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An Annual Interdisciplinary Research Journal, Number 10, 2020

NORDIC AND MUSLIM:
EMERGING LEGAL PRACTICES

Edited by:
Mikele Schultz-Knudsen, Hanne Petersen and Rubya Mehdi

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and Social Research

***NAVEIŃ REET:* Nordic Journal of Law and Social Research (NNJLSR)** is a peer reviewed annual research journal.

NNJLSR aims to publish original and innovative legal scholarship in the diverse fields of law. NNJLSR is keen to publish interdisciplinary socio-legal research that examines the interface between law and political science, economics, sociology, philosophy, anthropology, ecology, feminism and legal institutions.

The journal further aims to share research and ideas about legal matters of concern which are common to developing countries; to encourage research in these fields; and to build conventions of academic discourse and publication. The journal encourages work which sees law in a broader sense, and so sees legal matters as including cultural diversity and plural legal realities all over the world.

Moreover, the journal aims to function as a platform for communication on legal matters of concern among the powerless and those who struggle to access justice.

The journal welcomes contributions from judges, lawyers, academics and law students. In addition, given its policy of encouraging interdisciplinary scholarship, it welcomes input from specialists belonging to other disciplines. Contributors are welcome to address issues from national, comparative and international perspectives.

Contributions may be in the form of articles, book reviews, case comments or other forms.

The views expressed in the NNJLSR are those of the authors and they are responsible for their views expressed in the NNJLSR.

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Contact: David Stuligross david_stuligross@yahoo.com for help with copy editing

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The Editor
NAVEIŃ REET: Nordic Journal of Law and Social Research
rubya@hum.ku.dk

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A Decade of Emergence and Transformation of a Journal: *Naveeñ Reet*: Nordic Journal of Law and Social Research

In the wake of 2009/2010, when I was a visiting professor at Gillani Law College, Bahauddin Zakariya University (BZU) Multan, Pakistan the idea of establishing a Journal of Law and Social Research anchored at BZU was launched in a meeting attended by Livia Holden, Khalid Sayeed, Shuja ulhaque and Abdul Aziz Khan Niazi. In view of the need of the college the objective of the journal was to raise the quality of legal scholarship in the diverse field of law in Pakistan. Since then the journal has been published once a year.

The first issue of the journal was general, while all later issues focused on a specific subject. The second and special issue dealt with *Law and Corruption* (2011). This is a subject, which is not only relevant in developing countries like Pakistan, but also pertinent in global context. The cover showed an image of female underclothing hanging to be dried, an artwork of Khalil Chishti with a verse by the famous Urdu poet Mirza Ghalib "*Aakhir iss dard ki dawa kiya hey*" (oh this pain! Any cure). Right-wing radical element at the BZU raised objections to both the cover and content of the issue, for obscene and a challenge to traditional setup. However, with support of the Vice Chancellor Syed Khwaja Alqama the issue was published.

Through my affiliation with the Department of Cross Cultural and Regional Studies (CCRS) at the University of Copenhagen the journal became linked to this institution thus becoming more international. The scope of the journal was broadened to include legal matters of concerns common for developing countries. The scope of the law is understood broadly to include cultural diversity and plural legal realities all over the world. In 2014 the name of the journal changed to the present Naveeñ Reet, Nordic Journal of Law and Social Research. *Naveeñ Reet* is a Punjabi expression meaning 'new tradition' underlining the ambition of the journal to experiment and open up to new ideas. The journal has survived crises not only moving from one university and country to another but also economic crises in the world and at the University of Copenhagen.

Two issues have dealt specifically with gender the first addressing *Gender and Legal Profession* (2012). The legal profession has been male dominated all over the world until the turn of the 21st century. Gender is a recent category in law, and women have become important actors in struggles to transform the legal landscape, in a changing world order. The second issue on *Runaway Women* (2013) deals with socio-legal mechanism regarding a global phenomenon, the problematic of run-away women. The journal has also focused on fields, which have only recently become subjects of legal and normative research. Two issues have focused on *Law and Art* (2014 and 2015) and one on Law, C*ulture and Governance in Hunza* (2018). These issues put more emphasis on legal cultural studies on communication, as well as on concerns about justice and fairness expressed through different artistic expressions than on traditional dogmatic legal research. Two issues have dealt with China, one of the very important actors in an emerging new world order. The first was *Law and Transitional Society: Chinese and Global Perspectives* (2016) and the second *Living apart together – Chinese-European Perspectives on legal Cultures and Relations in the Digital Age* (2019). The last issue deals primarily with challenges faced by China as well as Europe by the normative and legal cultures in the digital age. To meet these challenges new traditions may be need to be developed. The issue is prepared under pandemic which adds to the challenges. Chinese authors view the potential of technology with more optimism in comparison to Western authors. However, nobody knows what transformation towards digital technology will leads to. The volume is an effort to link different actors of importance for the Nordic region and to initiate a dialogue and comparative discussions.

This resent issue (number 10, (2020) draws attention to *Nordic and Muslim Emerging Legal Practices.* The issue covers examples of how bridges are being built between Nordic legal practices and Muslim legal practices.

The journal is an open access online publication. We publish a small number of hard copies to provide libraries, subscribers, authors and for our record.

Accomplishments and efforts

We have often tried to arrange workshop before producing a special issues of the journal. This may allow participants to exchange ideas on the proposed subject and get inspiration from each other before finalizing their papers for publication.

Our efforts have been to provide an innovative and experimental approach to research and to, keep improving the standard of the journal. Naveeñ Reet has also been lucky

to have engaged peer reviewers, and has introduced improvements in the peer review process for both reviewers and authors.

The journal has recently been approved by the NSD Norway and is part of the BFI-system in Denmark.

Title covers are made by artists or photography relating to the subject matter of the journal.

Further aspirations and collaborations

As *Naveeñ Reet* means New Tradition this indicates that we welcome new experiments and ideas in research and dissemination.

The decade which has passed and the beginning of the 21st century have been marked by crises, uncertainty, unpredictability – and authoritarian tendencies. In the rapidly changing present world contexts and realities pose a challenge of rethinking long standing academic structures – as well as academic research, which is facing dilemmas including urgency & temporality and meaningfulness of research. The pandemic has become an additional challenge for which we have planned to publish a specific issue of the journal in 2021. In light of this we need inter-generational collaboration and to encourage young people to take creative initiatives, and develop new thinking in form and content. I am therefore proud to introduce three new young members to the editorial committee with this issue.

Finally our thanks go especially to:

– Z.A. Bhatti for facilitating publication process at BZU University Press.
– Ingolf Thuesen former head of CCRS for welcoming the journal with financial and moral support.
– Editors, members of editorial and advisory committee, authors, peer reviewers and title-cover makers.
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– David Stuligross david_stuligross@yahoo.com for help with copy-editing.

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Building Bridges in a Changing World - Introductory Reflections

Mikele Schultz-Knudsen[1]

How are bridges being built between Nordic legal practices and Muslim legal practices? That was essentially the question we asked the contributors of this issue. But why this question?

We are living in a globalized world. In the last decades, people have been travelling around the world more than ever before. Many people readily move from one side of the planet to the other, while modern technology allows them to keep in contact with families and cultural ideas from their home country.

Many children are transnational from birth, such as the child of a Moroccan mother and a Pakistani father born and raised in Denmark. This can lead to questions of identity, as well as doubts about which ethnicity and nationality to identify with – if any at all. In this time, which has been described as post-secular, religion has become one thing to identify with - or against. Children with mixed backgrounds might reject their parents' cultural practices but hold on to religious practices. They might identify as "Swedish Muslims", an inclusive term which is open for all regardless of whether their family background is Arab, Bosnian, Pakistani or Turkish.

Not only people spread across the world. Ideas are also spreading, including religious ideas. People from Nordic countries are taking inspiration from, or even converting to, religions that a century ago were almost non-existent in this part of the world. That goes for Buddhism and Hinduism, Hara Krishna and Mormonism and many others, including Islam.

Culture and religion are intertwined with law and legal practices. As cultural and religious practices spread across the world, it also influences legal behavior and perceptions of law. This is also happening in the Nordic countries. So what is the

1 Mikele Schultz-Knudsen is PhD student at the Centre for European and Comparative Legal Studies (CECS), Faculty of Law, University of Copenhagen.

relation between the existing legal systems and the new and emerging legal practices? Does it necessarily lead to conflict or can they work together and inspire each other?

One of the most noticed and discussed changes in the Nordic countries has become the presence of Islam. Although the majority population in the Nordic countries have been Lutheran for around 500 years, it is by no means the first time that religious minority groups have also been present. The Sámi people, Jews, Catholics, Orthodox Christians and Huguenots are just some examples of religious groups that historically and today are part of the Nordic countries. In recent years, other religions than Islam have also been on the rise, but Islam is generally the largest of these ”new” religions and has become the center of most debate.

Often debates on immigration and Islam are combined, as if they are one and the same. Islam is seen by many as a new and foreign religion in the Nordic countries. In the media and political debates, it is often the conflicts between “the West” and Islam that are highlighted. However, that focus cannot stand alone. Many Muslim families have lived in the Nordic countries for generations, and their children are living as both Europeans and Muslims. Even in the Middle East, many Muslims are strongly influenced by Western culture, while also retaining their religion. There is also a growing number of European converts to Islam. Thus, the practical reality is that Muslims are building bridges between Islam and the Western world. In some areas, the surrounding Western societies and governments are also trying to build bridges or include Islam in the society. These developments are also taking place in the Nordic countries.

Thus, when we made the call for this issue, we directly chose to search for articles that focused on the bridge-building. Either articles that came with suggestions for how to build a bridge between Muslims in the Nordic countries and the rest of the society within the area of law, or articles which highlighted situations where such bridges were already being built, where practical solutions were being found or where consensus areas between Muslim and Nordic legal practices were explored.

I am writing this introduction in the autumn of 2020. The world is marked by the Covid-19 pandemic, which has spread across all parts of the world. In some ways, this is the largest crisis so far for the idea of globalization, internationalization and free movement. Worldwide, air travel has been shut down and borders have been closed. Even internally in the EU, free movement has been heavily restricted, as countries

have sought to protect themselves from outbreaks in other countries. The epidemic hit suddenly and for most unexpectedly. Young people traveling freely around the world found themselves trapped in a foreign country, unable to find a plane home to their families. Just like many other families, my family is spread across the world. We have been unable to visit close family members for many months now. I know that the same goes for many other families, who might have parents living in one country and adult children in another. These families took advantage of globalization, but the pandemic is making them doubt their choices.

However, seen from another angle, the pandemic has more than anything shown us how small and intertwined our world has become. What begins in China – or anywhere else in the world – has immediate consequences for the rest of the world. The lockdowns have also clearly shown us how dependent we have become on a globalized world. It is in no way sustainable – for the economy, for families or for societies – to continue these lockdowns indefinitely. The situation has shown the need for solidarity, locally and internationally. Healthy people are wearing masks to protect more vulnerable people. Young people are restricting themselves to protect the elderly. Countries are sending equipment to each other to help end outbreaks – because even an outbreak on the other side of the planet might also reach us. Globally, we form a world together, and locally, we form a society together, regardless of our cultural, ethnic or religious differences. Any attempts to only show solidarity with our own country, our own ethnic group or our own religious group are doomed to fail.

Although the idea for this journal and for the individual articles were thought up before this epidemic, they deal with some of the same themes. Essentially, it is a fact that the Nordic countries are made up of various ethnic and religious groups, but we form one society, where we are dependent on each other. We need to find ways to make the society work without insisting that everyone conform to the majority culture and religion, but also without creating parallel societies that do not form a cohesive society.

This journal issue is inspired by two conferences arranged in 2019 by the Centre for European and Comparative Legal Studies (CECS) at the Faculty of Law, University of Copenhagen, Denmark. The first conference focused on Islam and Danish law, while the second conference took a wider focus on Islam and law in Europe. At both conferences, several of the speakers – on their own initiative – focused on areas of consensus or on attempts at bridge-building. There seems to be a general interest in

this focus, both among researchers and increasingly among policy makers, but perhaps even more among the people who are practically dealing with these topics as part of daily life. This includes Muslims themselves, who have to find ways to live life both as Muslims and as people of the Nordic. However, it also includes civil servants, attorneys, judges, religious scholars and others, who are faced with situations where they have to find practical solutions on how to live a Muslim life without being in conflict with state regulation, or who have to practically decide to which extent state regulation prohibits certain ways of living.

Looking at the articles in this issue, it becomes clear that many different bridge-building attempts are in progress and they are initiated by different actors. While some articles look at how Muslims are trying to build bridges, others look at how NGO's, governments and legislators, courts and researchers can or are contributing to this bridge building.

One group of actors are the Muslims themselves. How are they trying to build bridges with the legislation and society around them?

The article "The mosque is for all: Waqf as an emerging structure of Islamic institutionalization in Denmark" by Lene Kühle looks at how Muslims in Denmark have combined the Islamic concept of "waqf" (Islamic foundations) with Danish legislation on foundations. This article is an interesting addition to debates about the use of "sharia law" in Europe. Such debates generally focus on only a few controversial elements of sharia law, but Lene Kühle brings light to a rarely discussed Islamic legal concept, which is finding its way into Europe. Lene Kühle points out that in Denmark, the number of mosques being housed in buildings owned by Muslim foundations have been rising, and argues that waqfs might be a good way for Muslims to solve some of the practical problems they are facing, such as how to finance mosques and secure a practical footing in Denmark. Waqfs might especially be able to provide enough economic backbone to eliminate the need for foreign donations. However, the establishment of Muslim foundations in Denmark is still not widespread. Lene Kühle identifies a number of obstacles for the further development of waqfs in Denmark, such as the fact that the traditional waqf differs from the Danish foundations in several ways, but also opposition to the idea of Islamic waqfs in Denmark from both within the Muslim community and the wider society.

The contribution by Shaheen Sardar Ali, Justin Jones and Ayesha Shahid titled "To register or not to register? Reflections on Muslim marriage practices in Britain" also focuses on what takes place among Muslims. This is an in-depth analysis of developments in Britain, which we believe can also provide valuable insights for the Nordic countries. The article focuses on the religious Muslim marriages (nikah) and specifically on whether Muslims choose to register these marriages, thus making them both religiously and legally valid. The article especially focuses on whether decisions not to register are informed and conscious. The article is based on multiple types of research, including surveys and group discussions. The findings suggest that the trend is towards registering marriages, and that this is a conscious choice due to the respondents wanting to follow the law of the land. Some respondents even argued that this was a religious obligation. Amongst those participating in the survey who had not registered their marriages, the majority explained that this was due to lack of awareness. However, looking deeper at those who chose not to register lead the researchers to conclude that it happens due to a multitude of reasons, including mutual wishes to try out the relationship before legally being married (sometimes called "halal dating"). The researchers also heard examples of women who preferred being in a part-time polygamous marriage (sharing their husband with another woman) and therefore were fine with not having their marriage registered. This led the researchers to conclude that Muslims in Britain are developing new Muslim marriage practices that move far beyond the classical Islamic concepts.

Jesper Petersen's article "The Islamic juridical vacuum and Islamic authorities' role in divorce cases" also looks at how Muslims are dealing with marriage, more specifically with divorce in a Danish setting. His main argument is that there is an Islamic juridical vacuum in Denmark. With this, he means that there is a demand for legal institutions to assist women who want to divorce Islamically, but no institution in Denmark has so far been able to handle this demand. Instead, women approach imams and Islamic teachers and ask for their help in getting a divorce, but these Islamic authorities are generally reluctant to get involved. This finding differs from the general assumption in the Danish public debate, which is that imams are eager to uphold a parallel legal jurisdiction in which they make and enforce decisions. Jesper Petersen finds that most imams do not think they have the power to make or enforce a divorce decision and that they refuse to take such a role. Some of them instead take the role of mediators, which entails trying to convince the husband to agree to the divorce. Due to security concerns from violent husbands, other imams have formed ad hoc divorce councils where

they try to comfort the woman by declaring that she is divorced, however, even these decisions might be disputed by the husband or others. Thus, there is still no uniform practice and the concrete actions and solutions depend on the woman's situation, resources and her social network.

Thus, the three articles by Lene Kühle, Jesper Petersen and Shaheen Sardar Ali et. al. all show examples of how Muslims are trying to build bridges and navigate the terrain between Islamic tradition and Western law. They show a clear tendency and willingness to find solutions, even if it means reinterpreting the Islamic tradition, whether it be in regards to how to form foundations, how to form marriages or how to achieve religious divorces. However, they also all show that the bridge-building is only on its way. Practices are very diverse and bridge-building attempts are facing obstacles due to legislation or cultural concerns.

Farhat Taj's article "The cultural adoption of human rights in a local context: A case in Norway" has a different focus. Instead of looking directly at the actions of Muslims, it looks at how NGO's might be able to help build bridges. The article focuses on a NGO in Norway, Pakwom, consisting of Norwegian-Pakistani women. It especially works for the human rights of women who have little contact with the wider Norwegian society. It also provides support to individual women struggling with marital problems rooted in domestic violence and divorce. Farhat Taj focuses on a concrete case, in which a woman, Asma, had suffered a great deal of violence from her husband and in-laws. Her husband applied for separation from her, but before the separation had gone through, he married another woman in Pakistan. Asma knew very few people in Norway but found Pakwom. She felt that the domestic violence she had suffered had violated her dignity, and she wanted to see her former husband behind bars. The caseworker in Pakwom suggested to have the former husband charged for bigamy, despite this not being Asma's primary objection to her husband. Asma was happy to learn that she could teach her former husband a lesson, and after winning the case, she became more confident, actively found a job and married another man. The case also inspired other women in similar situations to learn more about their rights in Norwegian law. The article shows how important legal literacy can be. It was in the dialogue between the caseworker and Asma that this rather creative way of punishing the husband showed itself. The article also shows interesting considerations about how to vernacularize human rights into Islamic thinking, since the caseworker and Asma developed an Islamic argument for the case together. Many Muslims would consider polygamy allowed within Islam, but

Asma made it very clear during interviews that the case also involved Islam, which, in her understanding, did not allow her husband to violate the law of the country he was living in. This understanding became possible by making a different interpretation of Islam on polygamy, similar to how the articles above showed new interpretations on marriage and divorce.

While NGO's can help build bridges, another central group of actors is the governments and legislators.

In the article "In what sense is Islamic religious law legally recognised in Denmark?" Niels Valdemar Vinding asks whether Denmark might already have recognized the use of Islamic law in Denmark. His conclusion is that it seems a bold but appropriate statement to say that sharia is legally recognized in Denmark – at least in part. His analysis is focused on a recent Danish legislation on the recognition of religious communities in Denmark. This legislation allows for the recognition of religious communities under certain conditions. One condition is that the articles of association of the community as well as descriptions of rituals and basic doctrines of faith are made public online. Taking inspiration from Norman Doe's "Comparative Religious Law – Judaism, Christianity, Islam", Niels Valdemar Vinding discusses what recognition is and how the term has been used in Danish law. He then operationalize the term Islamic religious law to analyze to which extent it appears in these documents uploaded by the communities. He finds that six substantial aspects of Islamic religious law are part of the documents and therefore core parts of the material substance of legal recognition of Islamic religious communities in Denmark. On that basis, he finds that Islamic religious law is a relevant and legal fact in Denmark. This does not mean that Islamic religious law is a valid source of law in Denmark, but it does mean that those parts of Islamic religious law that have been used as the basis for recognizing the Islamic communities are now legally recognized facts in Denmark. However, Niels Valdemar Vinding ends his article with pointing out that this is not the same as political recognition and that many Muslims might not see themselves as recognized.

Effie Fokas looks at another actor: the courts. In her article "Islam at the European Court of Human Rights" she specifically looks at both the European Court of Human Rights (ECtHR) and – to some extent - at the Court of Justice of the European Union (CJEU). While other articles have pointed out examples of bridge-building, this article is more aimed at criticizing the lack of bridge-building from these European courts.

Effie Fokas goes through the kind of cases the ECtHR has dealt with regarding Islam. This includes cases regarding religious communities' right to autonomy from the state, restrictions on religious clothing, cases regarding bans on e.g. religious political parties and minarets and finally cases on the legal status of religious groups and the use of sharia law. Effie Fokas brings forward several criticisms of this court practice, which has been raised by scholars before her. One especially important criticism is that the court is treating secularism as an extra-conventional goal, allowing secularism to be used as a reason for limiting the freedom of religion, despite secularism not being mentioned as a reason for limitation in the Convention. Another criticism is that there appears to be a double-standard when comparing the treatment of Islam with the treatment of Christianity, where Christian practices appear to be better protected. Finally, the ECtHR has also been criticized for putting politics over religious freedom, as public debates seem to have influenced the court. Looking instead at the CJEU, Effie Fokas discussed whether this might be an alternative venue for Muslims to seek protection. However, the CJEU has a more limited competence and in the limited case law regarding religion, it seems to suffer from some of the same problems as the EctHR. This includes a political sensitivity that appears to influence cases on Islam more than cases on Christianity. Effie Fokas ends her article with pointing out that the decisions from these two courts do not just have a direct effect on the parties in the concrete cases. The messages that the court decisions communicate more broadly to society at large are far more important in terms of potential impact on people's perceptions of their rights, and Effie Fokas finds that the overall message communicated to Muslims in these decisions is less than encouraging.

Mikele Schultz-Knudsen and Rubya Mehdi also look at the possibility judges have for bridge-building and combine this with looking at what legal researchers can gain from using bridge-building in their research. In the first part of their article, "Marital rape in Denmark and Pakistan: Minorities, culture and law", they compare the historical development of rape regulation in Denmark with the parallel development in Muslim law and Pakistan. Their analysis shows that comparing Danish law with Pakistani and Muslim law can lead to powerful insights about both systems, which in this case are relevant for current debates on rape legislation. The authors point out that recent debates in Denmark on rape legislation have not really considered how concepts such as consent and threat can have very different implications in minority cultures. The authors also show how societal and cultural views on women and sexuality have influenced rape legislation in both jurisdictions. Both in Denmark and Pakistan,

socio-economic changes challenge older views on rape, while the legal system tries to maintain as much continuity in the rape definition as possible. The authors show how the wording of written legislation is influenced by culture, but also how written texts are being interpreted and applied very differently depending on which cultural views influence judges, jurors and other interpreters of the text. The authors' ultimate aim is to inspire judges, lawyers, legislators and other professional actors on what to be aware of in cases concerning elements of sexuality and culture. After looking at the cultural influence on legislation, they focus on two concrete Danish court cases about marital rape within Danish-Pakistani couples. They show examples of how understanding the culture of the parties can help judges and lawyers ask the right questions and understand the testimonies. More importantly, the two cases underscore how culture can vary even among people from the same ethnic background, and how parties in a court case may rely on stereotypical cultural views to portray the other party negatively. Thus, the article highlights the importance of judges considering how their own culture is affecting their decisions, as well as how to avoid letting parties' stereotypical descriptions unduly influence decisions.

This issue ends with the article from Werner Menski, titled "European Islam in the age of globalisation and legal pluralism: Not easy being European". Werner Menski has developed a model for pluralist navigation, which can be useful for various actors involved in this field. The model can be used by Muslims, legislators, judges and others and is part of discussions on who should adapt to whom. Should Muslims simply follow the law of the land with no regards to their culture and religion? Or should legal orders adapt to social and religious diversity? The model imagines a kite as a metaphor for how important it is to use polycentric and polyphonic principles to balance the four corners of a situation. The corners are different competing types of law, namely: traditional natural law (including religion), social normativities, state law and the new natural law (including human rights). The model reminds us that e.g. state law is not the only source of legal authority and therefore not the only type of law that counts. Finding the right balance is necessary to ensure legal stability over a long time and often require complex hybrid solutions. Werner Menski further deepens the metaphor of the kite by encouraging us to use it to analyze where on the kite various positions and decisions are located. The model shows that prioritizing state law completely, and rejecting any place for religion in the legal sphere, runs the risk of leading to an ultimate crash. Similarly, if a Muslim rejects state law and human rights and only focuses on what religion says, it may lead to a crash. Instead, the model insists on the need to incorporate knowledge

from different socio-cultural contexts into decision-making processes. There are no ready solutions, but a strong suggestion to us all to be diversely connected.

Finally, I would like to thank the Centre for European and Comparative Legal Studies (CECS) for arranging the conferences in 2019 that inspired this journal, as well as both the Faculty of Law at the University of Copenhagen and the Dreyer Foundation for supporting the conference on Islam in Europe financially.

I would also like to thank all of the contributors for taking upon themselves the challenge of answering our question. The articles show many different approaches on how to face the challenges within this field, and they offer many creative new insights, solutions or suggestions, which we hope will inspire either practitioners or researchers to further initiatives. I would also like to thank the anonymous peer reviewers who have helped improve and clarify the articles and have offered new insights and suggestions that have made it into the articles.

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The Mosque is for All: *Waqf* as an Emerging Structure of Islamic Institutionalization in Denmark

Lene Kühle[1]

Abstract

The Islamic trust or foundation – the *waqf* – is traditionally a component of the complex of ideas, concepts and rules that is Islamic law. After marginalization under colonization and modernization, in recent decades the concept of the *waqf* has received renewed attention. This article presents the emergence of the *waqf* concept among Muslims in Denmark, partly in tandem with the establishment of Islamic foundations under Danish foundation legislation. The article argues that the establishment of Islamic foundations may be a beneficial way of organizing for Danish Muslims, but that the attempt to coordinate the understanding of foundations found in Danish legislation and in Islamic law may foreground certain tensions.

In recent decades, topics like the building and funding of mosques and Islamic family law relating to divorce, dowry and inheritance have ranked high on the political agenda in Denmark, as in other European countries. In public debates, these issues are often framed as a question of whether or not sharia law should be included within European legal systems. This question may in turn lead into that of how this phenomenon may contribute to the erosion of societal cohesion. This article will engage with an under-discussed aspect of this field, namely attempts to establish an Islamic foundation (or trust, endowments)[2], a so-called *waqf/wakf* (pl: awqaf). The point of departure is the recent establishment of foundations with Islamic purposes in Denmark, and the article aims to contribute to the discussion of how Islamic concepts and institutions are being integrated into the economic and legal working of European societies. Several

1 Lene Kühle is professor with special responsibilities in the Department of the Study of Religion, School of Culture, Aarhus University. Her research interests include religious minorities, state–religion relations, religion and politics, and religion in institutions.

2 I will treat foundation, trust and endowment as synonyms even if foundation typically refers to a grant-making institution and endowments typically refer to the funds with which non-profit institutions operate.

approaches are possible in research in this field. One is to regard the "integration of Islam" as an aspect of the institutionalization of sharia in Western societies. This approach raises questions about the extent to which Muslims are able to use the legislation in place, and whether legal concepts are in place that are appropriate to religious purposes. To the extent that institutional and legal practices are ill-fitted to accommodate needs, this might lead to explicit demands for institutional or legal change in order to accommodate Islamic needs. Another possible research focus is on what may be termed state-driven formatting of religious traditions. This type of research focuses on how the institutions and practices of Islam are accommodating to the European situation. One example has been the increased position of authority of the imam in Europe, which transforms the imam into a figure similar to a priest (Haddad, 2007; Vinding, 2018). This article will discuss processes of institutionalization and accommodation in relation to the concept of *waqf* in Denmark at the intersection of both these perspectives.

In classical Islamic law, *waqf* refers to "the permanent dedication by a Muslim of any property for religious or charitable purposes, or for the benefit of the founder (waqif) and his descendants, in such a way that the owner's right is extinguished, and the property is considered to belong to God" (Doe, 2018, 323). The existence of foundations is said to be universal:

> Ancient foundations and modern ones, religious and secular ones, and foundations in all parts of the world share the distinct quality of being bound to the founder's will that separate them from other organizational forms and unite them across religious, historical, cultural, and legal divides (Strachwitz, 2014, 78).

However, in different settings, foundations have taken different forms. In classical times, waqfs were powerful institutions in the Muslim world: in the early twentieth century, between half and two-thirds of landed property in the Ottoman Empire, half of the land in Algeria, and one-third in Tunisia and Egypt was held in waqfs (Abbasi, 2012, 122). In the nineteenth and twentieth centuries, *waqf* lands were widely nationalized and in some cases dispersed. In the early 1970s, one scholar almost signed the death certificate of the *waqf*: "It is evident that the wakf, once a great and widespread institution, is declining and will soon be obsolete" (Fratcher, 1971, 166). However, recent developments among Muslims in Europe suggest a possible future for the *waqf*

institution. Some Muslim-majority states have established state-supported waqfs, such as Turkey's Turkish Diyanet Foundation (Türkiye Diyanet Vakfı), formed in 1975 as an endowment and civil society support for Turkey's Directorate of Religious Affairs (Diyanet İşleri Başkanlığı). The Kuwait Awqaf Public Foundation, established in 1993, is another example (Ahmad and Rashid, 2015). It has been argued that there have been more energetic revivals of traditional institutions in settings such as Egypt, Lebanon, and the UAE, where state-controlled waqfs are absent and where *mu'assasat* (asset-bearing foundations) have been gaining popularity (Ibrahim and Sherif, 2000, 15). In Europe, organizations and foundations called waqfs have been established recently, indicating an interest in rebuilding the institution of the *waqf*. In France, for instance, the organization Al Wakf France held a symposium in May 2017 on the subject "The role of Waqf in the establishment of socio-economic institutions in Europe".[3] The argument developed in this article is that the institutionalization of waqfs as Islamic foundations within European legal systems appears to be an important part of the inclusion of Islam in European economic and legal systems. The "institutionalization of Islam" in this context refers to the emergence of relatively stable Islamic institutions in Europe. The concept of institutions here is not limited to what in everyday language is termed institutions, i.e. schools, hospitals. In fact:

> Institutions are the humanly devised constraints that structure political, economic and social interaction. They consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights) (North, 1991, 97).

Institutions are devised to create order and reduce uncertainty in in a mutual process. Institutionalization is always a selective process, in that some institutions are selected to be established and developed, while others are not (Rath et al., 1999, 59). The argument presented in this article is that the traditional institution of the *waqf* – after a period of low popularity – may once again be becoming the institution of choice for Muslims. And if this is the case, European Muslims may have an important role to play.

The argument presented has its foundation in two larger research projects. The first of these is a project mapping mosques in Denmark, which documents an increase in the

3 https://www.alwakfrance.fr/symposium-on-the-waqf-in-paris/?lang=en

number of mosques in Denmark housed in a building owned by a Muslim foundation or by the mosque association itself. While this was the case for 40 per cent of these mosques in 2006, it was 60 per cent in 2017 (Kühle and Larsen, 2017). Overall, the project shows that it is a high priority for Danish Muslims to own the building they use as a mosque. If money is short, ownership is prioritized above the employment of an imam. The second project is FINEX, "Financial exclusion, Islamic finance and housing in the Nordic countries." This project, conducted by independent researchers in Norway, Sweden, Denmark and Finland and funded by the Research Council of Norway, is designed to explore the extent to which Islamic norms about money and finance have resulted in the exclusion of Muslims from the financial system in those four countries. FINEX carried out a survey, used existing registry data from national statistical bureaux and banks, and collected qualitative data through interviews and focus groups. Overall, the project documents that living in accordance with the requirements of Islamic finance is a priority for many Muslims in these countries, even if the specifics of practising it, for instance by avoiding interest (*riba*), represent a challenge for many (Brekke et al., 2019). The reluctance to engage with interest may in some cases translate into hesitancy in taking up mortgage loans. This applies both to individuals who select private rental housing and to groups of Muslims, who will prefer to pay for mosque property in cash that has been donated or lent among the community of Muslims using the network/framework of the mosque or a broader group of Muslims. This approach to *riba* may prove to be an obstacle to Muslim dreams of buying a property in order to establish a community mosque. Fundraising initiatives are often restricted to specific ethnic groups, though collections initiated on the internet do broaden the potential group of donors (Kühle and Larsen, 2017). Danish mosques do not receive funding directly from the state, but it is possible to apply to become a recognized religious community, and donations to these are tax-deductible for the donor. However, though this option is often described as very attractive, only about one-third of Danish mosques have the status of recognized religious communities (Kühle, 2017). Recognized mosque communities include major mosques often identified as Arab, Turkish, Bosnian and Pakistani due to the predominant family background of mosque board member or the languages used in the mosque; mosques identified in a similar way as Somali, Afghan, Bangladeshi or Indonesian have not applied for recognition.

Taking a point of departure in the organizational and financial situation of Islamic communal life in Denmark, the article explores the question of how to interpret

engagement with the traditional institution of the *waqf* in light of the development of Islam in Europe, where a new face of Islam is developing:

> The Islamic scholars operating in Britain, France, and the United States are innovating. More or less explicitly, they recognize that their interpretations and decisions cannot simply reproduce opinions and decisions given in Cairo or Karachi. They also are responding mainly to the concerns of the Muslims around them and not relying on the major regional Islamic organizations in Europe and North America. Their worries are practical more than doctrinal: how to maintain legitimacy with respect to the ordinary Muslims who seek their services and how to shape procedures and decisions that will be effective in social and legal terms (Bowen, 2011, 1612).

This article suggests that the development of the *waqf* as a Muslim foundation answering to the practical needs of collecting funds (to build mosques and schools, for instance) may constitute a part of this process of development, as a way for European Muslims to construct a concrete and practical footing on which they may practise their religion in Europe.

Waqf and other foundations

Traditionally, two types of *waqf* exist. There is the family *waqf* (*waqf ahli*), which is set up for the benefit of the founder and his relatives to provide for their needs, and the religious or charitable *waqf* (*waqf khayri*), which is established for religious purposes such as the foundation or maintenance of a mosque or cemetery, or for charitable purposes such as the welfare of the poor. A *waqf* is administered by a *mutawalli*. Initially this is often the founder, but it may also be someone appointed by a judge. A *waqf* may be established orally or in writing, and the property in question must be owned property initially owned. Other conditions concern the founder (who must be an adult of sound mind) and the status of the *waqf* (perpetual and absolute – and for Shia Islam, unconditional), which must be identified with reasonable certainty. Finally, if established on the deathbed of the founder, the *waqf* may not exceed one-third of his estate without the consent of his heirs (Doe, 2018, 323; Vikør 2005, 339–344; Hallaq, 2009, 48-52).

While the existence of foundations is universal, the differences between the various forms of foundations should not be underestimated:

> At one level, foundation, fondation, fundacion, fundacao, fundazzione, Stiftung, stichting, stiftelse, éäñíá, or wakf, share a common image: a separate, identifiable asset (the root meaning of fund, fonds) donated (the root of stift) to a particular purpose, usually public in nature (implying the root of philanthropy). But this is where commonalties [sic] end. The various legal traditions and systems in Europe define and treat foundations rather differently (Van der Ploegh, 1999; Gallop, 2001); and registration, legal practices and oversight regimes vary accordingly, sometimes even within the same country, as is the case in Germany or Switzerland (Anheier, 2001, 1).

Foundations have a long history within Danish law. Previously, the term most used was *stiftelse,* but it may be argued that a *fond* is only a modern way of describing what was previously known as a *stiftelse* (Andersen 2002: 20).

According to Rasmus Kristian Feldthusen, professor of law at the University of Copenhagen, the criteria for a Danish foundation are as follows:

> (1) An irrevocable transfer of property from the settlor to the foundation,
>
> (2) One or more purposes, being charitable, family and/or commercial,
>
> (3) The power to dispose of the assets in the foundation rests in a board of directors,
>
> (4) The foundation can acquire rights and incur liabilities in its own name (separate legal personality),
>
> (5) No natural or legal person outside the foundation has property rights to the assets in the foundation, which implies that the foundation owns the assets in its own right, and

(6) At least one-third of the members of the board of directors must be independent from the settlor (Feldthusen, 2015).

The traditional *waqf* and the contemporary Danish foundation are similar in their overall aims, but differ in detail. One important difference is in their management. The *waqf* is led by the *mutawalli*, the custodian of the *waqf*, while the foundation has a board of directors. The *mutawalli* is often an individual (though it is possible to conceive of the *mutawalli* as a group of trustees) (Saleem, 2010). A second difference is the idea that the board of directors must be independent of the founder, as stated in Danish foundation law. A third is that Danish law distinguishes between charitable and commercial foundations (which are respectively administered by the Department of Civil Affairs or Civilstyrelsen and the Business Authority or Erhvervsstyrelsen), something absent from traditional thinking about the *waqf*. Non-commercial foundations must acquire more than 90 per cent of their income from donations; commercial foundations must submit financial reports to the authorities on a yearly basis (LBK no 938 of 20/09/2012), whereas the oversight of non-commercial foundations is very weak. By 2019, eight foundations of relevance to the discussion of waqfs or Islamic foundations had been registered in the Danish state's master register of information, the register of businesses, foundations and associations in Denmark (the CVR register); of these, five are commercial and three are non-commercial foundations. Two of the commercial foundations were previously classified as non-commercial.

Muslims' use of the Danish foundation legislation

The main entry in the CVR register is the Danish Turkish-Islamic Foundation (Dansk Tyrkisk-Islamisk Stiftelse/Danimarka Türk Diyanet Vakfı). The Danish Turkish-Islamic Foundation was established as an association in 1985 (Turan, 2008) by Danish Muslims with a Turkish background, with the assistance of the Turkish embassy in Copenhagen. In 1989, the Danish Turkish-Islamic Foundation registered as a non-commercial foundation. In 2006, an association by the same name became a recognized religious

community in Denmark.[4] The Turkish name of the foundation or religious community is Danimarka Türk Diyanet Vakfı, a name that indicates its association with the Turkish foundation, the Diyanet Foundation (Türkiye Diyanet Vakfı). This body has established associations and foundations in various countries with large groups of Turkish immigrants, with the objective of "rendering regular, effective and coordinated services for Turks, cognates and coreligionists living abroad".[5] To this end, Turkey's Directorate of Religious Affairs sends (and remunerates) imams to Turkish associations in Europe which own their mosque premises, which must contain a place of residence for the imam. Foundations like the Danish Turkish-Islamic Foundation enable the associations to buy a mosque, as Muslims of Turkish descent from all over Europe may donate to the foundation. As the Danish Turkish-Islamic Foundation is not registered as a commercial foundation, financial accounting is not publicly available, so the amount of donations is not known. The only information available is that the management consists of five persons from different parts of Denmark, and that in 2019 two of these persons were imams employed by the Diyanet. The foundation owns about 25 buildings used for mosques and cultural associations. It has reported that the foundation has between two and four employees (Kühle and Larsen, 2017).

A larger foundation is DIKEV, the self-governing institution of the Islamic Culture and Education Centre in Denmark. According to the foundation's homepage, DIKEV was established in Helsingør, Zealand, in 1989 by 33 persons of Turkish background. Today the board consists of five members (all male) from all over Denmark. The foundation, which appears to be an initiative by Turkish Muslim communities in Denmark inspired by the Milli Görüs movement, owns a number of buildings which are rented out to cultural associations, mosques, and private schools for a rent that covers expenses (Kühle and Larsen, 2017). The mosques that rent property from the DIKEV foundation are associated with the umbrella organization, the Danish Islamic Community (Dansk Islamisk Trossamfund), which became a recognized religious community in 2017. DIKEV was initially registered as a non-commercial foundation, but the

4 There is in fact a difference, as the foundation is named the Dansk Tyrkisk-Islamisk Stiftelse, while the recognized religious community is called the Dansk Tyrkisk Islamisk Stiftelse (with no hyphen). The adjective "Tyrkisk" in "Tyrkisk-Islamisk" in the foundation's name qualifies Islam, i.e. means that this is the Turkish version of Islam; the community name, however, means that the community is Danish, Turkish and Islamic. It is not clear if this distinction was intentional, but as it is the foundation which is at the centre of attention, the hyphenation in Dansk Tyrkisk-Islamisk Stiftelse is retained in the English translation.

5 https://www.diyanet.gov.tr/en-US/Organization/Detail//12/general-directorate-of-foreign-relations

Danish business authority decided in 1997 that the foundation was to be considered commercial because it received its income from property rather than donations. DIKEV challenged this, but the foundation was eventually registered as a commercial foundation in 1999. A third and even larger foundation is the Grand Copenhagen Endowment, established in 2008. The board of the Grand Copenhagen Endowment has four members from various locations in Denmark, and five from Doha, Qatar. The foundation has purchased three mosque buildings and one school building. An old industrial building in Copenhagen has been transformed into a stylish mosque building with minarets; the other two are family houses used as mosques in the provincial cities of Skive in northern Jutland and Skælskør in south-west Zealand.

Table 1 – Muslim foundations in Denmark (Sources: https://data.virk.dk/ and www.legatbou gen.dk)

NON-COMMERCIAL FOUNDATION		
NAME	**ESTABLISHED**	**PURPOSES (MY TRANSLATIONS FROM DANISH)**
Danish Turkish-Islamic Foundation (Dansk Tyrkisk-Islamisk Stiftelse)	15 March. 1985/ 1 January 1989[6]	To offer funeral aid following Muslim ritual from death to grave. This is done by providing assistance with funeral preparations following Muslim ritual in cooperation with associations and religious officials serving in the area. The funeral services are carried out through official bureaus associated with the authorities, where assistance is given to transport the deceased from any Turkish airport to the place where the deceased's family and relatives wish the body to be buried

6 There are often several dates of the establishment of foundations in some cases reflecting the establishment and the registration.

NON-COMMERCIAL FOUNDATION		
Culture and Education Foundation (Kultur og undervisningsfond)	4 December 1997/21 April 2006	To provide non-profit and general charitable support for cultural, social, commercial and educational activities, including supporting, establishing and conducting educational activities, including private schools, mosques, community centres and the like, as well as cultural associations. The institution remits all kind of charitable work. The institution also aims to take on the practicality of the burial ritual of deceased Muslims. The institution must be able to fulfil its purpose from its own income, through the purchase of acquired or rented premises
29.09.2016 Foundation (Previously Furkan Foundation)	1 January 2014	Not stated

COMMERCIAL FOUNDATION		
NAME	**ESTABLISHED**	**PURPOSES (MY TRANSLATIONS FROM DANISH)**
DIKEV foundation	1989/1997 16 October 1999[7]	To provide non-profit and general charitable support for cultural, social, commercial and educational activities, including supporting, establishing and conducting educational activities, including private schools, mosques, community centres and the like, as well as cultural associations. The institution must be able to fulfil its purpose from its own income through the purchase of acquired or rented premises
Danish Islamic Burial Foundation (Dansk Islamisk Begravelsesfond)	16 June 2003	To acquire, furnish, and own burial places made available for Islamic burials

7 The different dates refer to the establishment, registration as a foundation, and registration as a commercial foundation.

