

11 Accommodating Islamic Family Law(s)

A Critical Analysis of Some Recent Developments and Experiments in Europe¹

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Introduction

In this article, I will focus on the treatment of Islamic family law in the European legal order, in a context that is increasingly multicultural in nature. My analysis will proceed through three stages. First, I will briefly sketch the present situation, and explain why the status of Islamic family law was for a long time – and still is – governed in most European countries by the rules of private international law. Second, I will concentrate on situations that touch upon Islamic family law and that raise a number of specific problems. In the third and final part, I will shift the focus to the future: what pathways could a forward-looking analysis envisage that combines pluralism in family matters – including Islamic family law in particular – with respect for human rights, as defined by the European Convention for the Protection of Human Rights and Fundamental Freedoms? Three options can be identified, and my aim is to open these up to debate. As a result, the conclusions drawn will necessarily be fairly open-ended.

Limits to Private International Law in the Face of the Changing Demographic Profile of Europe

In Europe in recent years, the pluralism of family lifestyles has been increasingly linked to the migrations that took place in the post-war period. This growing diversity is quite clearly also the result of an ever more publicly supported sensitivity to the protection of individual autonomy. It should nevertheless be acknowledged that this increasing pluralism, in the sense of a juxtaposition of cultural models of family life, is heterogeneous in nature. A not insignificant complication results from the fact that migrations have, for the most part, come from countries where religious law constitutes a major source of law, particularly

in matters of personal status. In practice, so far it is private international law and its techniques that have for the most part been invoked to govern the lives of immigrant families.

Private international law is the branch of law that deals with private relationships that are characterized by one or another form of interaction between different national legal systems that apply in a given situation. This interaction may result from the mixed nature of a relationship between parties who do not share the same nationality. Alternatively, it may arise from a situation of cross-border mobility: the parties (or one of them) are living in a country other than that of their nationality – whether temporarily or on a long-term basis – and reside there as foreign nationals. For many years, therefore, questions relating to the personal status of people from countries where that status is governed by religious law were treated as issues covered by private international law.² The techniques of private international law continue to be important for all manner of questions relating to the reception, within the domestic law of the country of the parties' habitual residence, of situations relating to personal status that have arisen in a foreign country: marriages celebrated abroad, divorces granted by foreign judges, and so forth.³ When dealing with personal status issues, the rules of private international law often refer to religious law, since these immigrants are often from countries where personal status is governed by shari'a.

Over the years, however, the demographic profile of European communities of immigrant origin has undergone profound change. The presence of these groups is no longer linked primarily to immigration, but represents a permanent settlement in the country of habitual residence, that is, in Europe. It is true that there are still many instances of family reunification that involve interaction between different national legal systems: on the one hand, that of the country of origin of the partner who is joining someone living in Europe, and, on the other hand, that of the country where the family intends to settle.⁴ Yet family reunification is now just one aspect of the reality of immigrant families' lives; increasingly, these family situations originate within Europe. Moreover, in most cases the parties hold the nationality of the country of residence, while also retaining the nationality of their country of origin.⁵

These developments are changing the status quo: questions involving the legal treatment of personal status become, in such cases, first and foremost matters governed by domestic law. The latter for the most part does not allow one to take into account the religious convictions of the persons involved, or, if it does, then only to a very limited degree.

If we were to agree on the principle that it ought to be possible for the religious dimension to maintain, in law, the importance that the parties concerned attach to it, then dealing with religious phenomena in terms of personal status would require devoting particular attention to the new profile of the large numbers of such families and individuals currently living throughout Europe. Certainly the debate is of a sensitive nature, as it raises the prospect of calling into question certain historical developments, such as the secularization of civil law. I will return to this question below. We are in a sense witnessing a relatively new type of duality as regards the legal position (and identity) of individuals who, on the one hand, have become full-fledged citizens of their country of residence and are thus bound by its legal system, while, on the other hand, placing that system alongside religious norms of foreign origin that defy its capacity to integrate them. The sociological literature describes the situation of such people as 'transnational'.⁶

Today it seems that Muslims even more frequently – in various parts of Europe – are faced with the difficulty of combining respect for the laws enacted by the state in their country of residence with Islam. The values of the latter are often endowed, in their view, with particular legitimacy.⁷ Certain studies go so far as to warn that if this reality is not taken seriously, it could threaten the social cohesion of contemporary society.

