</sup> In this case the employer was obviously able to convince the tribunal that he had made every effort to find alternative work for the employee; in such a case German jurisprudence would also uphold the dismissal. Interestingly, the broad media debate in both cases – which seem to be extremely infrequent in Europe – is in stark contrast to the widespread problem of dismissals due to alcohol abuse.

Contact with interest-bearing business transaction is to be treated similarly, as it might occur in financial business or in the accounting department of a business. The most difficult problem may be the employment of women who wish to wear a headscarf for religious reasons, if their work brings them into contact with the public.<sup>50</sup> The employer is, of course, also protected by fundamental rights such as the right to the free development of the individual and the right to freedom of profession (cf. Art. 2, para. 1, Art. 12, para. 1 GG). Thus

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47 The 53-year-old woman was employed in the school administration. The next period of holidays coinciding with the time of the pilgrimage would have been 13 years later, at which point, she would have reached the age of 64 [Explain why this is a problem. The pilgrimage has to be done before a specific age?]. Additionally, she feared that her mother, who was taking care of her disabled child, would not be able to continue this at that time.

48 BAG NJW 2011, 3319.

49 Cf. The report available at <http://www.thisisderbyshire.co.uk/Muslim-worker-loses-Tesco-booze-bid/story-11581305-detail/story.html>.

50 Regarding dismissals due to clothing worn for reasons of religious or other beliefs cf. LAG Düsseldorf DB 1985, 39; ArbG Hamburg ArbuR 1996, 243; LAG Hessen NJW 2001, 3650, as well as recently BAG NJW 2003, 1685.

an employer may be faced with the difficulty that while he has no problem with someone wearing a headscarf, his customers may hold different views. As a rule it will at present not be possible to force him to ignore his legitimate business interests and persuade his clients to be more tolerant in future – they are more likely to terminate their business association with him.

It is still not possible to simply dismiss an employee for an important reason, or on grounds of conduct subject to protection against dismissal. There are decisions in favour of Muslim female employees wearing a headscarf in cases where no security reasons are at stake. The German Federal Labour Court accepted the claim of the appellant who wore her headscarf to work at a warehouse.<sup>51</sup> Stressing the great importance of religious freedom, the court ruled that this freedom cannot be abrogated by mere suppositions of possible economic disadvantage to the employer. Even in case of proven economic disadvantage, the employer would first have to consider whether the employee could work in a less sensitive capacity before being entitled to terminate her contract. Since European legislation on protecting employees against discrimination on religious grounds was introduced, the scope of protection will probably broaden even more. A case from Berlin in March 2012<sup>52</sup> might illustrate this. The application of a well-qualified Muslim woman from Iraq wearing a headscarf for a job in a dental surgery was rejected because the employer insisted on 'religious neutrality' in his enterprise. The Berlin Labour Court argued in favour of the claimant, stressing that there is no right to unconditionally keep any sign of religion outside the (non-religious) enterprise.<sup>53</sup> The employer was ordered to pay 1,500 Euros in damages to the claimant. This decision was regarded as a milestone by NGOs fighting discrimination.

There has not yet been a case in the legal practice known to me of the inverse situation of an institutional employer with Islamic sympathies dismissing an employee on the grounds of significant infringement of essential tenets of the faith. Should such a case happen it will be necessary to determine, in comparison with Christians in employment, whether the corporate credibility requires the infringement to be penalised by dismissal. One striking example of such a situation is the argument surrounding a supermarket in Évry near Paris. The mayor intended (without any legal basis) to force the Muslim management of the shop to sell pork and alcohol. This strange action may, however, have

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51 BAG NJW 2003, 1685.

52 Cf. ArbG Berlin, NZA-RR 2012, 627.

53 Cf. the report 'German Dentist Fined for Anti-Hijab Bias' of 20 Oct. 2012, available at <http://www.onislam.net/english/news/europe/459596-german-dentist-fined-for-anti-hijab-bias.html>.

an explanation in the fact that when taking on the shop the management dismissed all non-Muslim employees.<sup>54</sup> They, too, could be protected under the implemented EU guidelines in future.

Similar to the cases of individual employment law just referred to, the fundamental right to freedom of religion can have indirect effect on e.g. tenancy law.<sup>55</sup>

There are further areas of civil law in which religious concerns develop significance simply through interpretation of the relevant norms; the fundamental principle of all religions being equal must, of course, be observed. Thus the OLG Schleswig had to rule in the case of a quarrel between the Muslim father and the Christian mother of a three-year-old girl, the mother wishing to have the child baptised.<sup>56</sup> The court ruled that the father's refusal – he wished for the child to have the decision herself on reaching 'religious majority' – did not constitute grounds on which to grant only the mother custody and care of the child which had so far been shared. On the other hand, the Court of Appeals of Cologne<sup>57</sup> has prevented the father of a little boy from any contact on the mother's request, due to previous domestic violence and continuous jihadist propaganda which has already led to punishment and expulsion of the father. In a decision regarding sales law the OLG Hamm ruled it possible that the vendor of a house that had been used as a brothel-style swingers' club had a duty to inform the Muslim buyer of the previous use of the property. In the case in question, however, the plaintiff lost because this use had been some time in the past.<sup>58</sup>

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Stereotypes regarding the Muslim way of life, some of which may be widely believed, are, however, rejected: in the context of a husband and wife's shared obligation to pay, the Federal Court<sup>59</sup> pointed out that living in a 'typical Muslim marriage' does not immediately allow the conclusion that the wife's freedom of decision is restricted.

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- 54 Cf. 'Ohne Schweinefleisch und Alkohol', *Frankfurter Allgemeine Zeitung*, 24 Dec. 2002, 3.  
 55 BGH NJW 2008, 216, 217f. on the demand to install a satellite dish for Turkish Alevites (rejected in the present instance); concerning similar cases cf. also OLG Munich NJW 2008, 235.  
 56 OLG Schleswig FamRZ 2003, 1948.  
 57 Court of Appeal Cologne 15.03.2013 (26 UF 9/13), available at <http://openjur.de/u/618834.html>, accessed 10 February 2014.  
 58 OLG Hamm NJW-RR 2000, 1183f.  
 59 BGH NJW 1999, 135.

### 3 Applying the Norms of Islamic Law

Under German law there are two scenarios in which it would be possible to apply foreign legal norms – including those with religious self-legitimation. On the one hand it is possible to implement a genuine ‘application of foreign law’ under private international law, i.e. on the basis of the applicability of laws anchored in German law. In state courts, only foreign state law can be applied; thus, it is not ‘Islamic law’ as such that may be applied, but only in its various shapes given by state legislation or by recognised customary law. In international arbitration, ‘Islamic law’ or ‘sharia law’ could be applicable in principle; regarding the broad variety of interpretations, it cannot be recommended to agree on such law without specifications.<sup>60</sup> On the other hand these norms may be applied within the boundaries of the application of German civil substantive law as long as this allows scope of autonomous choice (so-called dispositive substantive law). In addition, some European states – although Germany is not among them – have integrated some ‘Islamic’ norms into their national law.<sup>61</sup> Finally, these norms are applied informally in many states, although this situation can be investigated and monitored to only a limited extent.<sup>62</sup>

#### a *Private International Law*

##### aa Introduction

Unlike public law, the function of private law is primarily to shape and safeguard legal relations between private persons. Their individual interests are of particular significance in this context. This is true also when they are connected to more than one legal system due to their circumstances. If someone’s life is structured according to the conditions of a certain legal system, this structure of life deserves protection even when the person in question changes his or her domicile or residence. Consequently the familiar law of the home country should still apply once he or she has crossed a border. The basic principle of such regulations is the assumption that all systems of private law are fundamentally of equal value together with the fact that for reasons of legal certainty it is preferable not to interfere with legal relations once they have become established with legal effect, even if they may not comply with the regulations of German substantive law in every detail. On the other hand it

60 Cf. Bälz, *Das islamische Recht als Vertragsstatut?*, IPRax 2005, 44–47 regarding an English case.

61 Cf. Rohe, *Shariah in Europe*, 686f.

62 Cf. Rohe, *Shariah in Europe*, esp. 687ff.

is in the interest of the community under the rule of law that there should be certain areas in which the same law applies to all those present in the country.

The question of whether domestic or foreign substantive law (rules of material law) should be applied is determined according to the statutes of private international law (conflict of laws), which in Germany<sup>63</sup> is mostly included in the introductory laws of the civil code (Art. 3 ff. EGBGB) and several European regulations (e.g. the Rome I, II and III regulations regarding contract, tort and divorce law). These statutes provide the balance between the restrictions sketched above. Of course the specifically legally formulated 'ordre public international' (cf. e.g. Art. 6, 13 para. 2; 17 para. 2 EGBGB) draws clear boundaries: in cases with sufficient domestic relevance where the result of applying foreign substantive law would be incompatible with essential principles of German law (including the fundamental rights), the norms of foreign law will not be applied. The German legislative authority determines in every single case the framework within which differences of laws will be adopted due to superior considerations.

The *ordre public* is not static but, in the words of the Federal Supreme Court,<sup>64</sup> 'being a substrate of the legal system in force the former as well as the latter are expressions of the elementary values and principles of domestic and, increasingly, also European society under the rule of law [...] subject to the transformation of these values and principles and following it, albeit at times with some delay.'

In the case of persons and families with foreign citizenship or dual German and foreign citizenship German conflict of laws rules until recently provided for the application of the law of citizenship in most issues of family and inheritance law. Unlike many countries of the Anglo-American family of laws, where regulations are tied to the forms of habitual residence (or domicile; cf. 4.2.b above regarding the Canadian situation), in Germany we still see the everyday application of foreign norms in these areas.<sup>65</sup> With reference to Muslims it must be pointed out that German substantive law applies to the increasing number of German citizens among them. The large group of Turkish Muslims is subject to the extensively reformed Turkish law which has the same

63 On conflict of laws under Swiss law cf. Schwander, *Die Anwendung*, 403 ff.

64 BGH NJW-RR 2007, 145, 148 on the prohibition of divorce under canonical law applying to Syriac Christians.

65 Cf. Rohe, *Rechtsfragen der Eheschließung*, 161, 163 f.; id., *Eheschließung*, StAZ 2006, 93 ff.; Scholz, *Islam-rechtliche Eheschließung*, 321.

attitude as German law towards traditional Islamic ideas. In addition, new EU legislation e.g. regarding divorce and succession<sup>66</sup> tends to replace citizenship with habitual residence as the most important connecting factor, thus leading to an increase in the application of domestic law. Nevertheless, citizenship still plays an important role in this field.

353 In the case of the not insignificant number of Muslim citizens of states which follow the traditional system of Islamic law, the rules applied are generally those which differ – sometimes fundamentally – from German law in some important aspects such as the equality of the sexes, religions and beliefs. German legislation aimed at limiting the application of foreign statutes is in many cases directed at such norms in particular. In the following we will discuss cases of conflict between typical institutions of Islamic personal status, family and inheritance law on the one hand and German legal principles on the other. At first, however, we must clarify the standards according to which such conflicts should be judged.

bb Standards by Which the *ordre public* Limits Norms of Islamic Law:  
For Example, Divorce

The question of how to draw boundaries for the application of foreign norms is answered in the main by the choice of legal criteria. The system of German conflict of laws (cf. the core statute of Art. 6 EGBGB)<sup>67</sup> relies solely on examining the concrete implementation. Similar to Italy and Spain, but unlike for instance in Austria, Belgium, France and the Netherlands according to more recent jurisprudence,<sup>68</sup> it is not examined whether the abstract substance of a certain foreign norm is contrary to the principles of the German legal system, but only whether this is the case in the concrete result of its application in the individual case.<sup>69</sup> A conflict of laws is furthermore presumed only if the case in question has sufficient domestic relevance, such as citizenship or habitual residence in

66 Cf. the Rome III regulation (no. 1259/2010) of 20 December 2010 on divorce and separation, and the regulation no. 650/2012 of 4 July 2012 on succession.

67 'A legal norm from another country must not be applied if its application will lead to a result that is clearly incompatible with essential principles of German law. It must on no account be applied if the application is incompatible with the fundamental rights.'

68 For different approaches in Europe cf. Büchler, *Islamic Law*, 27 ff.; Foblets, *The Admissibility*, 10 ff.; Bowen/Rohe, *Juridical Framings*, 135 ff.; Rohe, *Sharia in Europe*, 656 ff.; Gärtner, *Die Privatscheidung*, 2008; Koch, *Die Anwendung*, 2012.

69 Cf. here only BGH FamRZ 2004, 1952, 1955; OLG Hamm BeckRS 2010, 06463; OLG Hamm BeckRS 2011, 06358.

Germany.<sup>70</sup> Only essential divergence from German substantive law will be relevant.

There are advantages as well as disadvantages in both approaches: limiting oneself to examining only individual cases can give rise to the impression that the norms applied are 'endorsed' as such, even if their substance may be contrary to German substantive law. On the other hand this is the only way in which the concrete interests of the parties actually involved can be considered. The abstract monitoring approach avoids the danger of even seeming to endorse any such norms, but it does not provide protection to those affected in concrete cases.

The difference between the two approaches may be illustrated using the example of divorce law, and in particular the husband's one-sided right to divorce (*ṭalāq*; cf. Part 1, 4.2.b.gg; Part Two 4.1.i). As a legal institute, it is contrary to the constitutional statutes on gender equality (Art. 3 GG) and the protection of marriage and family (Art. 6 GG.). A *ṭalāq* declared in Germany is void (cf. Art. 17 para. 2 EGBGB):<sup>71</sup> within Germany a marriage can be divorced only by a court of law. The same is true of divorces outside of Germany as long as German law applies to them.<sup>72</sup>

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All the same, a *ṭalāq* that has legal effect under a legal system that may be relevant to the case can under certain circumstances be recognised under German law. In a ruling concerning an Iranian case the Federal Constitutional Court judged that failure to recognise a divorce effective under foreign law could be in breach of the right to remarriage (after a divorce) guaranteed by Art. 6 GG.<sup>73</sup>

Overall the court judgments on the matter do not display complete consistency.<sup>74</sup> However, the tendency is that a foreign *ṭalāq* will be recognised if in the concrete case the requirements of German substantive law for a divorce

70 Cf. BGHZ 120, 29, 34; OLG Saarbrücken, FamRZ 1992, 848; KG NJW-RR 1994, 199; OLG Düsseldorf, FamRZ 1998, 113, 115; OLG Hamm NJW-RR 2010, 1090; OLG Koblenz NJW 2013, 1377; OLG Munich FamRZ 2013, 36 ff.

71 Cf. OLG Frankfurt/Main, the president, StAZ 2001, 37 (concerning a comparable Japanese case); OLG Munich BeckRS 2012, 04354.

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

73 BVerfG FamRZ 2007, 615; cf. also BGH NJW-RR 2007, 145, 148 f.

74 Cf. BayObLG IPRax 1982, 104, 105; OLG Munich IPRax 1989, 238, 241; OLG Koblenz NJW-RR 1993, 70, 71; KG NJW-RR 1994, 199; OLG Hamm IPRax 1995, 174, 175 with notes. Henrich, 166; OLG Cologne FamRZ 1996, 1147; OLG Düsseldorf FamRZ 1997, 882 (LS) = IPRspr. 1996 no. 6; OLG Stuttgart FamRZ 1997, 882, 883; OLG Düsseldorf FamRZ 1998, 1113, 1114; OLG Cologne FamRZ 2000, 895; AG Frankfurt/Main IPRax 1989, 237, 238; AG Esslingen IPRax

would have been met,<sup>75</sup> or if the wife submits a request for recognition herself.<sup>76</sup> Recognition is thus possible if e.g. the partners have lived separately for more than a year, and if the wife was informed of the *ṭalāq* in suitable fashion and was able to present her side of the case. A *ṭalāq* is not recognised if the wife was not informed of it, and was thus unable to state her views on the case.<sup>77</sup> Some courts do not even recognise a *ṭalāq* even if the requirements of German substantive law for a divorce would have been met.<sup>78</sup>

It is not entirely clear, either, how to proceed before a court if norms of, or based on, Islamic law regarding *ṭalāq* must be applied.<sup>79</sup> Some courts reject the *ṭalāq* as a precondition for the subsequent divorce decree, in order to prevent norms being applied under which the wife is only the object of actions and has no rights of her own.<sup>80</sup> The Kammergericht (Court of Appeal) in Berlin even refused to concern itself at all with divorce proceedings according to Iranian law at the wife's request. The relevant reason given was that a *ṭalāq* would have to be the consequence, but that a non-religious German court could not be a part of such a proceeding.<sup>81</sup> Furthermore, a ruling by a German court in this matter would not be recognised in Iran anyway, and would consequently be futile.<sup>82</sup>

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1993, 250, 251 with notes. Beitzke, 231; AG Hamburg FamRZ 2000, 958; Wähler, Islamische talaq-Scheidungen, 113 ff.

75 Cf. OLG Cologne, FamRZ 1996, 1147; BayObLG, NJW-RR 1998, 1538; OLG Düsseldorf, FamRZ 1998, 1113; OLG Cologne, FamRZ 2000, 895; OLG Zweibrücken, NJW-RR 2002, 581; OLG Hamm 7 Mar. 2006, BeckRS 2007, 00423; OLG Hamm NJW-RR 2010, 1090; AG Hamburg, FamRZ 2000, 958; AG Kulmbach, FamRZ 2004, 631; a different opinion: Farnkfurt/Main, IPRax 1989, 237. In OLG Frankfurt/Main the president, StAZ 2003, 137, the *ordre public* problem is not raised, possibly because the wife did not object to the recognition of the private Pakistani divorce in Germany. Cf. also OLG Hamm, 7 UF 123/05, 7 Mar. 2006 (BeckRS 2007 00423).