COMMERCIAL FOUNDATION		
NAME	**ESTABLISHED**	**PURPOSES (MY TRANSLATIONS FROM DANISH)**
Grand Copenhagen Endowment (Københavns Store Fond)	19 February 2008/2020[8]	To provide non-profit and general charitable support for cultural, social, commercial and educational activities, including supporting, establishing and conducting educational activities, including private schools, mosques, community centres and the like, as well as cultural associations. The institution also aims to take on the practicality of the burial ritual of deceased Muslims. The institution must be able to fulfil its purpose from its own income, through the purchase of acquired or rented premises
The Foundation for the Muslim Association /Al Waqf (Den islamiske fond i Aarhus)	23 December 2008	To allow resident Muslims to practise their religion, to raise awareness of the democratic norms and values of Danish society by promoting mutual understanding, inter alia, by organizing joint meetings with other associations and religious congregations working with integration of ethnic minorities to organize excursion trips for both young and old to guide /support especially young people in their choice /retention of studies, to arrange teaching, including in language and the faith itself, to cooperate with other religions and others willing to cooperate in a friendly atmosphere to provide non-profit and general charitable support for cultural, social, commercial and educational activities, including supporting, establishing and conducting educational activities, including private schools, mosques, community centres and the like, as well as cultural associations

8 The different dates refer to the registration as a foundation and as a commercial foundation.

COMMERCIAL FOUNDATION		
NAME	**ESTABLISHED**	**PURPOSES (MY TRANSLATIONS FROM DANISH)**
Family Foundation (Familie fonden)	13 November 2007	To provide non-profit and general charitable support for cultural, social, commercial and educational activities, including supporting, establishing and conducting educational activities, including private schools, mosques, community centres and the like, as well as cultural associations. The institution also aims to take on the practicality of the burial ritual for deceased Muslims. The institution must be able to fulfil its purpose from its own income through the purchase of acquired or rented premises

The objectives of the Culture and Education Foundation, the Family Foundation, the Grand Copenhagen Endowment, and the DIKEV foundation are almost identical, word for word. The workings of the four foundations appear however to be different. The activities of the Family Foundation appear mainly to comprise support for the now discontinued Muslim private school, Roserskolen. The Grand Copenhagen Endowment, and the DIKEV foundation both own buildings that is rented out. The activities of the Culture and Education Foundation is not known. The address of the Foundation for the Muslim Association is at the Aisha mosque in Aarhus. This mosque, known as Al Wakf among Danish Muslims and as the Grimhøj mosque in public debates, is probably the most controversial mosque in Denmark due to controversial statements by its imams and board members. The Foundation for the Muslim Association and the 29.09.2016 Foundation, which support a mosque established by the Turkish movement, Furkan Vakfi, are similar to the extent that their activities effectively seem confined to the establishment and financing of one mosque. The 29.09.2016 Foundation has no stated objectives, and the assessment that this foundation is Islamic is thus made on the basis of other sources (Kühle, 2019). The last foundation is the Danish Islamic Burial Foundation, which was established in 2003 to support the establishment of the first Muslim burial ground Denmark, inaugurated in 2006 (Jacobsen, 2016). The Danish Islamic Burial Foundation has one employee.

Are Danish Islamic foundations considered as waqfs – by themselves and by the Danish authorities?

Research on the institutionalization of Islam in Europe has distinguished between "concealed" and "public" processes, with the latter implying a certain level of public recognition of the institutions concerned (Rath et al., 1999, 54). While processes of institutionalization have become increasingly "public" since the 1990s, those associated with *waqf* have in general remained sheltered from public view. There has been little public debate in Denmark about the establishment of Muslim foundations, and the identification of the various Muslim foundations as *waqf* has received little attention. The *waqf* concept is basically unknown to the Danish public, and the process for the establishment of waqfs in Denmark is also quite fuzzy. The first Islamic endowment in Denmark was the Danish Turkish-Islamic Foundation. The use of the Danish word *stiftelse* in the name of this body clearly identifies it as a foundation, as does the Turkish word *vakfi*. Interestingly, the Danish Turkish-Islamic Foundation was established as an association (using the word *stiftelse*) two years before it was transformed into a foundation. This indicates that the decision to register as a foundation was taken after the decision to establish the *vakıf* and therefore was not dependent on the legal category of foundation being available. It also poses the question of what it might mean for such an institution to be a *stiftelse* if it was not registered as a foundation. It is not unheard of for German Muslim organizations to register as *Stiftung* (e.g. the Deutsch Islamische Moschee Stiftung Düsseldorf), or for their British counterparts to register as "trust" (e.g. the Birmingham Mosque Trust). This suggests a contingent relation between the Islamic institution of the *waqf* and the European institution of the foundation: not all Muslim foundations will employ the concept *waqf* (or translations thereof), and not all institutions employing the concept *waqf* will be organized as foundations. Use of the concept *waqf* in Denmark has been limited, as it has in Britain, where the legal instruments of some Muslim organizations make reference to *waqf*, but most do not (Doe, 2018, 323). In Denmark, the word *waqf* is part of the name of four mosques in the Arab mosque environment (Copenhagen, Odense, Ringsted, Aarhus), of which only one, Waqf Aarhus, is organized as a foundation. The mosques differ in their profiles and international networks (including a cooperation with the Moroccan ministry of religion, Al-Azhar University, Cairo, and a Kuwaiti Salafi organization), but cooperate within the same umbrella organization of Arab mosques in Denmark (Kühle and Larsen, 2017). The Turkish word *vakfi* seems to be used only for entities that are in fact foundations – which also corresponds to the fact that "foundation" is the official translation of *vakfi*.

The similarities between the wordings of the objectives of the Islamic foundations are interesting. The almost identical formulations in the objectives of DIKEV, the Grand Copenhagen Endowment, and the Family Foundation forefront "the provision of non-profit and general charitable support for cultural, social, commercial and educational activities, including support, setting up and conducting educational activities, including private schools, mosques, community centres and the like, as well as cultural associations" (see Table 1). This specific formulation is also found word for word in the objectives of the Fund for the Muslim Association. It may therefore in this respect constitute the core of what it means to be a Muslim foundation – or a *waqf* – in Denmark. The standardized formulations, apparently first put into words by DIKEV in 1999, clearly reflect the vocabulary of Danish legislation on foundations and charitable associations, including the use of technical terms such as non-profit (*almennyttige*) and general charitable (*almenvelgørende*). The forefronting of educational activities furthermore corresponds to the strong traditional relationship between *waqf* and educational institutions (Hallaq, 2009, 38, 48); and the emphasis on places of prayer and religious socialization reflects two of the three pillars of Muslim life in Denmark (Kühle and Larsen, 2019).

It is interesting that the third pillar – burial – also appears in many of the stated objectives. Burial is of course central to the objectives of the Danish Islamic Burial Foundation. But it is also mentioned among the objectives of the Culture and Education Foundation, the Grand Copenhagen Endowment, and the Family Foundation. Funeral and burial activities were previously a primary part of the objectives of the DIKEV foundation, but in 2007 a separate organization, Ravza Begravelsesforening (the Ravza Burial Association), was established to handle these matters (Kühle and Larsen, 2017). This is surely done in order to fit the standard of a foundation in Denmark. DIKEV also appears to be the only one of the foundations that has had some success in being "able to fulfil its purpose from its own income, through the purchase of acquired or rented premises" (Table 1). By actually asking for rent for the use of the premises, DIKEV appears to be attempting to mirror the traditional working of the *waqf* as a mosque and a rental property, whereby the rent from the latter supports the former (Hallaq, 2009, 48).

It is striking how differently these foundations function. The Grand Copenhagen Endowment and the Fund for the Muslim Association were established through large grants from Qatar (Private Engineering Office, Qatar Charity) and Kuwait

(Munazzamat Al-Dawah, Society of the Revival of Islamic Heritage). As foundations, they might have been expected to be prepared to receive donations from Muslims in Denmark, but only DIKEV is recognized as benevolent by the Danish tax authority, with contributions to the foundation tax-deductible for the donor. The Danish Turkish-Islamic Foundation, however, is a recognized religious community and has this privilege. Unlike the Danish Turkish-Islamic Foundation and the DIKEV foundation, the Grand Copenhagen Endowment does not retain ownership of the mosques, but has donated buildings to local mosque associations. This means that they, like the Foundation for the Muslim Association and the 29.09.2016 Foundation, will gain profit from their properties to only a limited extent compared to DIKEV and the Danish Turkish-Islamic Foundation. The Danish authorities also seem to perceive the foundations quite differently. While DIKEV was initially registered as a non-commercial foundation, the authorities compelled it to register as commercial, while the Danish Turkish-Islamic Foundation seems to operate in relatively similar fashion, but is registered as a non-commercial foundation. Because commercial and non-commercial foundations are handled by different authorities, the concept of an Islamic foundation is not easily recognized by Danish authorities.

Foundations as a way of ensuring financial independence

The most successful Muslim foundation in Denmark in economic terms is probably the Danish Turkish-Islamic Foundation, which owns about 25 mosques and has been buying property for mosques and Turkish cultural associations since the 1980s. Due to the rise in property prices, the foundation is very wealthy. Through its ownership of many mosques, the Danish Turkish-Islamic Foundation has already proved its value as a foundation for Muslims in Denmark, though mainly to those of Turkish descent. Supported by its position as a foundation, it has become one of the strongest and most stable axes in Danish Muslim life.

Ghazi Wehbi, secretary-general of Al Wakf France, and executive board member of World Awqaf Forum, stated at a *waqf* symposium organized in Strasbourg in September 2018 that the fundamentals are:

> how to ensure the financing of the Muslim religion? Waqf is important for France because it allows having a funding source that is transparent and allows all Muslims or Muslims who want to contribute to the welfare

> of society, in general, to do so. Unfortunately, it is a source of funding that is very little known and sometimes ignored.[9]

Ghazi Wehbi hoped that the symposium would shed light on the contribution made by waqfs to the financing of Islamic institutions in France, precisely because that financing was a source of public controversy. A similar picture emerges in Denmark, where a ban on the funding of Muslim institutions from the Middle East is to be the topic of a parliamentary bill in 2020. Mosques in Denmark are generally good at fundrasing, but in many cases, the amount collected is not sufficient to buy the selected property. The development of a system of strong Muslim foundations could therefore provide an economic backbone for the development of Islam in Denmark capable of eliminating the need for foreign donations, as suggested above in the case of France.

Obstacles to further development

The establishment of Muslim foundations is still not very widespread among the Muslim communities in Denmark: Muslim voluntary and charitable organizations such as Danish Muslim Aid (established in 2006) are voluntary associations rather than foundations. This scarcity may be due to the existence of barriers to further development. Some resistance may come from within the Muslim communities. While for some the concept of a *waqf* has legitimacy and is sharia-compliant, for others this is not the case. Some modern puritanical sects, including the Wahhabi sect of Saudi Arabia, consider *waqf* to be a heretical innovation (Kuran, 2001, 845), while for others *waqf* is too strongly associated with state directorates and government offices to be of relevance to an organization that seeks to be a part of civil society. Modern Muslims may also wonder whether the decline of the institution of *waqf* is only natural, given its lack of facility to adapt (Kuran, 2001, 843).

As the establishment of waqfs under European law is still a very new phenomenon, problems are difficult to anticipate, but three examples will serve to illustrate their possible form. First, it is not always easy to combine the *waqf* institution with the reluctance to deal with interest that is less prevalent among Muslims with a Turkish background, but not uncommon among those with Somali, Pakistani (Brekke, 2018) and Arab backgrounds. The reluctance to pay interest makes entrance into the property

9 https://www.alwakfrance.fr/6eme-colloque-international-du-magazine-awqaf/?lang=en

market more difficult, on the one hand, but also appears to be a key to the success of the foundations on the other. Foundations might be a solution for mosque associations unwilling to deal with interest, but only if the problem of interest is addressed in a way considered adequate for the relevant actors.

Second, waqfs have traditionally lacked legal personality, which is a requirement in Danish foundation legislation. If a *waqf* is regarded as a charitable gift to God, it might be difficult for founders to accept that foundational law requires at least one-third of the members of the board of directors to be independent from the settlor who made the gift. This requirement has no equivalent with the waqf. The potential conflict between a founder and a board of directors is not specific to Islamic foundations, but religious references, as well as historical precedents, might amplify it. Modern Islamic thinking about waqfs does understand them as legal entities, and a modern *waqf*, unlike the traditional understanding, is overseen by a board of *mutawalli*s endowed with powers quite similar to those of a corporate board of trustees (Kuran, 2001, 843). Yet traditional understandings of responsibility and power may still prevail. Many Danish mosques are riven by conflicts of authority – between the imam and the board, between imams, or between differing positions within the board (Kühle, 2019). Muslim foundations are likely to witness similar conflicts to those already evident in two foundations, the Foundation for the Muslim Association and the Grand Copenhagen Endowment. In both these cases, board memberships are central to the conflicts. These types of conflict are of course not limited to Muslim organizations, but conflict that becomes too great can impact on perceptions of the legitimacy of this way of organizing.

A third obstacle emerges from outside the Muslim environment, namely from Danish politicians and opinion makers who might regard what could be seen as efforts to implement sharia within Danish legislation quite negatively. The question of potential ethical conflicts in the acceptance of hybrid *waqf* structures under Danish law is absolutely a legitimate one, and in a global world, it is also a difficult one, because boundaries are blurry. Does the Danish Turkish-Islamic Foundation constitute a Turkish (European-style) foundation, or an Islamically legitimate *waqf* (*vakıf*)? The colours are already blending. The attempt to bring the Islamic *waqf* and the Danish foundation into correspondence both in theory and practice is ambitious. History, however, holds out some promise that the work will not be in vain. It can be argued that Muslim and European philanthropy and foundations have a common origin in ancient

Mediterranean practices, as laid down in the Byzantine Emperor Justinian's Code of AD 529. Some even claim that it is no coincidence that the foundation emerged in Europe during a period of increased contact between Europe and the Muslim world, and that the Franciscan friars who allegedly introduced it in England were quite active in the Middle East (Gaudiosi, 1987, 1246). Whether the inspiration is direct or indirect, it has at least been claimed that "an islamic *Waqf* is not far removed from a German *Stiftung*, a French *Fondation*, a Dutch *Stichting*, an Italian *Fondazione*, and from a foundation in an English-speaking country" (Strachwitz, 2014, 78).

Differing versions of foundations have been interacting for centuries. The first decades of the twenty-first century have seen a concerted effort not only to bring the differing European conceptions of foundations together, but also – though from very different corners – to include the concept of *waqf* as well. Denmark has one of the highest ratios of foundations per capita in Europe (272 per 100,000 people) (Anheier, 2001, 11). It can be argued that the prevalence of these many, often small-scale foundations is part of a social democratic model, where foundations are integrated in "public welfare service delivery" (Anheier, 2001, 23). Danish Muslims may want to establish Muslim foundations for practical reasons, but some may also want to establish them because the establishment of a *waqf* is "a charitable act of the first order" (Hallaq, 2009, 48). Muslim institutions that choose to organize themselves in the form of commercial foundations will provide Danish society with greater insights into the financial working of Muslim environments in Denmark, as well as engaging with a much-cherished Danish way of organizing.

Conclusion

This article has argued that in recent decades Danish Muslims have experimented with joining the Danish tradition of setting up foundations. It has shown that the establishment of the institution of *waqf* is very much in process. It is difficult to speculate what the outcome will be. The establishment of foundations – whether understood as waqfs or not – may help Danish Muslims to organize so as to overcome some of the economic challenges that they face.

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To Register or not to Register? Reflections on Muslim Marriage Practices in Britain

Shaheen Sardar Ali, Justin Jones and Ayesha Shahid[1]

Abstract

This is an abridged version of the article. The full article is available in Jahrbuch für islamische Rechtswissenschaft, edited by Cefli Ademi and Mathias Rohe and published by C.H. Beck/Munich in 2020. The article looks at practices regarding Muslim marriages (*nikāh*s) in Britain. In Britain, entry on the civil register is required for a Muslim marriage to be recognised as a valid marriage. However, some Muslims do not register their marriage and live in *nikāh*-only marriages. This article draws upon multiple pieces of research to investigate whether decisions not to register are informed and conscious. This includes surveys, focus group discussions and academic conference panels. The results clearly highlight the plurality and diversity of both Muslim thought and conduct in contemporary Britain, and finds that Muslims are developing a number of 'new' Muslim marriage practices, such as taking out a *nikāh*-only marriage as a means of validating a dating relationship. The article concludes with reflections on possible responses to the considerable challenges in accommodating Muslim and civil laws of marriage.

Introduction

In Muslim majority jurisdictions, as well as countries where Muslims form a minority population (such as Britain), Muslim marriages (*nikāh*s) are conducted in a variety of ways. These include 'oral' marriages with no written record,[2] or marriages for which written *nikāhnāmah*s (marriage certificates) have no official recognition. They

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1 Shaheen Sardar Ali is Professor at the School of Law, University of Warwick.
Justin Jones is Associate Professor at the Faculty of Theology and Religion, University of Oxford.
Ayesha Shahid is Assistant Professor at Coventry Law School, Coventry University.

2 Such as that of the first author, Shaheen Sardar Ali in 1974 in northern Pakistan. Historically, the *nikāh* ceremony itself was a private event with only very close family in attendance, followed later by celebratory *valima* to publicise the union. Oral *nikāh* is becoming less frequent nowadays in view of laws requiring registration of births, divorces and deaths.

also include marriages where *nikāh* is recorded by filling out and signing pre-printed marriage contracts in the presence of an official of the state, such as is prevalent in most jurisdictions in the Muslim world and beyond.[3]

However, while in most Muslim majority jurisdictions there is a standard procedure for ensuring that a *nikāh* marriage gains formal recognition by the authorities, this is less the case in Europe, and especially in Britain. In Britain, entry on the civil register, separately from a *nikāh*, is required for a Muslim marriage to be recognised as a valid marriage; yet, there is little by way of an institutionalised legal mechanism to ensure that this happens. Therefore, a different dynamic relating to marriage comes into play among Muslim communities in Britain and other European jurisdictions, with attendant complexities regarding what constitutes a valid marriage and what does not.

The debate about Muslim marriages seems to have intensified in recent years in Britain, as in many European nations. In particular, there has been considerable discussion of the apparent reluctance of some Muslims to register their *nikāh* marriages with the civil authorities. Why do many Muslims take out *nikāh*-only marriages, and why is formalising a *nikāh* through registration resisted by some British Muslims? Moreover, is this act of contracting an unregistered *nikāh* – often in the full knowledge that such a marriage does not carry official recognition, and with the full and free consent of both partners – *an informed, conscious and new iteration of Muslim family law in England and Wales?* This is the key question we seek answers to, and one that potentially offers important insights into the way forward for Muslim family law in non-Muslim jurisdictions including Britain.

These central questions also lead to further questions that the state has to engage. How far should Muslims be able to live under the jurisdiction of laws derived from their religious traditions in matrimonial and family questions, should they choose to do so? And, to what extent should modern states tolerate or accommodate the existence of these laws – for example, by permitting or recognising *nikāh*-only marriages and religious divorces within the legal system? Finally, what solutions might be suggested in bridging the gaps between official government policy and practice of Muslim communities in Britain? This paper touches on some of these additional issues.

3 For discussion of the *nikāh* contract in many different contexts, see Asifa Quraishi and Frank Vogel eds, *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (Harvard University Press, 2009)

Background and Context

It is worth mentioning at the outset that, in some ways, the debate about unregistered Muslim marriages in Britain is one of fairly recent prominence. Earlier generations of Muslims in Britain, often first-generation migrants, had mostly married in their countries of origin and brought along state certified documents testifying to their matrimonial status – and did not appear to have any problems with registering their marriages. Even those who were married in oral *nikāh*-only ceremonies appeared to have no qualms in approaching relevant state bodies for a marriage certificate and/or recognition of their marital status. This process was followed in order to shore up newly gained legal status as British citizens and called upon especially when couples sought spousal visas to travel abroad.

However, in more recent times, there has been an increasing sense in media and policy circles that younger (second and third) generations of British Muslims have shown increasing ambivalence to matters of marriage registration. As an example, we might cite the Register Our Marriage Campaign, set up in 2016 by Aina Khan, a practicing barrister who claims long experience of representing women whose *nikāh* marriages were unregistered, subjecting them to ills including being excluded from wills and deprived of shares in property.[4] The campaign has claimed that unregistered marriage is what she calls a 'ticking time-bomb' within the British Muslim community, and especially among young couples.[5] By neglecting to register their marriages, she argues, women (and men also) carry the legal status of co-habitees, rather than spouses, putting themselves and their children at risk of social and financial insecurity. Khan's perspective also fed into a prominent 2017 Channel 4 documentary *The Truth About Muslim Marriage*, which asserted that up to 80% of young Muslims are not registering their *nikāh* marriages with the civil authorities.[6]

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4 Aina Khan is a London-based solicitor with expertise in International and Islamic family law, who runs her own legal practice in London. With three decades of professional experience in Muslim family and matrimonial law, she has worked both in matters of British civil law and private international law. She founded the high-profile 'Register Our Marriage' campaign in 2014, and has been a leading advocate both for the reform of English marriage law for the registration of religious marriages under civil law and for awareness-building for the vulnerable.

5 Sources: www.registerourmarriage.org www.ainakhanlaw.com

6 https://www.channel4.com/programmes/the-truth-about-muslim-marriage/on-demand/64545-001

Every so often, the Law Commission and various governments in Britain have also commissioned studies and reviews on reforming family law provisions to seek ways of providing protection to cohabiting couples as well as tackling the questions of integration, the role of community dispute resolution bodies such as *shari'ah* councils councils in England and Wales, and whether Islamic law is being misused or applied in a discriminatory way. The most recent of government-commissioned reviews is the independent review into the application of Sharia law in England and Wales by Prof Mona Siddiqui, *Applying Sharia in England and Wales* (also known as the 'Siddiqui Report'), commissioned by the Secretary of State for the Home Department and published in 2018.[7] This report once again recognised the persistence of practices within the community of *nikāh*-only marriages and 'Islamic' divorces, and the active role of bodies such as *shari'ah* councils in exercising duties such as providing Islamic dissolutions of marriage. The Siddiqui Report made three significant main recommendations: (i) legislation ensuring that civil marriages are conducted before or at the same time as a *nikāh* (ii) encouraging civil registration through awareness raising programmes (iii) state regulation of *shari'ah* councils through a code of practice.[8] To do this, the review recommended amendments to the Marriage Act 1949 and the Matrimonial Causes Act 1973 to ensure that civil marriages are conducted before or at the same time as the Islamic marriage ceremony, bringing Islamic marriage into line with Christian and Jewish marriage in the eyes of the law. The review also, controversially, put forward the recommendation of amending the offences provisions of the Marriage Act 1949 to impose penalties on the celebrant of any marriage, including Islamic marriage, should they fail to ensure that the marriage is also civilly registered.

The debate on Muslim marriages in Britain, therefore, remains vigorous. However, while the media, academics and policy-makers have been vocal in these discussions, the most immediate participants in these worlds – the community voices who work within British Muslim communities, and individual Muslims - can often be drowned out. In view of the complexity and multi-layered nature of the research question/s at hand, as well as the impossibility of reaching out to every member of the British Muslim communities, authoritative research on this complex subject is a challenging endeavour. Bearing these challenges in mind, the present contribution seeks to put forward the

7 Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/678478/6.4152_HO_CPFG_Report_into_Sharia_Law_in_the_UK_WEB.pdf

8 *Ibid.*

voices of a cross-section of British Muslims, Muslim religious leaders, lawyers and activists, who handle matters of Muslim marriage and divorce in Britain. It is an attempt to offer reflections on Muslim marriage in Britain as it exists at the grassroots level.

Methods

This paper draws upon multiple pieces of research and has grown organically over a number of years. It is informed by a rich array of source materials, including surveys among a cross section of British Muslims, focus group discussions within diverse constituencies of British Muslims and dedicated panel discussions on the subject at academic conferences.

A major concern to us as researchers, academics, activists and members of diverse communities, with our own ideological, political religious and cultural positions on issues which include *nikāh*-only marriages in Britain, was to conduct research that included voices of members of Muslim communities from a diverse range of constituencies. We were conscious of the difficulty of basing our conclusions on a single research method; hence the decision of adopting a mixed method for obtaining information and views informing our research findings. We decided to use surveys, focus group discussions and academic conferences with dedicated panels on Muslim marriage practices to deepen and enrich our data set. This survey was then followed by two focus group discussions in Bolton and Manchester, and a subsequent panel discussion with solicitors, *imam*s, Muslim community workers and activists at Oxford University in June 2018. All three methods collectively provided a rich canvass of information, opinions and perceptions on why some British Muslims register their marriages whereas others resist the practice – outwardly, at least – in the name of religion. It is to this we now turn our attention.

Reaching out through surveys: Responses of British Muslims regarding their marriage practices.

To listen to voices from the ground, Ali and Shahid developed a brief questionnaire on Muslim marriage practices among Muslim communities in the following towns and cities: London, Birmingham, Manchester, Bolton, Standish, Wigan and Coventry. A survey was carried out to explore the lived realities and experiences of Muslim men

and women in light of their immigrant background, socio-economic status, legal and cultural position in the family and society. The aim of collecting empirical data was to bring knowledge of the lived reality of Muslim marriage practices in Britain, and to include diverse voices that are not heard at the decision-making forums where reform processes are initiated, debated and implemented. Questions posed included those about respondents' own marriage practices, and why they chose a particular way of marrying (*nikāh*-only/ civil marriage only/ *nikāh* plus civil registration). We also asked respondents their views about the reasons for their preference, including their opinion on marrying in mosques that were registered to conduct marriages.

The total number of respondents participating in the survey was 88, representing a range of voices from the ground. Our respondents, many of whom were contacted using the snowball technique, were chosen bearing in mind variables of gender, age, marital and professional status. Muslim communities in Britain are closed communities and gaining access to the community especially women can be complicated. However, we already have established links with the Muslim community through friends and community organisations, and as Muslim women building on strong networks, we are not considered as 'outsiders' in the community.[9]

Voices from the Field: Most of the respondents participating in the survey were in registered marriages, as well as having undergone a *nikāh* by holding two separate ceremonies. Out of the total of 88 respondents 39 respondents were married in the UK: of these, 11 had their civil ceremony followed by *nikāh;* and 24 respondents had a *nikāh* ceremony followed by a civil ceremony. Only 4 couples had marriages at a registered mosque. Most respondents found registration procedures at the registry office more complicated and time consuming. Respondents also emphasised the importance of registration for protecting women and provide them security in case of divorce.

The main reason given for conducting marriage in a registered mosque was that conducting the two ceremonies together will save time; will be more convenient and

9 Ethical and Access Issues: Informed consent of the participants was taken before asking them to fill out the survey form. All participants were informed about the purpose of the survey, use of the data, and were given assurances of anonymity for reasons of confidentiality, privacy, and data protection. Privacy of our participants and interviewees will be protected and all data anonymised. Warwick University's Research and Ethics Committee has scrutinized and approved the survey.

cost effective; and most importantly, the marriage will also be registered and legally recognised under the law of the United Kingdom. To quote one participant:

> "holding it in a registered mosque allows me to practice my religion fully and the law of the land under same roof, don't have to do two ceremonies …Save time and money".

Another respondent commented:

> "Beneficial to conduct both ceremonies in one place as it would be economical too."

A third remarked:

> "This would be a beneficial route and a time saver in view of conducting two ceremonies".

Information in the surveys also reflected awareness of the legal requirement of registering a marriage among professional men and women. At the same time, they were keen to maintain their religious tradition; hence the response from majority of the respondents of having undergone both civil ceremony as well as *nikāh*.

Amongst our respondents, we also found women who had been married overseas. 13 respondents were married in Pakistan; 5 had marriages registered in Pakistan, while 8 had *nikāh* in Pakistan but were not sure if the marriage was registered there. 1 respondent was married in Kenya. All 14 in their comments mentioned that it was important to have their marriages registered and wanted their children's marriages to be registered in the UK.

We also distributed questionnaires to unmarried young men and women between the ages of 18-35. The data shows that they wanted their marriages to be registered and also to have a *nikāh* ceremony. Out of 17 respondents in the unmarried category, 6 wanted *nikāh* in a mosque with registrar in attendance; and 7 wanted *nikāh* in a registered mosque with authorised person in attendance; and 2 participants preferred to have only civil ceremony in the registry office. It is also interesting to note that of all the respondents in this category, only 2 were content with a *nikāh*-only marriage (with no

registration) to take place at home or in a mosque. They considered *nikāḥ* to be the only appropriate way "according to their faith and to seek Allah's blessings".

One of the respondents commented: *"it's important to have the ceremony in a holy place, I will feel more comfortable and it will be easier to attend. I also trust mosques more".*

A similar response was given by another respondent from Manchester who was also in favour of conducting the marriage ceremony in the mosque. He commented*; "would be a blessing to conduct the wedding in a mosque. It will be a simple ceremony. The Islamic way of marriage would be more appropriate".*

In our data sample, we had 18 respondents who had a *nikāḥ*-only marriage in the UK. 4 out of 18 were divorced. They regretted that their marriage was not registered, due to which they were unable to receive any support from the former husband and could not claim their share in the property of the husband. They could also not claim any child support from the former husband. The reasons given by respondents for having a *nikāḥ*-only marriage included lack of awareness (11 respondents), personal preference (2 respondents), and to fulfil parents desire of conducting a *nikāḥ*-only ceremony (1 respondent). The data also indicates that it was chiefly women who were not aware of the legal requirement of registering marriage. This was visible clearly from the responses of housewives, those who were married in Pakistan, and single mothers. It was also interesting to note that women who were in *nikāḥ*-only marriages wanted more information and awareness from the researchers about the legal requirements of a valid marriage in the UK. Another surprising finding was that very few have used registered mosques for marriage purposes.

An important fact emerging from the data brings into question the perception that young educated Muslim men and women do not want a registered marriage and want non-interference from the state and the right to exercise their personal choice. Responses from the field also suggest that the trend is in fact *towards* registering marriages. Muslim men and women are registering their marriage either through separate civil ceremonies or by conducting the *nikāḥ* and civil ceremony in one place. Our data shows that having a civil ceremony or registering marriage is more than just a 'tick box' exercise, and our respondents want to follow the law of the land. This is a sign of integration and adaptation to the socio-legal norms of the country that is now their home, while maintaining their religious values.

In summation, some questions and reflections arose from respondents' conversations with us beyond the survey as well as from responses provided in the questionnaire itself: For instance, why is it that despite the fact that some mosques are authorised to register, the number of marriages held at such mosques is very low? Should the law on marriage be amended to recognise Muslim marriages in the same way as Jewish or Christian marriages? To what extent is the perception that younger Muslims do not want to register their marriages a widespread emerging trend and reflective of reality on the ground?

Voices from a women's only group in Bolton and 'dars' group in Manchester: An inter-generational collage

Conscious of the diversity and inter-generational understandings and practices of British Muslims relating to marriage, we also reached out to Muslim communities in north-west England including those in Bolton and Manchester.[10] Two groups were identified for focus group discussions, one in each city. Shaheen Sardar Ali was aware of, and had met some members of these groups from as far back as 1990 when she was a postgraduate law student at the University of Hull.

In 2018, the all-women group in Bolton invited Shaheen to their monthly meeting. Set up as an informal women's only group over two decades ago, this inter-generational group included women from Bolton, Preston, Standish, Wigan and Manchester who met every month at different members' homes to catch up on social and family events. At times, they would meet to read the Qur'an for some special occasion, and every now and again they would go for a picnic or go to the cinema together. These lunchtime meetings included generous spread of food contributed by the group.[11]

Most of the women had met Shaheen on several previous social occasions and were pleased to see her at their meeting. They had already been made aware of the research questions, as the survey was shared with them both in its English and Urdu versions.

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10 This access was made possible through the good offices of Shaheen's paternal uncle, Dr Miftaullah and his wife, Iffat who have lived in that part of the country since 1969. We gratefully acknowledge their facilitation and support.

11 Thirty-two women were present on the day. Ages of group members ranged between 25 -75); educational levels were quite varied with most women having obtained high school qualifications or below. A few were university graduates; most were home-makers; a couple of the younger were in employment.

The inter-generational dynamic was very interesting, particularly in how they engaged with the question of whether or not to register a Muslim marriage.

Views across the generations were almost unanimous. As voiced by the 75-year-old grandmother:

> "of course: marriages should be registered! How else would the wife get her rights within marriage in Britain?"

Another woman, a mother whose daughter was in a *nikāh*-only marriage, said:

> "It is so unfair when the bride-groom's family insist on a nikāh-only marriage, saying they will register it shortly after the wedding, [when] they actually don't have any intention of doing so. Look at the case of our own daughter. Born and raised in England, she knew it was important to register her marriage, but we all conceded to the groom's family and left it at nikāh only. After a while their relationship became quite rocky and still is. We asked them to register the marriage but they wouldn't. We now know why. They did not want my daughter to have any share in her husband's assets. She left her job to look after the family and her children but, if the marriage ends, she will be left penniless. I will say to all parents: make sure the marriage of your children is registered."

Only one out of the 32 women in the group was of the view that marriage need not be registered and that a *nikāh*-only marriage is sufficient. Shaheen says that: "I noticed that beyond making this statement she was not prepared to elaborate, so I went up to her and sat next to her to broach the subject further". In a one to one whisper she said:

> "I say this because my son was married and upon his divorce, we feared his (ex) wife would take away everything. Thank God we realised that if you don't register the nikāh, then that is fine, as it is only in a civil marriage that the wife gets a share of the matrimonial property. Why should she (wife) take away my son's hard earned money? That is why I am not in favour of registering a nikāh."

In our discussion, whether those in *nikāh*-only marriages do so due to their religious conviction believing that being married in the eyes of God and the community is all that counts, women were unanimous in their understanding that:

> "Our religion (Islam) wants us to follow the law of the land which we have made our home, and make all parties to the marriage safe. So even though nikāh means that we know the couple is married, registering is equally important. There is no contradiction between Islam and civil registration of marriage. In fact one supports the other."

The general mood of the meeting led Shaheen to infer that this group of women were clear in their views regarding the importance of civil registration of a *nikāh*. They appeared aware of developments in their country of origin (Pakistan) declaring that: "people in Pakistan fill out marriage forms and have certificates that are recognised by law, so what is the difference between those marriage registrations and the one in England?"

On a Monday evening, the 'Manchester *dars* group' of men and women meet at members' homes to listen to recitation of the Qur'an and its translation and explanation; hence the name of the group.[12] This group too, was formed several years ago and served as an opportunity of members of the British Muslim communities to collectively understand their religious tradition, seek responses to questions from scholars invited to these events, and expand their networks.[13] Shaheen's uncle introduced her to the group, and encouraged them to engage with her research theme and offer their insights and views on the subject.

Of the over forty men and women present, not a single one doubted the necessity of registering a marriage. Neither did any person present show any sign of resistance to a civil marriage. In fact, Shaheen was questioned about what they thought was self-evident:

12 Describing it as the 'Manchester dars group' was due to the fact that it had been set up by those living in Manchester but with membership from surrounding towns.

13 Ages of members ranged from 35-80 years. Most members were over 60 although younger membership was being encouraged.

> "Why are you asking us whether nikāh ought to be registered? Of course it has to. How else would the couple be married in the eyes of the law in this country?"

When asked why some did not wish to register their marriage, a 75 year old gentleman who said he had lived in the country for over fifty years remarked:

> "bad-nyatee (bad intentions), what else? They want to hide some 'wrong doing' of course... let me give you an example. The imam of a mosque in our city already has more than one wife. Last weekend, he married yet another wife. Why would he register his marriage with the state? To go to jail!!!"

The *dars* session too offered a unanimous opinion regarding the importance as well as acceptance of registering a Muslim *nikāh*-only marriage; they believed it to be a religious obligation, and not simply something required by law. Interestingly, while our surveys and conversations with *imam*s and others in Muslim communities were aware of and raised the matter of 'trial' relationships and 'halal dating', neither the Bolton women's group nor the Manchester *dars* group appeared to be aware of it. It may also be that they were not comfortable in raising it as a reason for *nikāh*-only marriages.

Keeping their ear to the ground? Reporting some community leaders' voices on Muslim marriage practices in Britain

The third source of data for the present study comes out of a thought-provoking panel discussion at the international conference held at the University of Oxford, 'Reformulating matrimony in Islamic law', organised by Justin Jones and funded by the Arts and Humanities Research Council (AHRC) in 2018. The panel, chaired by Shaheen Sardar Ali, brought together speakers from a range of vocations: –*imam*s, members of *shari'ah* councils, and Muslim community activists and lawyers. All the panellists were asked to reflect from their personal experience upon the matrimonial lives of British Muslims: the kinds of marital and divorces practices that they follow, and the implications of these for the relations between religious and civil laws. The panellists selected for this event were all deeply involved with Muslim communities in their various roles, and their words reflected their vast experience of actual practice among Muslim communities. It was a lively session, engaging and frank, with panellists sharing

their knowledge and opinions openly and honestly. The question and answer session too, brought into relief the rich canvass of views, perspectives and practices prevalent among Muslim communities in Britain regarding Muslim family law, and in particular, the question of Muslim marriage registration.[14]

A number of participants affirmed that significant numbers of Muslim women in *nikāh*-only marriages believe mistakenly that their *nikāh* is (legally) recognised under the law in England and Wales. Aina Khan, the barrister and activist cited above, identified a lack of awareness as the central reason for the prevalence of unregistered marriage. Many women, she argued, believe their *nikāh* marriages to have official recognition, whether through their ignorance or through misplaced trust in the word of their husbands to handle the registration process. The situation, she powerfully argued, is giving rise to an unknown number of what she calls '*nikāh* horror stories', referring to cases of women being ejected from their homes, deprived of inheritance or their fair share of marital assets, or abandoned internationally by men that they considered their 'husbands.' She argued that women without civil marriages are also leaving themselves open to the possibility of extortion or blackmail, whether by their 'husbands', in-laws, or community bodies such as *shari'ah* councils. She also noted that unregistered *nikāh* can cause further problems for British Muslim women outside of the UK, where legal documentation alone is considered the authoritative indicator of marital status. Significantly, she also noted that the cuts to legal aid since the Legal Aid, Sentencing and Punishment of Offenders Act (2012) has withdrawn funds from family law litigation, depriving victims of legal assistance and thus rendering many women even more vulnerable. They are put into weaker positions vis-à-vis family, and possibly, forced to seek intervention by unregulated community bodies, such as *shari'ah* councils.[15]

Khan's statement reflected the common surprise – both within Britain's Muslim community and also internationally – that British law has adopted so few legal measures to promote civil registration of *nikāh* marriages. This is contrary to the laws

14 For a full transcript of the panel and more detailed commentary than is possible here, see the blog on ShariaSource available in seven parts at: https://islamiclaw.blog/2019/11/20/muslim-marriage-and-divorce-practices-in-contemporary-britain-part-1-introduction/; https://islamiclaw.blog/2019/12/06/muslim-marriage-and-divorce-practices-in-contemporary-britain-part-7-conclusions-and-further-observations/.

15 https://islamiclaw.blog/2019/11/22/muslim-marriage-and-divorce-practices-in-contemporary-britain-part-2-aina-khan/;

implemented both in other Western European nations, like France and Germany, but also in most Muslim-majority nations. These countries, she argued, have done more to put an end to the existence of the kinds of 'clandestine marriages' that still exist in the UK.

As well acknowledging the prevalence of unregistered, marriage, many panellists were alert to an assortment of other problems that it creates. One example is Bana Gora, president of the Muslim Women's Council, a community organisation based in Bradford.[16] She noted a range of startling cultural practices which are, in different ways, by-products of unregistered *nikāh*s, many of which violate the rights of women especially. These include polygamous and underage marriages; the withholding of alimony after divorce; the unequal distribution of inheritance; and instant triple-*ṭalāq* divorce. All of these practices exist as a consequence of unregistered *nikāh*s.

Other panellists, however, indicated a body of other reasons for the choice to take out a *nikāh*-only marriage, some of which make for uncomfortable listening. Some confirmed that some members of the younger generation of Muslims as a form of '*halal* dating', or a means of 'testing' a marriage before taking on the legal commitments of a registered marriage. Some also suggested that it often owed to carelessness on the part of young Muslims. Ajmal Masroor, one of Britain's most high-profile *imam*s,[17] blamed especially the 'Bollywood' influence in popularising glamour weddings, and the frequent use of *nikāh*-marriages as easy means of licencing sexual relationships. A culture of celebrity and ebullience, he argued, can cloud reflection and judgement, and incite young people to take out 'DIY *nikāh* marriages,' or 'backstreet *nikāh*s', with little consideration of the consequences. The pressure of *imam*s, *khandan*s (families) and *biradari*s (community bodies), he argued, also exact unwelcome social influence in matrimonial matters.

16 https://islamiclaw.blog/2019/12/03/muslim-marriage-and-divorce-practices-in-contempoo rary-britain-part-6-bana-gora/; Bana Gora has particular expertise in matters of social policy and engagement with marginalized communities in particular, and at present is involved in the MWC's plans to build the first ever woman-led mosque in the UK.