A highly revelatory source of information on this matter is the many websites, based not only in Europe but also in Canada and the United States, which for several years now have enabled Muslims to submit questions relating to various aspects of their personal status.⁸ The queries centre on the question of how to ensure that the different components of personal status that fall under the provisions of the (secularized) civil law of the country of residence can nonetheless be reconciled with the requirements of Islam as regards family organization: religious marriage occupies a prominent place here.

In Europe today, the vast majority of states have chosen to secularize the laws governing the person and the family.⁹ This option gives priority to non-confessional laws. The difficulty this represents for persons who wish to combine the requirements of domestic civil law on personal status with the treatment of the latter in accordance with (their) religious law should not be underestimated. The situation is all the more complex for Muslims, since in Islam there is no unequivocal doctrinal position on the question of which law applies to a devout Muslim residing in a country governed by secular law.¹⁰ In principle, such a person is a legal subject bound by the rules of a non-confessional (state) legal order, but the various schools of shari'a differ amongst themselves with

regard to the effects of this principle which they are willing to recognize on a religious level. This complicates matters for those concerned, and in part explains the confusion on the part of certain people when it comes to respect for the law of the state of their habitual residence; this is the case even if very often, as we have seen, they are full-fledged citizens of that country.¹¹

One could of course retort that the situation for new religious minorities – and in particular Muslim communities – is not substantially different from that of adherents of other religions, since the secular civil law is in all cases the only one that is granted recognition by the state authorities. This response strikes us, however, as too categorical when it comes to Muslim communities. Not only because it circumvents a major difficulty, namely, the close connection which many Muslims continue to make between law and religion, but also because it fails to explore the alternative pathways that may be available.

The aim here is *not* to provide an inventory of the numerous works published in recent years on various aspects of personal status in countries where religious family law applies, or on the way questions of personal status are handled in the domestic law of European countries – seen through the prism of private international law – whether concerning the application of these statuses by judges in the country of residence or the reception of situations created abroad and of personal statuses governed by religious law. Several authors have, in the past few years, analysed the various solutions offered by case law or legal theory to the most common problems encountered in practice. These studies for the most part present an admirable analysis of private international law on questions relating to Islam, in particular: filiation, naming, conditions for a valid marriage, the rights and obligations of the spouses, the relations between parents and children, the dissolution of marriage through divorce and, finally, the status of property as well as its distribution upon death. I will limit myself here to referring to only a few of these works.¹²

Instead, I take a different approach, focusing on future perspectives and going beyond the limits of private international law to raise questions as to other potential approaches. This approach is an *exploratory* one: the aim is first and foremost to remind us of a number of questions that at this point must remain open and that are linked to the treatment, in civil law, of personal statuses that are religious in nature. The approach unfolds in two stages: first, an examination of the reasons why, in my view, we should not take comfort too readily in the argument that the new religious communities living in Europe today must necessarily behave like all others and accept the separation of law

and religion. In the second stage, I address the core of the problem and look at the future perspectives mentioned above. The approach draws in large part on the literature on the subject. The way in which religious status is handled in the context of secular state law has to date been studied principally in Canada, Germany and England.¹³ In what follows, I will look at the following three pathways toward a solution: the incorporation into domestic (civil law) of religious rules, taking the example of Islamic family law and in particular the marriage contract; the autonomy of the will in private international law; and finally, recourse to religious arbitration for certain types of family dispute. All three of these will be addressed here in what is necessarily a summary fashion and, as already suggested, departing to some extent from the strict confines of the techniques of private international law.