76 Cf. e.g. OLG Frankfurt/M FamRZ 2009, 1504.

77 Cf. BayObLG IPRax 1982, 104; OLG Stuttgart IPRax 2000, 427; a very complex but instructive Iranian case was tried by the OLG Frankfurt/Main NJW 1990, 646.

78 Cf. OLG Stuttgart IPRax 2000, 427; OLG Stuttgart FamRZ 2004, 25; a different opinion: OLG Koblenz NJW-RR 1993, 70.

79 Cf. Wähler, Islamische talaq-Scheidungen, 113–125.

80 Pointing clearly in this direction: AG Frankfurt/Main NJW 1989, 1434.

81 This opinion was shared by an Iranian Muslim respondent in a divorce case, who wanted to be divorced by a Muslim scholar or a person appointed by him only; the OLG rejected his request (cf. OLG Stuttgart FamRZ 2004, 25 ff.).

82 Cf. KG IPRax 2000, 126 with critical note, Ch. Herfarth, 101. Cf. also the similar judgment in Ontario in the case of Khaddoura v. Hammoud (1998), 168 D.L.R. (4th) 503 (Ont. Gen. Div.), 507.

In this case the character of the relevant Islamic norms was fundamentally misunderstood. While it may be true that the *ṭalāq* is regulated according to the religious dimension furnished by the rules of the Quran, pronouncing a *ṭalāq* and reviewing it is a legal act and consequently within the competency of a court of law.<sup>83</sup> Thus it was entirely justified that the Federal Supreme Court overturned this ruling.<sup>84</sup>

Other courts replace the *ṭalāq* with the court ruling and consider the declaration itself to be a mere procedural rule which does not need to be applied under the regulations of international civil procedural law, as courts only apply their own procedural law on principle.<sup>85</sup>

The wife's request for divorce is relevant at the level of the *ordre public* in Germany: in this context there may be an inadmissible restriction by regulations of the Islamic law of the home country. As a result the wife is entitled to divorce irrespective of the regulations of the law in her home country.<sup>86</sup>

A new dispute has arisen in German jurisprudence regarding whether the *ordre public* applies in every case of unequal treatment of the sexes, or only in cases of fundamentally different treatment.<sup>87</sup> The EU Rome III Regulation expressly demands equal treatment of the sexes regarding divorce; in case of inequality under the applicable foreign law, the *lex fori* has to be applied according to Art. 10. If the husband declares *ṭalāq* at his wife's request, or in

83 Cf. also OLG Stuttgart FamRZ 2004, 25 ff.

84 Cf. BGH FamRZ 2004, 1952. Now cf. also OLG Hamm, 7 UF 123/05, 7 Mar. 2006 (BeckRS 2007 00423) on concluding a marriage before a mufti in northern Greece, and the similar judgment by the Ontario Court of Justice in Khan v. Khan (2005 ONCJ 155) [2005] O.J. No. 1923 sect. 31 ff.

85 Cf. OLG Düsseldorf, FamRZ 1998, 1113.

86 Cf. OLG Stuttgart FamRZ 1997, 882; OLG Cologne FamRZ 2002, 166; OLG Zweibrücken NJW-RR 2002, 581 f.; OLG Stuttgart FamRZ 2004, 25 f.; OLG Rostock FamRZ 2006, 947; this stable jurisprudence is not dealt with in OLG Hamm FamRZ 2012, 1498. According to OLG Stuttgart FamRZ 2004, 26 it would not be suitable to confer onto her only the 'male' right to declare *ṭalāq*.

87 Cf. the controversial remarks in OLG Hamm FamRZ 2013, 1481, 1484 ('the German state respects other, particularly extra-European, cultures, including their legal culture, but equally demands their respect towards German culture. According to the bench's conviction, this would not be met if in cases where religious Muslim divorce law poses higher hurdles to the wife's request for divorce as compared to the husband, in a kind of reflex reaction *ordre public* always is referred to'), and Henrich in his comment on OLG Hamm FamRZ 2012, 1498, 1500.

accordance with her wishes, the problem of insufficient equality is neutralised by the result.<sup>88</sup> This concrete approach is the only efficient way to help the divorced wife, in cases when she wishes to remarry and therefore needs the recognition of the previous *ṭalāq*, for example.<sup>89</sup> In case of non-recognition she would be forced to seek a divorce from a European court, which could often turn out to be equally time-consuming and expensive, particularly if the husband is living in a country which is not easily accessible for judicial correspondence, or if his address is unknown. If the residence permit for the woman is dependent on the new marriage, her need for having the *ṭalāq* recognised is even more pressing. The abstract 'human rights approach' would then turn against the very person it is intended to protect, and the woman would consequently be punished twice. In my opinion the wife should also retain her claim to the dower in any case, and not be obliged to (re-)pay any sums of money, which would be expected under existing norms of Islamic law (cf. Part Two 4.1.i above). In my view, applying rules of this kind would be a breach of the *ordre public*.

Another aspect is that of the post-marital pension rights adjustment under German law (cf. Art. 17 para. 3 EGBGB). Its function is to divide the right to a pension according to the respective contribution to the marriage, irrespective of which partner contributed the financial support during the marriage and was able to acquire such rights. This is an internationally hardly known specific norm of German law. Consequently in German–Iranian cases most courts did not consider the pension rights adjustment to be part of the German *ordre public international*,<sup>90</sup> while the OLG Oldenburg maintained the opposite view.<sup>91</sup> In my opinion decisions must be made according to the circumstances of the individual case: if the married partner who looked after the housekeeping did not receive any financial compensation during the marriage, and if s/he does not receive any compensation in case of divorce, invoking the *ordre public* ought to be considered.

If, finally, the wife is granted a right to divorce against the husband's wishes even if he is unable to provide financial support due to unemployment

88 Von Bar/Mankowski, *Internationales Privatrecht* I, § 7 n. 266 with further references.

89 This was the case in the decisions of the German Federal Supreme Court of 2004 (BGH FamRZ 2004, 1952) and of 2007 (NJW-RR 2007, pp. 145, 148 ss).

90 BGH NJW-RR 2005, 1449 f.; OLG Cologne FamRZ 2002, 613 f.; OLG Frankfurt FamRZ 2011, 1065; confirmed by ECtHR FamRZ 2011, 1037.

91 OLG Oldenburg FamRZ 1995, 1590.

through no fault of his own it should also be possible to apply the *ordre public*,<sup>92</sup> unless there are further grounds for divorce.<sup>93</sup> 356

cc Minimum Marital Age and Marriage Guardians

In many Islamic states the minimum marital age is below the limits set down by German substantive law (§ 1303 BGB). In the case of a minimum age of fifteen it is possible that, due to the proximity of the regulation in § 1303 para. 2 BGB, even if there is sufficient domestic relevance a breach of the *ordre public* will be assumed frequently but not necessarily.<sup>94</sup> The marriage of a fourteen-year-old, on the other hand, will definitely be considered a breach,<sup>95</sup> while the minimum age of twelve or fourteen is under no circumstances permissible.<sup>96</sup>

If the married partners have reached the minimum marital age required by the standards of German law, the question arises of whether this constitutes a remedy of the invalid marriage, or whether a new marriage must generally be contracted.

The one decisive factor is in my view the vulnerability of the respective minor, usually the wife. In this view it would be appropriate to consider the marriage valid if this entails benefits for the vulnerable party. Otherwise a reaffirmation of the marriage will be necessary. This must not necessarily take the form of a marriage ceremony as stipulated by German substantive law, in order to prevent the possible result – which might go against the wishes of the parties involved – of declaring the preceding relationship ‘illicit’. This is a particularly valid point if there are children of the marriage. It should, in fact, be sufficient for the vulnerable partner to declare voluntarily and in earnest her wish to continue with the marriage.

There are, however, some requirements that must be met in this context. Marriage between minors takes place under what is *de facto* duress, as there is no decision by the parties involved for which they can take responsibil-

92 Along these lines OLG Bremen FamRZ 1999, 1520 f.; a different view, without explanations, OLG Stuttgart FamRZ 2004, 25, 26.

93 Along these lines but unclear OLG Düsseldorf, FamRZ 1998, 1113 f.

94 Cf. also KG FamRZ 1990, 45, 46; AG Tübingen ZfJ 1992, 48; Staudinger/Mankowski, Art. 13 EGBGB marg. n. 203 with further references.

95 Thus also Staudinger/Mankowski, Art. 13 EGBGB marg. n. 203 with further references; a different opinion e.g. Scholz, Islam-rechtliche Eheschließung, 328, with reference to the respective cultural background.

96 Cf. OLG Cologne NJWE-FER 1997, 55 (on former Iranian law); OLG Cologne FamRZ 1997, 1240 (Iranian case on the guardianship for a ten-year-old girl); KG FamRZ 2012, 1495 (mixed German-Lebanese case).

ity. This situation may continue beyond the acceptable minimum age. The option of divorce does not appear sufficient in cases where the vulnerable person is prevented from taking independent steps in this direction. Thus the registrar's tact and sensitivity are an important factor. Declarations presented by the husband or other family members are certainly not sufficient unless they are supported by explicit independent declarations of the vulnerable person. Family pressure, or pressure exerted by the husband, would seem to recommend interviewing the vulnerable woman on her own or with a neutral adviser.

Subjecting women who are of age to a marriage guardian (cf. Part 1, 4.2.b.cc; Part 2, 2.1.e above) must be considered a breach of the *ordre public*, irrespective of the question of whether this is an instance of a non-applicable procedural rule.<sup>97</sup> This is all the more true of the guardian's option of selecting a groom and agreeing a marriage contract with him.<sup>98</sup>

#### dd Proxy Marriage

Some problems arise in the application of the law in the context of proxy marriage, which is permitted in the Islamic world (and elsewhere).<sup>99</sup> It allows the declaration of agreement to a marriage to be delivered by a third party appointed by one or both the future spouses. There is no personal decision by the acting third party in this instance; he merely transmits the previously taken decision. Thus it really is a variant of transmitting the relevant declaration of willingness by intermediary. Texts dealing with this subject often refer to 'declaration by proxy' in order to distinguish it from the more extensive 'voluntary decision by proxy'.<sup>100</sup> This type of proxy marriage must thus be described as an issue of the type of marriage subject to Art. 11 EGBGB and Art. 13 para. 3 EGBGB (marriage within Germany only ever in the statutory form).<sup>101</sup> It does not necessarily constitute a breach of the *ordre public*.<sup>102</sup>

97 LG Kassel StAZ 1990, 169, 170 and AG Wildungen with a critical unconvincing note. Kremer 171f.

98 AG Giessen StAZ 2001, 39.

99 Cf. only LG Stuttgart StAZ 1992, 378 and Kotzur, Kollisionsrechtliche Probleme, 72 with further references.

100 Cf. Staudinger/Mankowski, Art. 13 EGBGB marg. n. 220; OLG Zweibrücken NJW-RR 2011, 725.

101 BGHZ 29, 137, 139 ff.; OLG Karlsruhe StAZ 1994, 286f.; Palandt/Thorn Art. 13 EGBGB marg. n. 10; Wall, Anerkennungsfähigkeit von Ahmadiyya-Eheschließungen, StAZ 2012, 120 ff.

102 Cf. BayObLG StAZ 2001, 66f. (concerning Iranian law); VG Koblenz IPRspr. 1993 no. 55, 134 ff.; OLG Zweibrücken NJW-RR 2011, 725 (it is even not necessary that the spouses have

Where the problems arise is in the prevailing application of the law under which the determining place of the conclusion of a proxy marriage is solely the place in which the declarations of the appointed third party were delivered.<sup>103</sup> This is a means of avoiding the formal requirement set down in Art. 13 para. 3 s. 1 EGBGB in those cases where the persons willing to enter into matrimony are already present in Germany, or intending to reside there permanently. The severity of the problem becomes apparent when marriage to a second wife is intended, as long as this is permitted in the country where the marriage is to be declared. In this way the principle of monogamy could easily be circumvented. Similarly, the proxy marriage of a minor girl does not grant the necessary minimum protection of her free will, at least in cases where the family has arranged the marriage.<sup>104</sup>

In cases of this kind there is in my opinion a breach of the spirit and the purpose of the regulations in Art. 11 and 13, para. 3 s. 1 EGBGB. The purpose of permitting a foreign formal requirement is to keep legal procedures effective as long as they have taken place in the formally correct manner and are genuinely foreign actions. In the cases discussed here the aim is not, however, to adhere to familiar local law, but to circumvent the law in force in the actual place of residence.

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These avoidance strategies may be prevented if the appointment in Germany of a third party is defined as being part of concluding a marriage which will result in German substantive law being applied. In view of the concrete circumstances of the case (authorising a notary, or a similar person, by telephone to deliver the declaration immediately), a type of irrevocable authority has been given, which under German law is tied to the form of the transaction to be realised on this basis. Comparing it to a 'declaration of willingness' delivered by an intermediary may be even more apposite in the present case: the declaration is considered to take effect as soon as the intermediary has been dispatched, not only once he has delivered it. The concept of 'anticipatory connection'<sup>105</sup> (to remedy breaches of formal requirements) can also be considered, which would mean that the focus for the formal effect of the declaration would be on the married partners' definitely intended place of residence.

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ever met before); vG Stuttgart StAZ 2014, 55, 56; a different opinion: AG Giessen StAZ 2001, 39.

103 OLG Hamm StAZ 1986, 134ff.; MünchKomm/Coester Art. 13 EGBGB marg. n. 148 with further references, restricting; Staudinger/Mankowski, Art. 13 EGBGB marg. n. 755f. with further references.

104 AG Offenbach BeckRS 2010, 23013.

105 Cf. MünchKomm/Coester, 3rd ed. 1998, Art. 13 marg. n. 95, 96 with further references.

Employing an intermediary in the case of a proxy marriage is entirely different from actual ‘voluntary decision by proxy’. The latter is subject to the regulation set down in Art. 13 para. 1 EGBGB.<sup>106</sup> If the intermediary is permitted to make an independent decision regarding the choice of future marriage partner, this constitutes a serious breach of the constitutional fundamental rights of human dignity and free development of the individual (Art. 1, 2 para. 1 GG). This kind of marriage is in fact nothing but a kind of trafficking in humans.<sup>107</sup>

#### ee Rules and Agreements Concerning the Dower

Under classical as well as modern Islamic law agreeing a bridal gift (paid by the groom to the bride, *mahr*) is an integral part of concluding a marriage. The origin of this institution is to provide financial security to the wife in compensation of only small post-marital alimony and the overall lack of security in old age.<sup>108</sup> Agreeing an obligation to pay in the event of a divorce can furthermore erect a financial barrier against the husband’s widely granted one-sided right to divorce.<sup>109</sup>

359 This background displays clearly that there is a problem of qualification according to the conflict of laws.<sup>110</sup> The courts appealed to did not have any distinct or uniform approach for a long time.<sup>111</sup> The Federal Supreme

106 Cf. Staudinger/Mankowski, Art. 13 EGBGB marg. n. 219 f. with further references.

107 AG Giessen StAZ 2001, 39; cf. also Scholz, Islam-rechtliche Eheschließung.

108 Cf. only Wurmnest, Die Brautgabe, 1878, 1879 with further references.

109 Cf. only OLG München IPRspr. 1985 no. 67; OLG Hamm FamRZ 1988, 516, 517; OLG Celle FamRZ 1998, 374, 375.

110 Cf. BGH NJW 1999, 574; OLG Cologne IPRspr. 1982 no. 43; OLG Hamburg IPRax 1983, 76; OLG Munich IPRapr. 1985 no. 67; OLG Hamm FamRZ 1988, 516, 517; OLG Hamm FamRZ 1991, 1319 ff.; OLG Düsseldorf, FamRZ 1993, 187, 188; OLG Frankfurt/Main FamRZ 1996, 1478, 1479; OLG Celle FamRZ 1998, 374, 375; OLG Cologne NJW-RR 2007, 154, 155; AG Hamburg IPRspr. 1992 no. 122; AG Kerpen FamRZ 1999, 1429; AG Fürth FÜR 2002, 450. Krüger, Ehe und Brautgabe 114, 115 f.; Menhofer, Religiöses Recht, 152 ff.; Elwan, Le droit interreligieux, 62 ff.; Wurmnest, Die Brautgabe; most recently Yassari, Die Brautgabe, 269 ff.

111 Cf. OLG Nuremberg NJWE-FER 2001 (Art. 14 EGBGB, which provides fundamental regulation of the legal consequences of valid marriages, comes to bear when the payment is demanded during an existing marriage); similar also OLG Zweibrücken FamRZ 2007, 1555, 1557. In the author’s opinion in this case the regulation on marital property regime (Art. 15 EGBGB) ought to be applied. The difference is that in the former case the applicable substantive law would change if citizenship or habitual residence were changed, while in the latter case the applicable law would be ‘frozen’ with regard to the time at which the marriage was concluded. The latter option would offer more legal certainty in the context of this financially very relevant issue; in addition the dower appears to have the function of

Court,<sup>112</sup> finally, classified the dower as being subject to the statute of the general effects of marriage (Art. 14 EGBGB).

If a dower has been agreed, a breach of the *ordre public* does not necessarily follow. After all, the *mahr* has the function of providing security for the wife-to-be, as compensation for little or no claim to maintenance, or as a protective measure against the one-sided divorce<sup>113</sup> declared by the husband. It is not a payment to the bride's family, which does still exist in some parts of the Islamic world,<sup>114</sup> and which would indeed be in conflict with the German *ordre public*.<sup>115</sup> Consequently in my opinion the *ordre public* does not intervene in these cases.<sup>116</sup> On the contrary, the allowance of a dower may be a recommended course of action even if the marriage takes place in Germany.<sup>117</sup> The court ruling of 1980,<sup>118</sup> which judged simply that agreeing a dower was contrary to the German *ordre public*, would be incorrect in this view, and would probably not be repeated in this way nowadays.<sup>119</sup> Otherwise German courts might be preventing foreigners from getting married in a fashion that guarantees legal effect under the law of their home country, or they might prevent wives from possessing the financial security that is often so essential.