17 ttps://islamiclaw.blog/2019/11/29/muslim-marriage-and-divorce-practices-in-contempoo rary-britain-part-5-ajmal-masroor/. Masroor leads prayers in four London mosques, and has been a high-profile spokesperson and broadcaster for British Muslims. He has been a well-known proponent of reformist Islamic thought, including on issues of family values and laws, and has headed the Barefoot Institute, which handles matters of marriage, divorce and family mediation for British Muslims.

All panellists acknowledged that sometimes one partner or the other might favour a *nikāh*-only marriage for their own personal benefit. Men might, by not registering a marriage, seek to escape sharing their assets with their wives. Some panellists were also open that some men desire to take out *nikāh*-only marriages to keep a door open for a second, polygamous marriage – something that is illegal under civil law. But it is easy to forget that sometimes women too have found favour in taking out unregistered marriage. Bana Gora and Ajmal Masroor alike spoke of women who had chosen not to register their *nikāh*, so as to deny their husbands the ability to make a claim upon their own personal wealth.

Particularly instructive on this was a contribution by Amra Bone, a panellist on the Birmingham Shariah Council, and has often been known as Britain's first female '*shari'ah* judge'.[18] She argued that women could be 'surprisingly strong', and rather contradicted the stereotype of the helpless Muslim wife. Some women, she said, wanted *nikāh*-only marriages to ensure their own financial independence. She also evoked some unexpected examples of Muslim women's legal behaviour: for instance, women who willingly, and sometimes even by preference, share their husband in polygamous marriages, to provide them with a greater degree of personal freedom to build a career or avoid burdens such as having children. This was a strong call to question old assumptions about Muslim marriage and acknowledge the existence of alternative forms of 'balance' in Muslim society that depart from orthodox ideas of marriage. However, like other panellists, Bone was clear to say that she advises Muslim couples to register their marriages. She admitted that she cannot force them, but always tells them that they should at least be aware of the consequences of not doing so.

A different approach to the question came from Musharraf Husain, a scholar and *imam* based in Nottingham, and one of the leading Muslim community representatives of the Midlands.[19] Departing from the idea that *nikāh*-only marriages stemmed chiefly

18 https://islamiclaw.blog/2019/11/27/muslim-marriage-and-divorce-practices-in-contemporary-britain-part-4-amra-bone/; Bone has also worked as a Muslim leader and chaplain within the community in Coventry and Birmingham for some thirty years.

19 https://islamiclaw.blog/2019/11/26/muslim-marriage-and-divorce-practices-in-contemporary-britain-part-3-musharraf-husain/; Trained at al-Azhar in Cairo, he is a scholar of the Qur'an and Islamic sciences, and is a public community spokesperson and educator; he is also the chief executive of the Karimia Institute, an Islamic foundation that engages in numerous activities of religious education and charity. He has been an important Muslim spokesperson on issues of integration and community cohesion in the UK.

from ignorance, he argued that it was often a proactive *choice*, made either by partners or their families. Despite having registered his mosque to conduct parallel religious and civil marriages, he argued that many of even his own congregation have refused to take out the latter, asking him to perform *nikāh*-only marriages. Muslim marriage in the UK, he suggested in a striking metaphor, has become like a 'Drive Thru McDonalds', with Islamic marriages and divorces being contracted and terminated with minimal planning or consideration.

While he reflected some similar explanations to the other panellists (e.g. avoiding legal obligations to a spouse; carelessness by the parties), he also noted that Muslims do not instinctively consider their mosque as a natural location for marriage, meaning that, unlike Christians, Muslim families often envisage their *nikāh*s as being solemnised in private settings, rather than a religious building that can be licensed for marriages. But he also argued that many *imam*s and religious leaders in Britain, fearing the erosion of community values, have wanted to keep marriage 'flexible…, feasible and easy' as possible, and thus, they have avoided complicating the *nikāh* with legal conditions or baggage in order to bring people into marital unions.

Attitudes within the community are only part of the explanation, however. The state has also played a part: by refusing to legislate on *nikāh*-only marriages, it has allowed them to persist. Indeed, elaborating on the state's role, Husain offered a striking interpretation of ongoing Muslim disengagement from marriage registration, which goes back to the initial migrations from South Asia in the 1950s-60s. At this time, he argues, economic migrants from Pakistan and Bangladesh considered the UK to be merely a 'transient home': they remained focused upon 'the myth of return',[20] while the state offered little support for these new communities and merely 'left' them to integrate. This '*laissez faire* attitude' on the part of the state towards the Muslim population served to foster an ethic of community self-reliance that has led to tendencies among Muslims towards community autonomy in to handling personal and community affairs, and has meant that many Muslims have tended to see questions of state recognition as an irrelevance.

The views of the panellists, therefore, confirmed some of the same issues raised by respondents in other research elements of this study. Equally, they posited a range

20 This is an allusion to Anwar, Muhammad (1979), The Myth of Return: Pakistanis in Britain. London: Heinemann Educational Books.

of possible solutions to the problem of unregistered Muslim marriages. Aina Khan, speaking of her 'Register Our Marriage' campaign, outlined a three-fold approach to addressing the issue. First is the call for reform of the law. She proposes that the Marriage Act of 1949 be widened to automatically register *all* religious marriages as civil marriages, rather than, as now, only the marriages of Anglicans, Jews and Quakers: a fair and equal marriage law, she argues, should either cover all faiths, or none. Second, she argues for a public awareness campaign to target the Muslim community, working through 'roadshows' and other large events, to communicate the benefits of registering marriage. This is something that her campaign has consistently embarked upon. Third, there is a call for further research and professional advocacy, with a particular proposal for the construction of an international database to identify landmark court judgements and compare international mechanisms for adjudicating religious marriages.

Other community figures tried to answer the question not just in terms of the law, but the need for proactive engagement from community leaders. Musharraf Husain was among those who, unlike Aina Khan, saw little appetite within the government for any major interventions into the laws of Muslim marriage in the UK; and for him, this suggested that community practitioners needed to find solutions themselves. He noted his own licencing of his mosque for marriage as an example, along with his encouragement of his congregations. He also describes how the *nikāh* certificates that his association provides include a written statement that a *nikāh*-marriage must be registered for it to be considered valid. This mechanism is comparable with some of the ways in which *shari'ah* councils have found ways to engage religious and civil laws alongside each other; for instance, issuing *khul*ʿs (Islamic divorces) upon the presentation of a civil divorce certificate.[21] There is, then, the prospect for aligning civil and religious laws of marriage and divorce in mutually constructive ways.

Ajmal Masoor identified the need for more responsible community handling of matrimonial issues: not just of families, but also, the need for qualified *imam*s to officiate marriages. It needs community leaders to emphasise the seriousness and sanctity of marriage in the Islamic traditionand it needs trained religious counsellors to handle marital breakdown in line with the Qur'an's teachings on divorce. Masroor also developed a particular Islamic line of reasoning in favour of registering marriage.

21 Musharraf Husain also refers to family solicitors with training in Muslim family law, who can issue *khula'* to accompany a civil divorce certificate.

He argues that, by Islamic laws of contract, a *nikāh* can only be considered as lawful in *shari'ah* if it is 'legally enforceable': in other words, in contemporary Britain, a Muslim marriage must be civilly registered to be valid. These arguments have often been used by *imam*s in Europe, especially in countries with a higher degree of marital regulation than the UK, and suggest possibilities for the creative reformulation of matrimonial laws in Muslim minority contexts. [22]

In a comparable but different way, Bana Gora argued that 'perhaps the best solutions come from within the Islamic tradition itself'. She suggested that Islam's internal 'richness and diversity', the existence of multiple legal schools and the flexibility of *shari'ah* all enable the religion to provide its own solutions. More striking still was her invocation of Islam's polymorphous legal tradition to address contemporary questions. For instance, as a solution to the problem of marital mistreatment, she notes the possibility of adding stipulations or conditions to a *nikāh* contract. As she notes, this practice has often fallen out of favour in the contemporary world, but it has a long legal pedigree and was widely adhered to in some legal eras; and so perhaps it can offer a means to protecting women today. Similarly, she proposes looking to Islam's different legal schools, and indeed to the different legal-constitutional frameworks across Muslim Africa and Asia, to seek lessons for the handling of matrimonial practices. Pushing the need for public education and a recognition of Islam's pluralism, she makes a particular call for ordinary Muslims to take charge of the community's destiny, and engage the civil process where necessary.

Gora, like others, strikes a positive tone on the question of moves towards the alignment of religious and civil laws of marriage. She notes the increasing willingness of women among the UK's third-generation Muslims to critique and challenge normative understandings. Things are changing, she argued, on account of generational change and the expansion of knowledge and enquiry. Memorably, Aina Khan called for the enticing prospect of a new *ijmā̓* (consensus) for handling the problem of unregistered *nikāh* marriages: in other words, a collective agreement on the issue within the Muslim community.

22 Source: http://ajmalmasroor.com/

Some Concluding Reflections

The present contribution arose from the need to deepen our understanding of the changing nature of law and practice in diverse communities. In particular, we were interested in how both meanings and practice of concepts evolve over time and place, and how they impact heavily on the lives of people, particularly in the case of minority communities who encounter plural legalities. Using the institution of marriage in the Islamic legal tradition as an example, this paper set out to demonstrate differing articulations of what constitutes a 'marriage' in Muslim majority as well as Muslim minority jurisdictions such as the United Kingdom and how Muslim communities in Britain, now firmly rooted in a British identity, are re-defining marriage and divorce in their own terms.

The conclusions posited here cannot be comprehensive. We are conscious of the fact that the present study also shares the flaw of limited reach. Of millions of British Muslims, we were able to reach out to just 150 or so respondents who voiced their opinion on the question of Muslim marriage practices in Britain. At the Oxford conference, we picked up five respondents, all of whom are willing to speak to academic audiences and all of whom position themselves as modernisers aiming to facilitate the social integration of British Muslims. Nevertheless, we would like to close by picking up on a number of themes that run through the research findings.

First, this study clearly highlights the plurality and diversity of both Muslim thought and conduct in contemporary Britain. Rather than searching for a dominant Muslim perspective, we are reminded to consider the multiplicity of perspectives on matrimonial questions at work in this community today. To speak of British Muslims as somehow naturally inclined by their religion to avoid registering *nikāh* marriages does not do justice to the number of overlapping discourses and dynamics at play.

Our data shows that the reasons why many couples take out *nikāh*-only marriages are heterogeneous, and specific to the circumstances in which the women and/or couples find themselves. In some cases, may be the result of a mutual wish to trial their relationships prior to or instead of a civil marriage; in others it may reflect a misunderstanding about the *nikāh*'s admissibility in English law. In other cases, *nikāh*-only marriage may arise from the wish of one partner to evade legal obligations towards another, or the attempt of a husband to keep the door open to a second marriage. Or indeed, as in some quoted cases, a *nikāh*-only marriage might reflect the wish of either

partner to protect their own private wealth and assets. Indeed, while it may sound harsh, some of this material might also lead us to conclude that the *nikāh* has been combined with the minority status of Muslims in Britain to be used instrumentally as and when it suits the self-interest of Muslim individuals. Examples given here include not just the many individuals quoted as having personal advantage in *nikāh*-only marriages, but also the Muslim women who as one panellist stated, wouldn't mind being in a polygamous union and in an almost 'part-time relationship'. These diverse factors at play mean that we cannot make generalisations.

Other quoted factors in the debate include pressure from in-laws to avoid registration; or an obsession with the glamour and show of marriages without due attention to legal niceties. There is also the matter of the difference between a Muslim idea of marriage, which is based around an officiating *person* (*imam*, *qazi* etc), and the Marriage Act of England and Wales that predicates the registration of marriage upon the *place* in which it occurs; as many respondents reflected, a mosque is not inherently seen as a natural location for a marriage. There is also the suggestion that long-term patterns of immigration and a '*laissez faire*' state attitude towards integration in Britain have encouraged a disengaged attitude within the Muslim minority towards English civil laws, and a consciousness of organising the community's internal affairs on their own terms.

Yet, a striking feature evident that runs through these discussions is the sense that some British Muslims are reaching new definitions of what constitutes a Muslim marriage. They are developing a number of 'new' Muslim marriage practices and are moving far beyond the definition of marriage as rendered in *fiqh* as a contract between partners to legalise the procreation of children. One could argue, for example, that taking out a *nikāh*-only marriage as a means of validating a dating relationship in the absence of an official marriage infringes the traditional understanding of the Islamic marriage contract, for which legal recognition and intended permanence are compulsory conditions. Moreover, a *nikāh*-only marriage is, under British law, treated as a practice akin to unmarried cohabitation; and non-married cohabitation is considered illegitimate under Islamic law. The kinds of Muslim marriage being practiced in the UK, therefore, illustrate how Muslims in Britain, and perhaps in other Muslim minority contexts, are redeveloping the traditional form of the *nikāh* in new ways, perhaps pushing definitions of Islamic marriage to their very limits in the process.

That said, across this study, the overwhelming impression is that taking out a *nikāh*-only marriage reflects the value placed on the *nikāh* contract itself for British Muslims. It seems clear from these extracts that many British Muslims have maintained a deep sense of the need for religious marriages and divorces; and many consider the *nikāh* rather than the civil marriage to be the one that carries meaning for them, even when they may hold both together. To argue that this feeling will somehow dissipate in the face of authoritative civil laws seems to be a spurious debate. At the same time, though, these marital practices as discussed are all being developed within a self-consciously British Islam, rather than being 'foreign' cultural norms imported in wholesale from elsewhere. While some speakers indicate that certain attitudes towards marriage reflect a residual 'memory' of countries and cultures of origin (South Asia particularly is cited by several), for the most part informants are keen to emphasise that these communities consider themselves as British Muslims and are thus in need of matrimonial customs and laws that work within the British context.

We pledged in the introduction to offer some possible responses to the considerable challenges in accommodating Muslim and civil laws of marriage as they exist in Britain today. Of course, bringing *nikāh*-only marriages into the fold of the English legal system via compulsory registration could take away some of the manipulative uses of *nikāh*-only marriage as discussed, and could resolve some of the '*nikāh* horror stories' of women being divested of their rights or homes after the dissolution of their *nikāh*s. However, as some point out, the state is in no mood to introduce any substantive legislation on the matter. The issue is perhaps too politically sensitive; and as one respondent notes, the state has come to rely increasingly on practices of arbitration to resolve disputes outside a crowded court system, especially in the aftermath of cuts to legal aid. State intervention, therefore, seems unlikely to provide a holistic response.

Instead, it is clear that the more lasting solution rests in a multiplicity of options. For instance, there are perhaps gentle shifts in debate at the judicial level. For example, the recent court case of Akhter vs Khan (2018) resolved that a *nikāh*-only marriage should be considered a 'void marriage' rather than a 'non-marriage', which would make a Muslim marriage subject to laws of financial reparation in the case of marital

breakdown.[23] The verdict may yet be repealed, but it does indicate movement in legal thinking.

But major moves to resolution also have to come from within the community itself. And contrary to some portrayals, these contributions reveal that there is obviously considerable will from within the community to do this. The vast majority of our respondents, as well as our panellists who include two *imam*s and a panellist on a major Shariah council, argue that Muslims should register their marriages with the state and should remain cognisant of their rights and duties before the law. They also argue, explicitly or implicitly, that since the *nikāh*'s fundamental status in Islam is that of an official contract, so an Islamic marriage needs to be legally recognised if it is to be legitimate. And they are finding ways to align the parallel issuing of civil divorces and Islamic *khulå* separations. These are just a few examples of how community leaders are advocating the engagement of British Muslims with the legal system.

Our findings hint at various possibilities for aligning Islamic and civil laws, finding ways to make them work together as mutually cognisant systems of law in British Muslim society. It seems to be a debate that is only likely to continue.

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The Islamic Juridical Vacuum and Islamic Authorities' Role in Divorce Cases

Jesper Petersen[1]

Abstract

This article argues that Islamic authorities do not try to sustain a jurisdiction over Islamic divorce in Denmark. They respond to a juridical demand caused by the absence of Islamic legal institutions in Denmark, which I call the *Islamic juridical vacuum*. This vacuum entails that sharia is often defined locally in communities or families rather than by Islamic authorities, and when women are unable to obtain an Islamic divorce they turn to Islamic authorities for help. That is, in the absence of Islamic legal institutions they expect Islamic authorities such as imams and teachers in mosques to take the role of an Islamic judge upon themselves and issue Islamic divorces. However, Islamic authorities in Denmark have no formal legal power to issue divorces and they are often incapable of helping women whose husbands object to divorce. Therefore, some women end up in a type of marital captivity that Anika Liversage and I – with the Arabic word for marrigage, nikah – call *nikah-captivity* (Liversage and Petersen 2020).

It is often assumed in Danish public debates that imams uphold a sort of parallel legal jurisdiction centred around sharia courts (see for example Birk 2020, Borg 2016, Hedin 2017 or the documentary *Moskeerne bag Sløret*). The term sharia court (*shariadomstol*) implies that Islamic authorities uphold a jurisdiction, keep a registry of people's marital status, and that they can enforce their decisions. However, no such parallel legal system has been found by researchers anywhere in Europe. Instead researchers have found a variety of practices that in their most institutionalized form exist as sharia councils (Bano 2013; Bowen 2016). However, Islamic juridical practice is in most places characterised by the absence of institutions and there is no indication of monopolization of Islamic authority (Eijk 2019; Jaraba 2019; Liversage and Jensen 2011; Mustasaari 2018; Roald 2009). Even British sharia councils' performance is sometimes unstable and the losing party may threaten the scholars in the councils (Bowen 2016: 63, 88-102).

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1 Jesper is PhD in history of religions specialized in Islamic studies.

In this article, I will argue that Muslim immigration from countries with religious family law to Denmark has created an *Islamic juridical vacuum*, which has generated a demand for legal institutions that can assist women who want to divorce Islamically without their husbands' consent. No institution has so far filled the vacuum in Denmark and for this reason Islamic authorities such as imams and teachers in mosques are often called upon to take this role upon them. However, most Islamic authorities are reluctant to get involved and even if they do, they can't enforce their decisions. This means that there is no entity that lay down the rules of Islamic divorce, and thus the Islamic juridical vacuum produces a variety of practices that are often defined in the social networks in which they are practiced.

The article is based on 21 semi-structured interviews with Islamic authorities of whom 19 are male and 2 are women. Male informants are referred to as M followed by a number from 1-19 and female informants are referred to as F followed by 1 or 2. I made the interviews in 2018-19 as part of a research project led by Anika Liversage on Islamic divorce practice in Denmark at VIVE (The Danish Center for Social Science Research).

The informants' jurisprudential orientation is spread over Hanafi, Shafi'i, Maliki, Jafari, and a few informants are not following a school of interpretation (*madhab*).[2] Many Shia Muslims follow Jafari, but due to this school's historical development in close proximity with the Shafi'i school, which is a Sunni-school, the discussions regarding divorce are very similar between these branches of Sunni and Shia (Stewart 1998). Although the present study found that school of interpretation has a limited influence on how Muslims divorce, the Marja-institution had an influence on a few cases because their authority is not territorially confined (Liversage and Petersen 2020: 222-230).

An Islamic authority is defined as a person who in a community can speak with authority on Islam; some are imams, others are teachers while others again are in other ways recognized for their knowledge on Islam. The data from the interviews with imams and religious authorities have been triangulated with interviews with 37 women who have difficulty or who can't obtain an Islamic divorce (details on the sample, triangulation and further results of the project can be found in Liversage and Petersen 2020 and in Petersen and Vinding 2020).

2 See details on the sample in Liversagen and Petersen (2020) page 46-47.

The article starts with a brief introduction to *nikah* (Islamic marriage) followed by a short genealogy of Islamic divorce practice from sharia to Islamic law in the late 19th century. Today Muslims navigate three juridical spaces related to divorce: pre-modern sharia, Islamic law, and secular law. This genealogy is followed by an explanation of the current situation in Denmark where a segment of Muslim women is unable to obtain Islamic divorces. The last part of the article focus on overlaps between Danish law and sharia, and the effect sharia practice can have on the outcome of divorces cases under Danish law.

It should be stressed that there is a vast diversity in Islamic divorce practices in Denmark and that the informants for this article have been purposely selected because of their relation to the juridical vacuum (Bernard 2011: 147-155). That is, this article does not reflect normative Muslim practice in Denmark, it describes a segment of women who are unable to divorce Islamically.

Nikah – Islamic marriage

It is common for both Islamic authorities and a segment of religious Muslims in Denmark to make a distinction between nikah (Islamic marriage) and civil marriage. Imam M1 explains that this is a distinction between the Islamic and the secular:

> … nikah is not a human invention. It is a divine decree that came with the creation of Adam and Eve while the civil marriage was invented a century ago or something like that. So, it is obvious that the nikah which came by divine decree thousands and thousands of years ago is more important [than civil marriage]. (interview 27 April 2019).[3]

As imam M1 understands it, there is no overlap between Islamic and civil marriage. They constitute two separate marriages that regulate personal status: the nikah regulate personal status under sharia and civil marriage regulate personal status under Danish law. This conception of religious marriage is not unique to Muslims, it is also upheld by members of other religious minorities in Denmark such as a segment of the Jewish, Catholic, and Hindu communities (Liversage and Jensen 2011: 10; Liversage and Petersen 2020: 14 and 101-102).

3 Translated from Danish

There is no church in Islam and *nikah* (Islamic marriage) is therefore not a sacrament. That is, imams are not ordained by a religious institution to perform nikah. Within *fiqh* (Islamic jurisprudence) a nikah is merely a civil contract between two people: a groom puts an offer forth and the bride or her guardian (*wali*) accepts the offer (or vice versa) in front of two witnesses (Hallaq 2009: 271-280 and Vikør 2012: 300-309). The nikah renders a sexual relation between the bride and the groom free of sin, and in addition to this, nikah is seen as a highly recommended part of a good Muslim life. Imam M3 explains that:

> Marriage is a contract between two partners. That is, the state is not involved, the imam is not involved – the imam merely facilitates the conclusion of the marriage contract. He explains that you should say this, you say that, you say this, and there you go, you are married in front of two witnesses etc. It is not the imam who performs the marriage ceremony – he is in principle superfluous in the conclusion of a marriage. (interview 14 March 2019).[4]

It should be noted that even though there is no basis for it within the Islamic legal tradition many Muslims conceptualize the imam as a sort of Islamic priest whose ritual performance is needed to render a nikah valid. Similarly, the Danish law on religious communities outside the state-church § 15 (*Lov om trossamfund uden for folkekirken*) is based on a Christian conception of religion according to which marriage is a sacrament administered by a priesthood on behalf of a religious institution such as a church. That is, the Danish state issues marriage licences to imams as if they were ordained by a churchlike institution to perform an Islamic marriage ritual even though such a role does not exist in the Islamic legal tradition.

Sharia, Islamic law, and secular law

The historical origin of the distinction between nikah and civil marriage is important for the understanding of the current situation. In the 19th century Muslim majority countries adopted the model of European legal systems and this entailed a transition from pre-modern sharia to Islamic law that we still see the aftereffects of today in both Muslim majority countries and especially in Europe. The transition from pre-modern

4 Translated from Danish

to Islamic law entailed so fundamental changes to the conception of law that the former system is largely incomprehensible to people other than historians and legal scholars, or as professor Jakob Skovgaard-Petersen puts it: "today these [modern] legal institutions and procedures are so ingrained that people in the Muslim world, like us, can hardly imagine what a pre-modern legal system looked like before the modern territorial state" (Skovgaard-Petersen 2019).[5]

Sharia is conceptually a divinely revealed set of instruction on how to live a good Muslim life in accordance with God's commandments. These instructions cover rituals, ethics, instructions for everyday life, and an area that could be called pre-modern law. It is important to stress that there is no text or written document that contains the sharia; only God knows the sharia and humans are therefore destined to derive the sharia from sources such as the Qur'an, the narrations about Muhammed (hadith), and a range of other texts. Human attempts at deriving the sharia from the sources is called fiqh which means insight. Islamic legal scholars – or people with insights as they are called in Arabic (*fuqaha*) – belong to a range of different schools of interpretation and there are even disagreements over the correct interpretation of sharia within these schools (for an overview see Bakhtiar 1996). That is, fiqh is a discursive tradition rather than a fixed set of laws and this was the basis of pre-modern sharia practice within Islamic courts. It is important to notice that there were no common point of reference to a legal text for these courts. The individual Islamic judge (*qadi*) practiced his profession based on his insight into the discursive legal tradition that he was educated within (Hallaq 2009; Vikør 2012; Zubaida 2003).

The practice of marriage under pre-modern sharia was largely a private matter and often the nikah contracts were merely oral. Likewise, divorce was a private matter. A man who wanted to divorce could pronounce the *talaq*-divorce, which effectively terminated the marriage. If a woman wanted to divorce, this could be negotiated and the husband would receive a compensation for agreeing to a *khula*-divorce, which also terminated the marriage. Again, this was a private matter and no legal institutions were involved (for details see Hallaq 2009: 280-287 Vikør 2012: 309-316).

However, if disputes couldn't be handled in the private sphere, between families, or private arbitrators one could seek the assistance of the Islamic court. This was for

5 Translated from Danish.

example necessary if a husband had travelled abroad without returning and therefore effectively rendered his wife without maintenance and unable to marry another breadwinner. In the absence of her husband a woman – possibly a widowed woman – could not obtain her husband's consent to divorce and she therefore needed an Islamic judge who could issue the divorce. However, some schools of interpretation (*madhab*) like the Hanafi school would not allow such a legal action because this was seen as a violation of the husband's right to withhold consent. However, as professor Knut Vikør explains, Islamic judges would often be practical about this, and when Islamic judges from for example the Hanafi and Shafi'i school sat on the same court, the Hanafi judge would delegate this type of divorces to the Shafi'i judge:

> The Hanafi court has often accepted that this is a real weakness in their law, which has led to unacceptable hardship for women who through no fault of their own have lost their only realistic provider. When Hanafi and Shafi'i judges have worked in the same court, this has on occasion made them come to a tacit understanding: If such a case came before a Hanafi judge he would often excuse himself and let such cases go before his Shafi'i colleagues. The latter could then dissolve the marriage according to his school and the Hanafi judge would later accept this decision on the bases of reciprocal acceptance of verdicts made by the other schools. (Vikør 2012: 313-4).

This case demonstrates two important points: in the pre-modern courtroom sharia was applied as a discursive tradition with an eye on the practical effects of it and Islamic judges would accept each other's verdicts even though they themselves did not agree with the interpretation of sharia that formed the bases of it. Similar observations have been made by other scholars both historically and in contemporary practice (Bowen 2013: 138-155).

With the advent of European legal systems in large parts of the Muslim world in the 19th and 20th century, Islamic law was introduced as a replacement of pre-modern sharia. Legislators picked the most suitable interpretations of sharia and drafted Islamic legal codes that were implemented within a European inspired legal system. This drastically changed the practice of marriage and divorce because couples were now required to register their marriages and apply for divorce under Islamic law. That is, marriage and divorce were no longer a private matter, it was regulated under the

jurisdiction of an Islamic court system that could enforce its verdicts (See Otto 2010 for examples).

Some Muslim countries went even further and secularized the personal status law. On 4 October 1926 Turkey for example introduced a new family law based on the Swiss civil code, which replaced the former Islamic law, *Mecelle.* The new law constituted a clear break with the past by abolishing polygamy and making the sexes substantially equal in rights to divorce, but most importantly it transferred marriage and divorce from the domain of the Islamic clergy to a secular legal system. Marriages had to be registered with the state and divorce became subject to court rulings under secular personal status laws (Kocak 2010, 243). Because the transition from *Mecelle* to secular law in Turkey took place almost a century ago it has become part of the Turkish way of doing things, and Turks therefore tend to accept European divorces issued under European legal codes as Islamically valid (Liversage and Petersen 2020: 196; Roald 2009: 110).

However, a segment of Danish Muslims from countries that practice Islamic law such as Afghanistan, Pakistan, and most Arab countries do not accept the Islamic validity of divorce under secular law. It should be noticed that some immigrants from these countries do accept secular divorce as Islamically valid but so far, no research project has determined how many belong to either segment in Denmark. The absence of an Islamic legal institution has caused an Islamic juridical vacuum from which highly diverse Islamic legal practices emerge. Islamic authorities who get involved in Islamic divorces do not oppose Danish law, they accept that a divorce ruling by a Danish court changes a person's status under Danish law, but this is seen as unrelated to divorce according to sharia (Liversage and Petersen 2020: 196-200).

Immigrants continue their way of doing things after migration but school of thought typically plays a minor role. The majority of Turks and Pakistanis in Denmark for example belong to the Hanafi madhab but Turks typically use the Danish secular legal institutions to divorce, whereas segments of Pakistanis maintain the notion that an Islamic divorce is needed in addition to the secular divorce. This is because Pakistan use Islamic law whereas Turkey – as mentioned above – use secular law, and these ways of doing things are continued in the diaspora and in some cases inherited in modified versions by their children (see Liversage and Petersen 2020 for details).

The Islamic juridical vacuum in Denmark

Some Muslim countries have revised their Islamic legal codes so that women have access to divorce without their husband's consent, but even in countries where these revisions haven't been made, women have developed somewhat effective strategies for obtaining divorces without their husbands consent even though the legal system bestow unequal rights on the sexes (see for example Mir Hosseini 2000). However, in a Danish context these legal institutions do not exist, and this absence means that a segment of Muslims falls back on locally adapted understandings of pre-modern sharia as a way of regulating divorce as a private matter. Women therefore rely on their husbands consent if they want an Islamic divorce that is accepted socially but in cases of disputes there are no legal institutions that can hear their cases. For this reason, some women start searching for court-like institutions that can play the role of an Islamic court or Islamic authorities who can play the role of an Islamic judge. In other words, it is not the imam or Islamic religious authority who tries to uphold a jurisdiction, he is cast in the role of a sort of quasi Islamic judge by a demand among a segment of Muslim women (Liversage and Petersen 2020: 177-180). However, the interviewed Islamic authorities are well aware that they do not hold the institutional power to dissolve a marriage and for this reason most of them reject this casting and take the role as mediators instead. Islamic authorities are, furthermore, well aware of other issues of involving themselves in divorces such as security concerns, time constrains, and some do not see what Islamic divorce has to do with the imam-role.

Interestingly the juridical vacuum empowers the husband in a marital dispute in that his right to withhold divorce is not disputed by any legal institution. As it is now, a woman who wants an Islamic divorce without her husband's consent, finds herself in a legal vacuum with three paths that are unlikely to provide her with a stable Islamic divorce: 1) pre-modern sharia under which she may need her husband's consent to divorce. 2) provided that the marriage is registered under Islamic law abroad, she may be able – depending on the country in question – to obtain a divorce there. However, this will take time, be costly, and may require support from her family. 3) provided that she is also married to her husband under Danish law, she can obtain a divorce from the administrative unit that handles divorces, *Familieretshuset.* However, this divorce is unlikely to be accepted as Islamically valid in a community that does not understand secular law to have an effect on nikah.

Path two and three are not available to all women because they rely on prior registration of the marriage, and path one and three take place within the Islamic juridical vacuum and can therefore lead to unstable Islamic divorces. In practice, the rules for Islamic divorce are laid down locally in communities and sometimes just between families, and a woman's ability to obtain a divorce either by declaring it herself or declaring a secular divorce under Danish law valid depends on the resources she has available. In other words, as the field is structured as an Islamic juridical vacuum it is the local power dynamics that determine the rules by which Muslims divorce and often Islamic authorities will not become involved. Women with many resources such as family support, a strong network, education, job, proficiency in Danish or English, knowledge about their rights and how the Danish system works etc. are much more able to define the rules that regulate divorce and they merely declare themselves Islamically divorced. That is, they make a decision but its effect depends on whether they have the resources to "enforce" it. On the other hand, women who lack resources can become trapped in what is called *nikah-captivity* (a neologism coined in Liversage and Petersen 2020). However, as mentioned above, type 1 and 3 divorces are bound to be disputed and the outcome of them largely depends on how it is received by the woman's significant others and her community. Descendants' higher level of resources compared to immigrants' level of resources is the most important variable for explaining why descendants and converts in general are more able to Islamically divorce their husbands (Liversage and Petersen 2020: 17-18).

Type 1 and 3 divorces can be unstable in the sense that women may come in doubt as to whether they are valid, and this doubt may arise much later in life when they for example want to remarry. In rare cases this also holds true if the woman files her divorce petition in a British sharia council even though these decisions seems to meet widespread acceptance because of the British sharia councils' high degree of institutionalization. However, it should be noted that even though British sharia councils have achieved the highest degree of institutionalization in Europe, their performance is also unstable in some cases (Bowen 2016: 88ff.).

The role of religious authorities

The juridical vacuum puts pressure on imams and Islamic religious authorities to act even though they in many cases do not have the institutional power to issue divorces as speech acts (Austin 1975). The American anthropologist, John R. Bowen, suggests

that we in the context of sharia councils instead understand speech acts from the perspective of the French philosopher Jacques Derrida, who in his book *Limited Inc* argues that speech acts primarily are effective because of a pre-linguistic consensus that exists prior to them being pronounced (Bowen 2016: 88; Derrida 1977). That is, a religious authority can issue a divorce, but it will only be seen as valid if both the wife and the husband have the intention of divorcing. Otherwise it will be disputed and declared invalid by the disagreeing part. This means that the more a woman need the Islamic authority's assistance to obtain a divorce, the less he is able to do for her because his decision depends on the husband's acceptance of his claim to institutional power. Furthermore, it is often the women who do not have sufficient resource to Islamically divorce themselves who turn to the Islamic authorities, and as the effect of the authorities decision in many cases depends on the woman's resources they do are unlikely to have much effect. This inverse correlation is amplified by other variables such as security: if the woman is married to a violent husband, Islamic authorities will be more reluctant to get involved because of concern for their own and their family's safety. Stories about violent husbands are widespread among Danish Islamic authorities with the most extreme case being a husband who showed up in the mosque and put a gun to the head of an imam who had issued a divorce to his wife. It should be noted that even in Britain security is an issue. A scholar in Bradford for example had his house torched by a disgruntled husband after he had issued a divorce (Bowen 2016: 63).

Therefore, imams and religious authorities who choose to interfere on behalf of a woman in a divorce case first and foremost try to convince the husband to pronounce the divorce because this is the only viable way to create stable Islamic divorces without a legal institution. In other words, it is the husband who performs the speech act that terminates the marriage – not the imam (for a more detailed analysis of the related fiqh and its application in a Danish context see Petersen and Vinding 2020).

Divorce constitutes a problem for Islamic authorities because they are expected to make juridical evaluations without formal training in the relevant fiqh, and because their engagement in bad divorce cases as mere civilians without institutional power seldom have the intended effect. This is especially the case with type 2 divorces as a private person's decision in Denmark have no effect on a woman's personal status under the law of a foreign country. However, some women merely want an Islamic authority's assurance that she is divorced in the eyes of God, and some religious authorities feel obligated to do something for these women who find themselves in the Islamic juridical

vacuum as Imam M1 explains: "It is because somebody has to do it. You know, we can't just let people who have that kind of problems be stuck in limbo or leave them on their own. That is not okay." (interview 27 April 2019).[6] However, Imam M1 also explained that one has to be weary of helping too much because then it is rumoured that one can help and that attracts many more cases and all the problems that comes with them. Not all interviewees were as sympathetic as M1, but all agreed that the vacuum is a problem not just for the women, but also for the imams, religious authorities, and ultimately the Danish state.

When the interviewed Islamic authorities get involved in cases, they employ a number of strategies if men are reluctant to divorce. That is, they have ways of strategically trying to fill the vacuum by posing as a valid Islamic institution or in other ways produce divorces that are mistaken for "real" divorces. Others form ad-hoc divorce councils where a number of imams come together and issue a divorce which is typically written on a stamped paper with a letterhead. This spreads the security risk over several individuals and the divorce may hold a higher level of validity in the community when several prominent imams have signed it.

Some Islamic authorities comfort women by explaining that they are in fact Islamically divorced by referring to fatwas or arguments that either state that women have the right to unilateral divorce (Jaraba 2019: 85-6) or that a civil divorce constitutes an Islamic divorce (European Council for Fatwa and Research 2017). It should be noted, though, that these fatwas are disputed even though they come from such authorities as the sheikh of al-Azhar, which is one of the world's leading universities within Islamic studies, and the European Council of Fatwa and Research, which has several distinguished Islamic legal scholars on their board. One Danish imam has even written a 200+ pages argument for the Islamic validity of civil divorce in a Scandinavian context (Chendid 2015). However, a woman's ability to apply such a fatwa to her own case depends on her resources. In other words, even though an Islamic authority may apply such a fatwa in a conversation with a woman it does not necessarily have any effect on her social status as Islamically married or ability to divorce Islamically (see Jaraba 2019 for a typical case or Liversage and Petersen 2020: 73-74 and 196-199).

6 Translated from Danish.

These and similar fatwas' inefficiency underline that Islamic divorce is a matter of social dynamics in the web of relations around the Muslim woman who wants to divorce, and that Islamic authorities often have limited power in this web. In bad divorce cases the symbolic value of concepts related to Islamic marriage and divorce often merely constitute semantic resources, which are utilized – or weaponized[7] – in the coercive control of a woman, and men who exercise this coercive control will not let themselves be disarmed by an imam or other religious authority when they can choose to ignore them instead.

Attempts at resolving the issue of the juridical vacuum

There have been several attempts – especially in the last decade – to found a more permanent Islamic institution that can fill the juridical vacuum, but this has proven difficult due to the high demographic diversity among Danish Muslims. There is no common Islamic marriage and divorce practice among Danish Muslims, and it is therefore difficult to come to an agreement on a central Islamic authority that serves all Muslims such as the Jewish Beth Din or the Catholic Ecclesiastical council (Liversage and Jensen 2011: 26 and 44). The interviews with Islamic authorities demonstrate that a few divorce councils have existed for short periods of time, but they tend to disintegrate either due to internal disputes or the pressure from disgruntled husbands and families. It should also be noted that even if a divorce council has made a decision in a case this may not deter a man who is stalking his (ex)wife or engage in other kinds of post-separation violence. In other words, even though a decision by a divorce council holds a higher degree of validity its effect still depends on the woman's resources or ability to implement it. Some Islamic authorities refer women to British sharia councils or similar institutions abroad and a few help women write a good petition for divorce to these institutions.

The interviews and collection of juridical documents for the study, furthermore, demonstrates that some imams have started using nikah marriage contracts within which the bride has the right to divorce her husband. Likewise, some imams have started to write a clause into the contracts that delegates the power of declaring the marriage dissolved to the imam himself. These solutions constitute practical ways of

7 This term is coined by professor in Islamic studies, Jørgen S. Nielsen, but as he has not used it in writing yet I am unable to make a reference.

limiting the power of the husband in the juridical vacuum or making him share it with his wife. Even though these types of contracts are becoming increasingly popular, they are not widespread, and some couples even object to them.

Islamic divorce and Danish secular divorce

As explained above, none of the interviewed Islamic authorities see Islamic divorce practice as an infringement on Danish law because nikah and civil marriage are seen as two separate marriages. Some informants – as mentioned above – even argue Islamically for the Islamic validity of divorce under Danish law. However, conflicts can arise when it comes to child custody. All 21 interviewed Islamic authorities held the position that Muslims should follow Danish law. Imam M8 for example explains that:

> There are many [men] who says to me: "but in Islam we have the right to keep the children living with me – you know the ones who are older." I say: "*akhi* [my brother], we live in Denmark, we do not live in Saudi Arabia or Lebanon or Jordan. We live in Denmark; here it is Danish law that is the law." We are of course Muslims and we follow the word of Allah as well as we can, but legally we are under Danish law. We can't establish our own legal system in Denmark… (Interview 27 February 2019)[8]

The husband that imam M9 refers to makes a clear reference to pre-modern sharia and some versions of Islamic law under which children of a divorced couple belong to the mother until they reach puberty when custody is transferred to the husband (Hallaq 2009: 287-289). Although all 21 Islamic authorities acknowledge Danish law many also noted that men occasionally weaponize the talaq when they negotiate civil divorce. That is, they threaten to withhold the Islamic divorce if their wife does not agree to his terms in the settlement. These terms can be financial as K2 – one of the two female Islamic authorities – explains:

> The worst is that so many women jump on that wagon where they say: "But I just want to get rid of him, so I will give him what he wants". And also: "But I do not want anything from him – if we can just get

8 Translated from Danish.

> divorced". That is where I try to stop the woman and say: "Now, sit down and think. I know you want to get out of this marriage, and that you psychologically feel bad, but you should not leave this marriage without your *haqq* [justice]. You should not let him take it all." But unfortunately, that is often how it ends. The woman says: "I do not care, if I can just get out of it, he can have what he wants". And this is a distortion of women's rights… (Liversage & Petersen, 2020, p. 228)

As several other Islamic authorities K2 explains that men sometimes use sharia as it is defined in their own community to bargain a good divorce under Danish secular law. That is, they promise a stable divorce, which means that they will agree to an Islamic divorce with witnesses provided that the woman agree to a good settlement under secular law. It should be stressed that this study employs a qualitative method and therefore it cannot say anything about the extend of this practice.

Some men also use child custody as a bargaining tool in secular divorce cases. That is, the man can demand that his wife renounces custody of their shared children or another major sacrifice in return for his consent to Islamic divorce (cf. Jaraba 2019: 83-86). Because of this overlap between secular law and sharia – as it is defined locally within the Islamic juridical vacuum – some Muslims expect Islamic authorities to get involved as well because their arbitration or mediation in Islamic divorce cases can extend into an area that is regulated by Danish law. Some Islamic authorities engage in these discussions, but most stay out of them (see Liversage and Petersen 2020: 194-6 for details).

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The Cultural Adoption of Human Rights in a Local Context: A Case in Norway

Farhat Taj[1]

Abstract

Growing ethnic and cultural diversity in welfare states like Norway has created a gap between the legal rights and the social realities of vulnerable individuals in certain immigrant communities. Such growing diversity calls for innovative approaches to ensure the enjoyment of individual rights without generating unnecessary controversies regarding the cultural legitimacy of human rights. Combining legal literacy with vernacularisation strategies for the cultural adoption of human rights is an effective approach to promote and protect human rights in situations where individual rights seemingly clash with the authoritative interpretation of cultural norms and values. This article illustrates the said approach using a polygamy case in Norway handled by Pakwom, an Oslo-based immigrant-women's non-governmental organisation.