The Close Connection Between Law and Religion in Islam

The historical response in Europe to the problem of a conflict between loyalty to state law, on the one hand, and religious or confessional commitments, on the other hand, is well known: this problem is deemed to have been resolved by virtue of the separation of law and religion.¹⁴ In Europe today, with the exception of a few very specific regulations, state law is most often the only formal source that applies in matters regarding personal status.

This solution, taking secularization for granted, does not completely evacuate or dissolve, in the specific case of Muslim communities, the close and indeed inseparable link that members of these communities often continue to make between law and religion: shari' a or Islamic law is treated as the principal, and indeed the essential, source of law.¹⁵ One may obviously obscure this reality by giving a response from a strictly secularized legal perspective to any question regarding the personal status of Muslims. Evidently, in practice, not everyone's perspective is the same, and the reference to religion will not be of equal importance to each person. But in general it may be said that the common reference to Islam as the source of law explains why Muslims often continue to seek a sort of compromise or reconciliation between the requirements of their religion and those of civil law.

To refuse to take into account this endeavour would be to risk eliciting reticence on the part of these communities. In practice, such reticence with regard to the requirements of civil law is indeed perceptible. It manifests itself in various forms, as several studies on the patterns of regulation of family relations within Muslim communities in Europe

have shown.¹⁶ At times this reticence can go so far as to simply displace civil law and set up a parallel legal regime within the religious community, without seeking recognition under civil law for the situation thus created: religious marriage, for example, is celebrated without any concern for first entering into a civil contract, even if the law requires that this be done. In other cases, individuals return to their country of origin to seek justice, availing themselves of the rules of conflict of laws which, in the private international law of most Islamic countries, allow them to have recourse to those countries' domestic laws regardless of the number of years a person has lived abroad.¹⁷ In legal terms, and in particular from the perspective of legal security, both forms of behaviour raise serious questions: religious (informal) marriages will not be recognized by the authorities of the country of habitual residence, leaving the spouses without protection under domestic (state) law and hence vulnerable; as for the solutions reached in the country of origin, these create a legal privilege that is reserved for the nationals of countries which confer upon religious (Islamic) law the status of personal law. Such a privilege makes coordination among national legal systems in their case difficult: religious law prevails over secular law exclusively in the case of those who have retained the nationality of the country in question. The situation is all the more unjustifiable because often the factual connection to the law of the country of habitual residence has grown strong over the years, through, among other things, acquisition of citizenship and/or long-term residence; too strong for a person to be permitted recourse to the rules of private international law.

In light of these observations, a search for alternatives is warranted. Three types of legal solution may potentially be envisaged: (1) allowing rules based on religion to be granted effect under civil law. Notably, this could take the form of a (civil) contract, as in the case of marriage; (2) applying the autonomy of the will in private international law; and finally (3) recourse to religious arbitration for certain disputes. In what follows, I will examine these three options in succession. As indicated, these pathways draw inspiration from the doctrine and, in part, from case law. To date, the question of drawing on domestic civil law to find more suitable means of regulating the family life of Muslims has attracted the attention mainly of authors whose work focuses on the English-speaking world.

Future Perspectives: Three Alternatives

INCORPORATING RELIGIOUS RULES INTO CIVIL LAW: THE EXAMPLE OF THE MARRIAGE CONTRACT

At first glance, allowing the incorporation into domestic law of religious rules governing matters related to family law may be surprising, given that this approach runs the risk of restoring to religion a scope and an impact that secularized civil law has historically tried to limit.¹⁸ The risk may seem all the more serious in the case of personal statuses which contravene fundamental principles of the equality of the sexes and of non-discrimination based on religion that are now mandated by the civil law in most European countries.¹⁹ Such principles, moreover, are almost systematically met with the invocation by courts and civil officials of a public order exception.

Yet, several equally important legal values may militate against such a refusal and argue instead in favour of greater openness on the part of state law in Europe to religious personal statuses of foreign origin. One such argument is the extension in recent years of the principle of the autonomy of the will – both in domestic civil law and in private international law – which entails the possibility for adults (men and women) to shape their family life by combining elements of mandatory law, which do not suffer exemption, with elements of optional civil law.