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compensating for the very strict division of the possessions of the spouses, as there are no rules providing for compensation in the event of divorce or the death of one of the spouses; cf. also OLG Saarbrücken NJW-RR 2005, 1306; OLG Cologne NJW-RR 2007, 154, 155.

112 BGH NJW 2010 1528 ff.

113 Cf. OLG Koblenz NJW-RR 1993, 70, 71; KG NJW-RR 1994, 199; OLG Hamm IPRax 1995, 174, 175; OLG Cologne FamRZ 1996, 1147; OLG Düsseldorf, FamRZ 1997, 882 (LS) = IPRspr. 1996 no. 6; OLG Stuttgart FamRZ 1997, 882, 883; OLG Düsseldorf, FamRZ 1998, 1113, 114; OLG Frankfurt/Main, the President, StAZ 2004, 367; OLG Hamm NJOZ 2013, 1006 ff.

114 Concerning *başlık* in Turkey cf. Rumpf, Einführung, 118.

115 Cf. only OLG Hamm NJW-RR 2011, 1197 (Yezidi marriage); Staudinger/Mankowski, Art. 13 EGBGB marg. n. 385 f. with further references.

116 A similar tendency to that expressed by Scholz, Islam-rechtliche Eheschließung, 330 ff. It is not correct to classify a contract concerning *mahr* as a breach of the *ordre public* in general (thus LG Cologne IPRspr. 19890 no. 83); comparable to the view presented also Palandt/Thorn, Art. 6 EGBGB marg. n. 20.

117 Cf. Rohe, Der Islam und deutsches Zivilrecht, 47 f. A completely distorted evaluation is contained in the judgment of AG Brühl 12.10.2010, BeckRS 2011, 00423. Instead of dealing with the concrete case at stake alone (600 gold coins), which is required by German procedural law, the court held that the sum of gold promised in all Iranian marriage contracts could possibly exceed the available quantity worldwide.

118 LG Cologne IPRspr. 1980 no. 83; opposing view: Palandt/Thorn, Art. 6 EGBGB marg. n. 20.

119 Agreeing a dower in Egypt is recognised by the AG Fürth (FPR 2002, 450, 451) subject to German substantive law.

## ff Interreligious Impediments to Marriage

Many legal systems in the Islamic world state an absolute prohibition for Muslim women to marry non-Muslim men (see above).<sup>120</sup> From the German point of view this kind of prohibition of marriage on religious grounds is contrary to Art. 4 and 6 GG and consequently also if there is sufficient, in my view even slight, domestic relevance, also to the German *ordre public* under Art. 6 EGBGB.<sup>121</sup> The same applies to corresponding prohibitions of marriage between Muslim men and non-Muslim women under Shi'ite law.<sup>122</sup>

360 However, in 1967 the OLG Oldenburg recognised such a prohibition of marriage without further deliberation, even though there was already a child of the marriage.<sup>123</sup> In the context discussed here it must be borne in mind that couples of different religions not infrequently travel to another country in order to be able to enter into a marriage that would be forbidden under the law of their home country. Thus many Lebanese of different religious affiliation<sup>124</sup> marry in Cyprus or other states as they know that under Lebanese conflict of laws their future relations under family law will be subject to the law of the place in which they entered into the marriage (cf. Part 2, 2.6 above). These regulations furthermore show that the law in their home country – i.e. Lebanon – ultimately recognises this kind of marriage; if not at the level of substantive law, then with the aid of the conflict of laws. Tunisian courts seem to argue along the same lines when they recognise marriages entered into in other countries, albeit not entirely consistently.<sup>125</sup>

A similar procedure used to be found in Tunisia for a considerable time. There are no explicit legal provisions concerning interreligious marriages.

120 Concerning the practice cf. OLG Oldenburg IPRspr. 1967 no. 68; OLG Cologne IPRspr. 1982 no. 43; OLG Koblenz FamRZ 1994, 1262, 1263; AG Kaiserslautern IPRspr. 1992 no. 105; Staudinger/Mankowski, Art. 13 EGBGB marg. n. 390 with further references; Ebert, Das Personalstatut, 1996, 103 f.

121 Cf. BGHZ 56, 180; OLG Munich FamRZ 1970, 408, 410; OLG Hamm NJW 1977, 1596 (commandments of the Jewish law); BayObLG FamRz 1970, 656 (commandments of Greek Orthodox law); OLG Koblenz FamRZ 1994, 1262; Staudinger/Mankowski, Art. 13 EGBGB marg. n. 393 ff. with further references; MünchKomm/Coester Art. 13 EGBGB marg. n. 86 with further references; also Marcks, Tondernehe, 18 ff.; a different opinion: OLG Oldenburg IPRspr. 1967 no. 68.

122 Concerning Iranian law on the subject cf. Elwan, Zur Eheschließung, 124 ff.

123 OLG Oldenburg IPRspr. 1967 no. 68.

124 Regarding the prohibition of interreligious marriages for Muslim women cf. Bergmann/Ferid, Internationales Ehe- und Kindschaftsrecht, Länderbericht Libanon, as of 31 May 1996, 18 (Chaussade-Klein).

125 Cf. Benjemia/Ben Achour/Bellamine, L'ordre public, 216 ff. with further references.

When the practice of the courts appeared to implement the traditional prohibition of Islamic law, the question of the religious affiliation of the couple to be married was simply omitted (cf. already Part 2, 2.3 above). This is an illustration of the ways, typical of the Islamic world, of bringing about desired reforms without entering into direct confrontation with a strong traditionalist party. Consequently these marriages should be considered valid if the difference of religion of the partners would have been the only impediment to marriage. In my view it is incomprehensible to accuse these couples of 'Machenschaften'<sup>126</sup> (scheming) that cannot be accepted by the German legal system; this is the same kind of scheming of which one might accuse Romeo and Juliet.

A further problem may arise when the Muslim husband of a Muslim wife apostatises from Islam after the marriage has been concluded. Under Islamic law such apostasy leads to the marriage being dissolved (cf. Part 1, 4.2.b.gg above). In this case it is not Art. 13 EGBGB but only Art. 17 EGBGB that is relevant.<sup>127</sup> However, in my view the dissolution of a marriage as a consequence of apostasy from Islam is contrary to German *ordre public*. Thus in Germany, people divorced under duress are considered to be still married, unless they were divorced with legal effect according to another form.

#### gg Temporary Marriage

Shi'ite Islamic law developed the institution of temporary marriage (the so-called *mut'a* marriage, cf. Part 1, 4.2.b.bb above). In Iran, for instance, this type of marriage is admissible.<sup>128</sup> In Germany it would not be possible because of Art. 13 para. 3 S. 1 EGBGB, as limiting the term of a marriage also involves a formal aspect.<sup>129</sup> If defined primarily under the aspect of substantive law, the *mut'a* marriage would still be in breach of the principle that marriage is for life (cf. §§ 1311 S. 2, 1353 para. 1 S. 1 BGB) as an element of the *ordre public*, despite the extensively liberalised divorce laws. Some forms of *mut'a* marriage are comparable to those circumstances covered by the regulations of the German law on prostitution.<sup>130</sup> The enactment of this law, which no longer classifies prostitution as immoral and even allows a judicial way of enforcing the claim to remuneration, is likely to result in property claims arising from *mut'a* marriages

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126 Thus Fritz Sturm, Eheschließungen im Ausland. Nachweis, Wirksamkeit und Folgen von Rechtsverletzungen, StAZ 2005, 1, 14.

127 OLG Cologne IPRspr. 1982 no. 43.

128 Art. 1075–1077 ZGB, printed in Bergmann/Ferid, Internationales Ehe- und Kindschaftsrecht, Länderbericht Iran, as of 1 Oct. 2002, 123f. (Enayat).

129 Staudinger/Mankowski, Art. 13 marg. n. 794.

130 Cf. Mohaqeq Damad, Legal and Civil Aspects, 57, 62f.

being enforceable in Germany in the future. The term 'marriage', however, is unlikely to be used in this context, and the German *ordre public* is still opposed to recognising its status.

## hh Polygamy

In spite of some restrictions, entering into polygamous marriages with several women is still permitted in many parts of the Islamic world (cf. Part 2, 3.1.h above). Such marriages do exist, with considerable regional differences. Art. 6 para. 1 GG, on the other hand, insists on the principle of monogamy. § 1306 BGB adds explicit regulations to this principle, presenting it as a bilateral impediment to marriage.<sup>131</sup> Entering into a polygamous marriage in Germany<sup>132</sup> is in breach of the *ordre public* even if the law in the home countries of all those involved would permit it. The preliminary question of whether there is an existing marriage is connected independently, i.e. it has to be judged according to the law in the home country of the person wishing to marry.<sup>133</sup>

What is possible in principle, and in part provided explicitly by law, is the legal recognition of polygamous marriages concluded with legal effect under foreign law.<sup>134</sup> This is by no means an indirect endorsement of this legal institution – entering into a bigamous marriage is punishable by law (cf. § 172 StGB), clear proof to the contrary. Rather, the concern is that those involved do not lose legal positions in establishment and continued existence of which they have put their trust, simply because they have decided to change their place of residence. Thus for instance women in originally legally concluded polygamous marriages would lose their claim to maintenance and inheritance, if the marriage were treated as having no legal effect. Consequently, insofar as

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131 Cf. OLG Hamburg StAZ 1988, 132f.; AG Paderborn StAZ 1986, 45 (both on the identical situation before the amendment of the marriage laws); MünchKomm/Coester Art. 13 EGBGB marg. n. 68; Staudinger/Mankowski, Art. 13 EGBGB marg. n. 233 and 235 ff.

132 As far as the author is aware such marriages are concluded informally in Germany, in some cases simply to 'legitimise' extra-marital relationships. For a broader European legal perspective cf. Rohe, Shariah in Europe, 680 ff.

133 Cf. BGH FamRZ 1997, 542, 543; OLG Koblenz IPRax 1996, 278, 279; OLG Nuremberg NJW-RR 1998, 4; Palandt/Thorn Art. 13 EGBGB marg. n. 6 with further references also concerning the different view; of a different view: MünchKomm/Coester Art. 13 EGBGB marg. n. 72 with further references.

134 Cf. only LG Frankfurt/Main FamRZ 1876, 217 with further references; LG Osnabrück NJW-RR 1998, 582; AG Bremen StAZ 1991, 232, 233; BVerwGE 71, 228, 230 f.; BFHE 152, 537; Department of public prosecution at the LG Munich I IPRspr. 1996 no. 62; VGH Kassel NVwZ-RR 1999, 274, 275; Staudinger/Mankowski, Art. 13 EGBGB marg. n. 251 with further references.

the women involved would have a legal advantage over the husband due to the marriage – which can be dissolved at any time in Germany<sup>135</sup> – the marriage is considered valid. Social legislation also follows this principle in § 34 para. 2 SGB I which provides for the widows of a polygamous marriage by distributing a pension due per capita.<sup>136</sup> The legislative authority has taken the decision of putting the protection of the persons involved in individual cases above the – unchanged – rejection of the institution supporting this situation. On the other hand a man who is married polygamously under the law of his home country will have no claim to widower's pension if one of his wives dies, as the continued marriage has the same effect as a remarriage, in which case such claims become void under § 46 SGB VI.<sup>137</sup>

If on the other hand the legal interests of third parties or the community are involved, a polygamous marriage cannot be recognised. This is relevant to the spouses' immigration privilege under the law concerning aliens: second wives are not considered wives under this rule (cf. § 30 para. 4 Aufenthaltsg).<sup>138</sup> This explains why we can assume a comparatively small number of actively polygamous marriages in Germany, unlike in France, apparently.<sup>139</sup> The same standard should apply to privileges under social legislation, such as spouses' co-insurance, as long as the entitlement is not based primarily on financial contributions by the husband but expected to be undertaken by the general public for reasons of social policy. It is not necessary to provide any reasons why the general public cannot possibly be expected to finance such relationships.

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135 Cf. Rohe, *On the Applicability*, 187f.

136 The English solution differs fundamentally from the German one: none of the widows is considered rightful; cf. Court of Appeal in the case of *Bibi v. Chief Adjudication Officer* [1998] 1 FLR 375.

137 Hessen LSG 29 June 2004 (L 2 RA 429/03), BeckRS 2005, 41725.

138 Cf. vGH Mannheim NJW 2007, 3453 and also OVG Koblenz judgment of 12 Mar. 2004, InfAuslR 2004, 294ff. Criticism in some media, sometimes characterised by profound ignorance and strong desire to persecute (cf. 'Polygamie legal in Deutschland?', Emma May/June 2004, an article which does not even refer to the ruling court and its ruling correctly) has no factual basis; cf. 'Schwarzers Kanal – Desinformation für Fortgeschrittene', viewable at <http://www.zr2.jura.uni-erlangen.de/aktuelles/kanal.shtml>; a correctly discriminating approach, on the other hand, e.g. 'Rechtsprechung. Zweitfrau darf bleiben', Tageszeitung, 30 March 2004 (Cosima Schmitt).

139 Cf. 'Verwahrlosung durch Polygamie', Frankfurter Allgemeine Zeitung, 17 Nov. 2005, 3. It seems that France permitted the privileged immigration of these persons over a considerable time; the article quotes an estimate of 30,000 such marriages in France.

## ii Maintenance

In most cases concerning maintenance that have an international dimension, the regulations of German conflict of laws (cf. Art. 3 sect. 1 of the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations) result in German substantive law being applied anyway. The law of the home country of the persons involved may apply e.g. in cases of designation of the law under Art. 8 of the Hague Protocol or subject to bilateral agreements such as the 1929 German–Iranian agreement on domicile, if all parties involved are Iranian citizens.<sup>140</sup>

363 In such cases the frequently very restrictive rules on post-marital maintenance in many Islamic countries (cf. Part 2, 3.1.l above) may be contrary to the German *ordre public*. This is particularly true in cases where the needy divorced spouse has to provide for small children or is unable to pursue gainful employment for health reasons.<sup>141</sup> On the other hand, significant payments of dower or comparable gifts may alleviate the need and supersede (possibly in part) the claim to maintenance.<sup>142</sup> The prevalent opinion is that the mere necessity to claim social security if no maintenance payments are forthcoming should not automatically result in the *ordre public* being invoked.<sup>143</sup> In my view, however, there is a clear breach if the needy spouse contributed to maintenance during the marriage by looking after the household (according to §1360 BGB) but did not receive a financial equivalent such as post-marital maintenance; this will frequently be the case.

## jj Guardianship/Care and Custody of Children

In spite of a certain degree of softening, most legal systems in Islamic countries retain the overall generalising gender-specific allocation of guardianship and care and custody of children (cf. Part 2, 3.1.k). As a rule the father (or the

140 For details cf. OLG Bremen IPRspr. 1984 no. 92, n. D.H. IPRax 1985, 296s.; under this judgment both parents are ‘involved’, although demands were made only on the father. Exceptions are made in cases of refugees and asylum seekers. Cf. OLG Munich IPRax 1989, 238.

141 Cf. OLG Zweibrücken FamRZ 2000; OLG Zweibrücken FamRZ 2001, 920, 921f.; AG Kerpen FamRZ 2001, 1526, is reluctant to apply the *ordre public* and accepts some hardship, while emphasising that Islamic law would itself be capable of administering such cases to benefit the women.

142 Cf. OLG Munich IPRax 1989, 238. 241 (an Iranian case).

143 Cf. OLG Hamm NJW-RR 1995, 456, 458 (concerning a Turkish case); Staudinger/Mankowski, Art. 11 HUÜ marg. n. 386 ff. with further references.

nearest male relative) will be awarded sole guardianship, while the care and custody of children is divided according to age between the mother (younger children) and the father (older children). A mother usually loses the care and custody of children if she remarries after a divorce.<sup>144</sup> In some jurisdictions, a non-Muslim mother loses her rights solely because of her religious affiliation. The fundamental principle of German law, on the other hand, focusses on the child's welfare which must be determined in specific cases, and not by means of typecasting gender roles or discriminating against non-Muslims. In case of conflict the *ordre public* can be invoked.<sup>145</sup> First, however, it must be investigated whether the law in question includes regulations for hardship cases which take sufficient account of the child's welfare.<sup>146</sup> In this sense, the courts have to investigate which of the parents is likely to best support the child in developing its personality.<sup>147</sup>

These principles also apply in cases of significant breaches of the rights of the child caused by traditional 'family values' and educational ideas including physical violence.<sup>148</sup> In such cases decisions can be made under German family law subject to Art. 15, 5 ff. KSÜ, for instance by transferring the parental care to the relevant youth welfare office.

#### kk Adopting Minors

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The continuing prohibition of adoption may be a fundamental breach of the *ordre public*.<sup>149</sup> It must, however, be borne in mind that some legal systems in the Islamic world have comparable institutions which allow a legally secure inclusion of children within the respective nuclear family (*kafāla*; cf. Part 1,

144 Cf. BGHZ 120, 29, 35 f.; OLG Bremen FamRZ 1999, 1520; AG Kerpen FamRZ 1997, 105.

145 Cf. BGHZ 120, 29, 34 ff.; BGH NJW 1997, 3024, 3025; BGH NJW-RR 1993, 962, 963; OLG Karlsruhe IPRax 1993, 97; OLG Düsseldorf NJW-RR 1994, 7 on doubtful grounds; OLG Düsseldorf FamRZ 1998, 1113, 1115; OLG Koblenz IPRspr. 2005 no. 71; more reserved OLG Frankfurt/Main NJW-RR 1992, 136; OLG Bremen NJW-RR 2000, p. 3; very reserved AG Korbach FamRZ 2002, 633; cf. also Staudinger/Henrich Art. 21 EGBGB marg. n. 46 ff. with further references.