Introduction

Many non-governmental organisations (NGOs) around the world facilitate vulnerable people's access to basic human rights in contexts where law and culture overlap. Activists of grassroots NGOs are especially important when it comes to creating innovative ways to reconcile human rights with the relevant cultural contexts, a process that is known as the vernacularisation of human rights (Merry, 2006). This article argues that combining the vernacularisation of human rights (i.e. the cultural adaptability of human rights) with legal literacy is especially useful for addressing rights violations and protecting vulnerable individuals from social exclusion. This approach will be illustrated by a polygamy case handled by Pakwom, an Oslo-based Pakistani-immigrant NGO. The research on Pakwom used in this study was conducted as part of my PhD research at the University of Oslo (Taj, 2013).

1 Farhat Taj is Associate Professor at the Department of Child Welfare and Social Work, University of Tromsø, the Arctic University of Norway.

The article is structured as follows: part one contains the introduction, part two considers the conceptual and sociolegal context, part three provides the profile of Pakwom, part four describes the polygamy case, and part five discusses the polygamy case. The article ends with concluding comments.

The Conceptual and Sociolegal Context

Legal literacy, the vernacularisation of human rights, women's rights in Islam, and NGOs' advocacy of the vernacularisation of human rights are the conceptual and sociolegal considerations taken up in this article.

Legal Literacy

Legal literacy refers to a layperson's ability to understand the words used in a legal text, to draw conclusion from the said text and to use these conclusions to take appropriate action (Zariski, 2014, p. 22). Legal literacy is a strategic tool to develop rights awareness and the related skills to take appropriate action (Schuler & Kadirgamar-Rajasingham, 1992). It enhances individuals' capability to interactively engage with the law (Hellum & Taj, 2014). Access to legal information is also a human right. Legal and empirical information is important for understanding how the law interacts with social realities (Hellum & Köhler-Olsen, 2014). Such interaction indicates how the law could be used and vernacularised to protect and promote the human rights of vulnerable individuals.

The Vernacularisation and Framing of Human Rights

Vernacularisation refers to the processes of appropriating ideas and discourses from international human rights instruments and implementing them in local cultural practices (Merry, 2006). Vernacularisation reframes a human rights idea to make it function in a particular cultural context without having changing the core meaning of the idea.

The context of women's rights in Islam is one area where human rights could be vernacularised. Women's rights in Islam is a contested issue. Some scholars claim that notions rooted in Islam breach women's rights (Inglehart & Norris, 2003; McLoughlin, 2014), whereas Muslim feminists argue that Islam is compatible with human rights (Ali, 2000; Wadud, 2006). However, the fact remains that many dominant discourses on Islam are oppressive to women. The main issue is that Islam's authoritative discourse leaves little room for substantive changes even when the possibility for change exists

(Shahidian, 2002, p. 74). Nevertheless, it is neither advisable nor desirable to expect people to abandon their religion, in this case Islam, in order to enjoy human rights. A middle way has to be found that ensures reconciliation between the enjoyment of human rights and the religious legitimacy of the rights (An-Na'im, 1990).

NGOs and the Vernacularisation of Human Rights

Research shows that grassroots NGO activists have been successfully engaging with Islamic discourse, celebrations, signs, and symbols to legitimise their work for human rights within local Muslim cultural or religious contexts (Buehler, 2016; Jafar, 2007). The activists have found ways and means to use Islam as a resource for the promotion and protection of human rights. For example, religious women in Aceh, Indonesia's only province where the legal code is based on Islamic law, reconcile their understanding of women's rights with demands for gender equality based on international human rights law (Afrianty, 2015).

The vernacularisation of women's rights could be especially relevant for Muslim minorities in Western democracies, where some people believe that the laws of non-Muslim democratic states are not compatible with certain Islamic values, leading the people to prefer the prevalent understanding of Islamic norms over state law when it comes to family relations (De Kroon, 2016; Woodman, 2008). The law in Western democracies does not formally recognise any social norms that clash with the letter and the spirit of the law, including any such norms rooted in Islam. This means that certain Islam-based norms that are contrary to the law but still regulate social relations in some situations are merely a sociological fact. However, this sociological fact may undermine women's rights in certain situation (see Wærstad, 2006 for examples). In some Western countries with Muslim minorities, this sociological fact has also resulted in the emergence of informal Islamic institutions, such as the British Sharia Councils, where Muslim women's rights may be compromised during the processes of obtaining an 'Islamic divorce' (Bano, 2011). Such possibility of rights violation is especially relevant in cases where a violation may not be seen as a 'violation' according to the dominant Islamic discourses, such as the discourse about polygamy, which is permitted by many authoritative interpretations of Islam. This means that informal bodies, like the British Sharia Councils that often upheld traditional or dominant understanding of Islamic norms, may often not vernacularise women's human rights. In such situations, NGOs are one type of actor that can vernacularise human rights in secular Western democracies.

NGOs in Norway and the Vernacularisation of Human Rights

NGOs in Norway play an important social role as intermediary actors between vulnerable people and the welfare state (Loga, 2018). Assuming a broad view of 'law as culture'(Moore, 2001, p. 96) and a site of 'discursive struggle' (Shahid, 2007, p. 9), the Norwegian NGOs tend to avoid any activities that could potentially give the impression of a law-culture clash. The reason is that NGOs in Norway expect a part of their funding from and cooperation with the authorities in connection with their work. In fact, in welfare matters (including human rights matters), Norwegian NGOs showed an early dependence on the state in terms of finances and control (Selle, 1993). This implies that Norwegian NGOs are likely to abide by state law and unlikely to draw on any cultural norms that may seem contrary to Norwegian law. This also implies that the vernacularisation of human rights is not one of the NGOs' tasks in Norway. Nevertheless, one manifestation of the growing ethnic and cultural diversity in Norway is the fact that some NGOs do engage in the vernacularisation and framing of human rights (Taj, 2013). The aim of such NGOs is to adapt human rights to a specific minority's value system and, more concretely, to confront rights violations through advocacy and activism.

In many Western countries, the status of women' rights in Islam is an intense focus of research, yet little is known about how NGOs vernacularise women's rights in the context of Muslim minorities in welfare states with a non-Muslim majority, as is the case in Norway. To address said knowledge gap, this article discusses a polygamy case handled by Pakwom, an Oslo-based women's NGO, that involved a combination of vernacularisation and legal literacy.

Pakwom's Vernacularisation of Women's Rights Combined with Legal Literacy - A Profile

Pakwom is run by women of Pakistani background, referred to as Norwegian-Pakistanis in this article. The NGO's leader and caseworkers are all Norwegian Pakistanis. Pakwom works for the Norwegian-Pakistani women who are its members, but the NGO is also open to providing help and support to any non-member Norwegian-Pakistani woman who approaches it. Pakwom has 135 members, annually paying 300 Norwegian kroner (about 28 Euro) per person as the membership fee. The members come from various parts of the Punjab province in Pakistan, with most women belonging to the Jatt *bradary* (kinship group) and the Butt *bradary*. Most of them are Norwegian citizens,

some are permanent or temporary residents in Norway, some members have been living in Norway for approximately 25 years, and some have come to Norway more recently. Most members speak little-to-no Norwegian and are housewives. A few of the members are fluent in Norwegian and have jobs in the country.

Pakwom works to ensure the human rights of women who have little contact with the wider Norwegian society. It organises various activities, such as seminars, courses, group discussions, and picnics, among others, planned in consultation with its members. The NGO endorses the principles of self-help and empowerment. It frequently contacts the Norwegian welfare sector, including the Work and Welfare Management (known as Nav [Arbeids- og velferdsforvaltningen] in Norwegian), Social Services, the Child Welfare Services, schools, the police, crisis centres, hospitals, and municipal boards to procure the necessary help and support for its members.

Arguably, Pakwom's most important work to do with human rights is socio-legal, including consultations with an imam of a mosque, a law professor, and law students. Thus, the NGO selectively consults the imam of Pakmosque, an Oslo-based mosque run by Norwegian-Pakistanis, for spiritual and religious counselling regarding domestic problems. Pakwom also invites the feminist Islamic scholar Dr Shaheen Sardar Ali, professor of law at Warwick University in the UK and Professor II at Oslo University, to give interactive lectures in order to familiarise its members with a women-friendly interpretations of Islam and to improve their understanding of the plurality of legal norms in the Islamic legal tradition. Moreover, the NGO also engages law students from the Faculty of Law at the Oslo University for promoting legal literacy among its members.

Pakwom provides support to individual women struggling with marital problems to do with domestic violence and divorce-related family matters. The basic rule is that it is up to the woman to make her own decision concerning the marital problem, and Pakwom's role is to facilitate her decision-making processes by providing appropriate information, counselling, and moral and material support whenever possible and appropriate. Women approach Pakwom directly or with the help of family and friends who have contact with the NGO or its members. Frequently, Pakwom's own members become clients and seek the organisation's help with marital problems or other issues. In some of its reports, the NGO states that it is working to make women confident members of their own communities and of the wider Norwegian society. Pakwom's support

for individual women is the focus of this article and will be demonstrated through a polygamy case handled by the NGO.

The Polygamy Case

Asma, 45, has a primary school certificate from her village in Pakistan. She was married to her first cousin, a Norwegian citizen, who was interested in another woman. The marriage did not last long and ended with a divorce in Norway. The families (her parental family and that of the husband) married her off to the younger brother of her former husband, 10 years Asma's junior, who was also interested in another woman but agreed to the marriage due to familial pressure. Asma did not have any children and suffered a great deal of violence at the hands of her first and second husbands and in-laws. Her second husband married another woman in Pakistan while still legally married to Asma (he had applied for separation, but the marriage had not yet ended in a divorce under Norwegian law). She knew very few people in Norway. An acquaintance took Asma to Pakwom, which referred her to the Social Services, and the latter arranged a place of residence and some financial help for her.

Pakwom's leader is the caseworker for Asma's case, and she put me in contact with Asma, who agreed to participate in the research (Taj, 2013). I carried out two in-depth interviews with Asma at the Pakwom office. Additionally, during the one and a half years of fieldwork, I had seven informal discussions with Asma during the various social gatherings arranged by Pakwom for its members, such as *Eid* (Muslim festival) parties, *Milad* (the celebration Prophet Muhammad's birthday), cooking course, a Quran study course, a 17 May celebration (the national day of Norway), and a 14 August celebration (the national day of Pakistan). Moreover, I also had telephone discussions with the informant. Furthermore, at one point I facilitated the conversation between Asma and her Norwegian lawyer. Asma, whose Norwegian language skills are not good, requested me to accompany her to her lawyer in order to translate the conversation between the them. Asma and I (and other members of Pakwom) shared the same language, Urdu, in which we spoke to each other.

The leader of Pakwom came up the idea of relying on Norwegian law to help Asma, who, according to the leader of Pakwom, agreed 'following a face to face discussion that lasted for less than an hour'. The discussion also included a telephone conversation with a lawyer, in which the caseworker and Asma discussed the pros and cons of the

case with the lawyer. Pakwom hired a lawyer through the Social Services, who filed a polygamy case (hereafter referred to as the bigamy case because that was how the court documents classified it) in a Norwegian court on behalf of Asma. During the trial, Pakwom assisted the lawyer in preparing arguments – for example, by collecting material (marriage documents and video clips of marriage ceremony of the new marriage of Asma's husband) from Pakistan to substantiate the claim that Asma's husband had indeed entered a second marriage while still being married to Asma in Norway. The court punished Asma's husband for bigamy: 21 days in prison and a 7,000 kroner fine. The reason for the relatively 'lighter' punishment was the court's judgment that it was not his intention to be a bigamous man (it was he, not Asma, who had applied for the separation). His only breach of the Norwegian law was that 'he was too quick to remarry and did not wait for the legal termination of the marriage', Asma's lawyer explained.

After the court's decision, Asma looked confident and started to return to normal life. For example, she began actively looking for jobs. Pakwom was helped her with job applications, and finally she got a temporary position in a kindergarten. A year after the ruling, the leader of Pakwom, in consultation with Asma's mother, arranged a new marriage for her. Asma is now happily married to a man from Pakistan, who has joined her in Norway.

Discussion

Asma's case shows how grassroots NGOs negotiate contextual solutions to rights violations that arise due to law-culture overlap. The case highlights three important aspects of the contextual solution. The aspects, discussed in the following lines, provide useful empirical insights to advocacy groups for contextually addressing similar rights violations in Norway and elsewhere.

The Interconnectedness of Human Rights

This case underlines two important rights: the right to dignity and the right to equality in marriage. According to the Preamble and Article 1 of the Universal Declaration of Human Rights, dignity is a human right. The right to equality in marriage is established by Article 16 of the UN Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), ratified by Norway and now part of Norwegian law (i.e. the Norwegian Human Rights Act).

It was Asma herself who first pointed out to the case worker that the domestic violence that she had been through had violated her dignity. This is how she elaborated her position during an interview with me:

> They [her in-laws and her husband] beat me. They tortured me, physically and mentally. (...) They used to say I was a good-for-nothing, useless, mindless creature. (...) I descended into an inferiority complex. I have lost my *izat-e-nafs* [dignity]. I feel everyone in the world is better than me. I am good for nothing. (...) I have no children, not much formal schooling, and I can't speak the Norwegian language. I live alone. (...) The only thing that would restore my dignity is to get him [her second husband] behind bars. This will re-establish my confidence in myself. It will prove them [her second husband and her in-laws] wrong – their repeated assertion that I am good for nothing. It will prove to them and to their extended family that I can have goals and achieve them single-handedly.

After discussions with Asma, the leader of Pakwom concluded that Asma had a strong desire to restore her dignity by punishing her second husband and in-laws. 'The punishment', said the caseworker, 'has to be legal'. This led the caseworker to look for what she called an 'extraordinary possibility'. She found this possibility in Norwegian law, which bans bigamy. She said the following:

> I understood [from the discussions with Asma] that her dignity had suffered. (...) She wished to do something to restore her dignity. (...) I realised that something could come from Norwegian law, which bans bigamy. (...) Muslim law was not even an option because it permits bigamy.

Asma wanted to restore her right to dignity. Pakwom, in consultation with her, restored this right by invoking the right to equality in marriage. The right to equality in marriage was not an urgent objective for Asma. She might have compromised and accepted a co-wife if her in-laws and husband had not been abusive towards her over the years. In this sense, the case is neither a 'radical challenge to patriarchy' (Merry, 2006, p. 137) nor a fulfilment of the right to equality in marriage as demanded by the article 16 of CEDAW. Nevertheless, the case is remarkable in other respects. First, it demonstrates

how grassroots activists can use one human right, even if it is not the main objective in a given context, to achieve another right that is sought for by a vulnerable individual. In other words, activists can draw on the interconnectedness of human rights to realise the most appropriate contextual solutions to concrete human rights violations.

Legal Literacy

The case as whole underscores the usefulness of legal literacy as a strategic tool for meaningful engagement with the law. In other words, legal literacy facilitates the use of the law as a resource by both activists and vulnerable individuals (Hellum & Taj, 2014). The Pakwom caseworker, who has a basic knowledge and understanding of Norwegian law and human rights, shared the relevant legal information with Asma, who eventually chose to proceed with the bigamy case. In the process, Pakwom also facilitated another human right for Asma: access to legal information. In other words, the caseworker successfully imparted a part of her legal literacy to Asma, which Asma used to arrive at a contextual remedy for the rights violations she was facing.

Moreover, the bigamy case established a successful example that inspired other women in Pakwom to acquire legal literacy. It motivated the women who had concrete family problems to acquire and understand information about their rights according to Norwegian law. Some even began to claim their rights via court cases and/or by contacting the relevant branches of the welfare system. Following the successful outcome of the bigamy case, some other women who had been living in polygamous marriages approached Pakwom for consultations. Overall, the case brought a sense of confidence, success, and pride to the Pakwom caseworkers in relation to their work on human rights and resulted in a desire among the members of Pakwom to learn more about human rights in the Norwegian law.

The Vernacularisation of Human Rights

During the initial discussions leading to the lawsuit, no attempt was made by the caseworker or Asma to construct an Islamic argument in support of the legal case. Asma had already learnt in the Pakwom discussions about the multiplicity of interpretations on polygamy in Islam. There was no conceptual hurdle in Asma's mind preventing her from invoking Norwegian law. 'I was so happy when I came to know that I can teach a lesson to my in-laws and husband through Norwegian law', Asma responded when I asked her what was on her mind when she went home after the discussion with the leader of Pakwom during which they decided to rely on Norwegian law. Unlike in some

other cases, when the religious opinion of Pakmosque's imam is sought, the leader of Pakwom and Asma decided to use Norwegian law without consulting the imam. The leader of Pakwom explained as follows:

> We knew what the imam would say. He would say, what is the problem? Polygamy is legal in Islam. There is no violation of God's law in this bigamy case. (...) There can be no punishment for polygamy. (...) Bearing in mind her [Asma's] situation and her desire to restore her dignity, she and I agreed to keep the imam out of the issue. This is what we did all the way through in her [Asma's] case.

Although Asma and the leader of Pakwom never engaged with the imam of Pakmosque before and after the lawsuit had been filed, they did discuss articulating an 'Islamic' argument in defence of their decision in order to counter any potential objections by someone in Asma's family or community. When Asma and the leader of Pakwom decided to keep the imam out of the case, they knew that polygamy is a disputed issue in Islam and that there are different interpretations of the Quranic verses regarding polygamy. Asma had come to know about the controversies regarding polygamy in the Islamic legal tradition during the seminars with Professor Shaheen Ali, which were arranged by Pakwom as part of the legal-literacy programs for its member.

Moreover, by drawing on the insights from the legal-literacy discussions at Pakwom, Asma could also link Islam and citizenship responsibilities from an Islamic perspective in order to justify the decision to sue her husband. Asma explained it to me in a conversation as follows:

> Author: 'Your husband's marriage is legal under Islamic law. You said that you are a devoted Muslim person. He has not violated Islam. Why would you punish him for something that Islam permits him to do?'
>
> Asma: 'Islam may permit it. But Norwegian law does not. He is a citizen of Norway and lives in Norway. He must not violate the law of Norway. But he did. Any citizen of this country who violates the law of this country must face the law, and so must he.'

> Author: 'So, you delink Islam from the whole issue. Islam is irrelevant in this matter.'
>
> Asma: 'No, Islam is relevant. The religion of Islam that I understand does not oblige its followers to violate the law of a country that they have freely chosen to live in.

Asma's argument that Islam does not allow Muslims to violate the laws of their freely chosen country goes to the heart of the debate initiated by some contemporary Muslim scholars. For example, Dr. Shaheen Sardar Ali argues that for the Muslim immigrants in Europe, the continent is '*dar-al-sulh*', the land of peace (Ali, 2007, pp. 65–72). Ali (p. 71) argues that from an Islamic perspective, there is no hurdle for Muslims in Europe to engage with and follow the laws of European states, including family laws. This underscores, in relation to the bigamy case discussed, that choosing an interpretation of Islam that is compatible with the Norwegian ban on bigamy and linking Islam to citizenship responsibilities to justify the decision to sue Asma's husband for bigamy can be viewed as an act of the vernacularisation (i.e. cultural adoption) of Norwegian law.

In this manner, the Pakwom leader and Asma developed an Islamic argument in defence of the lawsuit when the court proceeding was well underway. While developing this Islamic argument, neither Asma nor the caseworker perceived any specific challenge that could come from the wider Norwegian-Pakistani community regarding their decision to go to the Norwegian court. However, they did anticipate a reaction from Asma's in-laws and the people close to them, who were displeased and disturbed by her reliance on Norwegian law. Thus, the vernacularisation of Asma's decision to go to court and of the subsequent court decision using Islamic discourse was a conscious attempt to pre-empt religion-based opposition initiated by the in-laws and the people close to them with *mala fide* intentions. Asma and the leader of Pakwom were right to anticipate such a reaction. Some months after the court decision, both Asma and the Pakwom leader confirmed to me that there was no public criticism of the decision in the community and that the only people who criticized her decision and the court's ruling were Asma's former in-laws and the people closed to them, who did so because they disliked her rather than due to their religious convictions. Unconcerned relatives and community members objected neither to her decision to sue her husband under Norwegian law nor to the court's decision.

Conclusion

One consequence of the growing ethnic and cultural diversity in Norway and other Western countries is the law-culture overlap that may, in certain situations, compromise human rights. This requires innovative approaches to protect and promote the human rights of vulnerable individuals. Grassroots NGOs, such as Pakwom, in close consultations with the vulnerable individuals, are negotiating contextual solutions that draw on law and culture as resources to remedy the rights violations. The NGOs' approaches provide relevant empirical and contextual insights that should be explored in further research so that others can, where appropriate, benefit from their innovative work.

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In What Sense is Islamic Religious Law Legally Recognised in Denmark?

Niels Valdemar Vinding[1]

Abstract

Following recent scholarly discussions on what kinds of religious law are accepted and recognised by state and the secular legal order, this article examines and discusses if and how sharia – understood as Islamic law, ethics and practice – may be considered legally recognised in Denmark. The question has both scholarly, legal and political implications, as well as a long history. The Danish context of recognition of religious communities is introduced, with some historical remarks, but this article takes a practical and empirical point of view in recent Danish legislation of recognition of religious communities and examines the specific articles of association and supporting documents that form the basis of legal recognition. The article introduces a short conceptual and theoretical discussion of what legal recognition implies and how to understand legal recognition as the mutual establishment of legal facts. The articles tests the question of legal recognition looking at empirical case evidence, key aspects and analysis of Islamic religious law in 25 recognised Islamic religious communities in Denmark. Legal recognition has important but limited implication, which should not be overstated, but the article does conclude that sharia is recognised as part of the material basis of the recognition regime in Denmark.

Introduction: The problem and its context

In his recent book, *Comparative Religious Law – Judaism, Christianity, Islam,* prof. Norman Doe critically tests a number of public, political and legal assumptions about the role and place of religious law in Britain (Doe 2018). The book surveys the primary and secondary religious law of Christians, Jews and Muslims, that is, first, the traditional, historical or classical sources of religious law and, secondly, the modern regulatory and legal instruments of Christian, Jewish, and Muslim religious

1 Niels Valdemar Vinding is postdoc at the Department of Cross-Cultural and Regional Studies, University of Copenhagen.

organisations, in their constitutions, articles of association or other foundational legal documents (Doe 2018, 3). The book also sets out to examine how and to what extent religious organisations in these documents address the applicability of civil law to their faithful. Most interestingly, the book seeks to assess which elements of "religious law are recognised expressly or tacitly by the civil law of the State and its institutions" (Doe 2018, 3). Norman Doe is well aware that this has the potential for – and is actively encouraging – political debate and increased awareness about the actual state of affairs of religious law. This is perhaps most significant in the potential for understanding the extent and reach of recognition of sharia – Islamic religious law, ethics and practice – that are implicit or explicit in the constitutional documents of the recognised communities.

Norman Doe's conclusions are ten-fold and extensive (Doe 2018, 388-398). The first three, however, seems most relevant for the controversy regarding Islamic religious law. He firstly concludes that "religious law exists as legal fact in society today, [and is used] in a wide range of areas in the lives of the faithful" (Ibid., 388). Secondly, misgivings about a lack of obedience to state law or jurisdictional controversies are refuted as he concludes that "all three faiths have a *general* jurisprudence on the submission of the faithful to law of the state," (Ibid., 389) and that "Muslim organisations incorporate, or defer expressly to, elements of civil law" (Ibid., 389). Thirdly, the place of religious law in society is clearly understood as based on reciprocity, as to "elements of religious law, and/or decisions of religious authorities are recognised either expressly or tacitly by the civil law of the State and its institutions." (Ibid., 389).[2]

Although Doe's *Comparative Religious Law – Judaism, Christianity, Islam* is centrally concerned with recognition, it does not touch much upon the conceptual understanding of legal recognition but Norman Doe has done so earlier, where he discusses the different modes of recognition across Europe." Behold fodnoten.[3] Looking to a Danish context, the circumstances regarding legal recognition for religious

2 This question echoes, and Doe also references the controversy, the lecture by Rowan Williams, "Civil and Religious Law in England: A Religious Perspective," where Williams points to "the presence of communities that, while no less 'law-abiding' than the rest of the population, relate to something other than the British legal system alone. Cf., Williams, Rowan, "Civil and Religious Law in England: A Religious Perspective," *Ecclesiastical Law Journal*, Volume 10, Issue 03, September 2008, pp. 262-282

3 Cf., Doe, Norman, "Chapter 5: The Legal Position of Religious Organisations" in: Doe, Norman, *Law and Religion in Europe: A Comparative Introduction*, Oxford: Oxford University Press 2011, pp. 96-97.

communities have been changed from 1 January 2018, and considering Norman Doe's questions and conclusions, this is an excellent occasion for a renewed study of recognition of Islamic religious communities in Denmark. Thus, the research questions to be examined in this article are: What is the material substance of legal recognition of religious communities in Denmark, in specific, of Islamic communities? Is it theoretically and empirically possible to trace Norman Doe's steps and see if his three initial conclusions also apply in Denmark? And what does the empirical basis of recognition of Islamic religious communities in Denmark say about the relation between the Danish state and the Islamic communities?

This article opens with a short conceptual and theoretical discussion of what legal recognition implies and how to understand legal recognition, specifically, as opposed to trends in political philosophy that focuses on 'politics of recognition.'[4]

At greater length, the Danish context of recognition of religious communities is introduced, with some historical remarks, but returning to the recent legislative changes in Denmark, in particular, the 2017 *Act on Religious Communities outside the Church of Denmark* and the 2018 *Executive Order on the Registry of Religious Communities*.

Following the introduction to the new system of recognition and registration, an attempt is made to test the recognition question by looking at empirical case evidence, key aspects and analysis of Islamic religious law in 25 recognised Islamic religious communities in Denmark. These 25 communities have in the last 18 months after the law came into force uploaded their financial records, articles of association, central rituals and basic doctrines of faith unto the webpage of the Registry of Religious Communities. This material totals 162 documents and 979 pages and this empirical material is examined in the analysis of six relevant aspects of Islamic religious law.

Finally, the research questions regarding the understanding of sharia as legal fact in Denmark and the noteworthy implications of legal recognition are discussed, and conclusions are drawn on the material substance of legal recognition of Islamic religious communities in Denmark.

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4 C.f., Taylor, Charles. "The politics of recognition." *New contexts of Canadian criticism* 98 (1997): 25-73, or, Modood, Tariq. "Anti-essentialism, multiculturalism and the 'recognition' of religious groups." *Journal of Political Philosophy* 6.4 (1998): 378-399.

Concept and theoretical observations on legal recognition

Recognition may be many things and indeed the literature on philosophical, psychological, political and legal aspects of recognition is vast. For the present purpose, I will consider the normative aspects of recognition as distinct from recognition as intellectual or cognitive understanding of facts or impressions, and as distinct from recognition as mere identification or as a reconfirmation of such understood facts and impressions. Or even, in opposition to historical laws and policies of toleration that were very much tools of one-sided supremacy (Samuels 1981, 246).

A precise, albeit conceptual, definition of recognition is proposed by Heikki Ikäheimo as "always a case of A taking B as C in the dimension of D, and B taking A as a relevant judge" (Ikäheimo 2002, 450). For the present purpose, it may be tentatively phrased along the lines of, "Danish authorities (A) taking Islamic communities (B) as Recognised Religious Communities (C) in the dimension of the relevant criteria and requirements according to law (D), and the Islamic communities (B) take Danish authorities (A) as relevant judges." Here, both identification ('B' as 'C') and judgement ('A' taking 'B') is implied.

Criticising this, it has been discussed if recognition should not be understood more widely than this, merely as proper or adequate regard or acknowledgement? However, as discussed by Paddy McQueen recognition must be understood more specifically, as "it requires not only that someone be recognised by another, but that the person being recognised judges that the recogniser is capable of conferring recognition" (McQueen 2011). By the very nature of the normative aspects of recognition, it seems mutual or reciprocal relations in recognition must be included, exactly because normativity is indeed relational and interpersonal, and recognition expresses a fundamental normative assessment in social relations.

From this question of a wider social or political versus a narrower legal understanding of recognition, two related precepts must be remembered. Firstly, a politically governed state may in its legislation assume only to recognise as adequate regard or toleration, and not engage in any mutual commitment. That is part of sovereignty and speaks to any state's freedom to commit itself. Secondly, however, in any inter-relational context, this does not satisfy the very basic criteria of what constitutes a right and rule of law. If a state does commit itself to protect rights, it takes upon itself an obligation, establishing a mutually committed relationship through those rights. In the rule of law discussions

of the 20th century, the focus on legal recognition as a basis of rights and legislation have been prevailing. Both Hans Kelsen and H.L.A. Hart discussed important aspects of legal recognition.

Kelsen, in his article on 'Recognition in international law,' argues that in simple terms the act of legal recognition is an establishment of fact, and that recognition must be "the establishment of the fact that a given community has satisfied [particular] conditions" (Kelsen 1941, 608). A court recognises a legally relevant fact; "Only by the act of recognition does it come legally into existence in relation to the recognizing […]" (Ibid.). A complex discussion of legal facts may be entirely relevant at this point but suffice it to highlight that usually or most commonly, courts and other ruling bodies establish legal facts. They make explicit that something is, in legal terms. Specifically, that something is recognised by the courts, means that the courts see it, and that it is admissible, legal, valid, or to be taken into consideration, and so on by the judges or authorities in power. In recognition of religious communities, authorities see whether they are in legal accordance with the definitions in the law and that it has satisfied particular conditions, to paraphrase Kelsen. A misunderstanding at this point would be to assume that the judges or authorities make such communities come into existence, produce them, or give them legal personality. That is not the case. As such, they recognise the factual state of the particular conditions of the communities, in relation to the law, that is the *Act on Religious Communities outside the Church of Denmark*.

H.L.A. Hart, however, holds that legal recognition is what makes norms (laws, in particular) valid, rather than just power-conferring, imperatives or commandment norms (Hart 1961, 92).[5] Hart analyses the second-order rules of recognition, which he sees as integral to the constitution of a legal system. The core of legal recognition is to acknowledge soundness, justice and validity, and as such subjects of a law will adhere to it if the judiciary maintains its legality, and the judiciary will maintain a law that the subjects of the law recognises as legitimate. In that sense, recognition is a kind of performative construction or mutual agreement on an order or set of facts (Ibid., 97). Considering both Kelsen and Hart, we might say that legal recognition is bringing legal facts into existence by mutual agreement and qualified reciprocity.

5 In Hart's legal philosophy these are the rules of change and rules of adjudication, and they prescribe the proper and just use of power and how to enact new laws without revolution and how to punish crimes. These are the powerconferring norms that enable one norm to sanction another, that is, be imposable by the judiciary and enactable by the executive.

This brings us inevitably to the question, of what recognition implies. A human being is recognised by dignity. A state is recognised by sovereignty. A law is recognised by validity. What is the material object for religious communities that is recognised, and what indeed are the objective criteria that needs to be met in order to be recognised as part of that appropriate normative category?

This is the core question of the present endeavour, as we find in the overall definition and from the conceptual discussion that recognition is deeply embedded in the complex social nature of law and politics. It is also exactly here we find the sources of this recognition: in the recent politically enacted *Act on the Religious Communities outside the Church of Denmark* and in the relationship of that legislation with the autonomous and recognised expressions of religious law embedded in religious communities' articles of association, constitutions and codes of faith.

Legal recognition in the Danish context, past and present

Recently, the question of explicit or implicit recognition of the religious law – here, Islamic religious law, specifically – has re-emerged in Denmark. Following several decades of discussion on religious communities, generally, and also, specifically the nature, moral and law of Islamic communities, in December 2017, a bill was passed in the Danish Parliament (*Folketing*) that collected and clarified rights and privileges concerning the affairs of religious communities outside the Evangelical-Lutheran Church of Denmark. In many ways, this bill ratified many of the existing executive practices in Denmark and gave clear and explicit language to the expectations and privileges of religious communities. Taking effect on 1st January 2018, this new *Act on Religious Communities outside the Church of Denmark*[6] sets the frame for state and religion relations in Denmark, and it does so by making the executive instruments that confers recognition upon dissenting religious communities part of statutory law.

Legal recognition in the past

As a starting point, the Danish Constitutional Act from 1849 sets the legal frame of the relationship between the state, the Church of Denmark and 'the religious communities other than the Evangelical-Lutheran Church of Denmark,' as they are

6 Lov om trossamfund uden for folkekirken, LOV 1533, 19/12/2017, https://www.retsinformation.dk/Forms/r0710.aspx?id=196402 accessed 6 January 2019.

referred to in Article 69.[7] While the constitution has been amended since – most significantly with the introduction of parliamentary sovereignty in 1901 – it seems that the "constitutional law governing relations between State, Church and Religions has not been changed in the 160 years since 1849" (Christoffersen 2010, 147). As for fundamental principles, the constitution guarantees freedom of religion and belief as long as nothing is taught that goes against morality or public order, and there is no legal requirement in Denmark to register or be approved in matters of belief, faith or religion (article 67). Denmark remains secular in the sense that at no point is religion required in interaction with the public or state.

Concerning minority religion and dissenting religious communities in Denmark, article 69 of the constitution enables Parliament to regulate other religious communities: "The affairs of religious communities other than the Evangelical-Lutheran Church of Denmark are regulated by an Act," (*My Constitutional Act* 2012, 39). The English translation is more benevolent than the original Danish, which has the word 'deviant' rather than 'other' in defining the relationship to state, speaking indirectly to the special relationship with the Evangelical-Lutheran Church of Denmark. In the constitutional drafting drafting, it was left to the young Parliament to act on this article, but the promise was never fulfilled. For years, rules and regulations to recognise and approve religious clergy and communities to perform ceremonies and weddings were left to the executive practice of the Ministry of Ecclesiastical Affairs and other ministries to govern executively *ad hoc* and as part of public law, that is, not specific ecclesiastical law (Roesen 1976, 353ff). This was changed with the 2018 statute.

As part of the preliminary work for the draft of the Act, a committee was set up to prepare a white paper on the legislative potential for enacting the fulfilment of the constitutional promise in article 69 (*Betænkning 1564,* 2017). From February 2015 to February 2017, this religious community committee held 15 meetings and invited several of the recognised and approved congregations and religious communities to discuss their work and progress. In their white paper, the committee discussed in some detail the idea and meaning of 'recognition' in the Danish context, as it ties the legal position of religious communities closely to the right to officiate marriages with civic legal validity. On legal recognition of religious communities, the committee writes;

7 The Danish Parliament has published a semi-official English translation of the constitution, My Constitutional Act (2012) with explanations by and in consultation with Supreme Court Judge, Jens Peter Christensen.

> Recognition as a religious community gives the religious community special economic privileges and the possibility of being delegated public jurisdictional authority in the right to officiate marriage with civic legal validity. This Committee understands that, in return for these special rights, the state may require the religious community to function in a way that meets - and at least is not in direct contradiction to - fundamental societal values, including democratic ideals, as well as the fundamental principles of law applicable to the exercise of public authority (*Betænkning 1564*, 38).

The idea of reciprocity in recognition is clear in the language of for 'rights,' state 'in return' 'may require.' Specifically, it echoes the existing executive practice as conducted by the so-called Advisory Committee on Religious Communities. However, the conceptual understanding of legal recognition for religious communities originates much earlier in Danish legal history.

August Roesen, who was permanent secretary at the Ministry for Ecclesiastical Affairs from 1964 to 1979, gives one of the fullest expositions of a legal understanding of recognition of religious communities. In his *Danish Ecclesiastical Law,* he traces the idea of legal recognition back to the idea of tolerance, and notes that as a general rule, it was illegal to confess to any other religion than the Evangelical-Lutheran, which of course echoes the *cuius regio, ejus religio* ["whose realm, his religion"] principle. However, a few places in the Danish realm and Schleswigian duchy, as in Fredericia and Frederiksstad,[8] Reformed, Catholic and Jewish dissidents were allowed by royal decree to celebrate baptisms and marriages as long as they remained loyal and obedient subjects. The Jewish community, e.g., was recognised already in 1685. The original Danish constitution from 1849 in fact distinguishes between recognised and other religious communities, and when Methodists in 1862 sought recognition, the Ministry of Ecclesiastical Affairs had to unfold what recognition meant. Strictly speaking at the time, only the Church of Denmark was recognised by law – by the constitution – and no statute was given, and no executive recognition existed. Lisbet Christoffersen argues that 'official recognition,' that is legal recognition based in the constitution, was – before 2018 – limited to the

8 Both cities are named after their founding prince, Frederik. However, they were two different men, not to be mistaken. Fredericia was founded by Danish King Frederik the 3rd (1609-1670) in 1650 and Frederiksstad was founded in 1621 by Frederik the 3rd, Duke of Slesvig-Holsten-Gottorp (1597-1659).

Church of Denmark in the identification with the Evangelical-Lutheran faith in Article 4 of the Constitutional Act. This 'recognition' means recognition of the Danish state's explicit responsibility towards the specific church that is the majority church of the people in Denmark – and only as long as it remains a majority church.[9] The ministry explained recognition with specific criteria regarding morality, public order, theological and organisational firmness.[10] In the language of the ministry at the time, it is these criteria that leads to 'Eligibility to be acknowledged as an independent ecclesiastical community (Heide-Jørgensen 2002, 282). Here the word for acknowledge in Danish is '*erkende,*' which is integral in the word for recognition, '*anerkendelse*,' and echoes the English (and Latin) 'cognition' and 'recognition.' From this, the notion of legal recognition in the Danish context develops. It is an understanding of factual conditions that is linked to a sanction or approval of those conditions by an active act of the king or authorities, which is the actual recognition that brings with it certain rights or privileges guaranteed by the king or authorities.

Axel Honneth, who has studied recognition most thoroughly, points out that visibility and cognition are the prerequisites for the acknowledged or esteem, as the operative idea in recognition. Recognition is an active and expressive act that shows the recognised that they are indeed seen and that they are worthy of solidarity and community (Honneth 2003, 98ff). As demonstrated historically and in the recent white paper, legal recognition in the Danish context is not just an acknowledgment of the beliefs of religious communities or their mere existence, but an acknowledgment of a reciprocal (although not equal) relationship between state and the concrete religious community. This relationship is rooted in the delegation of authority and is characterised by the condition that privileges can be revoked if the communities do not live up to criteria or comply with requirements.

9 Christoffersen, Lisbet, "Religion and State: Recognition of Islam and Related Legislation," in Nielsen, J.S. (ed.), *Islam in Denmark. The Challenge of Diversity,* Lanham, MD: Lexington, 2012, p. 76.

10 C.f. Norman Doe's summary list of criteria requires religious groups to satisfy for recognition in terms of "size, beliefs, statutes, rites, and the compatibility of these with State law." Doe 2011, 101.

Legal recognition in the present

For the practical question of legal recognition of religious communities in Denmark, the 2018 statute introduces two new, significant ideas; recognition by ministerial ordinance and a registry of religious communities.

Firstly, for dissenting communities there is now just one category; recognised by ministerial ordinance. Before 1970, a total of 11 religious communities were recognised by royal decree, and with the Marriage Act of 1970, the ministry was given competence to approve by ministerial ordinance, and recognition by royal decree was no longer used. The legal effects of these two tiers were comparable, but symbolically seen as much different.[11] In specific terms, the Act[12] specifies that,

> § 7. A religious community can be registered as a recognised religious community, if it:
>
> 1. has at least 50 permanent members who either have a permanent residence in Denmark or Danish nationality, and
> 2. does not encourage or do anything that violates the provisions of law or regulations laid down by law.
>
> *Subsection 2*. The request for recognition shall include the following information:
>
> 1. Name and home of the religious community.
> 2. Number of adult members of the religious community.
> 3. The Articles of Association of the religious community.
> 4. Name and address of the contact person who is responsible in relation to the Religious Register.
> 5. A text that expresses, describes or refers to the foundation of faith or doctrine in the religion of the religious community. .

11 Former Supreme Court Justice, Henrik Zahle, said of the Danish tier structure, that "The current Danish regulation of religious communities outside the Church of Denmark is not satisfactory. The - alternating – differential treatment of 1) Church of Denmark, 2) recognised religious communities and 3) approved religious communities seems hardly sustainable." Zahle, Henrik. *Dansk Forfatningsret*, 3. udgave, DJØF Forlag 2003.

12 Lov om trossamfund uden for folkekirken, LOV1533, 19/12/2017, https://www.retsinformation.dk/Forms/r0710.aspx?id=196402 accessed 6 January 2019.

6. Documentation or description of the religious rituals of the religious community.
7. The most recent financial statements, which must be audited and give a true and fair view of the financial situation of the religious community.

The second idea is that now there is a legal framework for revoking the recognition, if the religious community no longer lives up to the specified criteria. This has been theorised as an option that the ministry has always had, but there have been no cases, and there were never any control or inspection with the communities. Therefore, the new Act puts into effect a Registry of Religious Communities (Art 7, subsection 4: "Recognition is listed in the Registry of Religions Communities, which is allocated to the Ministry of Ecclesiastical Affairs"). Furthermore, it sets up a number of continuing requirements that the communities must adhere to, including annual reports as well as submitting their constitutions or articles of association to the ministry. This is regulated by the executive order on the Registry of Religious Communities from 15 November 2018,[13] which specifies that,

> § 3. The purpose of the religious community register is to ensure easier access to insight into which religious communities are recognised and which congregations are covered by a religious community›s recognition, and insight into their economic and organisational conditions.
>
> § 4. When a religious community with any associated congregations have been recognised, the Ministry of Church Affairs establishes a separate 'page' for religious communities and the individual congregation in the religious community register, which gives the religious community and possibly associated congregations the right to report information on the matters specified in sections 10 and 11.