The principle of the autonomy of the will supports the view that civil law ought to be more inclined to accept norms of religious and/or cultural origin that may differ from its own. One may disagree as to the degree of openness that is desirable, and one may indeed disagree profoundly with a thesis that would go so far as to attribute to the autonomy of the parties an impact that overrides fundamental civil rights such as the age of marriage, consent by the future spouses, impediments based on consanguinity or on the undissolved bond of a previous marriage.²⁰ Nevertheless, the principle presents a number of advantages that should not be underestimated when it comes to the question of incorporating into civil law elements of family law based on Islam. Shari‘a notably grants the spouses a surprising liberty to define their relations, both in terms of personal and of patrimonial effects.²¹

In order to offer the wife, in particular, a maximum number of guarantees protecting couples against certain specific risks under shari‘a, several authors in Denmark,²² Germany²³ and England,²⁴ in particular, have been suggesting for several years that spouses should enter into a valid and enforceable contract under civil law that contains the stipulations necessary to enable couples to frame their union according to

their particular needs, without, however, overstepping the limits and particularities of their religious law and without infringing on a fundamental right of either party.

This approach requires that each situation be subjected to careful prior analysis of the needs of both spouses and of their connection to the forum, both of their country of residence and of their country of origin: not only may the conditions for the formation of the contract vary, but also the regime under which it is implemented. Surprisingly however, in continental Europe, the application of this solution has hitherto been rare.²⁵ It seems to us that, in view of protecting the spouses, pre-nuptial agreements – well known to lawyers in North America – may serve as an inspiration to practitioners in continental Europe. There is indeed nothing to prevent them from providing more guidance to Muslim couples – should they wish to avail themselves of it – in searching for contractual solutions to, for example, problems of the management and division of property that arise in their particular case. The matter deserves to be examined in greater depth, all the more so since it seems highly likely that, over the years, there will be increasing numbers of cases where women in particular who have been excluded or discriminated against will, on grounds of non-discrimination, demand that their interests be taken into account.

For stipulations that are mandatory under Islamic family law, the problem presents itself somewhat differently. Some of these stipulations are alien to the nature of a civil marriage contract. This is true, for example, for the commitment by the future husband to pay a dower or *mahr* to his future wife.²⁶ The way in which such a clause is handled differs according to the various approaches. The mandatory nature of this provision has been the subject of several contradictory decisions in case-law: certain judicial decisions refuse to sanction it, evoking the religious and inadequately defined nature of the obligation, whereas others, on the contrary, agree to sanction it. Within certain schools of Islamic law, the obligation to pay the *mahr* is an imperative condition for Islamic marriage, and is separate from the matrimonial regime. One of its functions is to protect the financial interests of the wife by obliging the husband to pay her a sum of money or transfer property to her, in order to guarantee her a degree of financial security and a certain degree of independence. The *mahr* takes effect at the latest upon the dissolution of the marriage. Nevertheless, for the *mahr* to be enforceable under secular civil law, certain authors suggest that couples residing in Europe should enshrine it in a (secular) contract.²⁷ This will allow the civil courts to recognize it more easily, and if necessary the latter will be able to rule that a civil contractual obligation is enforceable even

if that obligation is founded on a rule that is religious in nature. From this perspective, a civil contract will be in a sense 'added on' to a marriage agreement.

It is not clear, however, that a separate contract entered into in civil law constitutes, in and of itself, a sufficient means for achieving the most complete and comprehensive legal arrangement possible for protecting a couple from the various risks to which their nuptial commitment exposes them either in domestic law or in private international law. It all depends on their specific situation. As I already mentioned above, the pros and cons of prenuptial arrangements in legal practice within the context of continental Europe would require further research.

