

Sharia Law: No Place in Europe

Sharia law, due to its increased presence in Europe, is staking its claim to become the main social, political and legal challenge of the 21st century. A distorted idea of multiculturalism and a culture of political correctness among politicians, academia and journalists go hand in hand to exacerbate the sharia problem in Europe. The understanding that sharia law discriminates against women is not rocket science. Likewise, the more sharia the more the rule of law suffers. Children's welfare under sharia does not meet European human rights standards either. Furthermore, the operation of sharia is creating parallel legal systems in Europe. This is happening in two ways: on the private level, through rulings delivered by sharia courts or their equivalent and, on the public level, through the encroachment of Islamic law on national legal systems. In this paper, I will explore the way in which sharia is undermining the rule of law, collides with gender equality and diminishes child welfare in those two settings with the help of "New Multiculturalism". In order to do so, this essay is divided into two sections. The first section will focus on the private level. I shall argue how these issues are present within the two different ways that sharia courts are functioning in Europe. From being officially set up in Britain (Muslim Arbitration Tribunals where decisions are binding) to acting as a "mediation" system in Germany and sharia-based "counselling" or "dispute resolution" in the Netherlands. The second section is concerned with the public level. I shall explore how the encroachment of sharia law within the legal systems in Germany, Spain, the Netherlands and Italy is having the same negative effects as sharia courts on gender equality, child welfare and the rule of law.

Sharia courts and the rule of law

One of the main concerns about the proliferation of sharia courts in Europe is the creation of a parallel legal system for Muslims and its undermining effects on the rule of law. This is the result of two contravening concepts, namely New Multiculturalism and the rule of law,

playing in Europe. On one hand, New Multiculturalism is a trend of multiculturalism which is more concerned with jurisdictional differentiation than the classic multicultural symbolic integration.¹ On the other hand, the rule of law has to do with the characteristics that a legal system must possess in order to be an effective system of laws. Among them is that laws must be general, public, stable, impartially applied and enforced.² The questions to ask then are whether the sharia-based tribunals, mediation, counselling and dispute resolution that are functioning in some European countries are actually infringing the rule of law. And whether the rule of law and the New Multiculturalism can be harmonized or are mutually exclusive. The rule of law is not only a requirement for being part of the European Union but it is also a cornerstone of the European Convention on Human Rights (ECHR).³ This is illustrated in the Turkish case of *Refah*. The Refah party in Turkey proposed a plurality of legal systems and the European Court concluded that an Islamic-based system is incompatible with the European Convention on Human Rights. One of the reasons given for its conclusion is that the State would lose its role as guarantor of individual rights and freedoms since individuals will be obliged to adhere to rules imposed by sharia law.⁴ The real problem in the majority of European countries (apart from Belgium where the Islam Party has won two seats)⁵ is not a political party aiming to impose sharia law, but something even worse: politicians, both in power and prominent offices, neglecting to acknowledge the fact that indeed sharia-based systems are not complying or adhering to the rule of law and thus creating a parallel legal system. For instance, David Cameron in a 2008 speech acknowledged the danger of two legal systems working side by side and then stated that “*all citizens are equal before the law*”.⁶ David Cameron’s claim referred to an official embracement of sharia law and is in line with the judgement of the European Court in *Refah*. However, in practice, sharia courts dealing with matters of public law through to the abuse of women are in operation in Britain and have recently been publicly unveiled by the

¹ Michael A. Helfand, “Religious arbitration and the new multiculturalism: Negotiating conflicting legal orders” [2011], *N.Y. Uni. Law Rev.*, vol. 86, No. 5, Nov 2011, pp. 1231-1305

² Randall Peerenboom, “Human rights and rule of law: what’s the relationship?” [2005], *Georgetown Journal of International Law*, Vol. 36, UCLA School of Law Research Paper No. 05-31.

³ Ibid

⁴ Dominic McGoldrick, “Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws” [2009], *Human Rights Law Review*, Vol. 9, No. 4, Nov 2009, pp. 603-645

⁵ <http://www.gatestoneinstitute.org/3442/belgium-islamic-state> Soeren Kern, *Gatestone Institute*, 9 November 2012 [last accessed 4 September 2013]

⁶ http://news.bbc.co.uk/1/hi/uk_politics/7264740.stm *BBC News UK*, 26 February 2008 [last accessed 16 September 2013]

BBC's *Panorama*, while Mr. Cameron turns a blind eye.⁷ Dicey's second tenant on the rule of law "No man is above the law, and everyone is equal before the law"⁸ has become empty in Cameron's mouth in the guise of political correctness. The same is happening in Germany with Angela Merkel. In 2010 she made it clear that Muslims must obey the law and not sharia, but the functioning of sharia-based mediation in Germany does not reflect her words.⁹ Joachim Wagner, a German legal expert, argues that Islamic sharia law is undermining the rule of law in Germany because the Muslim mediators are settling criminal cases without the involvement of German prosecutors. The application of sharia law to criminal cases leads to perpetrators escaping long prison sentences while paying the victims large sums in compensation. In return, the victims must make sure that their testimony in German courts does not lead to a conviction.¹⁰ This practice shows the inadequacy of the "Islamic mediators" for the rule of law in Germany since criminal law is an exclusive competence of the state.¹¹ The Islamic expert Matias Rohe argued in his article "*Sharia in Europe - Perspectives of Segregation, Assimilation or Integration for Muslims in Europe*" that "it has to be made clear in advance that European standards on Human Rights, democracy and the rule of law are untouchable without any restriction".¹² Bearing these concerns in mind, a research study "*Sharia in the Netherlands*" investigated whether sharia-based counselling and dispute resolution were functioning as sharia-based courts and concluded that they were not.¹³ Conversely, the feminist writer Nahed Selim has argued that even though sharia law is not applied in "sharia courts", mosques in the Netherlands are implementing sharia rules of marriage, divorce, inheritance, child custody and parental authority, among others.¹⁴ Sharia law legitimizes the assignment of the legal custody of a