In effect, this means that at the end of the 18-month grace period offered by the ministry, ending 9 September 2019, some 25 of about 28 recognised Islamic religious

13 *Executive order on the Registry of Religious Communities* 15/11/2018, https://www.retsinformation.dk/Forms/R0710.aspx?id=204953 accessed 6 January 2019.

communities have uploaded their financial statements, articles of association, a description of their central rituals and a statement of their basic doctrines of faith.

Returning to the overall question of whether Islamic religious law is recognised, we now know that both in the theoretical and in the Danish historical discussion recognition implies reciprocity, that the religious communities are understood as legal fact, and that there are explicit standards and criteria that must be met. Simply put, being recognised means being recognised *as* something, i.e., a religious community, and recognised *for* something, namely the material content referred to in statute and executive order. These criteria are the same for all who apply, be they Christian, Jewish, Muslim or any other faith, but as Norman Doe notes in his preface, these facts and equal criteria have much different political reception, with sharia being the most controversial (Doe 2018, viii).

Testing the cases: empirical evidence, key aspects and analysis of Islamic religious law

The second main part of this article pursues an exploratory study into the material content of the Islamic religious communities in Denmark.

The material

The ministry had defined a gracious timeframe for the all recognised religious communities to meet the requirements, so that the documents of all of the 28 recognised Islamic religious communities would be available online. As of 9 September 2019, 25 communities that are now considered recognised have uploaded their financial statements, articles of association, central rituals and basic doctrines of faith unto a webpage, which is the Registry of Religious Communities' public list of recognised religious communities.[14] The material of these 25 communities is the empirical basis of this paper – a material of some 162 documents in 979 pages.

14 This is the general page of the Registry for Religious Communities, and it has both a selection option for religious denominations, http://www.km.dk/andre-trossamfund/trossamfundsregistret/liste-over-anerkendte-trossamfund-ogtilknyttede-menigheder/ accessed 6 January 2019.

Key aspects

In order to analyse the material content of the Islamic religious law as explicit or implicit in the documents, six analytical key aspects are defined and sought in the material.

To understand the recognition of the Islamic religious law, it seems necessary to operationalise what we mean by Islamic religious law and demonstrate how it resonates with the living legal practice amongst Muslims in Islamic religious communities. It is a long and difficult discussion to define Sharia or Islamic religious law in practice, but some of the most relevant aspects or tell-tale indictors of Islamic religious law are presented and pursued analytically here. Others might have been chosen and more detailed introduction given to each, but for the present purpose, it is enough to establish with fair certainty that Islamic religious law is identified in the documents that form the basis of the ministerial recognition. The key analytical aspects highlighted here are some of the same aspects as form the structure of the ten chapters in Norman Doe's *Comparative Religious Law – Judaism, Christianity, Islam* (Doe 2018, 5) and include the objectives of the communities, their legal self-understanding, their legal practices and activities, their relationship with the governing Danish jurisdiction and the role of religious law in membership issues:

a. Explicit or implicit reference to sharia, Islamic religious law or similar in the definitions, purposes or objectives in the articles of association. [Indicator: "Purpose"]
b. Explicit or implicit reference to the legal schools of Islam. [Indicator: "Legal School"]
c. Explicit or implicit reference to counselling, mediation or conflict resolution according to Islamic legal principles (echoing what is commonly referred to as Sharia councils or courts). [Indicator: "Islamic counselling"]
d. Explicit or implicit reference to the supremacy of the Danish legal jurisdiction and rule of law. [Indicator: "Danish law"]
e. Explicit or implicit mention of Islamic legal principles in membership definitions, issues, or termination. [Indicator: "Membership"]

f. Explicit or implicit reference to marriage procedures, rituals or validity, either according to Islamic or Danish legal principles. [Indicator: "Marriage"]

Central quotes and statements cited to substantiate where each of these six aspects are identified, and the operative key words are stressed. They are all translated from Danish into English for this occasion.

Analysis

Before unfolding the analysis of the aspects of Islamic religious law found amongst the recognised Islamic religious communities, a few general observations are warranted.

All of the Islamic religious communities list the five pillars of Islam. This is important to note, as not only are these key to understanding the rituals, code and conduct requirements of Islam, but many Muslims consider the Islamic practice to be embodied in the five pillars and that these are of course regulated by Islamic religious law.[15] All of the communities organise their articles of association with a general assembly, a board of directors, financial responsibilities, procedures for termination and so on.

None of the 25 Islamic religious communities mention sharia or 'Islamic law' as such, and none of them, neither explicitly nor implicitly, refer to all six of the identified analytical aspects. However, in terms of specific observations, all six of the identified aspects can be found across the 25 Islamic religious organisations. The most telling aspects are presented here, but all of them are available online.

In the definitions, purposes or objectives in the articles of association, aspects of Islamic religious law are evidenced in the *Danish Turkish Islamic Foundation's* declared purpose to care for "Muslims in an appropriate manner to perform their religious duties,"[16] "to provide facilities for moral development,"[17] and to do so "in accordance with Islamic procedures."[18] Similarly, the purpose of *The Islamic Faith Community* is to "carry out the religious interests, obligations and rights of Muslims to God, themselves and their

15 Murata, Sachiko, and William C. Chittick. *The Vision of Islam*. New York: Paragon House, 1994. p. 8.

16 Articles of the *Danish Turkish Islamic Foundation*, art. 2, 'Purpose,' A.1.

17 Articles of the *Danish Turkish Islamic Foundation*, art. 2, 'Purpose,' A.3.

18 Articles of the *Danish Turkish Islamic Foundation*, art. 2, 'Purpose,' A.10.

surrounding communities"[19] and to "collaborate with the surrounding community properly with the best manners and correct etiquette."[20] The *Islamic Centre West* is based on the liberal view, that "the Muslim population can pray and implement its norms in Danish society."[20]

The legal schools of Islam are mentioned explicitly among a few of the religious communities as part of the basis of their articles or their central rituals or for the welfare of Muslims. "The Islamic Religious Society of Bosniaks in Denmark is based on the Sunni Muslim denomination, the Hanafi School of Law (named after Imam Abu Hanifa) and the Maturidi Law School, which is one of the largest law schools in Sunni Muslim Theology."[21] It is clear from this that in the directions of the legal schools of Islam there are also many concrete instructions and directions for rituals and for doctrine, and that these are of a legal as well as theological nature. One relevant example from the literature of this could be to note that the Hanafi legal school "insists that trading with non-Muslims is a necessity for the sake of public welfare," as Khaled Abou El Fadl highlights, "but that a Muslim should not sell weapons to non-Muslims" (El Fadl 1994, 149).

For a number of obvious and quite pragmatic reasons, the Islamic communities have had to deal with both uncertainty and conflict amongst a Muslim minority in Denmark. They offer therefore guidance, Islamic counselling and mediation on several topics and areas, from strictly religious issues, to family affairs and outright conflict. The *Muslim World League* lists as part of their purpose in their articles "Assisting in tackling and resolving issues facing Muslims and others and averting conflict and disagreement factors."[22] This is done by the *Muslim World League*, as part of an international non-governmental Islamic organisation that refers to their Islamic Fiqh Council in Mecca.[23]23 Most of the communities are very implicit with this, and may

19 Articles of *The Islamic Faith Community*, art. 2, 'Purpose,' section 1.

20 Articles of *The Islamic Faith Community*, art. 2, 'Purpose,' section 2.

21 Central rituals of *The Islamic Religious Community of Bosniaks in Denmark*. Obviously from the context in the quote, the drafters of the central rituals have made an error here. The Maturidi school is a theological school and not a law school, and they do not follow two different legal schools.

22 Articles of *Muslim World League*, art. 2, 'Purpose.'

23 Introduction to *Muslim World League.*

make reference to 'Ulama' (Islamic legal scholars)[24] or an Islamic legal knowledge requirement.[25] The *Islamic Centre for the European Countries*, however, are surprisingly explicit, and clearly state that "the Centre issues legal Islamic judgments and responses in all matters relating to Islamic faith, rules, marriage, divorce, conduct, inheritance, and halal / haram issues, all based on the Al-Qur'an, the Sunnah, and the consensus of Muslim scholars and analogies."[26] Here there are clear potential for conflict with the jurisdiction of secular Danish law in questions of inheritance and divorce, in particular, if the Islamic Centre for the European Countries really do mean 'legal Islamic judgments.' A likely alternative explanation is that this is a language issue, or that perhaps the community tries to project a more formal appearance than is actually the case.

Many of the 25 Islamic religious communities recognise the Danish legal jurisdiction and rule of law. The *Madina-Tul-Ilm Education Centre* have listed in their purposes that, "the association accepts and complies with the Danish laws and regulations, [and] ensures that every activity in the association complies with Danish laws and regulations."[27] The *Danish Turkish Islamic Foundation* highlights that they are founded "according to the Ministry of Justice's approval,"[28] and stresses that "the foundation carries out no activities that are against Turkish and Danish law as well as against national values and do not participate in politics."[29] This last phrase about politics remains polemically contested after the attempted coup d'état in 2016, especially as the Turkish Embassy in Denmark has been collecting detailed personal information on

24 "The Association's Board of Directors. (Section 4) The Chairman shall be elected by the General Meeting from among the Imam (Ulama) who is present at the General Meeting and has been members of the Association for at least two years." Articles of *Madina-Tul-Ilm Education Centre*, art 5.

25 For seeking a seat on the board of *The Islamic Faith Community,* "the individual must know how the scholars derive their decisions and regulations based on recognised evidence, and the ability to understand detailed research topics by posting in acknowledged source materials as well as asking recognised specialists for topics requiring rooted knowledge." Appendix, Articles of *The Islamic Faith Community*.

26 ICEL in the text they uploaded as central rituals.

27 Articles of *Madina-Tul-Ilm Education Centre*, Art 2 'Purpose,' 2.3.

28 Articles of the *Danish Turkish Islamic Foundation*, art 1.

29 Articles of the *Danish Turkish Islamic Foundation*, art 2, 'purpose,' C.

Danish-Turkish individuals in opposition to Erdogan, calling it 'a state's reflex after a terrible attempted coup.'[30]

As for membership, *Aarhus Islamic Faith Community* welcomes individuals of Islamic faith, "who undertakes to comply with the congregation's laws,"[31] and *The Islamic Faith Community*, requires members to "possess good Islamic behaviour and good Islamic morality."[32] Here the definitional line between questions of faith, morals, ethics and law are blurred, but it is important to note, that questions of faith absolutely (and obviously) have legal consequences for members.

The final observations of the aspects of Islamic religious law regards marriage, as 'performance of weddings with civil legal validity' is one of the most substantive privileges to follow from the recognition. For the *Albanian Religious Community in Denmark* it is part of their purpose that they "conduct marriages and funerals according to the prescriptions of Islam and Albanian custom."[33] This is the delegated authority that is the basis of the reciprocity in the recognition. It seems for some of the communities, the jurisdictional nature of the question is over-emphasised, as they describe in their central rituals that "After this, the couple is considered to be legally validly wed to each other, then they must of course publicly register according to Danish law."[34]

Implications and conclusions

From the articles of association and other key documents from the process of recognition it has been demonstrated that at least six substantial aspects of Islamic religious law are core parts of the material substance of legal recognition of Islamic religious communities. On that basis, we may conclude that, indeed, Islamic religious

30 "Leader of the Turkish Imams in Denmark: Yes, we collect information on Erdogan opponents," ["Leder for tyrkiske imamer i Danmark: Ja, vi samler information om Erdogan-modstandere"], https://www.kristeligt-dagblad.dk/kirketro/leder-tyrkiske-imamer-i-danmark-ja-vi-samler-information-om-erdogan-modstandere, accessed 6 January 2019.

31 Activities in Islamic congregations, *Aarhus Islamic Faith Community.*

32 Articles of *The Islamic Faith Community*, art 4, on 'Organisation,' 3 on 'Membership,' section 3.

33 Articles of the *Albanian Religious Community in Denmark*, art 3 on 'Purpose,' section 2.

34 Compare, Central rituals of *The Islamic Religious Community of Bosniaks in Denmark,* and TAIBA, text on Islamic rituals.

law is considered a relevant and legal fact in Denmark. It seems a bold, but appropriate statement to say that sharia is legally recognised in Denmark – at least in part.

The material substance of the recognition of Islamic religious communities is in part religious law as explicit throughout the documents. Such recognition in Danish regulation of religion, is twofold. The first regards the freedoms and obligations of religions communities as drawn from the constitution, while the second regards the new specific criteria and requirements.

As for general freedoms of religious communities, religious law – including Islamic religious law – is included in the freedom of religion and freedoms to worship and to freely organise, as long as nothing is taught that violates morality and public order, as per the constitution article 67. Therein lies a degree of autonomy, which also extends to principles from different Islamic legal schools and further, contemporary Islamic legal self-understanding and ethics, as expressed through out the documents. Not all ideas or principles from the Islamic legal tradition are applied by the communities, nor would they likely be accepted, of course, and this discussed in parliament during the readings of the bill, but the ones that does not violate 'morality and public order' are surely both applied and included in the autonomy of freedom of religion.

Specifically for the recognition regime, there are standards that must be met. The mutuality implies that being recognised means being both recognised *as* a religious community, but also recognised *for* the material content demonstrated in the articles of association, descriptions of basic faith and key rituals. Recalling the introductory discussion of what recognition means and implies, we may conclude that for the Islamic religious communities, recognition is a mutual agreement on the legal facts presented in the documents and the criteria of Danish law. Concretely, these legal facts were specified as the six related aspects of principles of Islamic religious law from the documents. Granted, while many religious communities might not always live up to their own articles and principles, there is a profound mutual recognition of these as legal fact, which means, on the one hand that the freedoms and privileges of recognised Islamic religious communities includes Islamic religious law, but on the other hand, it also means that the Danish law and administration governs.

With this insight comes a few final remarks on what such recognition does and does not imply.

Firstly, both from a scholarly and from a legal point of view great care must be taken in establishing factually what is meant and what is practiced, when talking generally about sharia and specifically about Islamic law, ethics and practice. This means that the administrative body that recognise religious communities must be very clear in specifying that recognition is as something particular, not assomething general or abstract. It is the specific community, the specific practice, and the specific iterations of sharia that is recognised on the basis of specific material and application. Recognition is not general, nor is it comprehensive of what sharia is elsewhere or has been in the past.

Secondly, legal recognition of the fact that sharia is part of Islamic religious communities does not imply the idea that sharia should be considered a valid source of law in Denmark. The idea that sharia should be the basis of the rule of law is not implied in the Danish recognition regime. Rather, the mutuality implied underscores that Danish law, administration and adjudication has complete jurisdiction, that 'morality and public order' as well as the other specific requirements is maintained, and that the recognition is contingent upon these preconditions.

Thirdly, in light of recent debates in Denmark and the rest of Europe, it is important to maintain that legal recognition is not political recognition. The kinds of performative language, social inclusion and active appreciation that may be politically produced is not at all at play here, and many Muslims may not see themselves as recognised in extension from this legal status. This is distinctly legal recognition as executive recognition rather than political recognition and, as of 2018, it is governed by law. However, as such, it is qualified reciprocity and mutually constructive commitment of those Islamic communities who adhere to the criteria and requirements and the executive administration that recognises this.

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Islam at the European Court of Human Rights[1]

Effie Fokas[2]

Abstract

The European Court of Human Rights (ECtHR or, the Court) is a formidable player in the development of legal approaches to Islam: its jurisdictional remit (covering over 800 million people across 47 countries) is vast; it is a standard setter for human rights protection in general on a global scale; and it has a rapidly growing body of case law relevant to Islam which has influenced states' engagements with Islam within Europe and beyond. Besides the Court's 'direct effects', in terms of impact on relevant legislation, through its decisions to do with Islam, it also has a significant 'indirect', social effect though the messages those decisions communicate about Islam and its place in society. This contribution examines the role of the Court in its direct and indirect effects on Islam, law and Europeanisation.

In the broader context of attention to Islam, law and Europeanisation, a consideration of the role played by the European Court of Human Rights (ECtHR or, the Court) is worthwhile for two main reasons. First, the Court has dealt with a number of cases to do with Islam, and in so doing has helped to shape national legal approaches to Islam in many of the countries within its ambit. The Court has engaged with a broad range of relevant topics, from the rights of Muslims to wear religious dress in schools and in the workplace, and the right to religious autonomy of Muslim minority communities living in Christian majority contexts, to the right to exemption claimed by Muslim parents from mixed-gender physical education and swimming classes in the public education systems. And, of course, the great geographic breadth of its jurisdictional remit (covering over 800 million people across the 47 member states of the Council of Europe, under the auspices of which the Court functions), together with the fact that any right won in one of these country contexts is automatically a right to which any

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2 Effie Fokas is a Senior Research Fellow at the Hellenic Foundation for European and Foreign Policy and a Research Associate of the London School of Economics Hellenic Observatory.

individual in other member state may lay claim, render the ECtHR a formidable player in the development of legal approaches to Islam.

A second main reason to consider the role of the ECtHR is because of the 'messages' the Court communicates about Islam through its judgements (Fokas and Richardson 2018). As established through a rich body of socio-legal scholarship, though the 'direct effects' of courts referred to above, in terms of impacting on legal change in the contexts in which the rights claims are made in each case, are important, consideration of courts' direct effects tells only a very small part of the story of courts' broader potential impact on the issues they address. In the words of Marc Galanter, who pioneered in the study of courts' 'indirect' or 'radiating effects' (1981, 1983), 'courts resolve only a small fraction of all disputes that are brought to their attention. These are only a small fraction of the disputes that might conceivably be brought to court and an even smaller fraction of the whole universe of disputes' (1981: 3). He thus indicates that because of such limitations on courts' 'direct effects',

> The *social effects* they produce by communication must be far more important than the direct effects of the relatively few decisions they render. Law is more capacious as a system of cultural and symbolic meanings than as a set of operative controls (emphasis mine; 1981:13).

From this 'decentered' perspective, the impact of courts on disputes is accomplished more extensively through the dissemination of information: 'Courts produce not only decisions, but messages. These messages are resources that parties use in envisioning, devising, pursuing, negotiating, vindicating claims (and in avoiding, defending, and defeating them)' (Galanter 1983: 126). Such 'indirect effects' of courts, then, entail the impact of their 'messages' communicated through their judgements on societies at large and, more specifically, on peoples' perceptions of their rights, the discourse about their rights and their pursuit of their rights, whether through legal or political (e.g., lobbying) means.

Thus this contribution examines the role of the Court in its direct and indirect effects on Islam, law and Europeanisation. It begins with attention to the main relevant articles of the European Convention on Human Rights (ECHR), which the ECtHR interprets. It then offers an overview of the ECtHR's Islam-related case law, necessarily schematic due to space limitations but detailed enough to give a broad sense of the contours of

that case law. A third main section will consider three major lines of scholarly criticism of the Court in its engagements with Islam, followed by attention to the 'new kid on the block' – the Court of Justice of the European Union (CJEU) – and its recent entry into the field of religious rights. The articles closes with reflections on the messages communicated by the ECtHR through its case law related to Islam.

Bases of relevant case law in European Convention on Human Rights articles

A collection of five ECHR articles may be identified as those most actively applied to religion-related case law in general, and to Islam-related case law specifically. The first and most conspicuous of these is Article 9 on the 'Freedom of Religion or Belief', which is divided into two clauses, the first of which protects the freedom of thought, conscience and religion, including the right to change and to manifest one's beliefs, alone or in community with others. Whilst there are no limitations on the freedom of belief, the second clause of Article 9 sets out potential grounds for limitations on the freedom to *manifest* religion or belief, indicating that such limitations must be 'prescribed by law and … necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, and for the protection of the rights and freedoms of others'. In the first case in which the Court issued a judgement finding a state in violation of religious freedom (*Kokkinakis v. Greece*, 1993), the Court expressed what can now be understood as its mantra on the freedom of religion or belief; this mantra can be found in the majority of cases henceforth which engage that right. It reads:

> As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. (para. 31)

Other ECHR articles frequently invoked in cases somehow involving Islam, often in conjunction with Art.9, are Articles 10, 11, 14, and Article 2 of the 1st Protocol

to the Convention. Article 10 protects the Freedom of Expression, which includes the 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. As in the case of the freedom to manifest one's belief, so too the freedom of expression includes limitations 'in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.

A third article of the Convention much engaged by conscience-based groups in their claims against states in which they reside is Article 11, on the Freedom of assembly and association. Like articles 9 and 10, the right is not absolute, and is subject to restrictions to do with national security, public safety, prevention of crime and disorder and protection of health, morals and the rights of others. In all, of the restrictions set out on the rights expounded in Articles 9, 10 and 11, 'necessary in a democratic society' and 'public order' feature most frequently in the ECtHR's judgements entailing Islam-related rights limitations. In some cases, as we shall see, it is rather striking how elastic these notions can be when used to defend Muslims' rights limitations.

A further ECHR article which features in a great deal of ECtHR case law involving a Islam is Article 14, which prohibits discrimination on several bases, including religion[3]. Finally, Article 2 of the first Protocol to the Convention guarantees the right to education and the right of parents to ensure such education and teaching 'in conformity with their own religious and philosophical convictions'. Neither of these two articles include, in the text of the Convention, any formal limitations on the rights guaranteed therein.

Islam-related ECtHR case law: broad themes

Islam-related claims arise before the ECtHR under a broad range of themes. This is *not* an exhaustive list but, as indicated above, it is sufficient for presenting the contours of the ECtHR's engagements with Islam and Muslims' rights claims. The themes are

3 Note bene: Art.14 may be invoked by the Court only in conjunction with other ECHR articles; i.e., discrimination in the enjoyment of any particular right secured by the ECHR is what Art.14 protects against.

presented *roughly* chronologically, based on when the first judgement relevant to each was delivered. This ordering of the material is to give a sense of how the case law has evolved over time[4].

In order to present the scholarly criticism of the Court's handling of Islam-related cases, in the following section a selection of these cases is presented in greater depth. The selection focuses on cases to do with religious dress, e.g., the headscarf or burqa ban, and *mainly* but not exclusively on those which have been heavily criticised. These are either 'problem cases' in and of themselves, or problematic in relation to one another. Together, they help tell a broader story about the ECtHR in relation to Islam.

Religious autonomy

The first several cases arising before the Court involving Islam had to do with religious autonomy and the right of religious groups to self-determination (within, always, the limitations set out above). For example, in a series of cases against the state of Greece (Serif v. Greece 1999, and Agga v. Greece *1-4,* 2000-2006), the Greek government was faulted for interferences in the selection of muftis for the Muslim communities in the region of Thrace. The same issue is addressed in the cases of Hasan and Chaush v. Bulgaria (2000), and Supreme Holy Council of the Muslim Community v. Bulgaria (2004). Thus in its early engagements with Islam the ECtHR tended mainly to questions of Muslim minority communities' right to freedom from interference from the states in which they are based.

Religious dress

A second and the largest body of cases relevant to Islam addressed here has to do with religious dress – mainly the headscarf and mainly in educational settings, of teachers and students. In Dahlab v. Switzerland (2001) the Swiss state was called to defend itself against the claim of a primary school teacher who was not allowed to teach with her headscarf, in spite of no complaints from the students or parents about the latter, because the headscarf was deemed a 'powerful religious symbol' which might impinge on the young students' freedom of conscience. Ms. Dahlab was a convert to Islam hired before that conversion, and taught wearing the headscarf for 3-4 years without

4 It should be noted however that dates somehow arbitrary though in this context, because the months or years between the date a case is filed by complainant and the date a decision is delivered may be wholly different from one case to the other. All cases can be found on the Court's database at www.hudoc.eu.

complaint by her students or parents of the latter. In *Dahlab*, the Court dismissed the case as inadmissible, but the case remains an important element in the Court's engagement with Islam because of statements the Court made in its inadmissibility decision regarding the meaning and impact of the headscarf, statements which made their way into other later case law. Specifically, in *Dahlab* the Court determined that

> … it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children … it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination (*Dahlab v. Switzerland,* p.13)

There are three key elements in particular to the Court's reasoning which we see repeated in later judgments: 1. The headscarf is a 'powerful external symbol' which might have a proselytizing effect; 2. The headscarf is incompatible with gender equality, and 3. The headscarf is incompatible with tolerance and respect for others. Overall the judgement communicates a rather negative message about Islam: the wearing of the headscarf may have a proselytizing effect, the judgement suggests, specifically because 'it appears to be imposed on women by a precept which is laid down in the Koran'. As such, the Court argues, the wearing of the headscarf is contrary to a. tolerance, b. respect for others, and c. equality and non-discrimination. The conceptual leaps are significant here, and they are not much moderated by the 'softening' language of 'might have' and 'appears to be' used by the Court. Rather to the contrary, with such broadsweeping claims being made, one would expect evidence to be offered and precise rather than fuzzy wording.

Likewise in Leyla Sahin v. Turkey (2005), the Court deemed that the Turkish state was not violating the religious freedom of a university student when she was banned from sitting her university exams wearing a headscarf. In *Sahin,* the Court ruled that interference with right of a university student to wear headscarf to sit her exams was

justified because it had a legal basis and pursued the legitimate aims of protecting the rights and freedom of others and protecting public order. Specifically, the Court stated:

> 'In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn'.

In short, the Court emphasized the importance – in the Turkish context where the state is formally secular - of preserving secularism, gender equality, and the rights of others, because elsewhere in the judgment it indicates: 'it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it'. Thus similarly with the *Dahlab* decision, the Court expresses concern regarding the impact on others of a woman wearing a headscarf, though – rather critically – it does not discriminate between the potential impact on young school children, on the one hand, and fellow university students, on the other. As such, this decision too communicates negative and essentialized notions of harm caused by the wearing of Islamic religious dress.

The *Sahin* judgment is amongst the most vehemently contested and criticized religious freedoms judgments of the ECtHR.One such criticism comes from within the Court itself, in the form of a dissenting opinion by Judge Francoise Tulkens. Tulkens describes the judgment as an expression of paternalism, as far as the gender equality argument goes. 'I fail to see', she notes, 'how the principle of sexual equality can justify prohibiting a woman from following a practice which [she says she has] freely adopted…'. Likewise, Professor Jeremy Gunn highlights irony in the case: '[w]e would not normally expect a human rights tribunal to be more solicitous of the sensibilities of those who do not like religious expression (which is *not* guaranteed by the European Convention) than of the right to manifest religion (which *is* guaranteed by the Convention)' (Gunn 2012: 133). *Sahin* is particularly noteworthy because it is the first Grand Chamber decision on the issue of religious clothing.

Kervanci v. France and Dogru v. France (2008) are cases brought before the ECtHR by Muslim students in the French education system claiming that mandatory participation students in physical education which did not allow the wearing of the headscarf violated their right to manifest their belief; their claim was not vindicated by the Court. (Notably, though decided in 2008, these cases arose *prior* to the 2004 general ban on headscarves in schools; a string of cases later challenging that ban (*Singh* et al. 2009, etc.) was declared inadmissible by the ECtHR).

Arslan and others v. Turkey (2010) concerned 127 Turkish nationals convicted for wearing religious clothing in public other than for religious ceremonies; *Arslan* was at that time exceptional as a religious dress case in that the Court *did* find a violation. The Court noted that, unlike several other religious dress cases it had decided, the applicants here were punished for their religious dress in public areas that were open to all, rather than in public establishments where the state's interest in religious neutrality might outweigh the individual's right to manifest his/her religion. Thus the Court explicitly stated that it saw no basis for defending a general ban on religious dress in public spaces. The Court further noted that it *might* have accepted that strict maintenance of a secular system was important for Turkey's democracy and public safety, but that the Turkish judicial decisions at issue had failed to rely on that justification.

In so doing it presaged its judgement in the much better-known case of S.A.S. v France (2014), which also concerned the ban on religious dress (in this case, the full face covering of the burqa), from all public spaces. Here the Court exchanged its earlier resistance to a general ban in public spaces in favour of the French state's argument that such a ban was justifiable in the interest of 'living together'. S.A.S. claimed violation of her religious freedom after France passed the 2010 ban on full-face covering in all public spaces (except religious ones) across the country. She emphasised that it was her choice to wear the veil, in efforts to override arguments about women's rights and gender equality as those made in *Dahlab* and *Sahin*. That aspect of S.A.S.'s position was supported by a third party intervention from the Human Rights Center at the University of Ghent, led by Eva Brems, the language of which intervention factored prominently in the Court's final judgment, in *spite of*, however, its ultimate acceptance of the French state's defense based on the principle of 'living together[5]. The S.A.S.

5 See the aforementioned Third Party Intervention at https://hrc.ugent.be/wp-content/upy loads/2019/10/SAS.pdf, and the text of the Court's judgement at https://hudoc.echr.coe.int/ eng#{"itemid":["001-145466"]}.

judgement may be interpreted as an expression of the Court's tendency to protect state secularism, as in the Turkish cases also, as both countries are constitutionally-determined secular states. Rather controversially though, in *Belkacemi and Oussar* v. Belgium and *Dakir v. Belgium* (2017), the right of a state to ban full-face covering specifically in favour of 'living together' was similarly conferred by the Court on Belgium, a state which is not however similarly constitutionally-determined as a secular state.

Further extending its sanctioning of French bans on religious dress, in Ebrahimian v. France (2015), regarding the non-renewal of the contract of a social worker as a result of patients complaining about her wearing headscarf, the Court ruled that Ebrahimian's religious freedom was *justifiably* restricted for the sake of preserving secularism and religious neutrality in work environments. Thus in this case the Court approves of the extension of the ban on headscarves in public schools to a ban on headscarves in the public sector in general, without any discussion as to whether this jump from the educational sphere to the public sector in general is necessary and referring simply to the rationale of the French system which, the Court says, it is not its role to assess.

Finally, in Lachiri v. Belgium (2018), the ECtHR for the first time finds a violation in a case where the wearing of a headscarf by a Muslim woman was at stake. Here the claimant argued that her exclusion from a Belgian courtroom (where she was to act as a witness in a case) on the ground that she wore a hijab amounted to a breech of Art.9. The Court agreed, notably indicating that the Belgian state did *not* claim the ban was aimed at preserving secular or democratic values (and thus leaving open the interpretation, then, that *had* the state claimed the ban was for protecting secularism, then the Court would have found in favour of the state) (see Ringelheim 2018). The ban was instead justified by the Belgian state on the grounds of 'protection of public order', but the Court did not find any real threat to public order in Lachiri's wearing of the headscarf in the courtroom.

Religious political party closure

Refah Partisi v. Turkey (2003) is in a category to its own, because it is the only case to do with a closure of an Islamist political party (the follow up *Fazilet v. Turkey* case was withdrawn, with a rather heavy letter to the Court indicating that after *Refah* and *Sahin* there was little hope for their case; see Gulalp 2019: 149). It also stands out from the present presentation of cases in that it does not engage Art.9 on religious

freedom (it rests instead on Art.11 regarding the right to association). But it is worthy of careful consideration because the case communicates an especially powerful message regarding Islam in relation to democracy. In *Refah* the Court considered the decision of the Turkish Constitutional Court to close down the ruling political party Refah, on the grounds that it was a 'centre of activities against the principle of secularism'. The ECtHR ruled unanimously that actions and speeches by Refah leaders showed the party had a long-term aim to set up a regime based on sharia. In the Court's estimation, 'in the past political movements based on religious fundamentalism have been able to seize political power in certain States' (para.124*;* note that Refah *achieved,* did not seize, power through elections), and the establishment of a theocratic regime was not completely inconceivable in Turkey, 'account being taken of recent Turkish history and, secondly, of the fact that the great majority of its population are Muslims' (paras. 95 and 125). As in the cases of *Dahlab* and *Sahin*, here too we find rather essentialised notions of Islam being expressed by the Court. This is most conspicuously the case in its handling of sharia law: 'the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it' (para.123). In short, the Court here expresses the view that the fact that Turkey has a majority Muslim population makes the establishment of a theocratic regime more likely, and that sharia is 'stable and invariable' and antithetical to pluralism.

Minaret ban

Like the case of *Refah,* the case of Ouardiri v. Switzerland (2011) on the minaret ban is in a category to its own, but worth mentioning for the controversiality of the topic at the time. The case concerned the Swiss ban on the minaret introduced into Swiss law in 2009, following a highly publicised campaign and referendum 'against the building of minarets'. The campaign included posters suggesting a proliferation of minarets in Switzerland whilst in reality there were only 4 across the country at the time. The Court's decision was one of inadmissibility, because the claimant could not claim to be a *direct* victim of the minaret ban. But it is notable nonetheless because the ban garnered so much attention and the Court's pronouncement on it was eagerly anticipated. That pronouncement, empty of content though it was and based on consistently applied legal reasoning (lack of direct victimhood of claimant), may still be considered as having communicated a powerful *message* of a lack of the Court's willingness to defend the right of Muslim communities to have mosques with minarets. It may also have

communicated to some observers a more message of Court unwillingness to engage in such a controversial issue of 'Islam v. Christian-majority state'[6].

Legal status issues

A number of cases on these issues has arisen especially from amongst Alevi groups in Turkey, because their lack of recognised legal status disadvantaged them significantly in terms of their rights to operate places of worship, or to enjoy tax exemptions similar to those for Sunni Islam, or to have their perspective taken into consideration in the teaching of religious education in public schools. These include Zengin v. Turkey (2007), Yalcin v. Turkey (2014), Cem Vakfı v. Turkey (2014), Sofuoglu and others v. Turkey (2014), and Dogan v. Turkey (2016) and critically, in each of these the Turkish state is judged by the Court as in violation of freedoms secured by the ECHR. The judgements in these cases, when considered alongside the other cases against the state of Turkey presented above, suggest the Court treats Islam differently when pitted against secularism, on the one hand, and when expressed as a minority position within a majority Muslim context, on the other.

Sharia law

Finally, in this selective list, one of the Court's most recent and notable engagements with Islam is in the case of Molla Sali v. Greece (2018). This case concerned the claim of religion-based discrimination of Molla Sali, a resident of the Western Thrace region of Greece where, due to the conditions of a population exchange between Greece and Turkey set out in the 1923 Treaty of Lausanne, sharia courts prevailed over secular courts in matters of family law for the Muslim population in the region. The civil will of Molla Sali's husband was thus contested by the deceased's sisters on the grounds that Islamic law – according to which 2/3rds of the estate would go to the sisters – should govern this matter of inheritance. Here the Court ruled in Molla Sali's favour, indicating that the government's refusal to allow members of a religious minority the right to voluntarily opt for and benefit from ordinary law was not only discriminatory but also breeches the right to free self-identification (i.e., the right to choose *not* to be treated as a member of a minority; see para.157).

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6 One may of course only hypothesize about messages potentially received by different sectors of a population in a given context. As Galanter explains (1983: 126), 'a single judicial action may radiate different messages to different audiences'.

Scholarly critique

Clearly the presented case law offers much basis for criticism. Here I focus on three main lines of criticism embedded in much of the relevant scholarly literature. The first is that through its Islam-related jurisprudence, the Court has treated secularism as an 'extra-conventional goal'. As Kayaoglu notes, secularism is *not* listed as one of the potential limitations to the Article 9-guaranteed enjoyment of the Freedom of Religion or Belief, and secularism is not mentioned in the European Convention on Human Rights (2014). Yet the Court has appeared willing to renounce some of the requirements of democracy (e.g., guarantee of religious freedom) in favour of the principle of secularism (McCrea 2013). It does so perhaps most conspicuously in the *Refah* case, where it held that the right of states to defend liberal democracy encompasses measures to protect the secularity of the state and the separation of religion and politics.

A second major critique regarding the Court's handling of Islam is that it exercises a double-standard as compared with its treatment of Christianity. Indeed, rather conspicuously, secularism as a goal does not factor in the same way in case law to do with majority Christianity. The Court's interventions go beyond just defending a state's right to a secular regime (as in the Turkish case or, with a stretch, in defending 'living together' as a French state principle), to - as we have seen in cases such as *Dahlab* and *Sahin* – communicating normative and essentialised statements about Islam. As posited in the introductory chapter to one of the most thorough treatments of the Court's engagements with Islam (Durham et al 2012: 2): 'Are the remedies available under the key European human rights instruments … as effective for those whose beliefs, culture and identities are rooted in Islam as they are for other inhabitants of Europe?'.

The contrast is particularly striking when considering the case of *Dahlab* in which, as noted above, the Court described the headscarf as a 'powerful external symbol', in spite of *no* complaints to that effect (and thus no evidence suggesting it was impacting upon students' perspectives in any way), in comparison with those of *Eweida and Others v. United Kingdom* (2013), and *Lautsi v. Italy* (2011). In *Eweida*, and after a long string of cases in which the Court upheld states' headscarf bans, the UK was reprimanded by the ECtHR for defending British Airways in asking a woman not to visibly wear

her Christian cross necklace[7]. And in *Lautsi,* the claim of an atheist parent that the presence of the crucifix on Italian school walls violates her right to educate her children in accordance with her own religious or philosophical beliefs (enshrined in ECHR Art.2 of Protocol 1) was rejected by the Court, which accepted instead the Italian state's description of the crucifix as a 'passive' religious symbol unthreatening to parents' rights to educate their children in accordance with their own religious or philosophical beliefs, *in spite of* (and unlike in *Dahlab*) there having been complaints to that effect.

The *Lautsi* case leads us to a third major critique against the Court for its handling of Islam: that it places politics over religion. The Court's final decision in *Lautsi* was reached in 2011 by its Grand Chamber, after a chamber's original 2009 judgement which found unanimously (7-0) in favour of Lautsi. That judgement was reversed rather dramatically by the Court's Grand Chamber (15-2), after an intensive backlash across several states, embodied in an unprecedented number of national governmental interventions in the case (10, all in favour of the Italian state), as well as multiple interventions by NGOs (10, 6 of which supported the Italian state's arguments), and by 33 members of the European Parliament (all in support of the defendant state) (on *Lautsi* see Mancini 2010; Liu 2011; Ronchi 2011; Fokas 2015; Ringelheim 2014). If the lens on *Lautsi* is widened, we give due attention to the reform process which the Court was undergoing and to the particularly sharp direction the latter was taking whilst the UK was at the helmof the Council of Europe (the 'Brighton Process'; see Christoffersen and Madsen 2013; Fokas 2016). That reform process entailed national governments' efforts to reign in what many described as the Court's infringements on national sovereignty. And it converged, temporally, with UK threats to withdraw from convention system over what it saw as the Court overstepping its bounds especially over the *Hirst v. UK* (2004) case on prisoner's voting rights. The timing of the mobilisations aiming for *Lautsi's* reversal coincided with these developments – and in interviews with ECtHR judges and former judges, several indicated that the *Lautsi* reversal was influenced by this broader climate. The '*Lautsi* effect' has also been described as having had an influence over the *S.A.S.* judgement, in that the Court was more reserved in

7 It should be noted however that three other Christianity-based claims against the UK which the Court considered alongside that of Eweida were *not* supported by the Court: these are the claims of Ms. Chaplin, a nurse asked for reasons of health and safety to remove her Christian cross necklace; Ms Ladele, a registrar who on religious grounds refused to have (same-sex) civil partnership duties assigned to her; and Mr McFarlane, a counseller who refused to give psycho-sexual therapeutic counselling to same-sex couples.

Lautsi's aftermath regarding issues which involve politically sensitive issues as is religion (Fokas 2016).

Similarly, the *Refah* and *Sahin* decisions were widely seen as heavily influenced by political considerations. One major relevant factor was Turkey's pending EU membership, which it was still pursuing actively at the time of those cases. Another is the fact that the timing of these cases coincided broadly with that of France's introduction of its headscarf bans in schools.

Of course, also key is the 'margin of appreciation' which the Court affords to states in determining whether a particular restriction of a right is required ('necessary in a democratic society') in the given circumstance (Evans 2001: 142). In the religious freedoms context where, according to Evans (2001: 143), the margin tends to be particularly wide, the margin of appreciation is a substantial tool through which the Court allows states a certain, variable, leeway to interpret religious rights and freedoms within the broader context of their national cultures and traditions. Julie Ringelheim (2012: 306) suggests that the large discretion that the Court tends to grant to national authorities on religion cases is 'symptomatic of its difficulty in dealing with them'. Most likely by 'them' Ringelheim means the religion cases, but there's a strong case for saying the margin of appreciation is also symptomatic of the Court's difficulty dealing with the states and their potential backlash and thus political in nature.

Enter the CJEU: hope for venue shoppers?

Against the backdrop of the questionable record of the Court in its handling of Islam-related claims, many welcomed the idea that the Court of Justice of the European Union (CJEU) might be an alternative venue where some such issues could be addressed[8]. The EU formally extended its competence to the protection of fundamental rights through its 2000 Charter on Fundamental Rights. And the CJEU entered the realm of religion-related case law especially through the 2000/78 equality directive which establishes a general framework for equal treatment specifically (and exclusively,

8 See Fokas 2016 for interview-based research with social actors with a vested interest in religion-related case law.

unfortunately) in employment and occupation settings[9]. This directive was applied, with somewhat varied reasoning, to two headscarf cases addressed by the CJEU (notably, the first cases on religious discrimination to which this directive was applied by the CJEU).

In *Achbita v. G4S Secure Solutions* [C-157/15], the CJEU addressed the claim of Achbita who had worked for three years as a receptionist and after the 3rd year informed them that she intended to start wearing an Islamic headscarf during working hours. G4S had an unwritten rule that workers could not wear visible signs of their political, philosophical or religious beliefs in the workplace, and she was told she could not wear it, and was fired when she refused to remove it. The Belgian Court of Cassation asked the CJEU for a preliminary ruling on: 'should Art 2(2) of Directive 2000/78 be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?

In the case of *Bougnaoui v. Micropole Univers SA* [C-188/15], Bougnaoui was a design engineer whose work included going to customer's sites, and her employer told her to remove her headscarf when visiting clients because one client had complained about it. She refused and was dismissed. French Court of Cassation: 'Must Art4 (1) of Directive 2000/78 be interpreted as meaning that the wish of a customer of an info tech consulting co no longer to have the information tech services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason or the nature of the particular occupational activities concerned or of the context in which they are carried out?