Beyond the explicit designation of the matrimonial regime and certain provisions concerning the management and division of their property, the spouses may also stand to gain from negotiating arrangements concerning the personal effects of marriage that will protect them from specific risks they may incur by virtue of provisions in force in Islamic countries and that may quite possibly apply to them.²⁸ As a general rule, setting out the form of the obligations between spouses in terms of personal effects will mainly benefit the wife, since she is the one who incurs the greatest risks. Two well-known risks are that of her husband taking another wife, and the dissolution of the marriage on the initiative of the husband alone (unilateral repudiation). Polygyny and repudiation without the wife's consent do not constitute a serious legal risk for a woman living in Europe.²⁹ Yet, the insertion of clauses stipulating that the woman has the right to divorce her husband should he take another wife or, for even greater protection, the right to leave the marriage for reasons of discord, are likely to strengthen the woman's position in the event of her husband's remarriage abroad in an Islamic country where polygyny is authorized, or in case of unilateral repudiation. These clauses, which strengthen the position of the wife, are perfectly admissible in Islam, which leaves it up to the parties to incorporate religious considerations into the contract in order to protect themselves.³⁰

The question remains, however, as to the contract into which these clauses are to be inserted: is it the marriage contract itself, or a separate one? Muslim couples who marry civilly usually also celebrate their marriage religiously. That is in fact the only way to validate the marriage under Islam. The safest solution in such cases would be to include those clauses that are unknown in civil law in the religious marriage contract, for that way the risks incurred by virtue of their (religious) personal status are mitigated and thus covered by a religious contract.

Much more could be said about the role of the civil contract in the religious sphere.³¹ Certain provisions envisaged by the parties on the

grounds of their religion are not subject to legal definition under civil law. What meaning will the civil courts assign them in that case? Will the judge be disposed to enforce them as binding? The question may legitimately be raised, since just because an obligation is of a religious character does not mean that it cannot be recognized as valid under civil law.³² The monogamy clause, for instance, simply confirms the obligations undertaken by the spouses in civil law, and can therefore, in my view, be included in a civil contract. The will of the spouses is in that case to protect the wife, which in law is perfectly acceptable. As regards the right to divorce, one might ask whether it is licit to make a commitment to divorce. In this regard, it should be noted that a country like Norway opted over twenty years ago now (1991) for a solution in which all citizens contracting marriage, including non-Muslims, had to grant the other spouse the right to divorce.³³ That solution may seem surprising, as it applies to each person who engages in a marriage while such clause makes sense only in the case of a women who risks being unable to get out of the marriage if the law of a country where such a constraint (still) exists should apply to her.

Obviously, all this is not easily put into practice. On the one hand, because the contractual definition of certain aspects of religious marriage cannot but raise difficulties: to what extent are certain obligations, rooted in religious law, 'fit' for being the subject of a civil contract? On the other hand, since the suggestions put forward here require several conditions to be met simultaneously – something that will rarely be the case in practice: the two spouses should be informed of the legal/contractual options open to them, but above all, they should agree between them on the exact content of the additional protections they envisage for their own particular situation. They should also know how important it is to them to protect themselves against certain risks that are characteristic of the law by which they are bound as a result of their marriage and which, in the case of Islam, leaves the wife particularly vulnerable. Furthermore, this approach is a proactive one. The spouses do not gain any immediate benefit from their agreement, but agree to consider a future risk. Is it not asking too much that they should do so at the time when they enter into their marriage? One could of course imagine that a civil contract might be signed later on, after a few years of marriage, or that the marriage contract might be amended afterwards, but in that case it is necessary to do so before any serious disagreement should arise between them, for otherwise it will be too late to negotiate with due serenity.

The intention in this paper is to invite reflection: despite the numerous obstacles, it could be advantageous for some couples to incorpo-

rate clauses of a religious nature into their marriage contract in view of bringing norms imposed by their religious conviction into harmony with the requirements of civil law. It is true, however, that many questions remain and therefore professional and detailed guidance in these matters is necessary if one wishes, in practice, to offer spouses greater protection with regard to their rights and obligations which they take upon them.