146 Cf. OLG Bremen FamRZ 1992, 343, 344 in an Iranian case.

147 Cf. BGH FamRZ 1993, 316; FamRZ 1993, 1053; Staudinger/Henrich Art. 21 EGBGB marg. n. 50 with further references.

148 Cf. AG Korbach FPR 2003, 334 ff. In this case the Yemeni parents of two daughters had tried to force the eldest into a marriage she refused; the other daughters were beaten violently especially by the mother; the parents forbade the youngest, 16-year-old daughter to have girl friends and to use a mobile phone, she was forced to wear a headscarf outside the house, and the mother rejected any further schooling and prevented the girl from doing her homework.

149 Cf. AG Hagen IPRax 1984, 279.

4.2.b.hh above). Preventing the full status including the right to inherit within the extended family would not be automatically a breach of German *ordre public*.<sup>150</sup> In particular a child who does not live only in Germany would benefit if his/her personal law status were recognised in the other legal environment. Spanish law is worth mentioning in this context, as it offers a functional alternative to adoption with regard to issues of care and custody as well as financial support of a child ('inclusion in a family').<sup>151</sup> Similarly, the institution of *kafāla* is recognised under Art. 20(3) of the UN Convention of the Rights of the Child. The ECtHR has held in 2012<sup>152</sup> that the French legal refusal of the adoption of a child already living in a *kafāla* status does not violate Art. 8 and 14 of the ECHR.

In a specific case the Landgericht (regional court) Osnabrück recognised the prohibition of adoption which prevented the German wife of an Egyptian man from adopting his Egyptian child with his Egyptian second wife. The court ruled that as all parties involved lived together in harmony in Germany, breaking the legal relation of the child and the biological mother would not be necessary.<sup>153</sup>

## II Inheritance Law

Under classical Islamic inheritance law (cf. Part 1, 4.3 above) as well as most of the legal systems in force in the Islamic world (cf. Part 2, 3.1.n above) women (wives, daughters etc.) usually receive only half of the share of men of the same relation to the testator. This generic halving of inheritance quotas is a clear inequality which in view of Art. 6 EGBGB (also in connection with Art. 3 para. 2, 3 S. 1 GG) could be in breach of the German *ordre public*. The same applies in possible cases of closely related female heirs being superseded by more distantly related male heirs. This is another instance where it is not suitable to simply measure the Islamic rules against the German legal system in an abstract manner;<sup>154</sup> 'only' the result of its application on a concrete case<sup>155</sup> must be taken into consideration, taking into account the intensity of its effect within

150 Cf. OLG Karlsruhe FamRZ 1998, 56, 57; cf. also the critical remarks by Mansel, Die kulturelle Identität, 137, 196 f.

151 Cf. Art. 173 Código civil, printed in Bergmann/Ferid, Internationales Ehe- und Kindschaftsrecht, Länderbericht Spanien, Loseblattsammlung as of 31 July 1998, 37 ff.

152 Chamber judgment in Harroudj v. France of 4 October 2012, application no. 43631/09.

153 LG Osnabrück NJW-RR 1998, 582.

154 An abstract breach of the principle of equality is not sufficient; BVerfG NJW 1989, 1275; BGH FamRZ 1993, 316, 317; OLG Saarbrücken FamRZ 1992, 848, 849 (on the Iranian law of child custody); OLG Hamm IPRax 1994, 49 (= FamRZ 1993, 111) w. neg. n. St. Lorenz, op. cit., 148.

155 OLG Hamm IPRax 1994, 49, 52 (on the Shi'ite Islamic prohibition of interreligious marriages).

Germany. The wording chosen by established case-law, however, does require some specification.<sup>156</sup>

It is possible that in individual cases the result of applying this law may be devoid of informative value, as for instance in the case of a wife's share in the inheritance: there is no absolute standard to determine whether the share is fair or not. The calculation might be considered offensive with regards to the inequality compared to the husband's claim to the inheritance (theoretically, that is; in actual fact the wife would have survived). Thus the opinion to be endorsed is not stricter but simply defines more precisely that such theoretical considerations must also be taken into account. Otherwise the reference in Art. 6 p. 2 EGBGB would have no effect, for instance with regard to Art. 3 para. 2, 3 GG. Thus not only the concrete proportion of sons' and daughters' shares in an inheritance has to be examined with reference to the *ordre public*, but also the wife's inheritance quota. It may also be necessary on occasion to consider the corresponding liabilities of the respective male counterparts, which are incumbent only on them but not the women.<sup>157</sup>

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While German jurisprudence found itself repeatedly having to investigate breaches of the principle of equality as cases in which to invoke the *ordre public* regarding inheritance law, invoking it was not supported in any of these cases.<sup>158</sup> Firstly, differences in inheritance law are regularly an expression of evolved traditions, which warrant particular attention as private international law deliberately decided in favour of the law of the home country as the point of reference. Secondly, the German freedom in making a will informs inheritance law significantly – unequal treatment is also possible within this wider framework, and the protection of legitimate expectations may be less virulent than in other areas.<sup>159</sup> On the subject of wills by Muslims in a Western context cf. b) below.

156 Cf. St. Lorenz, n. on OLG Hamm IPRax 1994, 149 f., following him also Hans-Georg Pauli, *Islamisches Familien- und Erbrecht und ordre public*, (PhD) Munich 1994, 170 on daughters' right to inherit, not consistent; different regarding widows' right to inherit (op. cit., 173 f.). Detailed, Pattar, *Islamisch inspiriertes Erbrecht*, 471 ff.

157 In more detail Rohe, *Gutachten zum Internationalen und Ausländischen Privatrecht* 2002 no. 25, IPG 2002.

158 Cf. von Bar, *Internationales Privatrecht* II, marg. n. 384 with further references and the rulings quoted in Rohe, *Gutachten zum Internationalen und Ausländischen Privatrecht* 2002 no. 25, IPG 2002.

159 Cf. MünchKomm-Leipold, vol. 9 *Erbrecht*, Einleitung marg. n. 17 ff.; MünchKomm-Birk vol. 11 IPR Art. 25 EGBGB marg. n. 114 ff. with further references.

Of the existing interreligious prohibitions of inheriting (cf. Part 2, 3.1.n above) the objectionable ones are those preventing non-Muslims inheriting from Muslims but not vice versa.<sup>160</sup> They can furthermore be in breach of the constitutional protection of marriage and the family, especially if wills in favour of close relations are prohibited if they are of a different religious affiliation.

#### mm Conclusions

Overall the handling of divergent legal concepts by German courts displays a thoughtful approach that seeks an appropriate balance between recognising international differences benefiting those concerned on the one hand and maintaining indispensable common principles within Germany on the other. Over recent decades two essential tendencies have shown up clearly:

On the one hand, in cases with a clear domestic dimension courts are not willing to accept the application of Islamic (and other, comparable) norms significantly infringe on constitutional values such as the equality *before the law* of genders and religions. They do, however, permit these norms to be applied where the application of German substantive law would lead to a comparable result. This is also true in cases in which the norms of the Islamic law, or law influenced by Islam, to be applied include regulations for hardship cases on whose basis suitable results can be reached. However, not in all cases – especially before overstretched lower courts – is there a sufficiently in-depth appreciation of the applicable foreign law instead of immediately invoking the *ordre public*.

On the other hand, a (probably unique) case before the Amtsgericht (local court) Frankfurt led to outrage throughout Germany in 2007. A wife originally from Morocco, who reported being abused by her Moroccan husband, was denied legal aid necessary for a divorce due to hardship without observing the statutory separation period (cf. §1565 para. 2 BGB). The (female) judge based her decision among other reasons on the fact that the Quran (sura 4:34) permits beatings<sup>161</sup> and that consequently according to the wife's home culture this was no hardship case. She had, however, previously imposed protective measures

160 A different opinion, in contrast with his view on gender-specific regulations, is put forward by Pattar, *Islamisch inspiriertes Erbrecht*, 503 with further references, also regarding the view presented here.

161 For a different interpretation ('separation' rather than 'beating') cf. e.g. Zentrum für Islamische Frauenforschung und Frauenförderung (ed.), *Ein einziges Wort und seine große Wirkung. Eine hermeneutische Betrachtungsweise zum Qur'an, Sure 4 Vers 34, mit Blick auf das Geschlechterverhältnis im Islam*, Cologne 2005; also Ghaemmaghami, S. A. Hosseini, *Der Qur'an bekämpft Torheit*, Al-Fadschr no. 127 (2007), 63 f.

against the clearly violent husband, and the question under discussion was merely whether the formal bond of matrimony could be dissolved instantly.

The ruling contains several errors: the law primarily involved in this concrete instance is Moroccan family law, which prohibits domestic violence (cf. Art. 98 Sect. 2, 99, Family Code 2004) and allows the affected wife to take steps to get a divorce.<sup>162</sup> If things had been different, German *ordre public* ought to have been invoked, as according to the correct rulings of many courts physical violence provides sufficient grounds for a divorce due to hardship. Referring to a Quranic verse is doubly mistaken, as firstly the Quran must not be regarded as applicable Moroccan law, and secondly there are numerous interpretations of the verse which prohibit any kind of violence, or certainly sustained and brutal violence as in the case in question.<sup>163</sup>

While this isolated ruling was corrected as soon as it became known, some anti-Muslim activists from different camps exploited this occurrence in order to prove the alleged 'Islamisation' of the German judiciary, providing further 'evidence' such as the implementation of the constitutional principle of freedom of religion through the building of mosques etc. Of course, in doing so these apologists position themselves in conflict with the very constitutional foundations they pretend to defend.<sup>164</sup>

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In addition a considerable part of the potential for conflict will be eased if international marriage, family and inheritance laws are reformed. As a rule such conflicts arise out of opposition between the norms of the home country as determined by citizenship on the one hand and the norms of the country of (habitual) residence on the other. A foreign population with long-term residence can thus lead to foreign – and 'Islamic' – legal enclaves growing on German territory. If the norms of Islamic law are entirely incompatible with the principles of the German legal system, they will be blocked by the rule set down in Art. 3 EGBGB (*ordre public*). This does, however, lead to constant legal conflict becoming 'normality'.

German International family and inheritance law is increasingly regulated by EU rules which replace the citizenship of the parties involved (as the prime connecting factor) with their habitual residence. Thus German law will be applied much more frequently. This will also be more suited to people's

162 Cf. only Shahbūn, Al-shāfi, Part I, 256.

163 Regarding especially the still widely held opinion that a 'light' beating is permissible and the view of gender roles informing it cf. Krüger, Allgemeine Ehwirkungen, 649 ff. with numerous references.

164 For details cf. Rohe, Shariah in Europe, 657 f., 664 ff., 667 ff.

everyday circumstances, especially in cases where citizenship law means that 'foreign' citizenship is the determining factor even for people who have lived in the new legal environment for a long time and have adopted its standards. This applies especially in cases where the return to the home country, frequently assumed to be a certainty at the time of immigration, does not happen, and even more with regard to the offspring born and raised in Germany. It is the duty of the law to provide suitable legal norms for this group of persons as well. The application of foreign law would then be limited to cases with a genuine international dimension, and the fact that Germany has become an immigration country would be acknowledged. However, immigration countries typically try to limit legal diversity by involving territorial criteria. This is the point at which the legislative authority must take steps.<sup>165</sup> The application of Islamic law will then increasingly shift from private international law to substantive domestic law, as far as it grants autonomy and choice (cf. b) below).<sup>166</sup>

On the other hand, the new EU regulations allow a choice between the laws of habitual residence and citizenship. If we bear in mind that the primary purpose of private international law is to serve the interests of the private persons involved, widening the options of choice of legal system suggests itself, as long as the interests in the orderly application of legal relations including third-party protection are not affected adversely in the long term. They can be made more accessible by ensuring that the choice of legal system is subject to formal requirements and restricted to those legal systems linked to the individual through citizenship, habitual residence or property location. This would ultimately be the same thing as the allocation – undertaken with independent providence – of legal relations according to their 'residence' according to von Savigny.<sup>167</sup>

#### **b**      *Dispositive Substantive Law in the Areas of Civil and Commercial Law*

A second level of (indirect) implementation of Islamic norms is in the area of dispositive substantive law.<sup>168</sup> To the extent that the system of private law

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165 Cf. Rohe, Staatsangehörigkeit, esp. 25 ff. Cf. also Foblets/Overbeeke, Islam in Belgium, 1, 23 ff.

166 Cf. Rohe, Family, 49, 67 ff. with further references.

167 Friedrich Carl von Savigny, System des heutigen Römischen Rechts vol. 8, Berlin 1849, 28, 108.

168 For different approaches in Europe in this field cf. Büchler, Islamic Law, 57 ff.

allows freedom of scope, private preferences could play a part in shaping the law. For instance, the Federal Supreme Court and other courts have declared marriage contracts valid in which the payment of a dowry to the wife-to-be was agreed according to Islamic legal tradition.<sup>169</sup> The same is true of legal hybrids like gifts for couples of Turkish origin under Turkish (non-Islamic) or German family or contract law. Sometimes such gifts are called '*mehir*', alluding to Islamic traditions, sometimes they are apparently part of regional customs. Conflicts in cases of failed marriages after engagement or short-term divorces are increasingly to be dealt with in German courts; usually it has to be decided who is entitled to keep the gifts, whether gifts have to be restored to the donors or whether jewellery worn by the bride has been given as a gift or was only lent for the wedding ceremony.<sup>170</sup> The result is highly dependent on personal and regional particularities.

Those who wish to avoid interest-bearing and speculative transactions will also have ample freedom of scope.

The financial sector has already taken the needs of Muslims with a traditional outlook into account, so far on a relatively low level in Germany.<sup>171</sup> German and Swiss banks distribute 'Islamic' equity fund shares for financial investments which rule out any involvement with companies dealing in games of chance, alcohol, tobacco, interest-bearing loans or illicit sex.<sup>172</sup> The Kuvveyt Türk Beteiligungsbank (participation bank) has opened a branch in Mannheim and applied for a full banking licence in 2013.<sup>173</sup> Stock exchange values are already being listed in Dow Jones Islamic Market Indexes<sup>174</sup> or in the FTSE

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169 BGH NJW 1999, 574; cf. also AG Memmingen IPRax 1985, 230 ff.; AG Fürth FPR 2002, 450, 451; OLG Hamm NJOZ 2013, 1006, 1009; for a detailed overview cf. Wurmnest, Die Brautgabe, 1879 ff. with further references.

170 Cf. e.g. OLG Munich from 16 April 2013 (21 U 74/13), unpublished; cf. the report 'Die Braut, die sich was traut', SZ 15 April 2013, available at <http://www.sueddeutsche.de/muenchen/prozess-um-hochzeitsschmuck-die-braut-die-sich-was-traut-1.1649699> (last accessed 20 May 2014).

171 Cf. the instructive report by Farhoush/Mahlknecht, A critical view, 203 ff.; for other European countries cf. the other reports in Cattelan (ed.), Islamic Finance, 143 ff.

172 Cf. 'Islamischer Aktienfonds in Deutschland', Freitagblatt 2/2 Feb. 2000, 13; regarding legal issues cf. Bälz, Islamic Investment Funds in Germany, 7; id., Islamische Aktienfonds, 49 ff.

173 Cf. Becker, Islamic Banking, 22 and following regarding the challenges for the practice of notaries involved.

174 The Dow Jones Islamic Market Indexes comprise a number of product- and market-related indexes (up-to-date information may be found at <http://www.djindexes.com/islamicmarket>).

Global Islamic Index, and appear to be quite capable of keeping up with the competition.<sup>175</sup>

If these investments take place with religious authorities involved, some points of regulatory law<sup>176</sup> must be clarified, such as the documented definition of the investment principles, cf. e.g. § 165 para. 2 no. 2 KAGB, the lawful cooperation with Islamic expert panels, or the limits of applications by appealing to 'good Muslims'. The customary, if not entirely unproblematic at the regulatory level, determining or monitoring of company policy by sharia boards is likely to be unavoidable if the necessary trust of the religious clients is to be retained. It is the only way in which the desired 'exonerating effect', i.e. safeguarding activity according to religious norms in a subjectively satisfying fashion, can be achieved. The advantages of domestic providers subject to regulatory laws are obvious, as the author is aware of numerous Muslims in Europe having lost considerable sums with suspicious providers from the Islamic world who present themselves in religious guise,<sup>177</sup> or with comparable European organisations.<sup>178</sup> Even the state of Saxony-Anhalt has launched an Islamic bond (*sukuk*,<sup>179</sup> 100 million euro to begin with), based on a Dutch holding company.<sup>180</sup>

As for loan and investment transactions by means of types of shares and contracts that adhere to the principles of Islamic law, it is important to consider their advantages and disadvantages compared to the traditional instru-

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175 Cf. 'Das Geschäft mit islamischen Fondsanlegern wächst kräftig', Frankfurter Allgemeine Zeitung, 20 Dec. 1999, 35; Bälz, *Islamische Aktienfonds*, 447 ff.

176 For the European scene cf. Belouafi/Belabes, *Islamic Finance and the Regulatory Challenge*, 149 ff.

177 It is not coincidence that several Islamic countries have agreed to establish a regulatory and monitoring authority for Islamic finance (Islamic Financial Services Board; found at [www.ifsfb.org](http://www.ifsfb.org)); cf. 'Regelungsbehörde für Islam-Banken', Frankfurter Allgemeine Zeitung, 5 Nov. 2002, 27.

178 Cf. reports of suspicious investments by such organisations in Turkey in 'Neuer Markt auf Türkisch' (Michael Fröhlingendorf), Spiegel Online, 29 Jan. 2004 (viewed on 29 August 2014 at <http://www.spiegel.de/spiegel/print/d-29787309.html>).