Two Advocates General of the CJEU – Juliane Kokott (*Achbita*) and Eleanor Sharpston (*Bougnaoui*) gave divergent opinions on the respective questions. In Kokott's opinion, in *Achbita* there was no discrimination, because the rule was equally applicable to people of any faith. Kokott's opinion was rather provocative in indicating:

9 The 2000/43 equality directive on racial and ethnic discrimination has a broader remit, covering not only employment but also healthcare, social security, education, public housing, etc.

> if a ban such as that at issue here proved to be based on stereotypes or prejudice in relation to one or more specific religions – or even simply in relation to religious beliefs generally…then it would without any doubt be appropriate to assume the presence of direct discrimination based on religion[10].

The approach seemed blind to the social reality in Belgium, one of the countries to have introduced a ban on full face veils in all public spaces and where the ban at issue at Achbita's company was highly likely to be based on stereotypes and prejudice. Further, Kokott suggested that the employer should offer the employee a position which does not require contact with customers. This too is rather provocative, literally suggesting that religion should be hidden, at best, and that it is ok that Muslim women who chose to cover their heads would be limited – extremely limited – in their employment possibilities (non-visible, backroom roles).

The CJEU in the end found indirect discrimination in this case, but ultimately deemed that discrimination justifiable: 'the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate', because it relates to the freedom to conduct a business as guaranteed by Art 16 of the Charter. The judgement is criticised because the rule does not apply equally between people of faith and people of no faith. Further, the CJEU's approached hinged on the idea that it is acceptable for a company to wish to maintain (and project) a religiously neutral image. But as Eva Brems et al have argued, extending neutrality to the private sector is a 'big leap', - and 'neutrality can be an easy cover-up for prejudice' (Brems et al 2017).

Also highly controversially, Kokott opined that

> unlike sex, skin colour, ethnic origin, sexual orientation, age or a person's disability, the practice of religion is not so much an unalterable fact as an aspect of an individual's private life, and one, moreover, over which the employees concerned can choose to exert an influence. While an employee cannot 'leave' his sex, skin colour, ethnicity, sexual orientation, age or disability 'at the door' upon entering his employer's premises,

10 See http://curia.europa.eu/juris/document/document.jsf?docid=179082&doclang=en

> he may be expected to moderate the exercise of his religion in the workplace...[11]

Sharpston's opinion in the case of *Bougnaoui* was nearly opposite on that matter:

> to someone who is an observant member of a faith, religious identity is an integral part of that person's very being … it would be entirely wrong to suppose that, whereas one's sex and skin colour accompany one everywhere, somehow one's religion does not[12].

Ultimately in *Bougnaoui* the CJEU found evidence of discrimination, in indicating that a customer's wish not to deal with a person wearing a headscarf is insufficient to make not wearing a headscarf a 'General Occupational Requirement'.

Thus far, then, the messaging of the CJEU on Islam, insofar as the wearing of religious symbols is concerned at least, in one case communicates a prioritization of business interests over religious freedom for Muslim minorities, and in the other places a (not particularly strict) limit on that prioritization. Certainly, as a result of these two cases, at least some of the aforementioned hope in the CJEU was thwarted.

This court has not yet been called upon to address discrimination with regards to Christian or other religious symbols, thus we do not have a comparative perspective in this regard. However, the CJEU has addressed cases regarding majority *and* minority Christian priviledge and the right to religious autonomy of Christian churches. In one such case the CJEU addressed the Austrian state's classification of Good Friday as a public holiday only for members of three particular Christian minority churches, resulting in the privileging of members of those churches with a paid holiday on Good Friday or additional pay if they worked on that day [C-193/17; see CJEU Press Release No.4/19]. The CJEU here engaged with the question of whether a measure intended to benefit the adherents to a minority faith amounts to illegal direct discrimination against those who are not a member of that minority (McCrea 2019), and found in a 22 January 2019 ruling that this policy violates the EU equality directive 2000/78.

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11 http://curia.europa.eu/juris/document/document.jsf?docid=179082&doclang=en

12 See https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-07/cp160074en.pdf

In two other cases referred to the CJEU by German national courts, the court dealt with religion-based discrimination of (potential) employees by a church-based employer. One was raised by Vera Egenberger, a not religiously affiliated woman who claimed she had been discriminated against in her application for a position advertised as requiring membership in a Protestant church or a church affiliated with the Working Group of Christian Churches in Germany, though the work entailed 'had very little to do with churches' (Ciacchi 2019)[13] [C-414/16]. The second case concerned the termination of the employment contract of a man ('JQ') working for a private institution ('IR') dependent on the Catholic Church and who had remarried after divorce but without prior annulment of his first marriage by a church tribunal [C-68/17]. The German General Law on Equal Treatment allows significant exemptions for church-based employers based on the 'self-perception of the religious society or association concerned, in view of its right of self-determination or because of the type of activity' (Para.9, cited by Ciacchi 2019: 297). The CJEU rejected the subjective ('self-perception') perspective on church-based organisations' rights to exceptions from non-discrimination legislation with reference to 'objectively dictated' occupational requirements (for Vera Egenberger) and 'effective judicial review' over any decisions regarding the impact of the faith or lack thereof of employees on their performance of managerial duties (in the case of JQ) (see Ciacchi 2019 for further analysis).

Lucy Vickers (2017) describes the CJEU headscarf cases as a 'backwards step' in terms of equality which 'can best be understood in the context of a deeper reluctance on the part of the CJEU to address issues of state sovereignty which arise when considering the highly contentious question of the proper scope of protection for religion or belief in Europe'. By this reading, the CJEU has in common with the ECtHR a sensitivity to political concerns. But the latter three cases presented here, concerning Christian majority or minority claims, tentatively suggest the CJEU's willingness to contend with states' traditional approaches to Christian minorities or majorities when the latter are in breach of the equality directive. Arguably however, the political sensitivities around Islam are more often than not greater than those around Christian majority or minority privilege. Further, it must be noted regarding the CJEU preliminary reference procedure that – as compared with the ECtHR – the CJEU has a rather limited competence: according to the EU treaty article establishing this procedure (Art.267), it is at the

13 As Ciacchi notes, rather ironically the post consisted of writing reports on German efforts to combat discrimination in the framework of the UN Convention on the Elimination of All Forms of Racial Discrimination. (295).

national court's discretion whether to ask the CJEU for a preliminary ruling on a particular question; the *obligation* to refer a question to the CJEU only arises 'Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law,' (Art.267 TFEU para.3).

Concluding remarks

Realistically speaking, issues around Islam and law in Europe are bound to be politically fraught, just as issues around religion in the public sphere *in general* are increasingly politically fraught. As Ronan McCrea (2017) indicates, ' the question of religion's role in society has become bound up with highly combustible political issues such as migration, changing norms in relation to gender and sexuality, national identity and even national security'. However, when considering the treatment of Islam specifically, it is difficult not to see the latter as qualitatively different to that of other faiths.

In the case of the CJEU, there is yet fairly little evidence to go by: though that court has considerable experience with prohibition of discrimination in the employment context, its experience of dealing with religion-based discrimination is thus far fairly limited (O'Leary 2018; Pastor 2016). As such it has also not, yet, become a significant 'target' of national governments' ire regarding the supranational court's overstepping of their national sovereignty specifically to do with regulation of religion; the two courts are not evenly exposed to political pressures in these domains.

In the case of the ECtHR, however, it has actively engaged with religion-related case law claims at least since 1993, when it issued its first judgment finding a violation of religious freedom on the case of *Kokkinakis v. Greece.* It was not long after that it addressed religious autonomy claims of Muslim minorities in Greece and Bulgaria (e.g., *Serif v. Greece*, 1999; *Hasan and Chaush v. Bulgaria*, 2000); in such cases the ECtHR ruled in favour of the Muslim claims. But there seems to be a difference in the Court's approach to cases to do with outward expressions of Muslim identity and with Muslim challenges to state secularisms, and this difference is not limited to the past decade's 'high combustibility' of religion-related issues in the context of new nationalisms and turns towards particularism, both in Europe and globally.

As Siofra O'Leary (2018) notes, a further fundamental difference between the ECtHR and the CJEU is that the former rules in a fact specific and country specific way: each case it takes is judged on the basis of the specifics of the facts of the case in question, and in relation to the relevant laws in the given country context. The CJEU, on the other hand, is engaged to provide general interpretative guidance to courts in the now 27 Member States; its rulings are neither case nor country specific.

If, however, we return to the question of the 'indirect' or 'radiating' effects of courts, then beyond the impact of court decisions whether specific to the facts of a case and the country in question, or directly relevant to all 27 member states of the EU, the *messages* that court decisions communicate more broadly to society at large are far more important in terms of potential impact on peoples' perceptions of their rights. To date there is no systematic comparative study of these two courts' indirect effects[14], one may assume that the sheer volume of relevant case law at the ECtHR as compared with the CJEU entails far greater indirect effects of the former in terms of stakeholders' conceptions of their rights. In the case of both European level courts, however, it is safe to say that the overall message communicated to Muslims thus far is less than encouraging in terms of these Courts' concerns for protection of their rights to manifest their faith in public and, in some cases, in the private business sphere.

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Marital Rape in Denmark and Pakistan: Minorities, Culture and Law

Mikele Schultz-Knudsen and Rubya Mehdi[1]

Abstract

This article investigates how rape laws and rape cases are culturally influenced, with a focus on marital rape. The first part of the article looks at cultural influences on rape laws and compares the historical development of these laws in Danish legislation, Pakistani legislation and more broadly in Muslim law. Danish comparative law often compares with legislation in neighboring countries, but comparing to a more different legal system is valuable too. We find that in both Denmark and Pakistan, socio-economic changes challenge existing definitions of rape and marital rape, leading to demands for legal reform, while the legal system tries to maintain as much continuity in the legal definitions as possible. In both jurisdictions, societal views on women and sex also influence how judges and jurors interpret the law, sometimes leading them to contradict the written law. The second part of the article analyzes two court cases involving marital rape in Danish-Pakistani couples. Cultural considerations influenced every part of these court cases, from the questioning of witnesses to the judges' legal reasoning. Thus, having an understanding of the parties' culture is important for judges and lawyers. The cases show that culture varies markedly between people from the same national background. Because culture is not uniform, parties are likely to disagree on which cultural rules they followed in their marriage. Judges must be aware that parties may rely on stereotypical cultural views to portray the other party negatively. The article concludes with recommendations, including the need to educate the population as legal concepts of rape change, as well as for judges to be aware of not only the legal culture and the culture of the parties, but also of how their own culture might influence their decisions. The article also reflects on recent legislative changes in Denmark and Pakistan

1 Mikele Schultz-Knudsen is PhD student at the Centre for European and Comparative Legal Studies (CECS), Faculty of Law, University of Copenhagen. Rubya Mehdi is Senior Researcher at the Department of Cross-Cultural and Regional Studies, University of Copenhagen. We are thankful to Sohail Warraich, a practicing advocate, for his feedback on this article. He is LL.M from the University of Warwick and is a freelance researcher, trainer, writer, farmer and women's rights activist primarily based in Lahore city of Pakistan.

and points out that the debate in Denmark has not considered how consent and threats can have different implications in minority cultures.

Introduction

This article is inspired by two recent Danish court cases, which both had the same theme: a woman accusing her former husband of raping her during their marriage. In both cases, the couple had an ethnic and cultural background from Pakistan but lived in Denmark.

The Danish judges had to deal with a combination of two difficult elements: 1) Rape, which is a notoriously difficult crime to prosecute, especially when it happens within a marriage, where the involved parties are assumed to normally participate in consensual sex. 2) Cultural differences, which influence concepts of marriage, gender roles and sexual expectations. Culture also influences the concept and regulation of rape, which is even today debated and undergoing change in Danish culture and law, as we will show.

These two elements became a motivation for us to investigate how rape laws and rape cases are culturally influenced. The article is divided into two parts.

In part one, we focus on the cultural influences on rape laws. We focus on marital rape, but also include regulation of adultery, fornication and rape outside of marriage, since the societal views on these concepts are linked with the view on marital rape. This part is a comparative study of the historical development of these laws in Danish, Pakistani and Muslim law. We wanted to see which insights could be gained about developments in these legal systems when comparing them with each other. We chose these legal systems based on the Danish-Pakistani element in the court cases. First, we provide a framework on how regulations differ based on societal views on gender and sexuality. We then investigate how these varying views have shown themselves in legislation across time. We look at the historical Danish regulation and on current debates in Denmark and compare with developments in Pakistan, although for the developments before Pakistan's independence, we look more broadly at Muslim law. We have chosen the term Muslim law instead of e.g. Islamic law to better highlight that laws among Muslims are not only influenced by Islam but also by various other cultural and historical influences and therefore differ widely among Muslims. We find that our comparison of the legal

systems offers valuable insights on similarities and differences in development and on how culture and socio-economic factors influence rape legislation.

In part two, we focus on other cultural influences than legislation on rape cases in Denmark. Here we analyze which role culture had in the two court cases on marital rape, e.g. in arguments of parties, lawyers and judges.

By combining the two parts and using the Danish-Pakistani angle as an example, this article will lead to recommendations and inspirations for judges, lawyers, legislators and other professional actors on what to be aware of in cases concerning elements of sexuality and culture, e.g. cases involving minority cultures. These recommendations include awareness of both the legal culture, the personal culture of the judge and the culture of the parties. The article will also show the importance of raising awareness in the population, both for majorities and minorities, about rape laws and sexuality.

Part 1: Cultural influences on rape legislation

Framework for analysis

Which actions should be categorized as rape? This question has been given different answers across various cultures and various historical times. The answer depends on how the society views sex, sexuality and gender roles (Graversen, 1990; Rosen, 2006). These disagreements especially show themselves in the question of whether rape should be illegal inside a marriage – and to which extent.

To help our analysis, we have decided on four main categories to describe the societal views that we have identified in the history of legislations. In the rest of the article, we will relate various legislations within Danish and Muslim/Pakistani legal history to these categories, and thereby provide further details of the exact way these views show themselves in reality. We will here give a brief explanation of each of these societal views on rape:

1) A proprietary view: Under this view, women are seen as the property of their male relatives. This means that if a man rapes a woman he is not married to, it is considered a crime against her male "owners". The perpetrators' punishment often differs based on the marriage status of the victim, since having sex with another man's wife is considered worse than sex with an unmarried woman. Whether the relation was rape or consensual

sex is not necessarily considered important by the law. The woman does not have the legal right to consent and is often not seen as responsible, even when voluntarily engaging in fornication or adultery, while the man is punished regardless, since even consenting sex with her is a crime against her male relatives. In the proprietary view, marriage becomes the thing that makes sex legal. Since the husband becomes the new "owner" of the woman, this means that he in practice has a license to have sex with her regardless of her consent.

2) A theocentric view: Within the Abrahamic faiths, sex outside of marriage is generally considered illegal. However, in a theocentric view this is not seen as a crime against relatives, but as a crime against God. This means that under this societal view both the man and the woman are punished for fornication and adultery. As opposed to the proprietary view, their punishment will differ based on their own marriage status, since adultery is considered worse than fornication. Outside of marriage, it makes a difference whether the woman is raped or not, since she is only punished for intentionally participating in fornication or adultery. However, since only sex outside of marriage is seen as a crime against God, rape within marriage is also not considered a crime.

3) A morality view: If a society no longer views religion as being a valid reason for regulations, then another argument against rape can be morality. The main aim of this regulation is not the protection of the individual's autonomy but of the moral standards of society. This may lead to prohibition against adultery or even fornication, but generally rape is seen as worse due to the threat to society's order. However, in this view there is no direct reason for criminalizing rape within marriage, which might be regarded as a private issue that the wider society should not interfere with.

4) An autonomy (individualist) view: Under this view, both men and women are considered individuals who have the right to bodily autonomy. This means that it is seen as a crime to force them into having sex. In this understanding, it becomes irrelevant whether this crime takes place inside or outside of marriage, since a spouse does not have a license to disregard the other spouse's autonomy. On the other hand, men and women are free to engage in adultery and fornication as they please.

Thus, to summarize: In the proprietary view the man is punished for sex outside of marriage, and the worst crime is sex with another man's wife, regardless of whether it is rape or not. In the theocentric view, both parties are punished for sex outside

of marriage, but not if they have been raped, and the worst crime is having sex with someone else when you yourself is married. In the morality view, rape is seen as worse than adultery and fornication, but is still only a crime outside of marriage. In the autonomy view, it is rape that is forbidden, regardless of whether it is inside or outside of marriage. Only in the last view is marital rape criminalized.

Other reasons for regulating (or not regulating) rape could certainly be identified in other cultures or at other times than those we have investigated. Other elements could also be included in the analysis, we have e.g. not analyzed how the legislation differed in regards to same-sex relations, which is also influenced by the wider societal view. While we have decided on the exact definitions of these four categories, similar categories and explanations of the ideology behind legislation have been used by many other writers, which we have sought inspiration from (Azam, 2015; Conley, 2014; Dübeck, 2003).

The four descriptions above are ideal types of these views. As we will show below, societies generally lean more towards one view than other views. However, the change from one view to another can be gradual or contested, which means that two or more views might influence the legislation simultaneously.

Another important distinction lies in the definition of rape. In this article, two main definitions of rape will be discussed: 1) The violence-based definition, which criminalizes rape if the perpetrator has used violence or threat of violence. In this definition, having sex with someone against their will without using any violence is legal. 2) The consent-based definition, which criminalizes intercourse if one party did not consent to it, regardless of whether violence was used. Recently, Denmark has decided to move from a violence-based definition to a consent-based definition. During these discussions, a third definition was suggested: A voluntary-based definition, which criminalizes intercourse if one party did not voluntarily participate (Criminal Law Council, 2020). This definition is quite close to the consent-based definition. They differ in particular circumstances, where voluntary-based legislation would require the victim to signalize that they do not want the intercourse, while consent-based legislation leads to conviction as long as the victim did not signalize that they wanted the intercourse. It has been argued that the difference between these two definitions is miniscule (Vestergaard 2020). However, the consent-based definition makes it the responsibility of the person initiating the sexual intercourse to ensure that the other party has consented.

While these distinctions are used by Danish legal scholars, it is important to note that they are also to some extent ideal types and that the legislation might gradually change from one to another, as discussed in the following.

Other important distinctions relate to how the crime is proven. This is especially important in rape cases, since they are often difficult to prove. A very important element is the burden of proof. Is it the accused or the victim who has to prove what happened? Another important element concerns which arguments can be used in court. Is e.g. the victim's chasteness, class and caste, the parties' prior relationship or how quickly the crime was reported relevant as evidence? Our article does not systematically analyze the historical development of rules on evidence, which were of course very different before modern methods of evidence collection. In both Denmark and Pakistan today, the burden of proof in rape cases is on the prosecutor, since the accused is considered innocent until proven otherwise. In regulations that forbids adultery and fornication, the burden of proof can land on the victim to prove that it was indeed rape (only the perpetrator is punished) and not consensual sex (both are punished) depending on the exact definitions of these crimes and the rules on evidence. We will include rules on evidence in our analysis, when it is relevant for our main arguments. We will e.g. discuss the importance of the regulation in Pakistan, where the official definition of rape is focused on consent, but where case law suggests that the victim will frequently have to show evidence of violence to prove the non-consent, which in reality makes the application of the legislation violence-based.

Historical regulation in Denmark

We have investigated the oldest legal development in Denmark through existing literature. After the democratic constitutions, we have investigated the development primarily through our own reading of the laws and amendments enacted. Thus, for this period our references will be directly to the laws instead of literature.

In the following, we show how Danish legal history can be divided based on the four societal views described above. Thus, we have divided the history into four periods, which follow these four different views. However, as mentioned above, the development from one view to another happens gradually, which is also highlighted in the following. After our analysis of these four periods, we will look at the Danish decision in 2020 to change the definition of rape.

1) Before the Lutheran Reformation in 1536: Proprietary view

The proprietary view is clear in the earliest preserved Scandinavian laws, the Icelandic Grágás, written down in the 12th century. In these laws, it was the woman's husband, father or other male relative that could sue the rapist (Dennis et al., 2000, p. 70). If an unmarried woman voluntarily engaged in sex, she owed her own legal guardian a compensation (Dennis et al., 2000, p. 75). There is no indication in these laws that a woman could sue her husband for rape. On the contrary, if a woman fled and avoided her husband, he could declare it illegal for anyone in Iceland to house her, effectively forcing her back home to him (Dennis et al., 2000, p. 77).

The earliest recorded Danish laws are from the 13th century and have similar views. The man who had sex with an unmarried woman had to pay a compensation to her family (Koefoed, 2008, p. 80). However, in case of rape the money was to be used for the benefit of the woman or, according to some laws in Zealand, be given to the woman (Dübeck, 2003, p. 56). This is an early example of seeing the woman as the victim of rape.

As opposed to the Icelandic law, regardless of whether it was rape or not, the woman was considered to have been seduced and was not punished for sex before marriage (Koefoed, 2017; 2008, p. 80). Thus, she was seen as a passive element in these crimes, without any real agency of her own and not held responsible. There was no punishment for a man raping his own wife. Similarly, a man's relations with other women were not a crime against his wife (Koefoed, 2008, pp. 80–81) i.e. his punishment did not differ based on whether he was married. Instead, whether the woman he had relations with was married influenced his punishment, highlighting that the concern was her male family members.

In Jutland, the punishment for rape was instead outlawry, suggesting a deeper focus on rape as a societal crime. In 1396, the Danish Queen Margrete I further strengthened the idea of rape as a societal crime by introducing the term "kvindefred", stating that women, similar to the church and farmers, had a special right to peace during warfare (Jacobsen, 2005). These regulations could be said to show early signs of the morality view we have described above, since their focus was more on the societal protection and stability than on protecting the rights of the male family members.

2) From Reformation in 1536 until democratic constitution in 1849: Theocentric view

Especially following the Lutheran Reformation, Danish laws became more strongly influenced by both Biblical principles and newer Christian ideas (Tamm, 2005, p. 168). This includes the theocentric view of rape described above.

Interestingly, the Bible itself contains a mixture of the theocentric and the proprietary view. Mosaic Law regulates rape in Deuteronomy 22, 23-29. According to this, if a man had sex with another man's fiancée, both he and the woman were stoned to death, unless the woman was considered to have screamed for help. If a man raped an unmarried woman, he had to pay her father a compensation and marry her. As we see, the man's punishment did not differ based on whether it was rape or not. It only differed based on the civil status of the woman. Together with the compensation to the father, this links with the proprietary view. However, the strict punishment of stoning, which is not to the benefit of the male relatives, and the fact that both the man and the (engaged) woman are held responsible for breaking the rules, link with the theocentric view. There is no mentioned regulation of marital rape.

Following the Reformation in Denmark, voluntary sex outside of marriage was still illegal, but the view on the crime had changed. Any married person who committed adultery was to be killed (Koefoed, 2008, p. 85), although the rules were softened in the Code of Denmark, generally requiring repeat offences before death penalty was applied (Koefoed, 2008, pp. 87, 108; Code of Denmark 6-13-24). Thus, as opposed to both earlier Danish law and Deuteronomy, the man's crime was now that he had broken his own marriage vows and his promise to God, in line with the theocentric view we have described. Similar to Deuteronomy, women were seen as playing an active role in the crime and could be held accountable for their own actions. While the view before the Reformation had been that an unmarried woman naturally must have been seduced by the man and therefore was not to be punished, the idea that women were active agents spread, maybe influenced by the Church's view of Eve as the temptress (Dübeck, 2003, p. 69). This also had a role in rape cases. Laws from 1582 gave death penalty for rape of chaste women (Dübeck, 2003, p. 59), introducing a difference between whether the woman was known for being chaste or not, which would persist until 1930. Raping an unchaste woman was not punishable in itself, but a man who raped several women without marrying any of them could receive death penalty for this, regardless of whether the women had been chaste or not (Koefoed, 2008, pp. 94–95). An even clearer expression of this idea of "tempting women" influencing the legislation appears in 1734.

Until then, an unmarried man who had sex with an unmarried woman was obligated to marry her, if she wanted this. This obligation was removed due to the impression that women were luring men into sexual relations as a way of forcing them into marriage. Suddenly, society saw the man as the victim of the premarital relation and the woman as the seducing party (Koefoed, 2008, p. 309).

Marital rape was still not a crime, and the rules generally encouraged marriage, e.g. by reducing or dropping the punishment for unmarried fornicators who chose to get married (Dübeck, 2003, pp. 60–61; Code of Denmark 6-13-1; Koefoed, 2008, p. 106).

3) The first criminal code of the democratic era: Morality view

Denmark had its first democratic constitution in 1849 and a new criminal code in 1866 replaced the older laws. It removed the punishment for sex before marriage. However, it continued to be a punishable crime for a married person to engage in sex outside of marriage until 1930.

In 1866, the article on rape was placed in the chapter on vice crimes, suggesting that it was seen as a crime because it transgressed public morality, in accordance with the morality view on rape we described above. The article has remained in that chapter until today, which was criticized by Amnesty International in 2008 for conveying "a message that rape violates public morals, rather than the rights of an individual" and for still reflecting the original intention of the legislation as being "the protection not of the individual, but of the moral standards of society as a whole" (Amnesty International, 2008)

The law in 1866 criminalized the husband who forced his wife to have sexual intercourse with other men, but the punishment was less than for rape, and there was no mention of the possibility of punishing a husband for raping his own wife, although the law also did not directly state the opposite.

4) Since 1866: Towards an autonomy view

Despite the article remaining in the chapter on vice crimes, it is our impression that the reasoning for rape being a crime quickly changed. In writings from the early 20th century, the Danish legal thinkers began arguing that the crime of rape was a crime against the woman's sexual autonomy (Dübeck, 2003, p. 74). This did not immediately lead to major changes in the rape regulation. It is our conclusion that the autonomy

view on rape has slowly but surely influenced the legislation until the confrontation between the old views and the new view has come to a final (for now) confrontation in debates going on right now in Denmark.

Over the last 150 years, especially two tendencies have shown themselves in changes to rape legislation.

One tendency influenced by the autonomy view has been to include more and more types of violations in the definition of rape, slowly changing the definition of rape from violence-based towards consent-based.

The central article on rape from 1866 was fully violence-based and only included forced intercourse through "violence or threats of immediate life-threatening violence" in its definition (although other articles criminalized other sexual crimes, such as intercourse with an unconscious woman). The 1930 law widened the definition of rape to "forced intercourse with a woman through violence, deprivation of liberty or by causing fear for her or her loved one's life, health or well-being", thus the focus was no longer only on immediate life-threatening violence. In 1967, the definition also came to include cases where a man had deliberately put a woman into a defenseless state (e.g. by drugging her) and then had intercourse with her. In 1981, it was further widened to include all threats of violence, not just those that caused fear for life or well-being. Simultaneously, the article was rewritten in a gender-neutral language, so that it now also included a woman raping a man. In 2013, the article was changed again to include any kind of intercourse achieved by illegal coercion, as well as intercourse with any person in a defenseless state (regardless of whether the perpetrator had placed them in that state himself). In this regard, illegal coercion included e.g. acquiring intercourse with a woman (or a man) by threatening to otherwise disclose to others that she has committed a crime, that she has been unfaithful or any other matters of private life that she would prefer to keep secret. The Criminal Law Council specifically considered in 2013 whether the legislation should be changed to consent-based, but rejected the idea (Vestergaard, 2019). However, as our description shows, there has been a gradual movement from the violence-based definition towards a consent-based definition, by including more and more in the definition of rape. It should be noted that some of these actions were also illegal in Danish law earlier than the year mentioned here, but were not defined as rape and were regulated by other articles. Thus, the movement has especially been towards including more and more in the legal definition of rape.

However, even after the change in 2013, having intercourse with a conscious person who had not consented and who did not want to have sex was still legal in Denmark, if there had been no forms of violence, threats or illegal coercion. This has led up to the 2020 decision on whether the legislation should be changed to a consent-based.

The other tendency influenced by the autonomy view has been a move towards also punishing husbands and other partners for rape.

In 1930, the law made it possible to punish for marital rape. However, while the law also removed the chaste vs unchaste distinction in rape cases, the law instead introduced a new distinction, with less severe punishment for a man raping a woman he was in a lasting sexual relationship with. Similarly, other sexual crimes than rape, such as having sex with an unconscious woman, was still not illegal within marriage. The law also reinvented the rule that the punishment was remitted or reduced if the parties married after the rape. In 1967, the less severe punishment for rape in lasting relationships was officially removed. Yet, in 1981, the legislator noticed that jurors often acquitted rapists of art. 216 (rape by use of violence or threat of violence) and instead convicted them of the lesser crime in art 217 (intercourse achieved by other forms of illegal coercion), despite violence having been used. This primarily happened in cases where the man and the woman had known each other before the rape, showing that the change in 1967 had not penetrated fully into court practice (Criminal Law Council, 2012, p. 150). The law was changed again to prevent this practice. In 2013, the rule allowing for remittance of punishment if the rapist married the victim was removed and all articles were changed to also apply within marriage. Thus, while the law began recognizing rape in marriage in 1930, it originally had several reservations, which has only gradually been removed.

5) The 2020 decision: Autonomy and consent

Legal scholars supporting a consent-based legislation have argued that it would strengthen the protection of sexual autonomy (Vestergaard, 2019), in accordance with the trend we have identified since 1866. Contrary to this, a Danish law professor in 2019 criticized that such legislation could make it illegal for a husband to pressure his wife into having sex with him by threatening divorce (Madsen, 2019). This highlights an existing cultural conflict concerning autonomy and the extent to which pressure should be legal in marital relations.

In 2020, the Danish Criminal Law Council (Straffelovrådet) gave their recommendations on the matter. The council had found several problematic Danish court cases that had led to acquittal. The cases that the Council mentioned in their report included a case where a woman had tried to push away her boyfriend but had eventually felt pressured to go through with the intercourse, because she did not want conflict in the house or for an argument to happen. Other cases referred to by the Council, which did not involve boyfriends, included 1) a woman who said no, but had then felt paralyzed and unable to resist when the man anyway initiated intercourse; 2) a 16-year old girl alone in a bathroom with three men, who clearly said no, but did not try to leave; and 3) a woman who was in a bathroom with a man, where he turned her around, pulled her pants down and initiated intercourse, while she was saying no. In these cases, the women had not consented to the intercourse, but none of these cases had been considered illegal under the Danish legislation, since there had been no violence or illegal coercion involved (Criminal Law Council, 2020, pp. 125–127, 200–202).

The Criminal Law Council highlighted the importance of protecting the victim's right to self-determination and recommended legal change, but the members were divided on how to change the law. The majority suggested a voluntary-based definition, while a minority of only one person suggested a consent-based. These terms are discussed above in our framework. The defining example used by the council was two people partying together with sexual communication or touching, going home together, voluntarily taking off their clothes and lying down in bed together. In this situation, if one party initiates sex, while the other party stays completely passive, the voluntary-based definition would not consider it rape (Criminal Law Council, 2020, p. 136). It was not explained what this would mean for married couples, who could often find themselves in that situation.

The minority in the council insisted that rape should not be defined in the victim's lack of opposition, but rather in both parties mutual interest in sex. The minority felt the need to make sure that situations where the victim had been passive were also criminalized, such as when feeling paralyzed and situations inside marriage or relationships where one party due to despair or fear is unable to resist (Criminal Law Council, 2020, p. 169). Under the consent-based definition, the initiating partner has a responsibility of ensuring that a passive partner has consented to the intercourse.

Shortly before the publication of this article, a new definition of rape was implemented in Danish law. The new definition follows the consent-based view proposed by the minority in the Criminal Law Council. Thus, the new legal definition of rape is "intercourse with a person, who has not consented to it". The change came into effect on 1 January 2021.

Historical regulation in Muslim law

Since Pakistan has only been independent since 1947, we will first look historically at how Muslim law regulated rape before turning to the modern development in Pakistan. For centuries following the rise of Islam, judges in the Muslim world would decide cases based on interpretations of the primary and secondary sources of Islam. This has changed in modern time, especially following the colonial era, where ideas from Western law have spread or directly been imposed on many Muslim countries (Anderson, 1990). However, concepts and ideas from earlier applications of Muslim law continue to play a role in many Muslim countries, including Pakistan (Pearl and Menski, 1998; Mehdi, 1994).

There is not just one interpretation of Islam's sources. Denominations such as Shia and Sunni have different theological interpretations of the sources. Traditional Sunni Islam further consist of different legal schools, called "madhhabs", which have derived different rules from the Islamic sources. The two oldest are the Hanafi madhhab and the Maliki madhhab, which originated 150 years after the death of the Prophet (Hallaq, 2009, pp. 63–64). Both before and after this time, other competing interpretations have also existed. In our time, feminist interpretations of Islam are one of these competing voices. Within each madhhab, there is agreement on certain rules and methodological principles. However, in concrete legal questions, it is also normal to find some disagreements within a madhhab, since it has developed over generations through internal debate (Hallaq, 2009, p. 65).

Within the discourse of the legal tradition, it is common to divide criminal punishments into different categories, including: 1) Hudood (Singular: Hadd) are punishments directly prescribed in the sources of Islam (Noor, 2010). If an accused is found guilty of a Hadd offence, the judge will apply the exact punishment prescribed by Islam. Hudood are seen as crimes against God, so the judge or ruler cannot pardon a person found guilty of these crimes (Munir, 2009) but they can also not apply the punishments unless a number of strict criteria have been fulfilled. 2) Ta'zir refers to

discretionary punishments, i.e. offences forbidden by Islam but for which the judge can decide whether to punish and (within certain limits) which punishment to apply (Peters, 2009, p. 68; Munir, 2009). 3) Syasa can be translated to policy, and is the discretionary power of the ruler to make something illegal and prescribe a punishment. In contemporary usages, Syasa and Ta'zir are often seen as the same category (Munir, 2009).

1) Early Muslim law: Theocentric view with a focus on consent

The Quran forbids sex outside of marriage, including both adultery and fornication, which under one term is called "zina" (Quran 24.2). The Quran does not say anything directly about rape (Quraishi, 1997, p. 302), neither inside nor outside of marriage. Similar to the Bible, various statements telling husband and wife to be good to each other can be understood to mean that it is morally wrong to rape your spouse, but there is no direct mention of it being a criminal offence

The theocentric view on legislation is clear already in the beginning of Islam in the 7th century. In these rules, women and men were given the same punishment for zina (illegal sexual intercourse) (Bello, 2011, p. 171) and their punishment depended on their own civil status, similar to the laws written after the Reformation in Denmark. In the most prevalent early interpretations of Muslim law, a married person committing zina was stoned to death, while an unmarried was flogged 100 times. The Quran only mentions flogging as a punishment and makes no distinction in punishment based on civil status, but early jurists used other sources of Islam to argue for this distinction and the punishment of stoning. Thus, the punishment for zina was considered a Hadd punishment.

Early Muslim jurists saw the criminalization of rape in light of the prohibition on adultery (Noor, 2010, p. 429). Thus, the consequence of rape, i.e. forced zina, was primarily that a raped woman was not punished for zina, because she had been forced. The rapist was given the same punishment for rape as he would have been given for zina (Noor, 2010, p. 431). This also meant that marital rape was not considered, since zina could not take place in a marriage.

Muslim scholars thoroughly discussed and gave examples of different forms of duress that negated a woman's consent and therefore meant that she should not be punished for zina (Quraishi, 1997, p. 314). This included not only violent rape, but also having

zina with a sleeping or insane person or with a minor (Azam, 2015, pp. 103, 114, 132, 134). There are also examples of early Muslim rulers accepting that socio-economic factors could force a woman to engage in sexual acts, she would otherwise not have desired, and that she should therefore not be punished for such actions (Azam, 2015, p. 102; 2012, p. 456). Thus, the focus was not on violence, but on whether the woman had willingly participated in zina or not.

2) The madhhabs: Influences from proprietary, theocentric and autonomy views

Interestingly, Azam has shown that already at the time of the madhhabs, there were at least two different views on the crime of rape (forced zina), which she herself distinguishes as proprietary and theocentric (Azam, 2015). She has found that the Hanafi madhhab viewed rape very similarly to our theocentric category. On the other hand, the Maliki madhhab viewed the female sexuality as a property and rape as a proprietary crime, somewhat similar to our proprietary category, although with the important difference that the woman herself was seen as the owner, not her male relatives. This in reality also makes this view somewhat similar to our autonomy category, since she was to be compensated if raped because her rights had been violated. Of course, there are also obvious differences to the autonomy view, such as marital rape not being a crime in the Maliki view and men and women not being allowed to consent to zina. Since the Maliki madhhab was also influenced by the theocentric views described above, it is an interesting mix of several different concerns.

This difference in how rape was classified had practical implications. Similar to zina, the Hanafis viewed rape as a crime towards God with no human victim. Therefore, the rapist was punished but did not have to pay any compensation to the woman for the sexual violation (Azam, 2015, pp. 156, 158). The Malikis disagreed and both punished the man and demanded that he paid compensation to the woman (Azam, 2015, pp. 130–31). The two remaining Sunni madhhabs, Shafiis and Hanbalis, agreed with the Malikis on this (Noor, 2010, p. 431).

The other practical implication had to do with the burden of proof. For zina, traditionally the Hadd punishment was only carried out if the parties confessed freely or if four male witnesses had seen it take place. For this reason, many have described the rules as more symbolic, or as preventing the public spread of immorality but not the private (Quraishi, 1997, p. 296).

Since the Hanafis regarded rape as a Hadd like zina, a rapist could also only be punished if he confessed or if four male witnesses had seen the crime (Azam, 2015, pp. 188, 195). Historically, it seems that Hanafis did not allow judges to apply Ta'zir punishment in rape cases where this strict evidentiary criteria for Hadd had not been fulfilled (Azam 2015, p. 195). Ta'zir, the ability of a judge to apply a discretionary punishment, was reserved for crimes that did not fall under the definition of zina (and forced zina), e.g. anal sex (Azam, 2015, p. 173), while in cases concerning zina (and forced zina) Hanafi scholars applied the rules on Hadd, including the very strict evidence rules. If these were not met, Ta'zir was also not an option and the rapist/adulterer was not punished.[2]

As opposed to this, the Malikis clearly allowed for the woman to raise a rape case as a Ta'zir procedure and thereby purely on circumstantial evidence, such as her having screamed, immediately reporting the crime, bleeding afterwards etc. (Azam, 2015, p. 208). If the woman won such a circumstantial rape charge, the man was not stoned, since he had not been found guilty of the Hadd punishment, but he had to pay her a compensation and the judge could give him a discretionary punishment (Azam, 2015, pp. 210, 222, 225–27). However, the Malikis also allowed circumstantial evidence in zina cases. This meant that a pregnant unmarried woman could be punished for zina, unless she was able to prove that she had been raped. The Hanafis disagreed and accepted that neither the man nor the woman could be punished without witnesses.

Neither of the madhhabs recognized marital rape as a crime, although they did allow a woman to seek punishment of or compensation from her husband, if he caused damage to her during sex, e.g. through perineal tearing (Azam, 2015, p. 19).

3) Ongoing discussions in modern times

These disagreements between madhhabs show the diversity within Muslim law. Despite both legal traditions using the same sources, they reached different results based on interpretations and categorizations. This diversity in classical Muslim law leaves a door open for modern Muslim reformers to suggest other categorizations of rape, which could potentially include marital rape. One modern tendency among Muslim thinkers

2 As opposed to Azam's conclusions on this, Baldwin (2012, p. 128) says in the context of Ottoman Hanafi jurists that they could apply Ta'zir, when the strict evidence criteria for a Hadd crime had not been met. However, Baldwin's reference for this information, Peters (2009, pp. 65-67), appear to be talking generally about the concept of Ta'zir across the different madhhabs and not specifically about the Hanafi madhhab or Ottomans.

is to categorize rape as a violent crime, similar to other forms of assault (Noor, 2010, pp. 434–435). This categorization can also find support in opinions among earlier scholars (Quraishi, 1997, p. 315-319). Quraishi suggests including the crime of rape under Hirabah (rape as a violent taking) and Jirah (rape as bodily harm). Others have suggested that Islam leaves it up to the rulers' discretion to regulate and punish rape (Munir, 2009). These historic and modern disagreements show how the societal view on rape, be it proprietary, theocentric, moral or autonomy-focused, are also influencing how Islam's rules on rape are interpreted and applied.

Historical regulation in Pakistan

In the following, we will look at four historical periods: 1) The Muslim rule in Pakistan before colonization, 2) colonial time and early independence, 3) the Hudood Ordinances from 1979, and 4) the Women's Protection Bill from 2006.

1) Muslim rule: Diverse practices and local solutions

Discussions on the right regulation of rape and zina among Hanafi and Maliki scholars interpreting Islam does not necessarily correspond directly with how Muslim rulers and judges historically punished such crimes. The region of Sindh in modern day Pakistan was conquered by Muslims as early as 712. However, due to political, administrative and military difficulties, rules based on Islam were only systematically applied in this area from around 1204 (Fyzee, 1963, p. 401). Even then, application was not necessarily in accordance with the theoretical framework developed in the madhhabs. There are examples of sultans in the area pardoning and remitting Hadd punishments for adultery, despite the madhhabs not allowing this. However, there are also e.g. reports about a woman accused of adultery and many other crimes, who was sentenced by the Muslim emperor to be torn to pieces by dogs, a punishment completely unheard of within the scholarly legal tradition of Islam (Fyzee, 1963, p. 409). Thus, the Muslim rulers did not necessarily follow the madhhabs.