THE AUTONOMY OF THE WILL IN FAMILY MATTERS

The second potentially relevant pathway toward accommodating Islamic family law within the European legal order is the autonomy of the will in private international law. For the past few years, private international law has, in an increasing number of countries, and especially in Europe, offered another approach which, as regards family law, allows couples concerned by the interaction between secular civil law and a religiously-inspired law in their country of origin to agree, to a certain extent, on the way in which they envisage conflicts of law issues that risk arising in their case. This approach relates to the exercise of the autonomy of the will with respect to personal status. In Belgium, for example, the 2004 Code of private international law³⁴ allows for the law of the country of habitual residence to be tempered for certain matters, such as the dissolution of marriage by divorce and as regards the matrimonial regime, by granting the parties a right to opt for the national law.³⁵ This approach is of interest only to the extent that the couple does indeed retain a connection with the country of origin by holding that country's nationality, or that the spouses stand to benefit from recognition, in the other jurisdiction, of the matrimonial regime that they have chosen and any other future arrangements regarding the division of property. The same is true for the dissolution of their marriage by divorce, where applicable. In the 1980s, Jean-Yves Carlier did pioneering work in Belgium in which he scrupulously investigated the various advantages that persons who have kept a connection to a foreign law may gain from being granted autonomy in respect of personal status.³⁶ Belgian federal legislation has since moved in this direction, albeit cautiously. This solution has its limits, which have been identified in the first part of this paper. These include the fact that the solution applies only to couples who have maintained a connection to foreign law. It does not, therefore, offer a solution to persons who have converted to Islam and who have no legal connection to a foreign legal order that they would like to designate as the law that applies to their situation.

The limitations do not stop there, however. There is lingering uncertainty as to the question of whether autonomy plays a role in cases of multiple nationality as well, which, as noted above, is the situation in which immigrant couples increasingly find themselves. Where one or both partners also hold the nationality of the country of residence, it is not certain that the couple can still invoke the autonomy of the will, which in their case would be the equivalent of allowing them to opt for the application of the *other* national law. The question arises, notably, in Belgian private international law. On the one hand, the Belgian Code of private international law places persons with dual nationality under the protection of Belgian law: in cases of multiple nationalities of which Belgian nationality is one, Belgian law applies (Article 3, paragraph 2). The right to choose the applicable law would cease, in that case, to be seen as an alternative. But on the other hand, the Code does, in Articles 49, 50 and 55, grant couples a right to choose according to whether they feel more affinity with the society of their habitual residence or, on the contrary, with the country of the law of the nationality. The Belgian Code of private international law in a sense leaves open the question of couples with multiple nationalities. As a result, the answer will have to come from case law.

In terms of private international law, it would be best if situations of multiple nationalities were circumscribed by conventions – bilateral and multilateral – that ensure that the legal order of the country of which one of the persons holds nationality recognizes the situations arising from the effects of the law in force in the country of the *other* nationality, and vice versa, without this having to depend on measuring the intensity of the ties – always difficult to do – which the persons in question may or may not have with one or the other country. On the other hand, as has been emphasized since the introduction, it would be preferable not to continue to make ‘transnational’ family situations exclusively dependent on solutions devised in private international law. These solutions are intended primarily for situations that entail interaction on an international level between different legal systems and that seek to guarantee harmony at that level. Priority must henceforth be granted, in my view, to offering sufficient legal protection to persons who cannot make use of the techniques of private international law but come, instead, under domestic law.

RECOURSE TO RELIGIOUS ARBITRATION FOR CERTAIN FAMILY DISPUTES

The third and last option I will discuss here with regard to incorporating Islam into the domestic legal order of European countries is re-

course to religious arbitration for certain types of family disputes. The quest for solutions, in domestic law, to questions raised by the need to take into account by people's religious convictions may be situated at two different levels, although these are not mutually exclusive: either the individuals seek for themselves – for their own sake – to accommodate material law within the spectrum of commitments made among one another (for example, spouses), namely by enshrining those commitments in a contract or in some other form of explicit initiative; or potential adjustments are sought in terms of procedure, in particular where a dispute has to be resolved. It is on this second type of adjustment that I will focus here, in the last section of the forward-looking analysis. Two countries with an Anglo-Saxon legal tradition, Canada and Great Britain, offer contrasting illustrations of this issue. It would be risky on my part at this stage to suggest this route for other countries, but it deserves nonetheless to be mentioned.