179 Based on a combination of leasing contracts which relate to the state's real estate property. Muslims emphasise that this kind of loan is much more advantageous to future generations than simple credits which have to be paid back, as it is limited by the value of the real estate which will be passed on to future generations; cf. 'Finanzmarkt: Islam-Anleihe aus Magdeburg', Die Bank, 1 Jan. 2004.

180 Cf. 'Sachsen-Anhalt bereitet erste islamische Anleihe vor', Frankfurter Allgemeine Zeitung, 6 Nov. 2003, 31; 'Anlegen mit Allahs Segen', Handelsblatt, 14 July 2004, 29. Cf. also the thorough study by Sacarcelik, *Rechtsfragen islamischer Zertifikate*, 2013.

ments.<sup>181</sup> Deliberations may for instance use the purchase of real estate to illustrate this: advantages of the *murābaḥa* (cf. Part 2, 3.2.b. above) are that obligations are transparent and fixed. The client is at the same time the owner of the item 'financed', but also has to bear its obligations (including possible insurance); on the other hand the 'funder' receives real securities that are easily recoverable, and claims with comparatively small risks attached. Disadvantages may be due to a higher tax rate, and also to a lack of flexibility with regard to the fluctuating cost of refunding or the desire to terminate contracts ahead of term. Under Islamic law, customers' claims cannot be used for hedging transactions.

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The forms of so-called *ijāra*, which is similar to leasing, with or without the option to purchase, have the advantage – compared to the *murābaḥa* as well – that payment can be adapted according to the amount and the payment term; as the 'funder' has to be the owner, he can use the item for asset-backed securities when refinancing. Disadvantages are that clients are less than fond of the funder's position as the owner and of his resultant obligations which cannot always be covered by insurance. The more recent type of the diminishing *mushāraka* – a corporate partnership depending on the progress of repayment – avoids the abovementioned disadvantages and offers shared property with flexible payments. In Germany this would have to be operated in the form of a Gesellschaft Bürgerlichen Rechts (non-commercial partnership; §§ 205 ff. BGB).<sup>182</sup> The purchaser would rent the bank's share until the final repayment. Legal problems may arise with respect to the wording of the purpose of the partnership ('financing' or 'possessing' the item), the possible need for formal requirements in the partnership agreement under § 31b BGB, the application of the provisions on consumer credits (e.g. regarding termination of the contract, § 499 BGB), the question of whether the partnership agreement will be exempt from AGB-monitoring in accordance with § 310 para. 4 BGB and, finally, the possible liability of the bank in accordance with § 128 HGB regarding real estate obligations. In addition the double tax rate remains.

In the UK the practical implementation of traditional models of acquisition avoiding interest compatible with Islamic law has been facilitated through legislation. The customary way of financing real estate purchase with interest-bearing loans appears to be rejected by many Muslims. A possible way of avoiding this was found: the credit institution financing the transaction acquires the

181 Cf. the overview in Keith Leach, Islamic real estate financing – experiences of an international bank, *Immobilien & Finanzierung* 12/2005, 436 ff., on which the following remarks are based.

182 Cf. Becker, *Islamic Banking*, 22, 28 ff.

property, then sells it to the Muslim buyer at a higher price. However, such transactions frequently fall through due to the tax due on both transaction, i.e. the double amount.

Now new rules have been implemented to levy the stamp duty only once in cases of 'Islamic mortgage'.<sup>183</sup> HSBC Amanah offers such Islamic mortgages, other banks have followed suit. A market for real estate financing on a specific religious basis is beginning to emerge in Germany, too. German banks offer similar plans in cooperation with partners from the Islamic world for customers to whom the religious aspect is important. The German partners primarily manage sales and distribution, while the Arab partners provide the specific know-how.<sup>184</sup> The problems of double taxation have on the whole not been resolved in Germany. It remains to be seen whether Muslims will accept the possible division into transaction subject to the law of obligations and transaction subject to property law (with the property being acquired directly by the client in order to avoid two taxable transactions<sup>185</sup>) as conforming to Islamic law.

In this context we must refer to the developing culture of expert opinions, which deals with matters of economy among other things. Especially Muslims with an Arab background are active in this field, but also a number of German converts to Islam. Traditionally devout Muslims are concerned even outside the borders of the Islamic world with arranging their everyday activities in a fashion compatible with their faith, and consequently feel themselves bound by the rules prohibiting *ribā* and *gharar*. However, despite the initiatives discussed, commercial activity in the Islamic diaspora is not generally prepared for such requirements. Consequently those involved are faced with issues which they wish to have resolved in time-honoured tradition. There are individuals who resolve such issues, as well as, more recently, institutions, such as the European Council for Fatwa and Research which was founded in 1997.<sup>186</sup>

As regards interest-bearing transactions we generally find a very strict position which does not refer to modern considerations of credit economy with a single word, even among Muslim scholars – clearly every type of interest, including default interest, is considered to be prohibited. The expert opinion on

183 Cf. 'Chancellor abolishes double stamp duty', Muslim News, 25 Apr. 2003, 4; Iqbal Azaria, Islamic home finance arrives on UK's high streets, Muslim News 25 July 2003 (no. 171), 6. Regarding the situation in the USA cf. Maurer, Pious property, 2006.

184 Cf. Leach, Islamic real estate financing – experiences of an international bank, Immobilien & Finanzierung 12/2005, 436 ff.

185 Cf. Kilian Bälz, Rechtliche Aspekte der islamischen Immobilienfinanzierungen, Immobilien & Finanzierung 12/2005, 439, 440.

186 Cf. Al-majlis al-awrubi li-l-iftā' wa-l-buḥūth, Fatāwā, vol. 1, Cairo n. d. (1999), 19 f.

credit cards, however, states that the sin is only on the part of the interest creditor, not the person who uses a credit card as a necessary means of payment.<sup>187</sup> This illustrates the tendency to ease living circumstances. The contrary legal rule of *sadd al-dharā'i'* ('blocking the means' – actions are forbidden if they lead to forbidden actions) is not even mentioned.<sup>188</sup> A regression to medieval ideas can be seen in the opinion of the Shi'ite grand ayatollah al-Shīrāzī, which permits Muslims to take interest from non-Muslims (*kāfir*), but to pay interest only if it is inevitable.<sup>189</sup>

Islamic understanding can also be significant when applying laws, especially when interpreting contractual relations. The author's own experience as a judge yields the example that the prohibition to take interest may define transactions among Muslims. Thus it would be possible for this kind of understanding to inform an argument regarding whether the allocation of capital for business reasons is a loan or a silent partnership. The same is true of the question of whether the lack of documentation of important transactions – without formal requirements – is evidence of lack of interest in a legally binding transaction, or whether Islamic law's traditional focus on witness evidence<sup>190</sup> reduces the significance of written documents. The traditional understanding of gender roles may also have an impact. While Islamic law has always known separation of property – the wife is always entitled to dispose of her own property – it seems that there are frequent instances of the husband managing the wife's property as well. This may be relevant when assessing transactions between the spouses. Thus a court in New Jersey had to judge whether the transfer of \$400,000 from an Iranian wife to her husband had been a gift, as US law would presume in similar cases. The court, however, ruled against its having been a gift, based on the fact that the husband's managing the wife's property was customary, without changing the separate property status.<sup>191</sup>

German law allows wide scope for private autonomous decisions. If this scope were to be used intensively in the long term along the lines that the sharia's civil law sections could replace German dispositive civil law, some upheaval of legal culture cannot be ruled out. The German *ordre public interne* draws limits to autonomous regulations under German substantive law, e.g.

187 Op. cit., 40 ff.

188 In detail regarding the Council and its expert opinions: Rohe, *The Formation of a European Shari'a*, 161, 173 ff.

189 Ayatullāh al-'Uzmā al-Sayyid Ṣādiq al-Ḥusaynī al-Shīrāzī, *Mas'ala*, 393.

190 Cf. Wakin, *The Function of Documents*, 4 and ff.

191 *Shayegan v. Baldwin*, 566 A. 2d 1164, 1166 (N.J. Superior Ct., Appellate Division 1989), reference in Rosen, *The Justice*, 211 f.

§ 138 BGB that declares immoral legal transactions to be void. Unlike the *ordre public international* it draws stricter boundaries, as domestic cases warrant higher importance being accorded the domestic fundamental principles. Group-specific interpretations of what is moral would be in breach of the principle of maintaining a uniform minimal standard set down in § 138 BGB. Nevertheless, in individual cases there might be a legitimate interest in legal arrangements which are enforceable not only under German law, but also in other states which the parties involved are connected to e.g. by family relations or assets located there. Such cases are not purely “domestic”, but rather hybrid in nature. In consequence, the threshold for the application of *ordre public interne* would be appropriately placed between the *ordre public international* dealing with foreign law and the *ordre public interne* concerning purely domestic cases. In general, the limits drawn by mandatory law have to be applied equally without cultural biases whatsoever.

One question not yet answered in all details is whether an interpretation of the law that is permissible in principle becomes immoral under dispositive substantive law if it is explicitly based on motives contrary to fundamental decisions of the legal system. Thus a testator has the option of reducing his or her heirs’ apparent, e.g. children’s, share in the inheritance by half to the so-called ‘legitimate share’ under § 2303 para. 1 BGB without giving any grounds. However, what if this type of will distinguishes between sons and daughters and apportions the latter only a half share on the grounds that this would be in keeping with the norms of Islamic inheritance law?<sup>192</sup> The author is aware of such wills being made in Germany, even by persons who have lived there in the long term. Some solicitors refuse to cooperate in drawing up such wills (but under German law this cooperation is not mandatory).

Besides the issue of legal effectiveness this also shows up a requirement of future Muslim educational policy: the distinction under inheritance law is implemented with recourse to traditional rules of Islamic law (cf. Part 1, 4.3 above). Many Muslim scholars reject the accusation that women are treated unfairly under inheritance law, pointing out that this disadvantage is just in compensation of the preferential treatment of women under Islamic maintenance law: unlike men, women have no obligation to contribute financially to the upkeep of the family, even if they are wealthy (regarding the unrealistic nature of this scenario cf. Part 1, 4.2.b.ff above).

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192 Cf. Rohe, Gutachten zum Internationalen und Ausländischen Privatrecht 2002 no. 25, IPG 2002, Bielefeld 2004 with further references.

As regards claims to maintenance, in Germany the regulations of substantive law in the place of habitual residence of the entitled party apply (cf. a.ii above), independent of the citizenship of the parties involved. German maintenance law does, however, focus on the neediness of the entitled party and the financial capacity of the liable party, without distinguishing according to gender. Thus Muslim women who have the necessary financial capacity are obliged to pay maintenance. Treating women unfairly under inheritance law thus loses its purpose inside Germany, even from an internal Muslim perspective.<sup>193</sup> In a dynamic interpretation, granting a half share may be seen as a ‘minimum’ which does not rule out more extensive claims.<sup>194</sup> There is, however, so far a dearth of educational establishments where these considerations might be discussed and taught. This might, in fact, be a starting point for Islamic religious education<sup>195</sup> which could look at these issues in secondary schools.

The German law regarding “inadmissible questions” could possibly solve another case dealt with in France. The Tribunal de la Grande Instance in Lille recognised in a later repealed ruling the untruthful statement of a bride that she was a virgin as grounds on which to annul the marriage in accordance with Art. 180 Code civil (not just to divorce the marriage).<sup>196</sup> The legal system knows the phenomenon of inadmissible questions and agreements, i.e. cases in which untruthful statements and breaches of agreement do not result in legal consequences due to the protection of overriding legal interests of the other party or third parties. This is the case in agreements on contraception, which if not adhered to do not constitute grounds for damages payable to a parent liable to paying maintenance,<sup>197</sup> or in inadmissible questions concerning employment

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193 Thus e.g. with reference to the comparable situation in Canada the Canadian lawyer and Muslim activist Faisal Kutty in conversation with the author in Toronto on 28 July 2006; similarly the Iranian scholars Mahmud Taleghani and his daughter, quoted in Amirpur, *Islamischer Feminismus*, 35 f., and the German Imam Benjamin Idriz, *Grüß Gott*, 143 ff.

194 Thus the Muslim professor of law Enes Karić of the Islamic Department Sarajevo on the occasion of a conference there, with reference to the Bosnian scholar Husein Dozo; similarly also the Indonesian religious scholar and women’s rights activist Mulia, *Toward a Just Marriage Law*, 137 f.

195 Cf. Wolfgang Bock’s (ed.) collection on the subject, ‘Islamischer Religionsunterricht?’, Tübingen 2007; Myrian Dietrich, *Islamischer Religionsunterricht: rechtliche Perspektiven*, Frankfurt/Main 2006; Coumont, *Islam und Schule*, 440 ff.

196 Judgment of 1 Apr. 2008, viewable at <http://prochoix.org/cgi/blog/index.php/2008/06/02/2013-affaire-de-lille-le-texte-du-jugement>; judgment on appeal Cour d’appel Douai, 17 Nov. 2008; cf. ‘Virginité, la cour d’appel de Douai “remarie” les époux de Lille’, *Le Monde*, 19 Nov. 2008.

197 Cf. BGHZ 97, 372, 379.

law.<sup>198</sup> In my opinion, virginity as a 'prerequisite for marriage' should be on the same footing; the obsession with virginity in (not only) some Oriental cultures should not be granted legal support.

Nevertheless, from a legal point of view, making use of the scope of private autonomous decisions should generally be regarded as neutral. We must not forget that in Germany and other countries courses of action based on religious or ethical beliefs and affecting the system of private law are not an unknown phenomenon. However, a compact parallel legal system outside the applicability of private international law would be a new phenomenon in the area of dispositive law in Germany. In connection with mechanisms of implementing the law out of court (cf. e) below) Muslims might find themselves exposed to group pressure to make use of these. From the outside this would look as though the legal culture of this part of the population was going to be permanently separate and homogenous. Still, there are no initiatives of the kind among Muslim organisations in Germany.

On the other hand we cannot emphasise enough that we must not express a general suspicion of Muslims who attempt to harmonise the principles of their faith with their everyday life in the diaspora. This is especially true of cases in which the parties plan to spend their lives in more than one country. Here it would seem entirely sensible to seek legal regulations recognised by all the legal systems that might become involved. Making use of permissible freedom of scope in cases with a domestic dimension is not universally suspicious either. Legal certainty and the freedom to manage one's own life are highly valued assets of the rule of law, and all those who recognise the foundations of these freedoms and certainties must be permitted to benefit from them.

### c *International Commerce*

Islamic private commercial law may apply outside the borders of the Islamic world as long as the statutes of private international law (cf. 3.a above) make this possible. Germany and many other countries permit freedom of choice in this area ('party autonomy'; cf. Art. 3 Rome I Regulation). In commercial relations with certain Islamic countries such as Saudi Arabia or Iran the law governing the contract is frequently inspired by Islamic law. On the other hand, Islamic conflict of laws governing contracts may limit the choice of legal system. The Islamic *ordre public* – in some countries – objects to agreements or regulations which include interest.<sup>199</sup> Other countries have specific provisions

198 Cf. BAG NJW 1994, 1363f.; BAG NJW 1999, 3653.

199 Regarding present-day Egypt see H. Jung, *Ägyptisches internationales Vertragsrecht*, 98 ff.

for international commerce which permit internationally customary activities such as interest or transactions concerning indefinite subjects of a contract (cf. Part 2, 3.2.b above). The provisions of (not only) Islamic law of *ḍarūra* ('necessity knows no law') or *maṣlaḥa* ('greater benefit outweighs smaller damage') are legal justifications put forward (cf. Part 1, 2.7 above).

In the case of international contracts, Western contractual partners frequently attempt to rule out the applicability of Islamic contractual law, or at the very least to assign conflict solution to 'neutral' institutions such as arbitration courts outside the Islamic world. However, Muslim partners have found these not to be universally reliable in the past. This is one reason why countries such as Saudi Arabia insist as a rule that the Saudi Board of Grievances is appointed to solve conflicts. Unlike other courts in the country, this board meets with a comparatively high level of acceptance among international business partners.<sup>200</sup>

Remaining uncertainties regarding the expected result of the domestic judiciary or the implementation of, in particular, foreign decisions<sup>201</sup> ultimately lead to frequent demands for reliable, but also expensive, provision of collateral securities.

If a matter is brought before the public courts, in Germany and in many other countries the prevailing opinion<sup>202</sup> holds that only a particular national law may be selected, not 'the sharia' per se. When interpreting contracts it will be necessary to take into account – and there are comparable cases in international practice – whether the parties involved made this choice in order to state the terms of the contract more precisely, for instance by inserting clauses to waive interest.

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A specific issue of international commerce is the establishment of financial transfer systems. According to press reports in recent years, a system of so-called 'Ḥawāla banks' has become established in Germany. In the opinion of the Bundesanstalt für Finanzwesen (BaFin) they conduct illegal banking transactions; investigations into 485 of these organisations took place some years

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For a limited application under European conflict of laws rules cf. Bälz, *Zinsbeschränkungen*, 277 ff.

200 Cf. Krüger, *Vermögensrechtliches Privatrecht*, 485, 499 ff.

201 Cf. op. cit., 499 ff., 506 ff.

202 Concerning how to handle a contract intending to implement the 'principles of the Glorious Shari'a' cf. the decisions in *Shami Bank of Bahrain vs. Beximco Pharmaceuticals and Others* (Judgment of the High Court of Justice 2002 Folio 1172, QBD Commercial Court; Court of Appeal (Civil Division) [2004] EWCA Civ 19); also Bälz, *Das islamische Recht als Vertragsstatut?*, IPRax 2005, 44 ff.

ago.<sup>203</sup> Still, the *hawāla* is an established institution in Islamic law (cf. Part 1, 4.4.a above).<sup>204</sup> It is a basic model of cashless transactions<sup>205</sup> and was exported with great success to Europe in the Medieval and Early Modern periods. The term of *aval* credit or surety is a linguistic reminder of the origin of the institution, which essentially corresponds to the money order as regulated in §§ 783 ff. BGB, or the bill as in Art. 1 WG.