We are not aware of any systematic analysis of how Muslim laws on rape and zina were applied during the Muslim rule of what is today Pakistan. Two things prevent a full analysis. First, there is not enough material about historical cases. Sangar suggests that due to the social stigma in relation to cases on zina, they were probably often dealt with between the involved families without being made public at court (1967, p. 183). However, the lack of Mughal state archives also contribute to the lack of material (Pirbhai, 2016). Second, the pure diversity of practices makes it difficult to say anything

in general about this period. From around 1206-1526 the area that is today India and Pakistan was primarily ruled by various sultanates based in Delhi. Following this, the Mughal Empire ruled until the colonial time. However, parts of what is today Pakistan have also been ruled by e.g. the Timurid Empire and the Safavid Dynasty. The diversity in practices is partly due to the rulers having different approaches. However, another reason is that the central rulers often allowed freedom to settle disputes privately, e.g. through local arbiters or assemblies that used customary laws with only limited relation to the religious rules (Giunchi, 2010, p. 1121). Giunchi also mentions that disputes concerning honor were almost entirely solved outside of court. On the other hand, Pirbhai argues that earlier scholars have underestimated how often the official courts handled local criminal cases (2016). Official courts would make reference to Hanafi interpretations of Islam. However, judges might dissent from the official opinions of the madhhab if they found other options more suited for the community (Giunchi, 2010, p. 1122). To some extent, this is fully within the Hanafi methodology, which allowed for taking culture and context into consideration (Giunchi, 2010; Pirbhai, 2016). Thus, the legal application in these times was flexible and dependent on context, which also made them ambiguous.

It is outside the scope of this article to do a deeper analysis of the societal views influencing these various applications. Theocentric influences from Islam and the Hanafi madhhab prevalent in this area likely had influence, but if cases were solved privately by families due to issues of honor and social stigma, it would suggest that proprietary concerns also had a role.

When the East Indian Company first began the colonization process of the Mughal Empire, they originally wanted to apply the area's own laws, including the traditional Muslim law, although with the caveat that application of these laws should not be seen as contrary to the laws of England. In 1748, it was directly stated that this principle should also be applied for the regulation of sex offences, which meant application of Muslim law for Muslims (Giunchi, 2010, p. 1126). However, the British authorities wanted a clear and easily implementable law and did not take inspiration from the more pragmatic approach that Muslim judges had historically used. They also largely ignored the written collections on Muslim law that the Mughal emperors had gathered (Pirbhai, 2016). Instead, they used classical Hanafi books, primarily the 12th century book Al-Hidaya (Giunchi, 2010, p. 1127; Hallaq, 2009, p. 374). The British created a codification of one opinion within the Hanafi madhhab, excluding a variety of

contradicting opinions and nuances as well as the ability to take culture and context into consideration (Hallaq, 2009, p. 376). It was the first time that a unified Muslim law was applied within this area (Giunchi, 2010, p. 1129), but it was heavily influenced by the British legal perspective and was therefore an interesting mix of traditions that became known as Anglo-Muhammedan law (Hallaq, 2009, p. 377). The Muslim laws were altered in areas where they did not fit the British view on law and from 1790 to 1861, British criminal law gradually replaced Muslim law. The tendency in Hadd regulation to have very strict evidentiary criteria, making it difficult to convict criminals of these crimes, was found too lenient by the British (Hallaq, 2009, p. 378). Thus, while punishments like stoning and flogging were banned or restricted over time, the actual number of people punished for zina grew dramatically (Giunchi, 2010, p. 1131). This may suggest that the lack of documented zina cases from the earlier period was not only due to families hiding the cases from public view. It might also be because the population knew that it was difficult to get anyone convicted of zina and rape under the traditional Muslim laws. Eventually, a new penal code was drafted by the British, which replaced the Muslim laws completely.

2) Colonial Penal Code: Moral and proprietary, non-consent proven through violence

Pakistan inherited the Indian Penal Code (since then called the Pakistan Penal Code) from 1860 as their criminal code. This Penal Code was made during the British colonization of India and Pakistan and was based on the English law on rape (Kolsky, 2010). It continued to be in use until 1979 with only few changes.

Before 1979, the wording of section 375 was:

> A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:
>
> First.– Against her will.
>
> Secondly.– Without her consent.
>
> Thirdly.– With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

> Fourthly.– With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
>
> Fifthly.– With or without her consent, when she is under [sixteen] years of age.
>
> Explanation.– Penetration is sufficient to constitute the sexual intercourse necessary to the offense of rape.
>
> Exception.– Sexual intercourse by a man with his own wife, the wife not being under [fifteen] years of age, is not rape.

The age of consent was originally ten years of age in 1860, and the same was the case for the age mentioned in the exception-clause, which allows for marital rape as long as the wife is not below a certain age (Vibhute, 2001, p. 27). Both this age and the general age of consent were raised several times over the years (Law Commission of India, 1997, pp. 144-145).

Interestingly, the definition of rape in section 375 of this Code includes a man having sexual intercourse with a woman "against her will" or "without her consent". Thus, already in 1860, the written law in what would become Pakistan defined rape based on whether the woman had willingly participated. Violence is also part of the written definition, but only to make sure that a woman violently forced into "consenting" is also considered raped. However, while the definition includes a focus on consent and willingness, this does not mean that the application of the law focused on the woman's consent the same way the new Danish legislation is expected to do.

Kolsky has shown from case law in colonial India in the years leading up to 1947, that in the absence of violence and other circumstantial evidence colonial judges presumed that the woman had consented, and therefore based their decisions on other factors than the woman's testimony. These factors included discussions on the woman's previous sexual history, but the most important evidence was signs on the woman's body of her having violently resisted. Consent was inferred from non-resistance, and no physical signs of resistance therefore meant acquittal (Kolsky, 2010). Thus, the application of the regulation was violence-based if we are to apply the terminology from the Danish

debate. Examples of these practices include a case from the Lahore High Court in 1935, in which four men were found guilty of breaking into a woman's house and abducting her. Despite this, they were not found guilty of rape, since there were no marks of injury to the woman's vagina. In a case from 1933, the Oudh Chief Court held that "the first and foremost circumstance that can be looked for in a case of rape is evidence of resistance which one would normally expect from a women unwilling to yield to a sexual intercourse forced upon her" (Kolsky, 2010, p. 121). Especially lower-class women were expected to put up their utmost resistance and therefore found it difficult to get a rapist convicted, even when some signs of violence were present (Kolsky, 2010). In a case from 1907, a female beggar claimed to have been raped by two men on a path close to a temple. She had screamed for help, which attracted nearby villagers who saw signs of struggle when they arrived. Clear signs of violence were found on her body. Yet, the Kathiawad Chief Court found that there were no signs of "real struggle" since she was a "strong and mature woman". The court also found that the physical signs of violence could simply be the result of the kind of sex people of "such low class" engaged in, including the fact that they had not cared to find a fitting site before engaging in the intercourse (Kolsky, 2010, p. 117).

It is our impression that the regulation can widely be included under the morality view on rape. The rape laws did not treat women as property of male relatives, but the focus seems to have been more on the protection of the society than on the individual woman's autonomy. However, other provisions clearly highlighted that the proprietary view also influenced the legislation, for example Section 497, which criminalized adultery, but only for a man having intercourse with a married woman. The married woman was not punished, and neither was a married man who committed adultery with an unmarried woman. Thus, adultery was treated as a man's crime against the woman's husband. Similarly, section 375 only criminalized a man raping a woman, not the opposite.

3) Hudood Ordinances in 1979: Same legislation in a new disguise

Pakistan went through an islamization-process, which led to new criminal laws in 1979, entitled the Hudood Ordinances (Bubb, 2007, p. 71).

One of the new ordinances was the Zina Ordinance, which criminalized fornication and adultery, allegedly in accordance with classical interpretations of Islam, including the same punishments i.e. either stoning or flogging depending on the marital status,

if the requirements of e.g. four witnesses were met (Cheema, 2006, p. 134). However, if the strict criteria for evidence were not met the Ordinance also allowed for Ta'zir as an alternative punishment, which could lead to imprisonment and until 1996 also to flogging (Rathore, 2015, p. 9; Shah, 2010, p. 3). The Ordinance became very controversial and was criticized for not following the spirit of Islam, lacking public consensus and resulting in injustice against victims of rape (Mehdi 1990; 1992). Especially the inclusion of Ta'zir as a possible punishment for zina was criticized, since it made it much easier to prosecute women for zina, e.g. when they were unable to prove that they had been raped (Quraishi, 1999, p. 416).

The legislation placed rape as a subcategory of the wider crime of zina (fornication and adultery), calling it zina-bil-jabr (Literally: zina through force) and also here required four male eyewitnesses for Hadd and otherwise allowed for Ta'zir (Rathore, 2015, p. 10). The wording of the article of zina-bil-jabr was:

> A person is said to commit zina-bil-jabr if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely:
>
> (a) against the will of the victim;
>
> (b) without the consent of the victim;
>
> (c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt; or
>
> (d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.
>
> Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of zina-bil-jabr.

The law clearly excluded marital rape from the provision. While the Federal Shariat Court directly stated that the new law was a "complete departure" from the previous

legislation (Cheema, 2006, p. 132), it is nevertheless striking how similar the actual wording of the provision of zina-bil-jabr was to the previous colonial rape legislation (Quraishi, 1999, p. 414). One obvious similarity is that the written definition of zina-bil-jabr in the law used almost the exact same wording on consent and willingness as the colonial law. Interestingly, as opposed to the earlier legislation, the article was gender neutral and explicitly stated that a man could be the victim of zina-bil-jabr.

Practically, the Hadd punishments for zina and zina-bil-jabr were never carried out, due to the difficulty in providing enough evidence (Cheema, 2006, p. 151), making the Ta'zir regulation the primary practical regulation. Despite the consent-based wording, there were examples of cases where the intercourse had been established, but the male rapist was only convicted of zina instead of zina-bil-jabr, because the woman had not put up a struggle (Mehdi, 2003). Thus, not only the statutory wording but also the case law on rape borrowed many elements from colonial practices, including a focus on the moral character of the woman and physical signs of her utmost resistance. Elements, which were foreign to traditional Muslim law (Kolsky, 2010).

Thus, while the new laws were clearly claimed to be of the theocentric view, as opposed to the colonial law, the actual change specifically in regards to rape was miniscule. However, the new criminalization of adultery and fornication had direct consequences in rape cases. Firstly, rapists could no longer get out of punishment merely by claiming that the sex was consensual, since that could lead to them (but also their victim) being punished for zina instead (Cheema, 2018). Secondly, over the years, several cases from the lower courts in Pakistan received great criticism and media attention because women were sentenced to punishment for zina, either because a pregnancy was considered evidence or because them accusing a man of rape was seen as a confession to zina. When the cases were appealed to the Federal Shariat Court, these arguments would generally be rejected and the women acquitted, which shows the court preferring the view of the Hanafi (and Shafii) madhhab on this topic (Cheema, 2006, p. 149). However, since Zina was not a bailable offence, these women would often have spent several years in jail at that time and had become ostracised by their families (Lau, 2007; Shah, 2010, p. 4).

4) Women's Protection Bill: Going backwards to go forwards?

The criticism of the law led to changes in 2006, when the Women's Protection Bill was passed. The change was supported both through arguments on women's rights

and feminism, but also by theological arguments stating that the correct application of Islamic law was more women-friendly (Lau, 2007).

The change in 2006 meant reinstating the old rape provision from the Pakistan Penal Code that had existed before the Zina Ordinance, which means that the legislation continues to define rape as lack of consent and as being against the will of the victim. While rape was removed from the Zina Ordinance, Hadd punishment for adultery and fornication is still regulated by the Ordinance. Ta'zir punishment for zina was removed from the ordinance, instead a new provision regulating these crimes was implemented in the Pakistan Penal Code (Shah, 2010, p. 5). Thus, the current legislation is influenced both by colonial and Hadd-legislation and is therefore also still influenced by the societal views, which created these legislations.

The reinstatement of the colonial rape legislation came with the significant change that marital rape is no longer explicitly exempted from the rape provision (Cheema, 2006, p. 159; Shah, 2010, p. 9). This was a progressive move not only compared to the Zina Ordinances, but also compared to the original rape provision from 1860 and to neighboring countries such as India, which continue to have a direct exemption for marital rape. While this would seem to mean that marital rape is now punishable in Pakistan, no such cases have been reported (Khan, 2020).

Discussions on what it means to consent and how non-consent is proven continue in Pakistan (Munir, 2009). One critique from feminist voices has been that a woman in Pakistan threatened with divorce if she does not engage in sex cannot be considered to have consented to sex, since a divorce in Pakistan will often leave the woman economically destitute and socially stigmatized (Khan, 2020). Thus, as in Denmark, newer voices are insisting on autonomy being the central element in rape legislation.

Reflections

Comparing the development in legislation in Denmark and Pakistan, including the historical regulation in Muslim law leads to valuable insights. First of all, we can see how the socio-economic development has led to a changed view of women, which has influenced the culture and the regulation, in particular during the last century. The growing presence of women in the labor market, politics and public debate is undoubtedly one factor that has led to new views on what constitutes rape. This

highlights the importance of including all members of society in the development of law.

However, even more striking is the importance that the legal culture has. In both jurisdictions, rape has continued to be defined in accordance with the historical definition of rape in that legal system. In Denmark, rape has until 2021 been defined as involving violence, threat of violence or (more recently) illegal coercion, and legal scholars resisted a consent-based legislation. In contrast to this, a definition of rape that uses the term consent and is focused on the will of the victim has continued to exist in the written legislation of Pakistan, even as the legislation changed dramatically between secular and religious phrasing (and despite the actual application of the law mainly focusing on violence). It seems that jurists have a clear tendency to build on what is already present in the legal system, e.g. with Pakistan in 2006 reverting back to the wording in colonial law instead of developing an entirely new legislation

So far the legal culture, i.e. traditional legal concepts and definitions, have set the framework for the rape legislation, within which the socio-economic factors have been altering the legislation. However, in recent years the societal development seems to have changed the culture so much that the legal framework itself is now questioned. In Denmark, a completely new definition of rape has just been implemented, and in Pakistan, the Hudood-legislation has been altered through both secular and religious arguments, while feminist groups are pushing for even stronger change, also in relation to marital rape.

As we have shown, the written definition of rape is not the only thing of importance. The wider societal views on women can influence legal scholars and judges in how they interpret the law. In both Denmark and Pakistan, decisions have been made by jurors or judges in the lower courts, which were in direct conflict with the official legislation or the application by the higher courts. However, even within the wording of a legislation, cultural views can strongly influence the interpretation. In Pakistan, the fact that the legislation uses consent to define rape became almost irrelevant, especially during colonial times, because case law was based on the assumption that women have consented, unless they have violently fought back against the perpetrator. In that regard, it will be interesting to follow how Danish judges will interpret the new consent-based Danish legislation. Will they also hold on to previous understandings of rape, despite the legislation having changed?

Not only interpretations of legal texts but also of religious texts can vary wildly based on cultural views, as we saw in the different applications of Muslim rules on rape from the Hanafi and Maliki madhhab, but also from newer competing interpretations.

Thus, even the same text, legal or religious, can be interpreted and applied in very different ways depending on which of the four societal views, described by us, influence the interpreter. There are also other ways that culture can influence the exact outcome of marital rape cases, which we will look further at in the second part of this article.

Part 2: Cultural influences in marital rape cases in Denmark

Method

Above, we looked at the cultural influences on legislation. However, legislation is not the only culturally influenced factor in court cases. In the following, we will analyze the two Danish court cases with the aim of identifying to which extent culture influenced the cases. To identify this, we have looked for arguments that either the parties, their lawyers or the judges based on culture.

Both cases concern a woman accusing her former husband of rape in marriage with the couples having a background in Pakistan. However, they differ significantly from each other in their details. We have named one of the cases the "Conviction-case" and the other the "Acquittal-case", due to the very different outcomes of the cases. Both cases were decided before the new consent-based definition of rape was implemented in Danish law.

In regards to the Conviction-case, we identified the case through a short description on the court's website and subsequently received access to documents in the case at both the city court and the high court. In regards to the Acquittal-case, the defendant in the case, who was worried whether culture and language barriers could affect his case negatively, approached Rubya Mehdi. Subsequently, Mikele Schultz-Knudsen attended the court proceedings to observe the case. We did not assist either side in the proceedings. It should be noted that Danish court practice prevents access to the full testimony of an alleged rape victim. For this reason, we have not had access to the testimony of the accusing ex-wives in these cases, but we have been able to see what the lawyers or the judges have described them as saying.

Most Danish court case transcripts are not publically available. Therefore, we were not able to determine how often (former) spouses are prosecuted for rape charges in Denmark. However, these cases are rare, with one lawyer in the Acquittal-case specifically stating that he had not been able to find similar cases to compare with. We chose these two cases, because we were able to get access to both and because of their similarity due to the shared Pakistani background. We are however aware of other cases involving rape between spouses, including a case involving a Christian man accused of raping his wife and forcing her into reading the Bible (Ritzau, 2020). The fact that our cases have a relation to Pakistan is therefore only due to the theme of this article. More research into other marital rape cases is needed.

Description of the cases

The Conviction-case was decided in the City Court of Glostrup on 1 February 2019 and was appealed to the Eastern High Court who decided on the case on 7 November 2019. The defendant was accused of having abused his wife over a period of 5 years through both violence and rape. He was a Danish citizen, born in Denmark, with parents originally from Pakistan. In 2011, he was 19 and had an arranged marriage to a 21-year old woman in Pakistan. According to the Danish Aliens Act art. 9, a citizen of another country can only get family reunification in Denmark if both husband and wife are above 24 years of age (a law specifically made to hinder arranged marriages). For this reason, after living separated for 2 years, the couple officially moved to Sweden, but after less than a month moved into his parents' house in Denmark without notifying the authorities. Thus, the woman was in Denmark illegally and unable to get a job or use medical services. She had no network in Europe except people she met through her husband's family. After five years, she alarmed her brother to her situation and he informed their sister who had since then moved to Italy. The sister made a visit to Denmark unannounced and convinced the husband's family to let the wife go with her for a short while. Instead, the sisters went to the police and the wife never returned to the husband. Both the city court and the high court found him guilty of continuous violence towards her for 5 years. This was legally characterized as abuse, since he took advantage of her dependency on him. He was also convicted of regularly raping her, despite not explicitly using violence or threat of violence in every instance. The underlying threat of violence that existed in their relationship due to him earlier violently forcing her into vaginal, oral and anal sex was enough to make her feel forced to accept these acts later in their relationship, which were thus also characterized as rape.

The case involved testimonies from more than 10 witnesses, including family members and friends of both parties as well as a police officer.

The Acquittal-case was decided in the City Court of Copenhagen on 11 October 2019. The defendant was accused of one instance of raping his wife in 2014 during a trip to Pakistan and of another instance in Denmark in 2016, in which he was accused of having thrown their 4-month-old child down on a bed, punched his wife several times in the face and finally raped her. Further, he was accused of another instance of violence against her in 2017 and of having attempted in 2019 to threaten her into not testifying against him. The result of the case was a full acquittal. Both parties were born in Pakistan and had independently travelled to Denmark around 2009 to pursue PhD studies and later careers. Before this, the woman had spent 2 years in Germany, while the man arrived directly to Denmark from Pakistan. They met each other in Denmark through their work, fell in love, and initiated a romantic and sexual relationship in 2011, without the knowledge of their families in Pakistan (who would not have approved). They moved in together in 2012. In 2013, they were married with the blessing of their families. As opposed to the Conviction-case, they were not isolated from the rest of society in Denmark. On the contrary, they rented a room in the home of a Danish family in 2012-2015 and shared both kitchen and bath with this family. Their child went to daycare, they both worked and the wife's brother eventually moved to Denmark. In 2017, the husband applied for divorce. During the divorce proceedings, the parties had a bitter disagreement over the custody of their son. It was during these proceedings in 2018 that the wife first reported the accusations that led to the criminal proceedings. The wife originally won custody over their son but later contacted the husband and asked him to take over custody since she was about to get remarried and did not want the custody anymore. The criminal charges against the husband relied entirely on the wife's testimony, while his defense relied on his testimony. There was no other testimonies in the case.

Noticeable, the wife in the Acquittal-case was in a much stronger position in her marriage through higher education, deeper understanding of the society, legally being in Denmark etc., and her husband was in a similar position to herself, as opposed to the Conviction-case, where the husband was born in Denmark and had a strong family network. Similarly, the Conviction-case concerned a continuous abuse of the wife, while the Acquittal-case was focused on a few separate incidents.

Analysis

Danish court case hearings can broadly be divided into four main steps. 1) Presentation of the facts of the case. 2) Parties and witnesses give testimonies and are questioned by lawyers. 3) Parties and their lawyers state their legal arguments. 4) The judges give their judgment and reasoning. Each step contains an important element for the final decision: Background information, testimonies and the legal reasoning of lawyers and judges. We have divided our analysis based on how culture was part of these four elements.

1) Culture as relevant fact

In the judgment from the city court in the Conviction-case, which the high court later confirmed, the court directly mentioned that their decision was based on the fact that "The marriage was arranged by their parents and families. They only saw each other a few times before the marriage and without being alone together. [The wife's sister] has explained about this that 'After the decision had been made, [wife] was informed of it'."

It is interesting that out of all the information in the case, the court highlight this as a fact that their decision was based on. The case was not about whether any of the parties had been forced into the marriage. It concerned actions that took place 2-7 years after the marriage. However, the court must have found that the arranged marriage indirectly had an important effect as a background information to the case.

The court mentioned this information together with the fact that the wife was illegally in Denmark. The context suggests that both elements were seen by the court as information explaining why she stayed with the husband for several years and did not go to the police earlier.

To which extent the marriage was arranged had been an area of contention in the case and had led to different descriptions of the relevant culture. The sister of the wife claimed that the wife was not part of the decision to marry at all. She even claimed that the families had discussed whether the woman should marry the husband or his older brother, and only after deciding on this informed her of the decision. The husband disagreed with this description, especially in his testimony for the high court, and claimed to have met the woman in a clothing store in Pakistan and asked for her number. According to him, the couple themselves decided to get married and then their families gave their permission to the marriage. While he did agree that according

to their culture the marriage had to be agreed on between the families, he also stated that "nowadays Pakistani men and women choose themselves who they want to marry". Since the court specifically quoted the sister's statement in the decision, it appears that they trusted her descriptions of the culture and factual events.

2) Culture in testimonies and as questioning tool

In the Acquittal-case, one of the lawyers tried to find out if the defendant could remember an incident that, according to the wife, took place on 1 January 2014 during a trip to Pakistan. One of the lawyers in the case asked the defendant about his recollections of that day by using a cultural marker. He asked: "The incident is claimed to have happened on 1 January. That is a special day for Danes. Is it also a special day in Pakistan?" And when the defendant still did not recall the episode, the lawyer directly asked "Do you celebrate New Year's in Pakistan", to which the defendant replied "Yes, but not as much as in Denmark".

This is an interesting tool by the lawyer, which would have had more effect if the defendant celebrated New Year's. Most Danes would easily be able to remember how they celebrated New Year's, especially if they were travelling in another country during the holiday. Thus, the lawyer was using a celebration in his own cultural background to dig deeper into the defendant's story. This highlights how important it is for lawyers to have an understanding of the culture of the parties. In this case, the defendant had no special recollection of the New Year's celebration, maybe due to his cultural background. In other cases, the opposite could be true, with a date that seems mundane to the average Danish lawyer having importance in the parties' culture and therefore being useful for establishing facts of a case or digging deeper into a testimony.

In both court cases, culture was used frequently by the parties or witnesses to explain their actions and it was claimed several times that this or that was normal in Pakistani culture. The many references to what the parties and witnesses considered normal in their culture suggest that they found it necessary that the judges understood the cultural background before judging the case. Similarly, the lawyers also spend a great deal of their questions on asking about whether something was normal or not in the culture, suggesting that they also found that understanding the cultural background was important for reaching the right decision.

3) Culture to frame the parties

The defendant in the Acquittal-case made it clear in his final statement that in his opinion, his former wife had been trying to portray him within a stereotypical view of Pakistani men and that "she is using religion and culture against me. We are both liberal and well-educated. We are not fundamentalists or conservative".

If true, his observation is in accordance with a previous study. This study found several Danish child custody cases in which one or both parties portrayed the other party as religious and conservative, while simultaneously portraying themselves as modern, secular and well-integrated in the Danish society (Schultz-Knudsen, 2019). The study suggests that Muslims in Denmark assume that Danish courts have a stereotypical view of Islam and see religiousness as a negative trait in custody cases and that Muslims therefore try to portray themselves as secular and the other party as religious.

The same could likely be true in cases of marital rape. Since this was a criminal case, the court could and did decide that the burden of proof was on the prosecutor, and that while the woman might be telling the truth, her testimony alone was not enough to establish that a crime had been committed. This is a privilege that the courts do not have to the same extent in civil cases and custody cases.

The courts should be aware of such tactics used by the parties and aim to not let stereotypical assumptions influence which party they believe, neither by assuming that stereotypes are correct, but also not by assuming that a stereotype is never true. In the Conviction-case, the court found similar claims to be true.

4) Culture to determine the case

In the Conviction-case, one cultural element made it directly into the written reasoning of the city court, which was confirmed by the high court. The city court noted that it had "attributed significant weight to the fact that [the wife] saw no other option than to leave [the husband], despite knowing full well that it would be connected with great shame for both her family and [his] family and that she risked serious, maybe life-threatening, retaliation from both families".

This was part of the court's discussion on whether the husband's or the wife's story were to be trusted. Thus, the court had become convinced that for cultural reasons it was more difficult for the woman in this case to leave her husband than it would be for

most Danish women. Therefore, her actions had to be understood in a different light than similar actions from other Danish women. Since she left her husband despite these obstacles, the court found her story more trustworthy.

In both cases, it was a problem for the prosecutor that the women reported the crimes 4-5 years after the first incident that they considered rape. This would normally reduce the trustworthiness of their claims. In the Conviction-case, the court became convinced that the wife had been isolated and trapped and could reasonably claim to have made her accusations to the police as soon as she was able to flee her husband. In the Acquittal-case, the wife lived much more freely. Yet she continued her marriage, until her husband ended it in 2017, without telling anyone about the incidents that she considered rape until 2018. It was not discussed by the judges whether other cultural factors, such as a cultural taboo concerning sex and rape, might have made the women more hesitant to tell their stories.

Reflections

Culture can influence court cases in many ways, especially in cases regarding close relations, sexuality and marriage, such as custody cases and marital rape cases. Having an understanding of the parties' culture can help the judges and lawyers ask the right questions and understand the statements of parties and witnesses in their right context. The cultural context can be directly relevant for evaluating which testimonies are most truthful or for understanding the motivations of actions.

However, what the comparison of the two cases especially shows is that culture can vary markedly between people who "on paper" would seem to have the same background. In the Conviction-case, several witnesses and the defendant agreed that their community did not take lightly to divorced women, with the defendant acknowledging that his former wife could be expelled from her own family due to the divorce. Other witnesses stated that Pakistani women risk being killed, will find it very difficult to get remarried and that the wife's own father and brothers disapproved of the divorce and wanted the families to negotiate a solution, despite the woman having been beaten by the husband. In the Acquittal-case, there was not nearly as much focus on the divorce being problematic, and both the man and the woman had remarried following the divorce.

The Acquittal-case was also about a more modern and liberal couple which fell in love and began a sexual relationship before marriage, while the Conviction-case concerned

a more traditional and conservative family with arranged marriages, the wife staying at home and the couple living with his parents and siblings.

Thus, it is important that the judges do not assume to know what e.g. Pakistani culture is, but listen to the actual cultural descriptions in the concrete case.

Because culture can vary among people from the same ethnicity, it is also likely that parties and witnesses will disagree on which cultural rules were actually followed in the marriage. The courts have to be aware that parties and lawyers might attempt to rely on stereotypical cultural views to portray the other party in a more negative light, or to portray themselves positively.

The cases also show that culture and religion do not necessarily follow each other. In the Conviction-case, the husband had a non-religious lifestyle, drank alcohol and had an affair. Simultaneously, he was found to be patriarchal and had forced his wife into submission. On the other hand, the wife and her sister were religious Muslims who refused to party, went to the mosque and taught others about religion, but they insisted on divorce even when their own father and brothers wanted to find a solution in accordance with their culture. Thus, it would be wrong of the courts to assume that a religious Muslim is necessarily culturally conservative or vice versa.

In our impression, the Danish courts in these two cases handled these challenges well. In the Conviction-case, there was significant evidence to suggest that the woman was telling the truth about the marriage. In the Acquittal-case, the only evidence against the husband was the testimony of the wife, and her description of him being a conservative and patriarchal man did not seem to correspond with objective facts in the case.

It is possible that culture can play a role in other ways in rape cases. In the Acquittal-case, the defendant was also accused of having tried to pressure his former wife into not testifying against him by threatening to tell her new fiancé and her new friends that the defendant and her had lived together before getting married. Such a statement has very different implications depending on whether the culture of the woman's family is accepting of premarital relations or not, but in this case it was not directly related to the rape accusations.

Conclusions

This article shows how comparing Danish law with Muslim and Pakistani law can lead to powerful insights about both systems. Danish comparative law most often compares Danish legislation with legislation in neighboring countries or other similar countries, but comparing to a legal system developed in a more different culture and society is valuable too. As we have seen by comparing with the legislation in Pakistan, in both countries the socio-economic changes are challenging older views on women and rape, while the legal system tries to maintain as much continuity in the rape definition as possible. Thus, despite Pakistan in many ways being a much more conservative country than Denmark, the legal definition of rape uses the term "consent" simply because they have held on to the definitions used in their legal history, but their courts have similarly held on to old views on what constitutes consent.

The cases we have analyzed also give insights for current legal debates. In this article, we saw a Danish law professor argue that a man pressuring his wife into having sex twice a week by threatening to divorce her should not be criminalized, because she still had the choice. This seems to be a westernized and liberal view of free choice. In one of our cases, both the husband, wife and witnesses agreed that a divorce had harsh cultural implications for the woman, could lead to her own family killing her and could cause her deportation from Denmark. Feminist voices in Pakistan have argued that in such cases, it should be criminalized if a husband takes advantage of her vulnerable position and pressures her into fulfilling his sexual demands. This shows that areas of consent are grayed out in marriage and that even a legislation based on consent will have to further consider how to treat consent achieved under some form of pressure. It is our impression that the recent debates in Denmark have not really considered how consent and threats can have very different implications in minority cultures.

Concepts and definitions of rape are changing. In both societies in our analysis, cultural views on women have influenced what the population and legal scholars have considered to be rape. If a new legislation is more progressive than existing cultural views, it will be important for the society to educate the population on these new understandings of what constitutes rape and marital rape. This goes for both the majority and minority populations.

As we have shown in this article, many cultural themes are involved in rape cases at Danish courts, especially cases on marital rape. When making a judgment, the judges

have to be aware of 1) the legal culture, 2) their own personal culture and 3) the culture of the parties.

1) The judge needs to be aware of the cultural view on rape that the court itself is supposed to represent. This is the standard job of judges, who have to understand what the legislation wants them to do. In Denmark, this meant that regardless of the judges' own views on rape, the legal culture that they represented until 1 January 2021 did not automatically consider it a crime for a man to have sex with his wife without her consent. Instead, the action generally had to have involved an element of violence, threat of violence or similar. We have seen from the Criminal Law Council's report that even a girlfriend resisting and pushing her boyfriend away was not considered raped if she eventually gave in to avoid trouble or arguments. However, the case we analyzed which led to conviction showed that when the husband had previously violently raped his wife, the court could extend the verdict of rape to not only those instances where the husband violently forced his wife into intercourse, but also to sex which the wife engaged in because she knew that the husband could get violent.

2) While the culture of the legal system is important, the judge's or juror's own personal culture also plays a role. We have seen this in the legal history of Denmark, where the legislation had to be changed because the jurors were not applying the actual legal provisions to rape in existing relationships. We saw a similar trend in Pakistan, where the judges of the lower courts punished women for being pregnant outside of marriage or for having "admitted" to intercourse by reporting a rape, despite the highest court in Pakistan insisting that women were not to be held responsible in these situations. Thus, it is important for judges to make sure that they are not unduly influenced by their own cultural views. By reflecting on and being aware of their own cultural bias, they will better be able to avoid it influencing their decisions. This is however a difficult balance, since one of the reasons that the Danish court system use jurors in criminal law cases is directly to make sure that decisions are in accordance with the population's view on justice and crime (Melchior, 2009). While this is supposed to protect the general feeling of justice in the society, the examples in this article show that the weaker party – often the woman – risks having her legal rights undermined if the dominant cultural view is e.g. holding on to older patriarchal ideas. More research into the right balance between these opposing, but both valid, interests is needed.

3) The analysis of our two court cases have further shown how the culture of the two parties also influences the court case and judgment in various ways. For the lawyers and judges, it can be necessary to get a deep understanding of the culture to ask the right questions during the testimonies, to get all relevant facts into the case and to understand the parties' motivations. Thus, every case is different. The same actions might have to be understood and treated differently based on the cultural background. It should be noted that in 2009, Danish legislators explicitly prohibited judges from considering it as a mitigating circumstance in the sentencing that a crime was committed due to religious or cultural reasons (law no 330, which created the current art. 80, 3 in the Criminal Law Code). However, culture can still play a role in these cases. As our example with the threat to expose a premarital relation shows, culture can be the opposite of a mitigating circumstance, and be the very reason that something has to be considered a crime.

Importantly, culture is not uniform and is often contested in these cases. Not everyone from Pakistan has the same culture, and it can be an advantage for the victim and perpetrator of marital rape to present different descriptions of the cultural rules followed within their marriage. In these cases, the judges cannot just look at what is the norm for other people of the same ethnicity or nationality, but will have to assess which testimony is the most trustworthy given the context. The judge should especially be aware that parties might use cultural stereotypes to portray each other negatively, which should not be allowed to influence the decision unduly. The same goes for assumptions about religion and culture. As we have shown in one of the cases, being a deeply religious Muslim does not mean being culturally conservative, and being culturally conservative does not mean being religious. The courts must make sure to separate such terms.

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European Islam in the Age of Globalisation and Legal Pluralism: Not Easy Being European

Werner Menski[1]

Abstract

The article argues that polycentric and polyphonic basic principles of pluralist navigation are always needed as balancing tools to preserve sensitivity and awareness of agile agency of various legal, social and religious stakeholders to allow situation-specific forms of navigation. Clearly, this does not mean that 'anything goes', but demands that complex hybrid solutions have to be sought. Obviously states must retain a right to determine responsibly how their respective national identity and legal order should develop in conditions, nowadays, of intense pluralist challenges posed by increasingly diverse demographic structures. Especially the presence of many people in the Nordic countries who are Muslims, may have strong links to other legal orders, and feel connected to a religion that they value as part of their own life and identity while also claiming the right to be Danish, Finnish, Norwegian or Swedish, cannot be ignored.

Introduction: Changing demographic and religious landscapes in Europe and the involvement of Islam and Muslims

In this age of globalisation and legal pluralism (Michaels, 2009), it has become increasingly reductionist, and dangerous, to insist that 'law' or 'religion' as monist entities on their own can manage sustainably how we live together in Europe and construct multi-cultural societies and legal orders that do not violate basic rights of non-majoritarian actors at different levels or scales. The challenges identified and discussed in this article relate as much to the importance of what it means to be Islamic (Ahmed,

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1 Werner Menski, MA (Kiel) PhD (SOAS, London) is an Emeritus Professor of South Asian Laws at SOAS, University of London, where he taught courses about comparative law and legal theory, South Asian laws, Hindu law, Muslim law and the Ethnic Minorities and the Law, as well as immigration law. This article is based on a powerpoint presentation at the conference on 'Islam and Europeanization – Legal Perspectives on 4 October 2018 at the University of Copenhagen. I thank Professor Hanne Petersen and her team for involving me and accommodating non-Nordic perspectives in this fruitful debate.

2016), modern challenges to Islamic law (Ali, 2016) as well as presumed challenges that Islam and Muslims pose, in virtually all European countries, to modalities of living together in peace and harmony. It has recently been argued that there is no necessary contradiction or conflict between secular modernity and liberalism on the one hand, and Islamic notions of the 'good life', on the other (Jamal, 2018). However, while it may be fairly easy to theorise this elegantly, in practice and lived reality significant challenges have arisen that do require much more sustained and informed debate and careful balancing of competing expectations. This article will illustrate these predicaments, but also the constructive possibilities, by focusing on the model of responsible law-related management through flying kites (Menski, 2011; 2013; 2014a, b; 2018a).

While significant demographic changes are underway that appear to Islamise parts of Europe in new ways, it is evident that old and new conflicts and tensions of 'law' and 'religion' continue to exist, in new contexts, so that much agile learning about skilful balancing of competing expectations has to be undertaken. Arguing with the help of the kite model that we always need alert navigation or, to use a different image, that it will be necessary to engage in bridge-building, stipulates up-front that the problems to be debated have to be seen as a complex interdisciplinary field of academic as well as practical analyses. This results in many hybrid forms of managing diversity at various levels and in different domains, of which many useful examples already exist. These especially illustrate how young Muslims in Europe are trying to navigate traditions, while also making change (Barylo, 2018).

My academic work about kite-flying warns against 'quick fixes', but recognises that the various challenges, with goodwill and a constructive predisposition on all sides, can be overcome in efforts to harmonise normative pluralism and human rights (Topidi, 2018). However, if there are bad intentions and destructive agenda, then reasoned debate and calm balancing may simply become impossible, and we fall victim to terror and chaos. Hence, this article also warns states and law makers that ignoring the existing plurality of voices and perceptions and pushing through any particular narrow and nationalistic perspective may result in violence and wanton destruction. Such disaster scenarios confirm the limits of law in regulating highly contested issues simply through imposition of state-centric legal regulation and purportedly liberal reliance on human rights arguments that simply treat socio-cultural and religious traditions, whether of Muslims or other minorities, as completely intolerable. As Europeans, we might know

a lot about freedom and basic rights, but ignoring voices from all over the world, and especially the Global South, in debates about Islam and Europeanisation, seems short-sighted. Simplistic images of 'the West' and 'the rest' reflect power structures that legal pluralist navigation needs to scrutinise if we want to learn lessons from history. Most recent developments in reaction to the murder of a history teacher in France in late 2020, sadly, reinforce this point.

In post-World War II Europe, there were few Muslims, but many 'others'. Meanwhile, increasing international migration and much ethnic and religious global pluralisation has become a fact, which pans out in very different ways into local realities, sometimes with tensions, but also with much multi-cultural mixing. Along with this, the increasing presence of Muslims and of Islamic law in Europe has become a hugely important issue, so that new questions about 'law' and 'religion' and especially state law and Islamic normativities constantly arise. In highly diverse ways, thus, the situation-specificity of 'law' as a global phenomenon (Allott, 1980) has constantly been reconfigurated, and some parts of Europe have experienced intense plurification of law itself, too. For example, many British and German judges are busy, all the time, with handling cases involving Muslim law and a variety of foreign national legal systems. Private international law has experienced significant growth, but of course the law-related actions of Muslims in European jurisdictions (except certain parts of Greece) are not formally recognised as 'law'. This scenario has inter alia led to new tensions about where and how to draw the boundaries between private and public spheres, raising also important questions about who should adapt to whom? Should migrants from different countries and their descendants simply follow the law, so that the old Latin phrase 'cuius regio eius religio' gets new meanings? Or to what extent should legal orders adapt to social and religious diversities caused by globalising forms of demographic change. In British discussions, Modood (1992) suggested early on that it was '[n]ot easy being British', and in 2010 found in a new study that it was '[s]till not easy being British'. The highly experienced social anthropologist Roger Ballard (1994), based on intense ethnographic studies over many years, developed a model of 'skilled cultural navigation' among Asian immigrants in Britain, also in terms of religion, and taught that Britain's Asian minorities have become an integral part of the British social order, but 'they have done so *on their own terms*' (Ballard, 1994: 8, emphasis in the original). Detailed legal studies during the same period observed the unofficial emergence of hybrid forms of British Muslim law or 'Angrezi Shariat' (Pearl and Menski, 1998: 116). Subsequent developments have not contradicted that pattern, and have rather strengthened and

further diversified it, as various kinds of British Muslims are still engaged, in numerous ways, in navigating the co-existence of English state law and their respective Muslim personal laws, which they brought with them to their new European home, or passed on to the next generation(s) in various ways.

My own academic work over several decades, including participation as an expert, mainly on South Asian Muslim laws before courts in many cases, has taught me to identify some key challenges apart from falling victim to simple reductionist concepts of 'law' and 'religion', and specifically 'Islam'. Before I come to the kite model and various strategies of navigating diversities and pluralities, I briefly illustrate that as a result of global migration movements, which have clearly also affected Nordic countries, demographic realities have changed entire local landscapes. This has posed challenges not only to state legal systems, but especially, though often far less visibly, to regional and local authority laws, for example in the domain of planning laws. As such developments have happened haphazardly and unevenly and are often taking local authorities by surprise, they can only be inadequately regulated on a local case-by-case basis, rather than forming a firm body of national policy. The UK often employed interventionist policies of dispersal for specific ethnic or religious minorities when they arrived. The resulting and highly diverse settlement patterns, but also concentrations of ethnic minority populations despite attempted dispersal, challenge both state authorities and the various Muslim communities.

My experience is that many scholars in the academic disciplines concerned with such developments lack ethnographic curiosity or the necessary skills to follow up and map such changes. As a result, they struggle to assess demographic and religious change, which is complex, fast and often takes many hidden dimensions. A most impressive documentation of the unofficial status of Islam and Muslims, is provided in the eye-opening pictoral collection presented by Degiorgis (2014), showing *Hidden Islam* in Islamic 'makeshift' places of worship all over Northeast Italy in 2009 to 2014. This study in effect demonstrates the desire of the Italian state, as well as the more or less silent consent of Muslim communities, to maintain an invisible bridge between the Italian state and the increasing numbers of Muslim residents by rendering evidence of Muslim religious activity invisible to outsiders. To what extent such invisibility is partly a defining phenomenon of Islam in Europe today would be important to research, for a few showy and prominent mosques in major cities clearly do not convey the full picture of the lively practice of European Islam today.