In Canada, the question arose in relation to religious arbitration in family law.³⁷ That path was ultimately abandoned, with repercussions for other existing religious family law arbitration tribunals, which were to be abolished. There is no room here to go into the details of the (lively) debate – not only among jurists, but also in the media – provoked by the question, but simply to recall the stakes involved, since these were not without relevance to the situation of other religious communities established in countries with a secular civil law tradition.

The point of departure for the discussion in Canada was the right to freedom of religion. The question raised in Canada had to do with the approval given, in civil law, to legal proceedings of a religious nature: should the privatization of justice be accepted to the point where decisions handed down by religious authorities are recognized in law? Several modalities may be envisaged: (1) a privatization that is limited to religious mediation; (2) religious arbitration; or, finally, (3) full judicial pluralism authorizing the settlement of family disputes by religious courts. In the third scenario, one may speak of a true judicial pluralism that recognizes the existence of particular institutions that administer justice on an equal footing with state courts. The latter form of regulation exists in India, among other places, as well as in Lebanon, but seems to have little support in the West. In Canada, the second of the above options was the subject of much discussion after a group in the Province of Ontario known as the Islamic Institute of Civil Justice (IICJ) announced, in 2003, its intention to create a Canadian Islamic body that would arbitrate in family matters. It should be recalled that arbitration is not mediation, but has legal force on condition that the decision complies with state law and therefore does not infringe on the rights and lib-

erties of persons. The communities concerned would thus be required to accept the primacy of domestic law as regards personal status, but they would be allowed to set up their own arbitration boards for certain matters. The state judge would ultimately retain the right to order a review of the decision and of the procedures followed in reaching it.

An Ontario law has, since 1991, allowed for arbitration by religious authorities. The HCJ merely requested the right of Muslim communities to have their own arbitration board along the lines of other religious arbitration bodies already in place, it thus announced its intention to create a Canadian Muslim arbitration board for family matters that would be available to all Muslims in Canada. One remembers what happened: in the debate that followed the HCJ's announcement of its intentions, the Ontario legislature abolished the option of arbitration. The challenge came largely as a result of the fear that the religious arbitration would, in practice, infringe on certain individual rights, in particular those of women, should they not be entirely free to consent to arbitration but compelled to avail themselves of it under pressure from the patriarchal rules that prevail in their community, in the name of the protection which that community affords them and of an egalitarian conception of women's identity in Islam. In sum, Islam was reproached for its treatment of women. The debate in Canada is now not only closed, but the path opened by the 1991 Act has been abandoned.

Strangely enough, in the meantime religious arbitration seems to be blazing a trail through Great Britain, where the Muslim Arbitration Tribunal (MAT) has been authorized, pursuant to the Arbitration Act of 1996, to offer its services to Muslims who wish to use them to settle their conflicts.³⁸ Islamic mediation bodies, such as the Islamic Sharia Councils, as well as Jewish, evangelical and Catholic ones, were already well established in their role of accompanying conflicts between believers, which were for the most part familial or sometimes commercial in nature. Their decisions had no legal force, however, in the eyes of state law. With the establishment of a true religious arbitration tribunal, the Muslims of Great Britain appear to have succeeded in opening up the path that had been blocked in Canada. They have obtained recognition for specific institutions allowing Muslims who wish to do so to settle their disputes by means of arbitration. The aim is to open up an alternative form of dispute resolution, while respecting certain limitations: the procedure must abide by the obligation to protect individual rights and thus fundamental freedoms. It should, however, be regarded as a form of weak legal pluralism, since it all remains within the confines of public policy and the Muslim Arbitration Tribunal cannot pronounce divorce, that is, a divorce that equals a civil divorce.³⁹