Using such cashless forms of transactions is not generally objectionable per se. The economic justification seems to be on the one hand the desire to transfer money abroad quickly and cheaply – with a fee of only 1–2 % of the transaction amount.<sup>206</sup> In view of the very high fees still customary among commercial banks this is entirely understandable. Furthermore employing such mechanisms becomes almost unavoidable when it comes to transfers to countries without a functioning banking sector. In some Asian countries cashless transactions are possible only in this way. It is also possible to avoid restrictive regulations of currency imports.<sup>207</sup> The economic dimension of the *hawāla* is remarkable. In Pakistan alone the number of *hawāla* agents is estimated at more than a thousand who facilitate the transfer of ca. \$2,500–3,000 million into that country. IMF experts conclude that in 15 selected states (among them Iran, Pakistan, Bangladesh, Algeria, India and Turkey) \$760,000 million flowed through these channels over the past 20 years.<sup>208</sup>

Legal difficulties arise if these transaction types take place in an institutionalised fashion and go through bank-like organisations. According to the reports mentioned this appears to have indeed been the case. Due to the dangers attendant on these transfers, in 1998 the German legislative authority included the

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203 Cf. 'Hawala – das Wort eines Mannes gilt', Frankfurter Allgemeine Zeitung, 6 Oct. 2001, 3; 'Schattenbanken – ihr Geschäft ist die Geldwäsche', Erlanger Nachrichten, 10 Oct. 2001, 7. Regarding the legal facts and the legal evaluation cf. Findeisen, 'Underground Banking', 2125 ff.

204 Cf. only Nasir-e Khosrou's report from eleventh-century Baghdad (Nasir-e Khosrou, *Safarname*, 156): he mentions 'receipts' from money-changers which could be used to purchase goods.

205 Cf. Duri, *Arabische Wirtschaftsgeschichte*, 89 and n. 77, 179.

206 Profits are probably made mainly from differences between currency rates, cf. Findeisen, 'Underground Banking', 2127.

207 Cf. 'Hawala-System verliert an Gewicht', Frankfurter Allgemeine Zeitung, 12 June 2002, 27.

208 Ulrich Schneekener, *Strukturen des islamistischen Terrorismus: Das Netzwerk 'Al-Qa'ida'*, in Berlin, Senatsabteilung für Inneres, Islamismus. Diskussion eines vielschichtigen Phänomens, Berlin 2005, 33, 41.

money transfer transaction in §1 para. 1a p. 2 no. 6 KWG in the list of financial services subject to prior approval; penalties for breaches are found in §54 para. 1 no. 2 KWG (statutory offence) and in §§37, 50 KWG (if need be, suspension of business activity). According to information provided by the Bundesanstalt für Finanzwesen (BaFin) ca. 350 companies have reported such activity. Breaches of the duty to keep records according to commercial and tax law have also been mentioned.<sup>209</sup> If these *hawāla* banks are used to launder dirty money<sup>210</sup> or maintain the infrastructure of terrorist organisations, the dangers are obvious. It is for this reason that the Islamic world is taking initiatives for improved monitoring, such as the obligation to register with the central bank in the UAE.<sup>211</sup>

#### d *Incorporating Norms of Islamic Law into the National Legal System*

Unlike situations with an international dimension, citizens of the country of habitual residence are as a rule subject to the substantive laws of that state only. Some European countries – not, however, Germany – have incorporated some norms of Islamic law into the national legal system.

In Greece this is the case with regard to family and inheritance law applying to the Turkish minority in Thrace.<sup>212</sup> This is a special situation, dependent on historical circumstances, based on the Lausanne treaty after the First World War. It must be emphasised in this context that due to this regulation traditional norms of Islamic law are preserved, while Turkey has implemented compete gender equality since the law reform of 2002.

In 1992 Spain introduced provisions allowing marriage in accordance with Islamic formal requirements.<sup>213</sup> In order to guarantee sufficient legal certainty a mandatory registration duty was added.<sup>214</sup> Applicable substantive law is not affected by these norms. The situation in Italy is slightly different, where purely ‘Islamic’ marriage is not compatible with local formal requirements, but

209 Cf. Findeisen, ‘Underground Banking’, 2127.

210 Cf. op. cit., 2129 f.

211 Cf. ‘Hawala-System verliert an Gewicht’, Frankfurter Allgemeine Zeitung, 12 June 2002, 27.

212 Cf. Tsitselikis, The Legal Status of Islam in Greece, 417 ff.; id., Old and New Islam, 367 ff.; OLG Hamm, 7 UF 123/05, 7 Mar. 2006 (BeckRS 2007 00423). For a critical report cf. Lina Papadopoulou, Trapped in History: Greek Muslim Women Under the Sacred Islamic Law (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1877048](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1877048), last accessed 23 May 2014.

213 Cf. Mantecón, L’Islam en Espagne, 130 ff.; Martínez-Torrón, The Legal Status, 50 ff.

214 Cf. Art. 59 Código Civil in connection with the administrative rule by the general directorate of registries and notaries of 10 Feb. 1993.

due to conflict of laws the law of the home country of one of the spouses-to-be is sufficient.<sup>215</sup> Once again, this is purely a matter of formal requirement.

In the UK Muslim institutions, like other religious organisations, are entitled to apply for a permission to register marriages.<sup>216</sup> Furthermore, under the Divorce (Religious marriages) Act 2002 a court can demand that a marriage is dissolved according to the religion in question before granting a civil divorce.<sup>217</sup> In Germany, however, Art. 13 para. 3 p. 1 EGBGB states that in the country a marriage can be entered into only in the form prescribed here. Thus a marriage in an Islamic centre in Germany is void, even if it has been confirmed – in purely declaratory fashion – by a person authorised under Art. 13 para. 3 p. 2 EGBGB.<sup>218</sup>

Also in the UK, the Adoption and Children Act of 1989 was amended in 2002 to include regulations (Sect. 14 Aff.) permitting a specific form of guardianship or family membership below the threshold of full adoption, i.e. with no consequences for status. While the introduction of this institution is certainly linked to the prohibition of adoption under Islamic law and less strict alternatives (cf. Part 1, 4.2.b.hh above), it is open to everybody and thus increases the options open to the nuclear family without necessarily affecting the extended family context.

More far-reaching demands along the lines of introducing a system of private law divided along religious boundaries in the areas of personal status, family and inheritance have been raised mainly in the UK. As early as the 1970s and 80s the Union of Muslim Organisations of UK and Eire developed a resolution that envisages a separate Muslim system of family law to be applicable automatically to all British Muslims.<sup>219</sup> The idea at the back of this resolution is that Muslims, most of whom have roots in the Indian subcontinent,<sup>220</sup> were subject to their own system of family and inheritance law (which was based on religion) during the time of the British Raj, and that this situation should

215 Fritz Sturm, *Eheschließungen im Ausland. Nachweis, Wirksamkeit und Folgen von Rechtsverletzungen*, StAZ 2005, 8.

216 Information provided by the solicitor Nadeem Malik, Leicester/Birmingham, during a conversation in Leicester in March 2002.

217 Cf. Lord Nazir Ahmad, *Notes*, 71, 72; Khaliq, *Islam and the European Union*, 246 ff.

218 Cf. Wolfgang Jauß, *Wirksamkeit der in einer Moschee geschlossenen und im ägyptischen Generalkonsulat beurkundeten Ehe eines Ägypters und einer Tschechin*, StAZ 2005, 111 f.

219 Cf. Poulter, *The Claim*, 147 with further references.

220 Cf. only M. Y. McDermott/M. M. Ahsan, *The Muslim Guide*, 2nd revised edition, Leicester 1993, 11.

be perpetuated (universally).<sup>221</sup> Others would like such rules to be introduced according to the choice of those involved. The model cited is Islamic law, as well as the situation in most Islamic countries.<sup>222</sup> Substantive law applicable in these areas is indeed determined according to the religious affiliation of the parties involved. Social pressure seems to have by now increased to the extent that in 2008 the then Archbishop of Canterbury Rowan Williams said that introducing these (not: all) points of sharia law would be unavoidable.<sup>223</sup> This would lead to important areas of application, including ones highly charged as regards legal policy, being subject to a model of religious segregation.

Remarkably, the situation in France is quite different, in spite of a superficially similar colonial history. No widely expressed need for Islamic laws has surfaced beyond instances where conflict of law is invoked. The idea of *citoyenneté* for all those who recognise the foundations of the French Republic and identify with them appears to have left its mark on the Muslims as well. Unlike British colonial rule, while sharia courts had some competency in e.g. Algeria, their rulings were subject to French appellate courts.<sup>224</sup> In addition many Muslims seem to regard receiving French citizenship by no means as a rejection of Islam. This is particularly true of those who were compelled to taking this step in the aftermath of the Algerian civil war.<sup>225</sup>

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It is not likely that there will be any public discussion regarding the possible introduction of legal norms based on Islamic law, as even the occasionally used phrases of a 'communauté musulmane' or 'identité musulmane' are met with quick rejection.<sup>226</sup> The prohibition of (group) particularism goes so far that that the newly-created institution of civil partnership (PACS)<sup>227</sup> is open to heterosexual couples, too, in order to avoid creating a group privilege for same-sex couples.<sup>228</sup> It must furthermore be borne in mind that more than

221 Cf. Poulter, *The Claim*, 148 with further references.

222 E.g. Ahsan, *The Muslim Family in Britain*, 21, 24.

223 Cf. 'Civil and Religious Law in England: A Religious Perspective', lecture of 7 Feb. 2008, available at <http://rowanwilliams.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective>, last accessed 23 May 2014. For the broader debate cf. Rohe, *Shariah in Europe*, 656 ff.

224 Cf. the reference in Charnay, *La Charïa et l'Occident*, 25.

225 Op. cit., 28.

226 The continuing existence of Islamic personal status law in Mayotte is fairly exotic, widely unknown and has no effect to speak of with regard to debates on the subject.

227 For an overview cf. Anne Röthel, *Nichteheliche Lebensgemeinschaften*, ZRP 1999, 511, 514 f.

228 Information provided by Prof. Francis Messner, Directeur du Centre Société, Droit et Religion en Europe (CNRS) in Strasbourg during a conversation on 28 Mar. 2002.

a few Muslims in France come from countries such as Tunisia, Morocco or Turkey, whose legal systems have moved quite a long way away from the narrow confines of classical Islamic personal status, family and inheritance law.

Prominent voices from Saudi Arabia, finally, call on Muslims in the West generally to seek ways of living their lives according to the norms of Islamic law and governed by Islamic courts and arbitration authorities.<sup>229</sup> This kind of opinion was clearly shared by the Iranian respondent in a divorce case who refused to be divorced by the competent German court but insisted on a Muslim scholar or a person appointed by him.<sup>230</sup>

A legal division along religious-personal lines is not, however, in keeping with established European legal tradition.<sup>231</sup> In summary we must emphasise that the reasons against a general religious division of the law far outweigh those in favour of it. There is scope for interpretation at the level of dispositive substantive law. While marriage in a registry office is a legal requirement, nobody is prevented from bringing along witnesses, which would allow the forms of traditional Islamic law to be observed. On the other hand the sensitive areas of personal status, family and inheritance law have a high degree of social importance, although they regulate primarily private legal relations. The debates of past decades on gender equality – achieved after a long struggle – and religious neutrality – legally implemented slightly earlier – as well as the current discussion of the legal acceptance of same-sex partnerships illustrate the far-reaching significance this area has for social cohesion, too. Establishing segregated legal enclaves especially in these areas would be contrary to the fundamental function of the legal system in centralised and structured states under the rule of law whose civil society is similarly firmly structured. In such a polity, pluralism is founded on the establishment of possible, optional courses

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229 Cf. Ibn Baz/Uthaymeen, *Muslim Minorities*, esp. 71 ff.; most recently the Fiqh Council of the Muslim World League during its 16th meeting in Mecca, reported in 'A message from Muslim scholars to Muslim Minorities in the West', *Daawah* no. 4 1422AH/Feb. 2002, 8, 11. The Muslim jurist Khaled Abou El Fadl (*Speaking in God's Name*, 268 f.; 170 ff.) does not mince his words when he comments on legal opinions of this sort: 'I confess that I find the virtual slavery imposed on women by the C.R.L.O [the Saudi Permanent Council for Scientific Research and Legal Opinions, M. R.] and like-minded special agents to be painfully offensive and unworthy of Shari'ah. To claim that a woman visiting her husband's grave, a woman raising her voice in prayer, a woman driving a car, or a woman travelling unaccompanied by a male is bound to create intolerable seductions, strikes me as morally problematic. If men are morally so weak, why should women suffer?'

230 Cf. OLG Stuttgart FamRZ 2004, 25 ff.; the court rejected this request.

231 In detail: Rohe, *Religiös gespaltenes Zivilrecht*, 409 ff., esp. 415 ff.; Rohe, *Family*, 49 ff. with further references.

of action based on one and the same system of substantive law, with the debate on legal politics being conducted at all levels of society.

Further formal and substantive reasons are found within Islamic law itself. We must remember that in the areas discussed here, there is no uniform Islamic law that could be used as the basis for legal relations between Muslims. The variety of beliefs in the area of legal culture is even greater among Muslims, and an agreement would appear to be illusory.<sup>232</sup>

In addition a significant portion of the personal status, family and inheritance law in force in parts of the Islamic world is contrary to international, and even more so national, *ordre public*. Many Muslims – not least those of Turkish or Balkan origin – vehemently reject these regulations for these very reasons. Any potential assimilation would ultimately result in an extensive adoption of applicable rules of substantive law. Mandatory implementation of faith-based rules on Muslims would be untenable under the constitution.

A religious division of the law would furthermore result in problems at the level of interreligious conflict of laws. Which of several possible legal systems would apply in cases involving members of more than one religious group? The religious group with the greatest political power would reserve the final power to adjudicate to its own legal system. In Egypt this has for instance led to the bizarre situation that dominant Islamic law also applies to Christians of differing denominations (cf. Part 2, 3.1.b above).<sup>233</sup> The introduction of the mandatory<sup>234</sup> civil marriage in Germany and other European states is not least a consequence of comparable disagreements in cases of interdenominational marriages.<sup>235</sup> This final power to adjudicate could not easily be established on the basis of German and European constitutional law. Taking religious affiliation as a starting point would already be questionable. Interreligious conflict of laws would thus be difficult to solve. A option-based solution would also have to be designed in accordance with the fundamental rights and in the

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232 This also reflects to some extent the different political, ethnic and general cultural affiliation; cf., representative of many, Fred Halliday, *Islam and the Myth of Confrontation*, London etc. 1996, 120 ff.

233 Cf. Bergmann/Ferid, *Internationales Ehe- und Kindschaftsrecht*, Loseblattsammlung, Länderbericht Ägypten, 8 f.; Wähler, *Internationales Privatrecht und interreligiöses Kollisionsrecht*, 163 f.; regarding the self-definition of Islamic law as dominant law in family relationships cf. Areti Demosthenous-Pashalidou, *Rechtskollisionen bei der Auflösung von Mischehen zwischen Muslimen und Andersgläubigen*, *Der Islam* 76 (1999), 313, 315 ff.

234 The sole legal effectiveness of civil marriage is not affected by the change of personal status law as of 1 Jan. 2009, which means that purely religious marriages are now admissible.

235 Cf. the references in Coing, *Die Auseinandersetzung*, 360, 370 ff.

end would be very far removed from the development of the law in the Islamic world so far.

Yet another difficulty could arise out of the desire to leave a certain religious legal system and instead become subject to one that has no religious ties. There is an instance which has become legal practice in England.<sup>236</sup> An orthodox Jewish mother refused to be satisfied with the ruling of an Israeli court on the grounds that she as a woman had been discriminated against on the basis of the applicable law. The English court rejected the action as her religious affiliation had been the reason for the Israeli religious court to be competent in the case in the first place. Clearly, this kind of decision will not be satisfactory. On the other hand, in view of the legal certainty necessary especially in matters of family law, it would be just as questionable to allow a change of legal system indiscriminately. Consequently a legal affiliation based on religion appears to be misguided from the outset. It would also be contrary to the freedom of religion under Art. 9 ECHR, or corresponding national constitutional statutes, to tie persons – possibly against their will – to laws based on religious precepts they may well disagree with. This is particularly clear in the case of rules which disregard gender equality and for instance adhere to a rigid social allocation of gender roles that does not correspond to the realities of life any more.<sup>237</sup>

The Islamic charter of 20 Feb. 2002<sup>238</sup> of the Central Council of Muslims in Germany (ZMD) is worth mentioning as an example in this context. It expresses clearly that the fundamental recognition of the German political and legal system must include family and inheritance law as well as procedural law.<sup>239</sup> This delineates precisely the areas of potential conflict. It seems that there is sufficient potential for freedom of scope within the boundaries of German dispositive substantive law. This attitude corresponds to the concept of integration (individual interpretation within the boundaries of universally valid principles) as opposed to concepts of assimilation or segregation. Larbi Kechat, the Imam of the Paris Ad-Da'waa mosque who is very well known throughout France, made similar remarks on the subject of family law: 'We agree with the legal framework; we are not imposing parallel laws.'<sup>240</sup>

236 Re s (Abduction: Intolerable Situation: Beth Din), [2000] 1 FLR 454, 460.

237 Cf. also Esposito, *Women in Muslim Family Law*, 48.

238 The charter is available in print published by the ZMD, and also on the ZMD's homepage ([www.islam.de](http://www.islam.de)).

239 *Islamische Charta* Art. 13.