Moreover, there has been, and continues to be, huge mobility of Muslims (and other minorities) not only into Europe, but within Europe. Thus, many Danish Pakistani and Somali Muslims have been moving to the UK, and tens of thousands of Somalis have come from all over Europe to settle in the UK, maybe an unmentioned aspect of the current BREXIT agonies that nobody even dares to raise in public. That is then matched by continuing deliberate official ignorance over who these foreign Muslims are that have come to Europe. For example, the British Census, so far, does not count Somalis as a separate category, with the result that we have wildly differing estimates of that specific population, which is almost entirely Muslim, but may also self-identify as Middle-Eastern or African. Similarly, in the UK most Pakistanis, as only some experts seem to (want to) know, are actually Kashmiris, and among Turks in Germany, there are very many Kurds. In Norway, I found that many of the Pakistani Muslims are actually Ahmadis, members of a particular sect that are, in Pakistan, not even allowed to call themselves Muslims. Here, too, we see that the highly contested balancing of internal diversities within Muslim communities in Europe raises challenges that must not be ignored, especially since, as was also discussed during the conference, it remains impossible to identify who should be speaking to the respective Nordic state on behalf of Muslims.

While I am German and studied in Germany, I am actually much more familiar with developments in the UK. As part of my MA studies at the University of Kiel, I produced a map of the entire UK which shows the county-wise distribution of ethnic minorities on the basis of the 1971 Census figures in Britain. At that early postcolonial time, place of birth was the core census criterion, which was not actually very helpful in identifying specific ethnic or religious criteria. For example, persons identified in the 1971 Census as being born in what was then Muslim-dominated Pakistan might actually be Hindu or Sikh refugees that fled to India in 1947. They could even be descendants of British colonial officers born abroad while their parents served the Crown. And in summer 1971 this still included all persons born in what today is Muslim-dominated Bangladesh. Similarly, many Asian persons born in East African countries would actually be counted as East African, among whom there are also many Muslims. The British Census only introduced a specific, non-compulsory question about religion in 2001.

The national picture of the UK regarding ethnic minority settlement and religion is remarkable in several respects. It shows the reality of a multicultural Britain already in

1971, concentrated in certain central and mostly urbanised parts of the country, right up to Glasgow and Edinburgh, and of course in London, while Britain's peripheral regions were still almost completely 'white'. If such a map were to be drawn today, based on the 2011 Census, one would definitely see an intensification of the multicultural central areas, and also a significant pluralisation of many more peripheral and originally 'white' areas. Nationally, Britain almost had a Muslim Prime Minister, Sajid Javid, in summer 2019, before Boris Johnson gained power. Notably, London has for some years now had a Muslim mayor, Sadiq Khan, and many smaller local authorities in the UK have prominent Muslim leaders and numerous Muslim local councillors.

The place that I know best and where I have my ear to the ground, the well-known multi-cultural city of Leicester, is famous for its football team (which also has some Muslim players), but also because of its so-called Golden Mile of Asian shops which even attracts customers from Nordic countries, as I found already in the 1970s. A local council survey in 1983 counted 12.436 Muslims in the city, in a total population of just under 300,000. Of note here was the ethnic diversity of these Muslims, since 11,614 were identified as 'Asian', 383 as 'Other', 332 as 'White', and 107 as 'West Indian'. Since the 1980s, much Muslim in-migration has been seen in Leicester, and more recent Census figures tell the remarkable story of gradual Islamisation of the local population in this central English city. Below, I first report the national picture and then focus on the city of Leicester.

The British Census figures for 2001 on religion, then counted by the Census for the first time, identified for the whole UK a Christian population of 42.079 million (71.6 per cent), but already then 9.104 million people (15.5 per cent) claimed to have no religion, and another 4.289 million (7.3 per cent) did not state their religion. The 2001 Census also counted 1.591 million Muslims (2.7 per cent), as well as 559.000 Hindus (1.0 per cent) and 336.000 Sikhs (0.6 per cent). The corresponding Census figures for 2011 show a significant decline of the Christian population to 33.2 million (59.3 per cent), further growth of the presumably 'secular' population claiming to have no religion to 14.1 million (25.1 per cent), while slightly less people than in 2001, namely 4.1 million (7.2 per cent) did not state their religion. Muslims had by 2011 increased to 2.7 million (5.0 per cent), Hindus to 817.000 (1.5 per cent), and Sikhs to 423.000 (0.8 per cent).

The corresponding figures for Leicester confirm how internally diverse and complex one of Europe's globally known most diverse cities has now become. Leicester had a population of 279.921 in 2001, with far less Christians than average for the UK, just 125.187 persons (44.7 per cent), while even more people than elsewhere claimed to have no religion, namely 48.789 persons (17.4 per cent), and another 19.785 persons (7.0 per cent) did not state their religion. In 2001, Leicester was still a Hindu-dominated city when we look at ethnic minority religions, with 41.248 Hindus (14.7 per cent), 30.885 (11.0 per cent) Muslims, and 11.796 (4.2 per cent) Sikhs. The 2011 Census figures for Leicester are intriguing, as the city population had grown to 329.839 persons, of whom now only 106.872 (32.4 per cent) identified as Christians, 75.280 persons (22.8 per cent) claimed to have no religion, and only 18.345 persons (5.6 per cent) did not state their religion. Most significantly, Islam was now Leicester's largest ethnic minority religion, with 61.440 Muslims (18.6 per cent), while Hindus had grown to 50.087 persons (15.2 per cent) and there were 14.457 Sikhs (4.4 per cent) in 2011.

This city has now almost 100 mosques, many of whom are purpose-built and quite prominent. There are also many more places for Muslim religious and educational activities, including many Koran schools (madrasah) and several Muslim state schools. A significant case arose in 1988, hotly contested under the city's planning laws, when a large private house in a fairly central suburb was found to be used as an unlicensed mosque and local residents, mainly Sikhs at that time, complained about this to the City Council. However, the Muslims, partly relying on arguments regarding rights to practise their religion, won this significant case and secured the right to use this property as a mosque, with certain conditions imposed about noise and traffic regulations. This house is now a very active madrasah, while two streets away, at a very strategic crossroads location, we now have since 2000 Masjid Umar, one of the largest purpose-built mosques in the city, which attracts many worshippers. This is very visible several times a day, especially on Fridays and festival days, as hundreds of local Muslim residents walk to this mosque. In fact this whole middle class neighbourhood, including shops and other facilities, has now become almost completely Muslim-dominated, while the Sikh residents have mostly moved away from this area to another part of the town.

Such ethnographic ground-level observations about the prominent place of Islam and Muslims in a major European city today give rise to several important questions. Should one be worried about such evidence of a gradual Muslim takeover of urban spaces with

such high visibility, and perceive it as somewhat dangerous Islamisation of Europe? Or should one celebrate this as evidence of the peaceful adaptation of European Islam, leading us to engage in a pluralist dance of joy about the evident glocalisation and pluralisation of post-modern Europe? Is there a case for getting stressed out over certain socio-legal perspectives regarding Islam and Europeanisation, as the streets are full of Muslims wearing all kinds of Islamic dress, including many women with face veils?

The Copenhagen conference in early October 2019 was a welcome occasion to compare notes and to discuss to what extent, in Denmark and the Nordic countries, there seem to be new efforts now to think about building bridges. If locally, Muslims are a demographic majority, are we still going to be happy to use images of bridge-building, or should one prefer to talk about balancing acts? I do not know whether the British evidence is of any help in this context, for it seems to me that, wherever we are, everything is still possible in terms of patterns of interaction of Muslims and Europeanisation. Many European Muslims are clearly very modern and actively search for change (Barylo, 2018). While Tariq Modood (2010) has proposed that it is still not so easy being a Muslim in Europe, other Europeans may feel that Muslim are taking over entire neighbourhoods. In London, for example, there have been contentions over efforts to establish alcohol-free zones and private policing of certain Muslim-dominated neighbourhoods.

But how does one Europeanise Islam? Does 'the law' really have the power it seems to claim? To what extent do we need to recognise and account for Islamic practices or actions by Muslims that appear to counteract Europeanisation, and may lead to forms of ethnic or religious segregation that are the opposite of bridge-building? There have been endless debates about this, and there is no clearly visible solution in sight. Therefore I could have stopped my presentation here to invite discussion. However, my own work (Menski, 2018a) and also Jamal (2018) suggest that much plurality-conscious balancing is required, and is possible to achieve bridge-building and sustainable hybrid outcomes for a peaceful co-existence of Muslims and other Europeans.

The law-focused methodology of flying kites as a balancing exercise

Much of my recent work on legal pluralism has depicted the plural entity of 'law' explicitly as a kite with four corners (Menski, 2011; 2012; 2013; 2014a, b; 2018a). I

see with increasing clarity that one can apply this highly dynamic model to all kinds of different scenarios of decision making, especially as a tool to try and understand the position of any 'other' and then to manage conflicts and competitions. The kite model itself is really quite simple and almost commonsensical. In essence, its depiction of different competing types of law reflects a kind of global legal realism, not that dissimilar, I suggest, from Scandinavian legal realism. The kite model incorporates what lawyers have been studying in different classes, yet have not been taught to relate to 'law and life', perhaps because legal scholarship has been too impressed with its own sense of power, rather than engaging in democratic balancing of competing and overlapping claims. The pluralist kite model tends to irk state-centric lawyers and aggressive human rights protagonists, because it reminds them that their respective favourite source of law, whether state law or human rights and international law, is certainly not the only source of legal authority and thus not the only type of law that counts in any specific context.

The basic kite structure, which should not be viewed as a square box, but indeed a kite-like, quite subtle structure that connects the different corner points, is easily explained. At the top, kite corner 1 represents various forms of traditional natural law, ethics and values, including religion. The latter, in traditional contexts, including Islamic scenarios, also makes religiously-grounded claims to globalising universality and then incorporates major elements of corner 4 of the kite. Significantly, before the kite model became prominent, I developed a triangular structure of law (Menski, 2006: 612), influenced by the earlier teachings of Professor Masaji Chiba (1986) from Japan. Once I understood that Chiba's 'legal postulates' as his term of art for ethics and values of all kinds included both 'traditional' and 'modern', even 'global' values, the kite as a four-cornered structure appeared. It now helps to understand why 'traditional' and 'modern' values are so prominently engaged in hazardous clashes between old forms of natural law (which are not defunct) and various kinds of 'new natural law' (Menski, 2014b).

Next, connected to corner 1, on the kite's right-hand side, corner 2 signifies various social normativities as well as economic sustainability. On the left-hand side, kite corner 3 represents the various familiar forms and manifestations of state law, which are often not made by the state, but were adopted from other sources. Lastly, kite corner 4 at the bottom concentrates on and depicts the new natural law of human rights and various forms of international law regulation, potentially a kind of new global legal positivism.

Depicting law as a kite and analysing the operation of law as the skilful balancing of this kite structure in the air, and seeking to avoid crashes, has the advantage of concentrating the mind on several important components of this kind of game theory. This is not fun on the beach, but illustrates how law actually works in practice and indicates how boring and full of routine it may actually be to simply ensure legal stability over a long time. This model also tells us that law is always dependent on time, space and context. Therefore operating any law involves a never-ending, largely invisible sequence of kite-flying scenarios. We may not see the gusts of wind that push and pull the kite in different directions, but it is, like life itself, never static. Significantly, non-Western legal orders tend to internalise such basic characteristics of law and life without mortal fears of slipping into theocracy. Consequently, it is a core-element of non-Western approaches to law that one seeks to look for the justice of any particular scenario at any specific moment or in any given context. One does not, as we tend to do in the 'modern' West, measure justice against an existing written secular text, whether a code of law or a judicial decision taken to stand as precedent. The radical situation-specificity of non-Western legal reasoning, which sees a new scenario in every split-second moment, gives the kite model a relentless and potentially precarious volatility. But it also empowers the skilled kite-flyer, in other words, the legally conscious individual as a law-related agent, to adjust instantly to the slightest challenges. Observing this, one constantly measures split-second decisions while various legal actors, silently, or with much sound and fury, apply this model.

The kite structure also depicts the competing manifestations of law as irrevocably interconnected, so that no component could claim to be truly and fully autonomous. The various actors are all responsible, to some extent, for each other. This mutual multilateral co-ordination and agile cross-supervision not only protects the whole structure from the constant risk of total abuse of power and/or chaotic destruction, leading to a crashing kite. This requires alert individual or shared, and hence negotiated efforts to navigate any tensions between the various competing elements. Since it appears that the right balance makes a kite fly safely, the central question always remains what is the right balance in any particular scenario. That one may not expect total agreement about this is evident, in all cultures and legal orders.

In addition, the kite corners also identify four possible legal agents, who could of course be Muslims living in Nordic countries. In corner 1, we observe the individual agent, but to what extent is such a law-related actor connected to any higher authority, rather

than just claiming autonomy? Corner 2 is the arena of the individual agent acting as a member of any specific group or society, while corner 3 identifies the individual actor as a citizen (*homo politicus*), or maybe an agent of the state, a judge or a bureaucrat. Corner 4 signifies the individual as a global citizen (*homo globalis*), such as a human rights activist who wants to achieve change.

Globally we find that this constant four-cornered contest gives rise to only three basic types of state-centric legal management, and it appears that all law-related action takes place within that broader framework. In a Type 1 legal system, which is typical of the Global North, official claims are advanced that the state law is uniform and supreme. It is basically claimed that there is just one law for all, such as Danish law. Though there will be certain exceptions, these are at the discretion of the respective state authorities and are sought to be kept to a minimum. All Nordic countries would seem to subscribe to that pattern. But all Nordic countries also fall under the second type of state-centric legal order known to the world, which makes certain exemptions or special provisions for specific groups of the population that were the original owners of the land. This applies to the Sami in Norway, Sweden and Finland, while Danish law has specific exemptions for the people of Greenland and the German minority. This type of legal ordering is widespread throughout the world, prominently in the USA, Canada, Australia and New Zealand, but also in many countries of the Global South, notably more recently in Latin America with its increasing recognition of indigenous people's rights.

The third type of state-centric legal order takes the element of exemptions or special provisions for specific groups even more seriously and allows structural exceptions for different socio-cultural groups as law-related communities. Such legal orders explicitly recognise the co-existence of a general law, such as the country's Constitution, common contract laws, procedural and evidence laws, and so on. This is then combined with a set of so-called 'personal laws' that differ from country to country and reflect the demographic and socio-religious realities of specific communities of citizens. So, for Pakistan as an Islamic Republic, there would be a majority Muslim personal law, and then officially recognised minority personal laws for Christians, Hindus, Sikhs, Parsis and Buddhists, earlier even for Jews. This type of legal order, though widely seen as problematic by 'modern' scholars, is actually the globally dominant legal arrangement. Hence it is no coincidence that a large number of migrants to the Nordic states who originate from such types of legal orders remember this pattern as part of their lived

legal experience. The problems we were concerned with in the Conference and related debates largely arise when such migrants then seek to practise 'their' laws in Nordic countries and/or may seek to pass such values, norms and processes on to subsequent generations, even while living as new citizens in Nordic countries.

This specific scenario of intercultural and plurilegal conflict is a truly global predicament, as law and religion always co-exist and compete. To that extent, Nordic countries are, I suggest, not unique, as these plurality-dominated kites exist in all legal/religious orders and simply experience different Nordic mixities. Pluri-legal scholars will not be surprised about these kinds of intercultural conflicts. However, since the 'modern West' privileges secular state laws as the supreme power, and state-building processes are built on presumptions that citizens have given the state authority to act on their behalf, individual citizens are now deemed to be only indirectly, through voting rights and democratic representation, a law-making entity.

However, in non-Western legal orders and worldviews, the state and its laws have a different role, with huge impacts also on debates about the place of Muslims in relation to Europeanisation. Of course, notions of state power, even a strong state, are also present in Islamic law and in Hindu law (Derrett, 1968). But as primarily global religious and legal orders, with their own polysemic terminologies for various types of law in the corners of their respective kites of law and life, such legal orders do not accept uncritically that the state power holds supreme authority. In various culture-specific forms, these 'traditional' legal orders also envisage that the individual as a law-related entity is connected into a giant web of wide-ranging responsibilities, as Rankin (2018) has recently shown for the ancient, small religious community of Jains.

Being faced with such visions of order, even of a Global Order, from which there is simply no escape, does not mean this completely and fatally controls all individual agency. But it expects and demands responsible action, now in new contexts interpreted as subtle forms of environmental consciousness (Rankin, 2018). Hence the legal traditions of Islam, Hinduism and Jainism all hold the respective state authorities accountable for 'good governance', in the sense of protecting this believed-in higher Order. The state, and any official office holders, then, become servants of that higher order, rather than holding dominant legal authority. Such a state system can still exercise wide-ranging powers, but there is acute awareness that somehow this is not all there is. Notably, people living in and under such legal orders have, in my experience, far less

reluctance to accept the kite model of law as a realistic depiction of the intersectionality of law and life.

One can also depict the four interconnected kite corners by using a different graphic structure, namely four overlapping circles. This further reinforces the realisation that all these intersecting types of laws inevitably co-exist in multiple competitions and mixities. This then calls for conscious, responsible action for what one may call 'public interest', rather than narrower forms of 'private interest'. Another, somewhat deeper level of analysis would add power to this complex kite structure, specifically the power to make decisions at any moment. This slightly more complicated image depicts every kite corner not as an end point, but as another kite, in which again the four corners are present. This results in a superdiverse 'plurality of pluralties', in which four types of power aligned to the four kite corners move into focus. Corner 1 represents now a set of power from within, convictions, we might say, more or less strongly held values and beliefs. Corner 2 denotes a set of powers shared with others, exercised as a group rather than individually. Corner 3 represents the power over others, either because one was elected or appointed to be a legal or political office holder. Significantly, in training programmes for judges at European level, but also in India and Bangladesh, as I saw, these judicial actors realise within seconds that their power derives from such official appointments, anchoring them to corner 3, irrespective of who or what they are as persons. Finally, corner 4 manifests the double whammy, as I call it, of power from within and power over others, most evidently displayed when human rights activists, but also many law teachers these days, employ structures and powers of international law to promote their convictions, either in various legal actions or through teaching processes.

One can therefore look outside and beyond the kite to select what one considers the right tools for navigation and balancing in any particular scenario. But it is equally productive, it seems to me, to look inside the kite structure and to scrutinise where precisely in this law-related arena any particular position or decision may be inscribed or located. This method has not yet been fully enough explored, but offers huge scope for more fruitful navigation of conflicts, and is particularly relevant in arbitration or adjudication contexts. The internal structure of the kite, it appears, also has many substructures that allow the mapping of decision-making. Here, any conflicts of law and religion within a pluri-legal context may be analytically interrogated in terms of their value as components of responsible action.

In this context, however, pluri-legal kite flying in modern environments such as the Nordic countries also runs into ideological trouble. The dominant modern state-centric proposition in this secular-dominated age, we are told, means that 'religion' is simply not 'law'. Thus, it has to be the law that controls religion, and it could and must not be the other way around. While nobody really suggests, I think and hope, that Europe should ultimately be a theocracy, the above arguments privileging secular state laws risk rejecting any place or consideration for religion within the legal sphere. In its extreme form, this approach risks denying a voice to religion/culture in shaping 'the law' in any form. In kite-related language, it risks that corners 3 and 4 collude to deny any legal relevance to corners 1 and 2. The power kite image suggests, however, that such a truncated kite would crash. A total ban on any law-related input from corners 1 and 2 is simply not feasible. This cannot be responsible action, because it also denies the sub-voices of corners 1 and 2 that are hidden in kite corners 3 and 4 of the power kite structure explained above. The highly integrated nature of the kite demands respect for pluri-legal alertness.

An alert kite model always needs to use all four corners and cannot, literally, cut out any corner, otherwise the whole entity would crash and there would be actual or perceived epistemic violence. Therefore, to avoid the risks of unequal and toxic contests of power, of denying certain connections, and ultimately of burning bridges, the kite model teaches several basic principles. It insists on the need to consciously cultivate knowledge and awareness about the key role of individual agency and of alertness about the various intersectionalities of law and life. It also demands that knowledge from different socio-cultural and value-based contexts is incorporated in legal decision-making processes. When a Muslim in Denmark or other Nordic countries interacts with the respective state law, it may not be entirely irrelevant, in certain contexts more so than others, that the legal arena is in Europe. But the Muslim individual also has connections of various kinds that may extend beyond the European sphere. Expert guidance may therefore be needed on 'foreign' legal cultures, and responsible legal and religious decision making and skillful cultural and legal navigation are called for.

The kite model may help in this, as a management tool, while in itself it offers no ready solutions. It is prescriptive only in suggesting that being diversely connected, and being aware of such connections, is a solid rational basis of thought and action for human law-related agents. The key points here are insistence, firstly, that 'religion' is not per se irrational and secondly, that as humans, we are never really alone, nor fully

autonomous. Muslims would have no problems with these two points, yet in developed, modern secular contexts, it becomes tempting to argue that what is known as Enlightenment prevents 'religion' from being a dominant power. There will then also be tendencies to claim that individuals should be 'free' to act as they wish, though in late modernity or post-modern perspectives, such hedonistic and potentially irresponsible approaches and actions would struggle to pass the test of 'goodness'.

Rather than theorising this further here, I suggest focus on practical aspects of the kite model, which stipulates that finding the right balance for responsible action is necessary at any moment of one's life. This indicates attention to consciousness about duties rather than rights, and recognises that neither careless hedonism nor completely fatalistic subjugation of individual agency are likely to be conducive to responsible human co-existence. The challenge will therefore always be to find the right balance. Yet, as soon as one seeks to relate this, anywhere, to concepts of justice and equity, and good, stable, sustainable development and governance, different evaluations of what any of these desirable components and entities mean, and how they are to be achieved, will surface.

Having stated already that it is unwise to leave the law-related decisions only to states, international regulations or human rights activists, it is now necessary to examine the central role of individual agency and responsibility. Individual agency, whether anchored in kite corner 1, 2, 3 or 4, can be empowering and may help shape successful outcomes. Ideally all individuals should act responsibly and should strive to be the best they can be. But we know from bitter experience that abuses of discretion and power, and unrealistic dreams of domination, risk disaster and turmoil. The Danish Cartoon Affair of 2005 was a case in point, now replicated in France in 2020. While in 2020 Britain's BREXIT troubles still cause havoc and kite turbulences, earlier, the politician-journalist Boris Johnson, presently the British Prime Minister, compared veiled Muslim women to bank robbers. This incited increased violence against such Muslim women on the streets of Britain. Such episodes and interventions mark efforts to stir up trouble against 'others' and are hard to control if there is ill-will (Menski, 2018a: 21-22) and, equally dangerous, self-righteousness (Menski, 2018b: 92). If we ask how one secures a proper balance, it appears that the first requirement may be that one needs to know who one is, what one wants to achieve and why. The accompanying question, all the time, ought to be: 'Is this good?'

Yet my experiments with this kind of truth quickly ran aground. If a troublemaker thinks that his or her actions are justifiable in view of the desired aim, and thus are 'good', there is no guarantee that this is good also for others. Specifically, I learnt quickly that relying on the popular notion of the 'good Muslim', even the 'moderate Muslim' (Benkin, 2017), does not help to avoid endorsing terrorist activities in the name of Islam. If, as experienced experts have observed, Islamist rhetoric is 'music to the ears of pious Muslims' (Benkin, 2017: 93; Menski, 2018b: 95), it does not help to adduce arguments by 'liberal' Muslims that a responsible Muslim (*khalifa*) should not engage in violence against others. If 'fundamentalist' Muslims continue to argue that it is part of their responsibility to God that the whole world should be Islamic, the 'enlightened' or 'liberal' response that this is a 'wrong' interpretation of what being a Muslim means most likely fails to impress those who self-righteously push for global Islamisation and oppose Europeanisation.

A truly holistic 'ecology of law', however, reminds all voices in this contest to be truly 'liberal' (Jamal, 2018). It also needs to take responsibility for avoiding, as much as possible, any form of suffering (Baxi, 2002:34) in efforts to promote human rights. While not only Buddhism teaches that life itself is suffering, responsibility in life, right now, but also for the future and for future generations is increasingly asked for in recent global environmental discourses. These, too, seek to promote conscious use of people's agency as interconnected individuals and law-related entities. Everywhere, this raises questions about how to manage laws, in a variety of ways at different levels. But a major challenge remains that there is neither complete agreement over what 'law' or 'Islam' mean and imply. Since both are evidently highly plural entities, the scope for more or less violent disagreement is always latent.

The three-step approach of kite-flying

Aware of such lurking threats, I argue that using the kite flying methodology can help in making sense of such complexities and may offer guidance for responsible human action. I envisage this in three steps. Step 1 demands that any law-related actors first have to know and identify who or what they are and what they want to achieve. A later challenge will then be how to find and maintain a sustainable balance. The starting point of the mental kite journey thus locates and defines the identity of the law-related acting self. As indicated, is this legal actor simply an individual located in kite corner 1, with certain values, beliefs and presuppositions? Or is this individual agent operating

from corner 2 as a member of a social group, whether a family, a particular community or society, or a business? Or does this individual actor, perhaps hidden behind an official smokescreen of some office or function exercise choice and make decisions as a citizen and/or agent of a state in corner 3? Or, finally, is this law-related actor perceiving himself or herself as a global citizen or a representative of some global value or rule system? The trouble is, I suggest, that as individuals we are always all of this at the same time, in different kinds of mixities and roles. But like judges who have to make a decision and cannot say that they do not know, human kite flyers first have to make up their mind about their own position, preferences and ambitions. But then, immediately after that moment, there is a need for further decisions.

Having opted for any of the four above-mentioned possibilities, the chosen kite corner now becomes the location for the second step or stage of decision making. Now appears the power kite model, explained above, in which the sub-kite located in any of the four corners still contains all four competing elements. Step 2 of decision-making demands now that one must consider all four competing elements again to connect one's chosen primary identity in some form to these other types of law, in a particular sequence.

One cannot avoid this process, since no viable decision would be reached otherwise. As already stated, cutting out certain kite corners has the effect that the kite will crash. An individual who at this moment fails to make a decision may well cease to function. If someone has decided to be only a more or less autonomous 'I', and at the second step of decision making also insists on only being 'I', this depicts a terribly isolated individual with no support mechanisms or connections, and even no desire to use connectivity productively. Such a person risks becoming suicidal. Perhaps more dangerously, though, if this is a Muslim individual, insisting on an identity as a 'good Muslim I', perhaps even claiming that this is not merely a matter of individual identity, but an issue of global connectivity in relation to a strong worldview or belief, we face someone who is a religion-inspired Muslim. Co-opting corners 1 and 4, at stage 1 as well as stage 2 of the decision-making process and denying or rejecting any links to the other two corners, this individual could easily become an Islamic terrorist, or indeed someone like Anders Behring Breivik in Norway in 2011. It is quite evident that not only Muslims face kite-flying challenges.

The two-step process of decision-making thus teaches three important lessons. First, it confirms in principle that it is impossible to deny a voice and role to any of the

four competing kite corner elements. No matter how much an individual may hate any particular pluri-legal component, it cannot simply be completely ignored and literally cut out of the decision-making process. Secondly, this suggests that responsible individual action cannot be anchored purely in belief structures, values and convictions, whether of a religious or secular nature, but has to connect in some form also to socio-economic, political and legal entities and domains. Thirdly, though, this also means that any responsible institutional law-related action, whether on the part of a state agent or an international organisation, cannot completely ignore value-based elements in kite corner 1 and socio-cultural norms in corner 2. Responsible use of law-related agency thus always involves specific combinations of 1-2-3-4. Responsible actors have to handle the co-existence of values, norms and processes and need to record and explicitly mark the presence of what they do not like, as failure to do so would amount, as noted, to epistemic violence. In real life, human actors seem to manage this constant challenge quite strategically, by simply putting last what they like least, even what they hate.

Evidently, such pluralist chain constructs result in deeply contested and conflicting positions. It is an entirely different debate in what ways such positioning may be questioned and challenged, and to what extent decision-making processes are a matter of basic human rights, including the right to make wrong decisions according to the assessment of others. The kite model allows, as indicated, other methods and strategies to trace and assess why and how different positions arose and then to proceed with efforts to harmonise specific competing or clashing perspectives and positions. One may see this as step 3 of the kite flying process, a kind of corrective or confirmatory re-balancing through negotiation of conflicts and conciliation of rival positions. Step 3, however, requires looking inside the kite graph structure to locate specific positions and to map and retrace particular decision-making processes and competing positions. This may occur with a view to modifying any decisions made or seeking to persuade a competitor or any identified 'other' to revise their decision. The scope for such re-balancing processes largely depends on individual discretion and on skills, and of course on one's agenda, including the basic willingness to negotiate, which unfortunately we cannot take for granted (Menski, 2018a: 21-22).

Looking inside the kite brings more surprises, for the internal web structure of the kite is much more complex than we think. Dotted everywhere are four corner points of smaller decision-making arenas, at different levels of precision. It will help to take an example. Let us assume a Muslim individual in a Nordic country wants to protect his

or her values and religion against excessive Europeanisation. Four steps in the decision-making process become relevant, namely A, B, C and D. As we are deling with an individual, the decision-making process starts in corner 1 with step A. But the issue would be immediately to what extent this individual would prefer to co-opt any power from corner 2, the family or the community. So the question becomes how far from the starting point in corner 1 this individual point A actually moves closer towards corner 2 and point B. If the individual's choice in step A would simply be to stay strictly in corner 1, pray to God and leave it to Him to protect Islam in the Nordic countries, this could be interpreted as an individual attempt to pray for theocracy. How that person then manages daily social and political life in the secular environment of Nordic countries becomes an important question.

More likely, as individuals also need the support of broader society, a skillful combination and balancing of corners 1 and 2 and points A and B might result in specific forms of *Dansk Shariat* or some kind of custom (*riwaj*), law-related cultural constructs that are likely to be informal and may remain largely invisible. But they are possible, as Ballard (1994) convincingly showed for the UK, on the terms of the individuals concerned, more so if such navigation processes can be kept away from the potentially interventionist powers and supervision of state authorities. I am certainly not saying here that the Nordic states have no right to monitor what goes on in people's homes. But it is a matter of realism to accept that such legal interventions may have limits of reach and effect or, as Degiorgis (2014) illustrates so well regarding unofficial mosques and 'hidden Islam' in Northern Italy, the state itself may choose not to intervene. In Britain, the home schooling of Muslim children, which the state law allows, is such a potentially highly relevant issue. How does one effectively monitor what is taught in the home?

Whatever the precise relationship between corners 1 and 2 and the trajectory of decision-making between points A and B on the template of the inner kite structure, a Muslim in a Nordic country would probably need to cultivate all kinds of relationships with state agencies, and the individual's actions need to be lawful. A skilful combination of corners 1, 2 and 3, and thus a movement on the decision trajectory from point B towards a point C in the direction of the state corner would however still permit individual discretion to cultivate some kind of private *Dansk Shariat*. Here arises the issue of individuals failing to register their marriages according to Nordic state laws, for example. Finally, to what extent such an individual Muslim co-opts a globalised or

Europeanised transnational corner 4 and thus moves the decision-making trajectory towards a point D in the direction of corner 4 would depend on many factors and individual circumstances. It is not suggested that the necessary endpoint has to be the precise centre of the kite structure as an indicator of ideal balance or 'the right law' (Menski, 2012).

The result, it appears, would be that in all cases diligent analysis of these complex processes of pluri-legal conflict negotiation is possible, capturing multiple situations where normative pluralism and human rights tend to clash or exist in various uneasy relationships of tension (Menski, 2018a). As long as there is readiness to navigate and negotiate, there is much hope for sustainable solutions (Topidi, 2018). However, if there is lack of goodwill, or some kind of bad-tempered insistence on certain deemed or actual powers, there will be serious trouble, and there is no known insurance against this.

Key findings and conclusions

Responsible balancing of law and religion by people or states always involves specific combinations of 1-2-3-4 in the context of the kite model. Within the web of the immensely complex relationship of Muslims and Nordic countries, when it comes to the modalities and extent of Europeanisation, there is certainly a legitimate place for religion in European legal structures, also for minority religions. But since European state law and global international norms tend to view themselves as superior powers, a plurality-conscious analysis needs to remain sensitive to evidence of risks of enforced Europeanisation, which is known to have driven many Muslims away from Nordic countries. At the same time, there is still some room for discretion by Muslims in Europe to keep their identity more or less strictly Islamic, if that is what they wish to achieve. But there will be a price for this in the form of possibly restrictive strategic silences (Degiorgis, 2014), though such deliberate non-engagement may be cultivated by both sides. In any case, care must be taken to ensure that individual Muslims and non-majoritarian Muslims are not facing loss or impairment of their basic human rights in the name of Islam, nor in the name of Europeanisation.

It seems unwise and is probably impossible in practice for state law to totally deny Muslims in Nordic countries agency and voices regarding how to manage various core aspects of their respective culture/tradition and religion/values. It would infringe the

right to freedom of religion. The state, despite overarching claims to legal supervision, may thus in reality have limited control over what Muslims actually do behind closed doors or inside their own four walls, as long as they do not infringe state law. This observation, however, raises highly sensitive and important public/private boundary issues and indicates, in overall conclusion, that all stakeholders in these law-related balancing acts, which seem like a high-risk yet essential strategy for both sides, Muslims and Nordic countries, need to remain alert and co-operative, ready to learn from each other. There will continue to be much need for skillful compromises along the journey.

In the discussion after this paper, I gave the example of a highly significant, but unreported case involving a Muslim couple engaged in divorce in London in 2000. I conclude with this example here to reiterate that careful, plurality-conscious balancing is a crucial survival skill for all stakeholders in this never-ending kite contest. The so-called 'Case of the missing £1' (*Ali v. Ali*, unreported, High Court in London, 2000) involved a Bengali Muslim man and woman who worked in the city of London and, already in their early thirties and quite independent personalities, agreed to get married. The couple had a registered marriage under English law in London as a well as a Muslim marriage, a *nikah*. Part of the Muslim marital contract was an agreement by the husband to pay the wife a dower (*mahr*) of £30.001 in case of divorce. We see here that this highly educated couple skillfully used all four kite corners to construct a marriage that would be valid under English law and under Muslim law as applied by Bengalis, in London and anywhere else in the world.

However, this marriage did not last more than six months and one night, after an intense argument, the husband uttered an instant triple *talaq* and unilaterally ended the Muslim marriage, as he deemed to be his right. The wife was not actually opposed to this, yet when the husband next moved the English High Court to obtain an English divorce on the ground of irretrievable breakdown, she reminded the judge that she was owed £30.001, claiming her religious, socio-cultural and human rights, relying on corners 1, 2 and 4. The husband, however, strategically insisted on the formal legal position that under English law, a *mahr* is not known and could not be implemented. His argument relied only on corner 3, to the exclusion of all other corners. The judge struggled to understand this dispute before him and probably consulted peers overnight. Next morning, he granted the wife £30.000, and thus deliberately kept the London-based Muslim contract out of English law by the fictitious deduction of £1. He did not implement the Muslim contract, therefore, maintaining in effect the fiction that English

law is the same law for all. He simply made an ad-hoc equitable exemption for this specific woman to protect her human rights, her socio-economic entitlements, and also her religious principles. The kite sequence in the judicial mind might have been 3-4-2-1. The husband's effort to cut out corners 1, 2 and 4 to gain an unfair advantage from being in Europe completely failed.

I see this as a remarkably sharp and conscious pluri-legal decision, prompted perhaps by my expert intervention, which suggested to the judge that if he did not accept the woman's claim, she would get her money through a Sharia Council in London. For the past two decades, in numerous highly contested cases, English judges have continuously been engaged in highly sophisticated kite balancing, which of course would not please all participants in that kind of litigation (see K v K. [2016] EWHC 3380 Fam). But this is what responsible governance in multi-cultural Europe is now about, too: Europe's judges, in particular, are constantly called upon to find sustainable balances between completely contradictory positions of Muslim litigants that arise all the time when socio-cultural and religious elements of Islam and trends towards Europeanisation meet and clash. Flying kites responsibly helps in such scenarios to avoid individual tragedies and, possibly, avoids social unrest and disquiet. Whatever we call this highly plural exercise, there is little doubt that the kite flying methodology and related strategies are useful tools for shaping a Europeanising Islam and finding appropriate balances.

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Call for Papers for Special Issue 2021

SPECIAL ISSUE OF *NAVEIÑ REET:* NORDIC JOURNAL OF LAW AND SOCIAL RESEARCH: Civil Society in the Time of Covid-19

An invitation to submit articles for a special issue on Covid-19 and civil society in South Asia

The 2020 Covid-19-pandemic has initiated transformations of civil society in a number of countries. In some places, national governments have stepped back from ongoing liberalisations of civil society providing support to civil society organisations in order to reach needy groups in society. Other national governments have strengthened ongoing efforts to centralise economic and legal structures. In yet other cases, reciprocal processes or various mixtures of these processes have taken place. At the level of the public sphere, we are interested in artistic and literary responses to the Covid-19 crisis as well as formal regulatory responses in the public sphere. Some governments have for instance tried to control the flow of information, whereas others have bent to the unavoidable and accepted that information can flow freely in the internet age.

The planned issue aims to cover these themes in the countries of South Asia with the aim of establishing bases for comparison as well as documenting the developments in the region.

The Covid-19 pandemic is in the foreground of the evolving and often tenuous relationship between the state and civil society across the South Asian region. The incapacity of the state to perform myriad functions was held up in stark contrast by the need to not only assemble an efficacious response to the pandemic but also by the necessity to address the unfolding human tragedy. While in some cases, civil society organisations and citizens stepped up to fill the breach left by an incapacitated state, in other cases, the state strengthened its alliances with the civil society to deliver succour to those affected. Similarly, the capacity of the civil society to mobile swiftly and efficaciously to address the myriad issues invited even greater state repression in some cases, while governments have showered bouquets on other civil society interventions. Legal and judicial mediations have sometimes shaped these state–civil society interactions.

Irrespective of the precise nature of evolution in particular contexts, responses to the Covid-19 pandemic underscore many threads of cooperation and collaboration between the state and civil society. Many of these threads will outlast the pandemic itself. In this light, the special issue invites reflections on any aspect of the evolving civil society sector, with a focus on engagement with the pandemic and its likely post-pandemic implications.

We invite contributions on individual countries or comparative approaches (also beyond South Asia) on

- The transformation of government regulation of civil society
- Responses from formal (recognised) as well as non-formal (non-recognised) civil society organisations, such as the creation of ad hoc groups to organise relief.
- The transformation of the public sphere, where analysis of the meaning of internet communication and internet based groups may be included.
- Responses to the pandemic in arts and literature.
- Responses to the pandemic within religious groups on the background of the local developments seen in relation to large-scale developments.
- The impact of the pandemic on people at the margins of society – such as ethnic, tribal and religious minorities – and their responses in the public sphere.
- The impact of the pandemic on gender relations.
- The meaning of social and national settings (also beyond South Asia) in light of variations between dominant-collectivistic and dominant-individualised settings.

Schedule

Submission of Abstract 26th February 2021.
Response to Abstract 28th March 2021nd February 2021.
Submission of Article 30th July 2021.
Editors' decision based on peer reviews 1st November 2021.
Return of revised manuscript 17st December 2021.
Publication spring 2022.

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Volume editors: Rubya Mehdi, Peter B. Andersen and Amit Prakash, with Meghna Guhathakurta (Bangladesh).

Abstract and communication to Rubya Mehdi rubya@hum.ku.dk.

Erratum on page 33 in the Journal Number 8, 2018 Law, Culture and Governance in Hunza by guest editor Livia Holden

In the spring of 2000, a British development communications NGO called PANOS arranged a five day workshop in the village of Shimshal, a small community located at 3,100m in the Karakoram Mountain Range, in Pakistan's Gilgit-Baltistan region. During this workshop 13 villagers were trained to collect and transcribe oral testimony interviews with their relatives and neighbours in the community. Over the next two years 67 interviews were tape-recorded; 35 of these were transcribed and translated into English, and are now freely available on the Mountain Voices website (www.mountainvoices.org), along with similarly-constructed sets of oral testimonies from nine other mountain communities worldwide. 1 The website provides open access to over 300 interview transcripts from inhabitants of small mountain communities talking to local interviewers about their lives. It is a fantastic teaching resource and a virtually untapped source of qualitative research data (but see Cook and Butz 2011).

1 The Shimshal Oral Testimony Project was coordinated between PANOS and a community organization called the Shimshal Nature Trust (SNT), which represents the community in its dealings with outside researchers and donors. Villagers' trust and willingness to contribute to the project as interviewers and participants was predicated on the active involvement of SNT.

Information for Contributors

Contributions must be complete in all respects including footnotes, citations and list of references.

Articles should also be accompanied by an abstract of 100-150 words and a brief biographical paragraph describing each author's current affiliation.

Articles usually are expected to be in the range of 3000 to 6000 words and presented double-spaced in Times New Roman 12pt. Longer or shorter articles can be considered.

Please use British English orthography (of course, do not change orthography in quotations or book/article titles originally in English). Use the ending –ize for the relevant verbs and their derivatives, as in 'realize' and 'organization'.

Italics are used only for foreign words, titles of books, periodicals, and the names of organizations in the original language (except when the original is in English).

Dates are written in this format: 11 April 2013.

For numbers please use the following formats: 10,500; 2.53 for decimals; 35%; 5.6 million.

If a footnote number comes together with a punctuation mark, place it after the mark.

Please prepare figures and illustrations in a way apt for black and white printing and please secure necessary permissions for publishing before submitting your manuscript.

Standards for Source Referencing

It is essential that source referencing provides full and accurate information so as to enable a reader to find exactly the same source that is being referenced. Equally there needs to be pedantic consistency of presentation.

Please use the Harvard system of referencing which has grown in popularity in academic writing in education and the social sciences. In the main text, a reference or quotation is

annotated in parentheses with the surname of the author, the date of publication of the work and the page number from which the quotation was taken. The full bibliographic details are then provided in a list of the references at the end of the work.

Contributors are requested to submit a soft copy of their article and abstract to rubya@hum.ku.dk in Word format.

Articles