It is too soon to draw concrete lessons from the experiment being conducted at present in Great Britain with the MAT, but it would be very instructive to follow this experience closely and read the evaluations that will be conducted in Britain itself. The benefit to be gained from religious arbitration is not insignificant; it is very similar to the advantages of the traditional system of arbitration. In the case of Muslim communities, it is undeniable that the question of accommodation of rules of conduct drawn from Islam and from the principles of shari'a is a lively one. Shari'a is indeed a complex normative framework of rules and principles that regulate family life, among other things, and offer a comprehensive vision of the life of the believer. Family law is a particularly sensitive domain of law, the more so when it is closely linked to a religion, since this makes the handling of related matters from a legal perspective all the more difficult. One would therefore expect that particular institutions, deeply rooted in the reality and lived religious experience of a community of believers and, above all, recognized by that community, would handle the responsibility of arbitration entrusted to them with the requisite expertise and authority. Under the principle of arbitration, Muslims involved in disputes in Great Britain may henceforth turn to an alternative space for conflict resolution, one that is recognized by the state. This body is not free from the oversight of English law. Time will tell whether this experiment bears fruit, and thus whether it could serve as a useful path in the context of family law. The first studies devoted to the MAT do not rule out this possibility.

Notes

- 1 This paper is based largely on one that I presented, in French, at the Conference on 'Islam belge', which was organized by the Centre interdisciplinaire d'études de l'Islam dans le monde contemporain, and held at Louvain-la-Neuve, Belgium, on 13 December 2008. The proceedings, edited by Felice Dassetto, Farid El Asri and Brigitte Maréchal, will appear in a collective volume entitled 'Islam belge au pluriel' published by Presses Universitaires Louvain.
- 2 See especially J.-Y. Carlier and M. Verwilghen (eds.), *Le statut personnel des musulmans. Droit comparé et droit international privé*, Brussels: Bruylant, 1992; for more recent studies, see also the references cited in note 14.
- 3 M. Fallon and J. Erauw, *La nouvelle loi sur de droit international privé belge. La loi du 16 juillet 2004*, Antwerp: Kluwer, 2004; J.-Y. Carlier, M. Fallon & B. Martin-Bosly, *Code de droit international privé*, Brussels: Bruylant, 2008; F. Rigaux and M. Fallon, *Droit international privé*, Brussels: Larcier, 2005.
- 4 See especially M. Nys, *L'immigration familiale à l'épreuve du droit*, Brussels: Bruylant, 2002.

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- 16 See note 7.
- 17 El Gedawwy, *Relations entre systèmes confessionnel et laïque en droit international privé*, 1971, and A. Abdalla, 'Principles of Islamic Interpersonal Conflict Intervention', 2002. See also M. Charfi, 'L'influence de la religion dans le droit international privé des pays musulmans', *Receuil des Cours de l'Académie de Droit International*, 1987 (Vol. 203, No. 3), pp. 414ff; O. Ewan, 'L'Islam et les systèmes de conflits de lois' in: J.-Y. Carlier and M. Verwilghen (eds.), *Le statut personnel des musulmans*, 1992, pp. 313-341; M. Berger, 'Conflicts Law and Public Policy in Egyptian Family Law: Islamic Law through the Backdoor?', *The American Journal of Comparative Law*, 2002, pp. 555-594.
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- 27 In this regard, see R. Mehdi, 'Danish Law and the Practice of *mahr* among Muslim Pakistanis in Denmark', 2003.
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- 31 See especially I. Riassetto, 'Religion et contrat', in: F. Messner, P.-H. Prelot & J.-M. Woehrling (eds.), *Traité de droit français des religions*, Paris: Litec, no. 1520; B. Moore, 'Sur la contractualisation de la croyance', in: J.-Fr. Gaudreault-DesBiens, *Le droit, la religion et le raisonnable*, 2009, pp. 491-530.
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- such treatment would exceed the scope of this paper. Under the private international law currently in force in most European countries, the only religious marriage contracts that are at the same time regarded as marriage contracts in the civil sense are those entered into abroad in accordance with the law applicable in a country where marriage is governed by religious law; this is the case, notably, in Islamic countries in Asia, Africa and the Middle East.
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