240 Kechat, *Le coran*, 183, 189: 'Nous sommes en harmonie avec le cadre des lois, nous n'imposons pas une loi parallèle.'

e *Informal Application/Application out of Court*

Beyond the coverage of territorially applicable private law, finally, are relations formulated according to Islamic norms whose legal effect is not enforced by means of public mechanisms by those concerned. Cases have occurred in the UK in particular,<sup>241</sup> but also in Germany, in which Muslim parties have e.g. entered into a marriage or divorced a marriage solely in accordance with traditional Islamic norms.<sup>242</sup> There are widely differing reasons for this: some extremists are attempting to establish a religious parallel system because they do not wish to be subject to the institutions of a secular non-Islamic state. Others wish to ensure recognition in their countries of origin where German state acts are not recognised. Others again see it as the only way in which they can 'legalise' their relationship, if for instance the documents necessary for a civil marriage are impossible to procure in the country of origin, as is the case in many parts of Iraq at present. Occasionally the reason is simply ignorance of the legal requirements in the country of residence, including the access to legal aid. Some people simply follow the system with which they are familiar from their home country, not realising that their actions have no legal effect in their country of residence. Finally some people may be reluctant to turn to public authorities whom they do not trust to have the sensitivity necessary when dealing with their specific circumstances (cf. 3.2.d.cc above).

Such informal acts may well have legal effect within a foreign territory on which an Islamic legal systems applies, but not in Germany itself. They may, however, produce binding social effect especially in the case of people who are unable or unwilling to ask for the cooperation of public authorities. Of course this may result in the problem that a court is not usually prepared to declare a legal relationship at an end if it was never entered into with legal effect according to applicable law.

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<sup>241</sup> Cf. Pearl/Menski, *Muslim Family Law*, ch. 3–81; Shah-Kazemi, *Untying the Knot* 2001; Bowen, *Blaming Islam*, 2012; Bano, *An exploratory study*, 2012; id., *Muslim Women*, 2012; Malik, *Minority Legal Orders*, 2012.

<sup>242</sup> Little research has been done so far in Germany in this field. The author is currently running a field research project after having chaired a working group on 'parallel justice' in the Bavarian Ministry of Justice in 2012–2013. It should be stressed that phenomena of 'parallel justice' which ignore or even counteract the state legal order are far from being typical of Muslims in Germany and Europe. Instead, such phenomena occur in all social, ethnic and religious groups living in segregated extended families or tribal-like communities in far distance from society as a whole.

In the UK the 'Sharia Councils', an unofficial system of arbitration, have been developed for precisely these cases.<sup>243</sup> They do not have any official function, but they provide mediation at comparatively low cost, especially in the area of personal status law. Many of the cases dealt with involve Muslim wives who have sought a divorce ruling from the state courts and now wish to have this affirmed under Islamic law by means of *ṭalāq* (one-sided divorce by the husband).<sup>244</sup> This course of action is intended to result in the social environment accepting the decision as well.<sup>245</sup> This is of particular importance to English Muslims many of whom have close ties to the Indian subcontinent.

These arbitration councils have developed in England in particular for a reason. They derive their relevance especially from the comparatively great distance – greater than typical in Europe – many Muslim communities preserve to English family and inheritance law. In communities where forced marriages are still possible, for instance among groups of Pakistani origin – even though Muslims themselves point out that this is an un-Islamic tradition<sup>246</sup> – solutions that clarify these situations not only on the legal but also on the social level are indeed necessary.

On the other hand the concerns regarding the quasi-public role of such institutions are not to be taken lightly (cf. above regarding the parallel concerns in Canada). While their decisions appear to present a comparatively reformist line within the Islamic spectrum, there is no denying the fundamental inequality of genders and religions. Thus the wife wishing to be divorced is able to

243 Cf. Philip Lewis, *Islamic Britain*, 119 f.; Pearl/Menski, *Muslim Family Law*, ch. 3–81 ff.; Shah-Kazemi, *Untying the Knot*; concerning the development in other European countries cf. Foblets, *Community Justice*, 371 ff.

244 Cf. Philip Lewis, *Islamic Britain*, 119 f.; Pearl/Menski, *Muslim Family Law*, ch. 3–81 ff., esp. 3–96 ff.

245 Cf. e.g. Abdulrahim, *Islamic Law, Gender and the Policies of Exile. The Palestinians in West-Berlin*, in: Mallat/Connors (eds.), *Islamic Family Law*, 181 ff., 197 f., regarding concealed polygamous relationships in spite of an 'official' divorce.

246 The founder and chairman of the oldest Islamic Shari'a Council, Zaki Badawi, describes two dramatic cases in *Muslim Justice*, 73, 75 f. and 79. The first concerned a young Pakistani woman who was a university lecturer and had been forced to marry a Pakistani relative. After the civil marriage ceremony she refused to agree to the Islamic one. When her father tried to force her, she fled. One of her brothers attempted to kill her, because in his view she had defiled the family name and the father's soul would not be able to rest. Ten years later the husband had another family in Pakistan (under Pakistani law he was able to be married to several wives at the same time; M. R.), but the woman was unable to marry again as her family rejected her and the husband refused to agree to a divorce. This is a point where the civil courts' ability to pacify has indeed reached its limits.

proceed with the *khul'* (cf. Part 2, 3.1.i above), but unlike a divorce according to national law this results in financial disadvantages. Correspondingly there are said to be cases of husbands refusing a divorce, or pressurising their wives to divorce them, with the intention of bringing about precisely this situation. Ultimately the women involved are denied rights which the legislative authority grants to everybody. Consequently these mechanisms cannot remain a purely private matter, all the more when social pressure is applied and those who wish to insist on the rights guaranteed by the state are then branded 'bad members' of the religious community (cf. 3.2.d above). These problems become more urgent if the public legislative authority officially recognises mechanisms for out of court settlement, as is the case in England, Wales and Northern Ireland in the area of family law,<sup>247</sup> thus according them a kind of general 'certificate of non-objection'. Due to its particular sensibility in connection with legal culture, binding family law decisions (except merely financial issues) ought to be the preserve of the public judiciary.

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When deliberating how much uniformity is necessary within a legal system, blindly perpetuating the status quo must be ruled out, as well as the implementation of supposedly universal but in fact only particular ideas, and also challenging the fundamental elements of the 'house rules' without which any peaceful coexistence would be impossible. As regards points of law, in my opinion the primary aim of the legal system – namely establishing and guaranteeing peaceful coexistence governed by human rights and the state monopoly on the use of force – can only be achieved, a degree of abstraction notwithstanding, with a view to the concrete situation prevailing.

'Domestic' cases must be distinguished from those with an international dimension: frequently the domestic dimension in the latter is comparatively small, and the importance of worldwide legal plurality increases where the parties involved rely on certain norms when privately applying laws. In cases with a greater domestic dimension, on the other hand – and having lived in the country for a certain time usually plays a part – the shared, stabilising fundamental beliefs of the legal entities must be protected. Parallel legal systems that polarise society are not acceptable in this context, either. Any individual interpretation of the law in concord with public authority is only possible in the case of Islamic norms if reliable interpretations and scholars are found who (and which) are firmly rooted in a system of law and order based on human rights.

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<sup>247</sup> Based on the Arbitration Act (1996) several so-called Muslim Arbitration Tribunals have been established which are active in this area; cf. the information at [www.matribunal.com](http://www.matribunal.com) (viewed on 9 Sep. 2010).

Conflicts where the parties involved are afraid to turn to the public authorities will, however, remain unresolved. This paves the way for new tasks in schools as well as adult education: immigrants need information on existing legal remedies and protective mechanisms, which must of course be effective, in order to have the option of determining the way in which a conflict should be resolved.

Long-term institutionalisation of a division of the legal system along religious lines is consequently not in the interest of the national legal system if the possible beneficiaries are citizens of the country of residence, or live there in the long term. In this case the principle applies under which applicable law provides sufficient freedom of scope of interpreting the law in concrete instances.<sup>248</sup> Besides, all those concerned are free to consult private mediators without recourse to official sanctions. There are for instance reports of such arbitration initiatives among Alevis in *cemevis*.

#### 4 Muslims' Basic Attitude towards the Legal System in Force

In recent years a few comprehensive surveys were conducted in Germany and Europe concerning Muslims' basic attitude towards their life in the respective countries.<sup>249</sup> Some surveys asked general questions regarding views on democracy, the state monopoly on the use of force, the use of force or capital punishment.<sup>250</sup> There is not, however, any empirical, sufficiently confirmed data on attitudes to considerable parts of those legal norms that are contrary to traditional views of Islamic law (especially gender equality and religious equality; secular standard norms and guaranteed observance of human rights; physical punishment), for either Germany or most other European countries. The

<sup>248</sup> For details cf. Rohe, *Family*, 49, 55 ff. with further references.

<sup>249</sup> Cf. the survey by the PEW Research Center on 'The World's Muslims: Unity and Diversity', published on 9 August 2012, based on more than 38,000 face-to-face interviews with Muslims in 39 countries, available at [http://www.pewforum.org/uploadedFiles/Topics/Religious\\_Affiliation/Muslim/the-worlds-muslims-full-report.pdf](http://www.pewforum.org/uploadedFiles/Topics/Religious_Affiliation/Muslim/the-worlds-muslims-full-report.pdf) (last accessed 2 June 2014); no questions relating to legal issues were implemented. Cf. also the evaluation of 50 quantitative surveys and polls concerning Muslims taken in Europe since 2000 by Spielhaus, *Measuring the Muslim*, 695–715; Johansen/Spielhaus, *Counting Deviance*, 81–112; Jeldtoft, Nadia/Nielsen, Jørgen S. (Eds.), *Methods and Contexts in the Study of Muslim Minorities*, Abingdon, Oxford/New York 2012.

<sup>250</sup> Regarding Germany cf. Bundesministerium des Innern, *Muslime in Deutschland*, Hamburg 2007 (Brettfeld/Wetzels), esp. 140 ff. For Austria cf. Ulram, *Integration*, esp. 32 ff. For scholarly positions cf. e.g. March, *Islam and Liberal Citizenship*, 163 ff.

following remarks are thus only initial evaluations made possible by the individual surveys available as well as the author's many years of research in several European countries. The resulting models do not refer to concrete individuals but to typical basic attitudes.

'Everyday pragmatists': Presumably by far the largest group of Muslims in Germany and other countries in continental Europe is made up out of people who have fitted into the framework of democratic rule of law without any theoretical reflection. They do not question the claim to validity of the rule of law, even though – as, indeed, is the case in society as a whole – there will be criticism of individual norms, or infringements of such norms. Many of them have roots in countries such as the former Yugoslavia or Turkey, where traditional Islamic law has been abolished for a long time.

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If there are problems they mainly have their causes in economic or educational circumstances, or in particular cultural background ideas. Some people also lament the lack of opportunity for political participation unless they become German citizens.

'Opponents of Islam': In more recent times in particular, individual Muslims have spoken out who have developed a basic attitude that is very critical of Islam, due to a history of negative personal experiences. Their frequently very generalising remarks range from demanding fundamental reforms on the one hand to calling for a complete rejection of what they perceive as the antidemocratic and anti-human-rights Islam.<sup>251</sup> Even some organisations of 'ex-Muslims' with a decidedly anti-religious background have emerged; they tend to support the legal system in force without any more detailed specification, and often demand more stringent secular modifications.

'Islamists': The contrast to such attitudes of general rejection is furnished by a small fraction of Muslims who hold extremist Islamist views and aggressively reject the society they live in and its values.<sup>252</sup> They range from superfi-

251 Cf. Bahners, Panikmacher, 131 ff. One example is provided by Mrs Kelek's writings which are becoming increasingly unreliable; cf. Rohe, Das ist Rechtskulturelativismus, FAZ, 22 Feb 2011, viewed at <http://www.faz.net/s/RubCF3AEB154CE64960822FA5429A182360/Doc~EB5E4E252433E45E9BCADAE2F6002BCA7~ATpl~Ecommon~Scontent.html>; Bade, Klaus, Kritik und Gewalt, Schwalbach 2013, 147 ff.

252 This numerically small, albeit dangerous, group is the section of the Muslim community about which there have been the most publications in recent years; cf. e.g. the collections Bundesministerium des Innern, Islamismus, Berlin, 2nd ed. 2004; Berlin, Senatsverwaltung für Inneres Abteilung Verfassungsschutz, Islamismus. Diskussion eines vielschichtigen Phänomens, Berlin 2005. Well worth reading is also Farschid/Rudolph, Zeitgenössische Akteure, 403 ff.

cially non-violent indoctrination to a small number of violent extremists. These include groups like *Khilavet Devleti*, *Hizb al-Tahrir* or *Murabitun* as well as individuals commanding a certain public appeal. Some of their representatives openly refuse to be subject to the legal system of the country they live in. Remarks<sup>253</sup> calling for the principles of Islamic law to be applied in Europe ‘when the majority of people in this society decides in favour of it’ are also a cause for concern. The obvious collision between a few widely accepted interpretations of Islamic law in the areas of criminal law, family and inheritance law as well as the legal situation of non-Muslims and the majority-proof (!) principles of the constitution is presumably well known and shines a particular light on such remarks. Furthermore, the oft-repeated remark that the sharia should not be reduced to its objectionable norms of criminal law does not provide an answer to the question of how these norms, seeing as they do exist, should then be approached.

In his book ‘Das deutsche Kalifat’<sup>254</sup> Muhammad Ahmad Rassoul, whose books are sold by many Islamic bookshops and Mosques in Western countries,<sup>255</sup> speaks out in vehemently against democracy and Christians. In a vulgar fashion he turns real political and societal grievances against the idea of democracy as such; one chapter on the issue is tellingly entitled ‘Vom Untergang der Demokratie’ (On the fall of democracy).<sup>256</sup> Instead the author favours the establishment of a German caliphate, with a caliph who must, of course, be a Muslim and male, among other things.<sup>257</sup> Whether the author’s concluding desire to ‘make the hearts of the Germans beat for Islam and to found a caliphate (...) on German soil as a shining example for Europe and the rest of the world’ has any real chance of coming true is another matter.

Missionary attitudes are similarly problematical. While these frequently distance themselves from acts of violence, they spread deeply anti-Christian and anti-Western propaganda which goes far beyond normal debates concerning

253 Ahmad von Denffer, ‘Platz für das islamische Recht’, *Die Gazette* no. 2, June 2004, 63 ff., 65, viewed on 14 Mar. 2007 at [www.gazette.de/Archiv2/Gazette2/denffer.pdf](http://www.gazette.de/Archiv2/Gazette2/denffer.pdf).

254 Cologne 1993 (Islamische Bibliothek).

255 The author has seen it for sale e.g. in the UK, in Canada and Germany. One company in Munich is remarkable which besides this kind of publication sells suitable clothing for women: ‘Niqab with slit for the eyes from €8, closed from €8, Burqa in the Afghan style from €60’ (which is a considerable profit margin, as the author was able to purchase a similar item in Kabul for the equivalent of €4). Advertisement viewed on 11 Oct. 2006 at [www.muslimmarkt.de/al-madina-markt.htm](http://www.muslimmarkt.de/al-madina-markt.htm).

256 Op. cit., 81.

257 Op. cit., 124.

the delimitation of different substance, and cultural criticism. The fact that groups such as Tablighi Jamaat appear to be deliberately aiming to find supporters among those who are going through a transition, such as recent immigrants, gives particular cause for concern.

In 2001 the co-founder of an Islamic centre<sup>258</sup> in Berlin, who emphasises his thirteen years of experience of life in Germany, published a work on comparative law<sup>259</sup> which is permeated with such criticism. The author's severely anti-Western attitude is illustrated firstly by the language he employs: non-Muslims are called unbelievers (*kuffār*) throughout, German legal norms and court judgments as 'judgments of unbelief' (*aḥkām al-kufr*);<sup>260</sup> it is also clear from the subjects he discusses. The author declares Western society to be reprehensible as it believes only in material things, power, and lusts of the flesh;<sup>261</sup> he calls on all Muslims living here to always follow the norms of the (traditional) sharia. With fierce consistency he endorses physical punishments for sexual relations deemed illicit by Islamic law – in the traditional view these are stoning or lashes (cf. Part 1, 4.7.b.cc above). Among these he includes Muslim women who marry non-Muslim men, even if they were not aware of the culpability of their action.<sup>262</sup> While the German social security system is at first praised, he then criticises it with the argument that women can always stop obeying their husbands as they are not dependent on maintenance payments.<sup>263</sup> Based on all this the author's belief that leaders of Islamic centres ought to be authorised to rule in matters of family law such as divorce, as long as applicable German family law does not claim validity in a concrete case ('divorcing' a marriage concluded in Germany according to Islamic law and thus void) is worrying indeed.<sup>264</sup>

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There are indeed some efforts by small numbers of extremist Islamist groups and the Neo-Salafi movement aiming at the construction of an exclusive Muslim normative order opposing the governing rules of the land, based on the

258 The mosque in question is clearly the al-Nur mosque in Berlin-Neukölln; the book's author was an imam there and later moved to the Lebanon where he is said to be working as a judge.

259 Sālim ibn'Abd al-Ghanī al-Rāfi', *Aḥkām al-aḥwāl al-shakhṣiyya li-l-muslimīn fī l-gharb*, Riyadh 2001.

260 Op. cit., 618.

261 Op. cit., 146.

262 Op. cit., 394.

263 Op. cit., 79.

264 Op. cit., 624.

concept of *al-walā' wa-l-barā'*, which restricts Muslim loyalty to Muslims.<sup>265</sup> The proponents of this approach would propagate strict separation from the non-Muslim environment, e.g. by not participating in the political process, reducing contacts with non-Muslims to the minimum, and establishing parallel Islamic structures as far as possible. A new trend may be seen in Islamist youth culture: instead of theoretical debates on sharia-relevant topics, an exclusivist and totalitarian social life is advocated, which in its rejection of everything divergent ultimately states a claim to political domination.

'Traditionalists': Representatives of a traditionalistic approach act in clear delimitation from Islamist extremism. Evidence suggests that they constitute a considerable minority among Muslims in the EU and command the most advanced infrastructure at present. In many mosque associations in particular the dominant attitude rejects violence and aspires to cooperate with the majority society, while maintaining an explicitly traditionalistic view on important issues such as, in particular, gender relations. Matters such as the externally displayed religious observance are also viewed from a traditionalist point of view. The prevailing concern is to 'conserve the faith' in an environment that is perceived to be 'foreign' in vital matters. These attitudes reflect the *'wasatī'* (middle ground) approach to Muslim life in the diaspora by preserving the 'core' of Muslim faith, but equally searching viable solutions for Muslim life in a predominantly non-Muslim environment.<sup>266</sup>

This approach is often expressed in the form of uncritical adoption of centuries-old values, while the tradition, which is similarly Islamic, of reinterpreting the sources according to the circumstances prevailing in one's own time and place, is frequently not invoked. Thus the religious literature for sale in many Western countries mainly follows this fundamental trend, in some cases clearly inclining towards Islamist extremist ideology. Highly subsidised texts from the Gulf states must be mentioned in this context.

Assuming a defensive stance towards the 'true' Muslim existence in Muslim majority societies is typical of the traditionalist attitude in Europe. Instances are that diverging from the religious mainstream is explained as *ḍarūra* (necessity; cf. Part 1, 2.7 above) along the lines of 'necessity knows no law'. Ultimately this means that they live in a constant state of emergency. This does by no means rule out peaceful coexistence; after all, Islamic law laid down centuries

265 Cf. only Shavit, *The Wasatī*, 416, 427 ff. with further references.

266 Cf. Shavit, *The Wasatī*, 416, 420 ff. with further references; in Europe, Tariq Ramadan might be taken as a representative of this approach; cf. e.g. his works *Western Muslims and the Future of Islam*, Oxford 2004, esp. 62 ff., and *Radical Reform*, Oxford 2009; *Al-muslimūn fi-zill al-'almāniyya*, Beirut 2009.

ago the foundations for the legal and religious duties Muslims have to observe the laws in force 'abroad' (cf. Part 1, 4.9.e above).

The modern term describing these concepts is *fiqh al-aqallīyyāt*,<sup>267</sup> 'minority fiqh' etc. Unless, however, the legal and social fundamental consensus regarding the rule of law tied to democracy and secularism and observing human rights is actively endorsed, difficulties may arise in particular when a Muslim assumes a public office or is granted citizenship. Similar concerns arise when it comes to education future generations who will accept the existing legal system, but at the same time consider it in need of replacing. 389

When conducting numerous individual, yet non-representative interviews with some comparatively firmly observant Muslims in several Western countries<sup>268</sup> on issues such as whether applying traditional Islamic family law would be preferable to that of the respective country, the author found a degree of uncertainty. As a rule it was suggested he ask the imam for conclusive information. It is noticeable in this context that on their websites some Muslim organisations present information on Islamic personal status, family and inheritance law which are basically in agreement with the traditional view of the law and consequently contrary to fundamental values of the applicable law. Frequently a brief notice is added, stating that at the place of residence national law must be observed.

Finally, migrants must probably be counted among the traditionalists if they live in comparatively secluded circumstances and adhere to the (although possibly not exclusively) Islamic culture of their country of origin. In parts they use the options offered by the freedom of scope allowed by dispositive substantive law (cf. b above) – as long as they are fundamentally unproblematic. In some cases family law will be applied which will follow the principles of Islamic law but be ultimately invalid, as it is in breach of mandatory rules in the host country. While it is likely that there will be fewer cases in Germany than in the UK, the author does have information concerning several.

'Indigenous Muslims': Those who champion the independent and equal position of Islam in Europe do not regard the life of Muslims in Europe as an exception but as the new rule. Muslims ought to embrace the legal system in force and the society in which they live, and contribute to their further prosperous development. 'Indigenous' in this context does not refer to birthplace or nationality but to an inner attitude of belonging.

<sup>267</sup> Cf. Rohe, *The Formation*, 161 ff.; Hellyer, *Muslims*, 79–99; Albrecht, *Islamisches Minderheitenrecht*, 2010; Caeiro, *Transnational 'Ulama'*, 121 ff.; for a critical reflection cf. Saeed, *Reflections*, 241 ff.

<sup>268</sup> E.g. in Islamic bookshops and in mosques.

390 Recently an increasing number of scholars have come to the fore within this spectrum, some of whom dedicate themselves to training Islamic teachers of religion. Some of them are teaching in the newly established departments for Islamic theology in the German universities of Erlangen-Nuremberg, Frankfurt and Giessen, Münster and Osnabrück, and Tübingen. In addition the Turkish reform debate (cf. Part 2, 1.2 above) shows its influence especially where larger numbers of Muslims of Turkish origin live; the same is true of Bosnian Muslims. As an example of Muslim scholars living in the West, in France the theologian Soheib Bencheikh<sup>269</sup> is looking for a 'minority theology among other minorities' within a secular framework and observing human rights as well as freedom of religion and conscience. In his 1998 book 'Marianne et le Prophète' he says the following:

Islam's presence in France offers the Muslims the unexpected option to experiment and develop a minority theology among other minorities. This option is the result not only of the fact that France is a cosmopolitan society which contains a large Islamic community, but especially of the fact that France is a secular country whose secularism is expressed by the neutrality of its public authority towards everything concerning the issue of religious denominations. This absence of public intervention, coupled with the absence of social pressure present in Muslim societies, allows reformist and liberal tendencies to be produced to the benefit of Islam in France.

Such a minority theology is not only interesting and beneficial to the Muslims in France in that it ensures their peaceful and brotherly coexistence with other communities. An important factor is that it may be transferred onto the Islamic world as well. If Islam does not want to be excluded from the new international order which is becoming visible on the horizon, it must prepare internally, too, for the universal world and accept that in the world as a whole it is one among many minorities, a partner who plays a part and not a conquering opponent.

Nowadays human rights, freedom of religion and conscience, and secularism are the principles which meet with the highest degree of endorsement; they are able to lead the human, pluralistic community. These principles are free from ideological character that could object to the ruling ideologies or oppose one of them. They do not demand respect for one

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269 Bencheikh, *Marianne et le Prophète*, Paris 1998, chapter entitled 'La théologie de la minorité', 188–190.

ideology or faith but respect for humans, for every human being, whatever his conviction or denomination. This is today's *ma'rūf*.<sup>270</sup> These ethical principles known to and recognised by all of humanity must inform the work of every exegete wishing to give new life to the Quran here and now.<sup>271</sup>

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Followers of this trend base their support on time-honoured institutions of Islam, such as the question of the reasons for the revelation (*asbāb al-nuzūl*) which can provide the basis for historical-critical interpretation of the sources. Independent reinterpretation according to the circumstances of time and place (*ijtihād*) is more universally accessible. This is the kind of dynamic interpretation favoured by champions of Islamic feminism (cf. Part 2, 2.4.c above). Other examples of 'entrenched' Muslim scholarship in the Western diaspora can be found in the works of e.g. Tareq Oubrou,<sup>272</sup> Ahmad Moussalli,<sup>273</sup> Abdulaziz Sachedina,<sup>274</sup> Khaled Abou el-Fadl,<sup>275</sup> Amina Wadud,<sup>276</sup> Farid Esack,<sup>277</sup> Abdullah Saeed<sup>278</sup> or Mouhanad Khorchide.<sup>279</sup> A common denominator in all these works seems to be a shift in the perception of Islamic normativity. Sharia is delegalised and instead understood as a set of religious-ethical rules providing guidance.

270 *Ma'rūf* refers to the Islamic principle of *al-amr bi-l-ma'rūf wa-l-nahy 'an al-munkar*, namely the commandment to behave decently and abstain from indecent actions.

271 Bencheikh, Marianne et le Prophète, Paris 1998 (translated from the German version).

272 Oubrou, Tareq, Introduction théorique à la chari'a de minorité, Islam de France 2 (1998), 27–34; id., La charia de minorité: contribution pour une integration légale de l'islam (21.02.2003), available at <http://www.islamlaicite.org/article24.html> (last accessed 3 June 2014).

273 Moussalli, Ahmad S., The Islamic Quest for Democracy, Pluralism, and Human Rights. Gainesville etc. 2003.

274 Sachedina, Abdulaziz, The Role of Islam in the Public Square: Guidance or Governance?, in: Khan, Muqtedar, (ed.), Islamic Democratic Discourse, Lanham et al 2006, 173 ff.

275 Cf. his books The Great Theft. Wrestling Islam from the extremists, San Francisco 2006, 142 ff., and Speaking in God's Name. Islamic Law, Authority, and Women, Oxford 2001.

276 Cf. her work Inside the Gender Jihad. Women's Reform in Islam, Oxford 2006, 92 ff.

277 Cf. his works Qur'ān, Liberation & Pluralism. An Islamic Perspective on Interreligious Solidarity Against Oppression, Oxford 1997, and On Being A Muslim: finding a religious path in the world today, Oxford 2000.

278 Cf. Islam in Australia, Crows Nest 2003, 114 ff., esp. 198 ff.

279 Cf. his works Islam ist Barmherzigkeit. Grundzüge einer modernen Religion, Freiburg/Br. etc. 2012, p. 116 ff., and Scharia – der missverstandene Gott, 2nd ed. Freiburg/Br. 2014.

Even among followers of the traditional view there is a considerable range of opinions, some leaning towards the attitude described here. Thus within the abovementioned European Council for Fatwa and Research there has been an animated discussion of whether a woman who has converted to Islam may continue her marriage to a non-Muslim man. In this context we find the opinion that this is permissible (only) in the West, because women are respected here (and able to practise their religion freely), which constitutes a fundamental difference from the situation elsewhere.<sup>280</sup>

In individual cases non-theologians may employ the instruments of classical theology. Thus expert opinions by the English Muslim intellectual Ziauddin Sardar are in the form of fatwas. He expressed his anger at extremists who use Western freedom of expression to propagate the idea of 'Islamic states', even though in such states they would be silenced without further ado, as follows: 'Any Muslim involved in the planning, financing, training, recruiting, support or harbouring of those who commit acts of indiscriminate violence against persons or the apparatus or infrastructure of states is guilty of terror and no part of the Ummah (the Islamic faith community, M. R.). It is the duty of every Muslim to spare no effort in hunting down, apprehending and bringing such criminals to justice.'<sup>281</sup> Sardar himself recognised the 'novelty' of his approach, but hoped to help this 'novelty' to establish itself; according to him the thinking Muslim is able to provide information himself without being obliged to refer to 'superior' authorities.

The Bosnian chief imam in Germany, Mustafa ef. Klanco, also has a clear message: the sooner the Islamic community stops seeing itself as diaspora, the sooner progress could be made towards the desired integration. He points  
392 out some obstacles in this context, which result from the current practice of sending imams abroad for only a limited time and insufficiently prepared.<sup>282</sup>

The variety of these models shows clearly that it would be mistaken to position 'Islam' in general in opposition with the foundations of European states and societies, even though this view of extremist Islamists is shared by many right-wing extremists as well as some small Christian fundamentalist groups and a few authors with little claim to having arrived at their views using schol-

280 Reference in Caeiro, *Transnational 'Ulama'*, 121, 135.

281 Ziauddin Sardar, *My fatwa on the fanatics*, 23 Sep. 2001, viewed at 29 August 2014 at <http://theguardian.com/world/2001/sep/23/afghanistan.religion>. Cf. also his collection *How Do You Know? Reading Ziauddin Sardar on Islam, Science and Cultural Relations*, London etc. 2006.

282 During a conference at the Islamic department of Sarajevo University on 20 Nov. 2007.

arly methods.<sup>283</sup> On the other hand it is clear that the further development of Islamic theology within the indispensable European legal boundaries is necessary indeed in order to communicate to religiously inclined Muslims living here the firm conviction that they can be good Muslims, Germans, and Europeans all at the same time. It is particularly important to immunise the younger generation against attempts at radicalisation. The former judge with the constitutional court, Böckenförde, has pointed out in a much-quoted remark, that the libertarian, secularised state, too, is nourished by (spiritual and intellectual) prerequisites it is able neither to create itself, nor to guarantee.<sup>284</sup> This makes it doubly significant that a religious self-image should not call for structural opposition against the foundations of a liberal system of social coexistence based on human rights. Of course, Muslims must see in everyday practice that the freedom of religion that is one of the fundamental rights does indeed also apply to them. Democratic rule of law has a future not as a mere concept but only everyday applied practice. This is true not least in the context of establishing religious infrastructure within the boundaries of applicable law. Some self-styled defenders of western values are clearly in need of more education in this area.

Muslims in Europe have usually deliberately chosen the existence outside a Muslim majority society, which is a new historical development. In their everyday life, many have adapted more or less to their new environment. Religious identity – which is extraordinarily multi-faceted among Muslims as well – only plays a small part in this context. Many problems arise from reasons that are not religious but economic or social (language, education, discrimination etc.) or rooted in cultural concepts (family structures and gender relations). It is,

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283 Examples of such books, which tend to summarise a few correct details but leave out all evidence to the contrary and thus arrive at statements which should not, in my opinion, be considered to be reliable scholarship, are publications and public statements by Hans-Peter Raddatz (culminating in the claim ‘to simplify we can say that a Christian abuses his religion if he uses violence, while a Muslim abuses his religion to the same degree if he does not use violence’), *weltwoche.ch* 16/04, *Weltwoche-Gespräch* (Thomas Widmer), viewed on 14 Mar. 2007 at [www.weltwoche.ch/ausgaben/2004-16/artikel-2004-16-islam-bedeutet-f.html](http://www.weltwoche.ch/ausgaben/2004-16/artikel-2004-16-islam-bedeutet-f.html). Cf. also Christian Troll, *Islamdialog: Ausverkauf des Christlichen? Anmerkungen zum Buch von Hans Peter Raddatz, Stimmen der Zeit 2/2002*, 1, 7 (about Raddatz’ book *Von Gott zu Allah? Christentum und Islam in der liberalen Fortschrittsgesellschaft*, Munich 2001), web version viewed on 4 Sep. 2002 at <http://www.sankt-georgen.de/leseraum/troll5.html>; Werner Höbsch, *Diffamierter Dialog. Hans-Peter Raddatz und das christlich-islamische Gespräch, Die neue Ordnung*, 6/2005, viewed on 17 Mar. 2006 at <http://www.die-neue-ordnung.de/Nr62005/WH.html>.

284 Ernst Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit*, Frankfurt/Main 1976, 42, 60.

however, important whether one's own understanding of religion makes for a positive, neutral or negative attitude towards the foundations of coexistence under the liberal and democratic rule of law.

393 It is possible to reach an agreement that incorporates religious beliefs by means of a systematic approach (democracy as a procedure; cf. Part 2, 3.3.a above) as well as at the level of human rights.<sup>285</sup> Derivation along the lines of religion would ultimately rely on an understanding of divine rules as the guarantee of human liberties. It must be understood at all times that the constitution is out of bounds, with the exception of permissible (!) changes through legislative channels. Legislation must, however, develop genuine persuasive power and be 'taught'. This is a particular challenge for a Muslim education system in Europe.

Thus there are two preconditions for positive identification with the concept of democracy. On the one hand an inner conviction is required. On the other the democrat's environment must convey to him a feeling of belonging. Appropriating democracy exclusively for the Western cultural group ('Kulturkreis') (if, indeed, such a thing exists) would be counterproductive from this point of view, as well as being factually incorrect. In an interview one of the influential voices of European Islam, the chief mufti of Bosnia and Herzegovina, Mustafa Cerić, pointedly said: 'We are living through the development from slavery to freedom, from the law of the strongest to the democratic rule of law. The world owes this development to Western civilisation, and to Europe in particular. The legitimation of the state, i.e. democracy, is one of the greatest achievements of all time. But now these values are not tied solely to Western civilisation any more, but they are values others recognise, and claim for themselves, as well. What is happening now is really a crisis of Western civilisation, which apparently does not wish to share these values with anybody else.'<sup>286</sup>

The phrase 'European Islam' or 'European-influenced Islam' is frequently put forward in this context. It can be helpful if its denotation is sufficiently defined. Islamists will generally reject it vehemently, as they disapprove of its essential meaning. Some Muslims, however, reject the phrase only because they fear a falsified faith may be forced on them, up to and including the simple fear of having to eat pork etc. There is of course no intention of regionalising the theological foundation of Islam. The sole goal aspired to would be to limit the possible ways of interpreting it to the range which moves within the

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285 Cf. e.g. the beginnings of a synthesis in Mbaye Lo, *Muslims in America*, Beltsville/Maryland 2004, 132 ff. as well as the literature referred to in Part 2, 2.4.c above; cf. also Ḥanafī, *Democracy*, 435.

286 'Patrioten im Namen des Islam' (Erich Rathfelder), *taz*, 16 Apr. 2004.

boundaries of freedom of religion as well as those of the liberal and democratic constitutional rule of law in Europe. This makes it quite clear that the Islamist positions we have mentioned by way of example – and which are, after all, desired by few Muslims only – have no place in these societies under the rule of law. This refers not only to violent extremists but also to the media surrounding them, which are active not only in the UK but also in Germany, and sometimes surprisingly openly. 394

On the other hand it is important to avoid drawing generalising boundaries as this may put off people willing to integrate, and even unintentionally result in the extremists finding more recruits. Extremism does not lurk behind every headscarf and every beard. Of course (exclusively) traditionalistic attitudes may offer points of attack in the public discussion. Still, we can frequently discern opinions which clearly delimit themselves against Islamist tendencies and are furthermore willing to cooperate with other public and social organisations and groups to try and contain Islamism. Drawing the boundaries too narrow may underestimate dangerous developments, while drawing them too wide may push people who look favourably on our political and legal system into a marginal position. Consequently it is vital to find the appropriate path between trivialisation and demonisation.