⁷ www.bbc.co.uk/news/uk-22044724?sthisfb Jane Corbin, *BBC News UK*, 7 April 2013 [last accessed 24 September 2013]

⁸ AV Dicey, *Introduction to the Study of the Law of the Constitution*, (Macmillan, 1st ed 1885, 10th ed 1959, pp. 45-54) in Textbook, p. 90
⁹ <http://www.reuters.com/article/2010/10/06/us-germany-muslims-idUSTRE69552W20101006> Stephen Brown, *Reuters*, 6 October 2010 [last accessed 13 September 2013]

¹⁰ <http://www.gatestoneinstitute.org/2397/islamic-sharia-law-germany> Soeren Kern, *Gatestone Institute*, 8 September 2011 [last accessed 10 September 2013]

¹¹ German Criminal Procedure, available at: www.lawcom.govt.nz/sites/default/.../german_criminal_procedure_0.pdf [last accessed 17 September 2013]

¹² Matias Rohe, "Sharia in Europe-Perspectives of Segregation, Assimilation or Integration for Muslims in Europe", available at: http://cmes.hmdc.harvard.edu/files/Mathias.Rohe_lecture.pdf [last accessed 5 September 2013]

¹³ L.G.H. Bakker, A.J. Gehring and K. Mourik, et al. 2010. Summary. Sharia in the Netherlands: A study of Islamic counselling and conflict resolution among Muslims in the Netherlands. May. Radboud University Nijmegen. http://english.wodc.nl/images/1900_Summary_tcm45-266259.pdf [last accessed 19 September 2013].

¹⁴ http://vorige.nrc.nl/international/article2296923.ece/Help_Muslims_escape_the_tyranny_of_sharia_law Nahed Selim, *NRC Handelsblad*, 10 Julio 2009 [last accessed 17 September 2013]

child to the father after the age of seven.¹⁵ In a case concerning this matter in the UK, *Lebanon*, the House of Lords stated that sharia law on child custody was incompatible with the Convention. The Lords decided that it violates Art 8, right to family life, stating “*The mutual enjoyment by parent and child of each other’s company is a fundamental element of family life*” and Art 14, prohibition on discrimination. Lord Bingham points out that “*it is discriminatory too because it denies women custody of their children after they have reached the age of custody simply because they are women*”.¹⁶ Sharia tribunals have proven to be failing in the UK, the same as Islamic mediation in Germany and sharia-based counselling and dispute resolution in the Netherlands. They are undermining the rule of law by not adhering to the national law and violating the Convention as it was declared in *Refah*. So it goes without saying that no country in Europe will legitimise any ruling from a sharia court or equivalent involving matters that run against the Convention. Logically, then, in national cases involving individuals from a different cultural background the law of the land should be applied without exception. However, in some European legal systems, such exceptions are becoming the rule and this will be explored in the next section.

Sharia Law encroachment

Germany

Sharia courts are only part of the problem. A growing encroachment of sharia law in certain European legal systems, like Germany, is another influencing factor for a two-tier system. It seems that a distorted idea of multiculturalism (New Multiculturalism) has now broken into German jurisprudence. In 2007, a judge was removed from a case for quoting a verse of the Quran that permits men to hit their wives. In support of her decision to deny the woman a divorce, the judge explained that the couple was from a “*Moroccan cultural environment in which it is not uncommon for a man to exert a right of corporal punishment over his wife*”¹⁷. Despite the 2007 case, in June this year the court of appeal in Hamm

¹⁵ Sharia Law in Britain a threat to one law for all and equal rights, 2010, available at: [http://www.onelawforall.org.uk/wp-content/uploads/New-Report-Sharia-Law-in-Britain_fixed.pdf] [last accessed 28 September 2013]

¹⁶ <http://www.telegraph.co.uk/news/newstoppers/lawreports/joshuarozenberg/3239938/Law-lords-say-sharia-is-arbitrary-and-discriminatory.html> Joshua Rozenberg, *The Telegraph*, 28 October 2008 [last accessed 22 September 2013]

¹⁷ <http://www.theguardian.com/world/2007/mar/23/germany.islam> Kate Connolly, *The Guardian*, 23 March 2007 [last accessed 28 September 2013]

decided that sharia law will apply in the German courts to those who marry under sharia law in a Muslim country and decide to seek divorce in Germany.¹⁸ The New Multiculturalism advocates would happily support the judge's decision. But from the evidence above, allowing sharia within a national legal system is not only against the Convention but can have the same outcome as seen in Britain, Germany and the Netherlands, where sharia was initially permitted in dealings of certain private matters in compliance with the legal system but its scope was subsequently extended to matters that were the exclusive business of the state. The same could happen here: allowing the encroachment of certain sharia rules may have no end. An old Chinese proverb says "*A journey of a thousand miles begins with a single step*"¹⁹. Therefore, the only idea of multiculturalism that should be given room in Europe is one where in a multicultural liberal society people are free to enjoy their cultural and religious identity in the private domain whilst acting as citizens in the public one.²⁰ Above this, the imperative concept of "one law for all" or, in Lord Kalms' words "*the greatest achievements not only for our country but for humankind*"²¹ could be replaced by a disparate set of laws that allow for the betrayal of women and children alike.

Spain

Spain is another example of a European country officially embracing Islamic law within the national jurisprudence. The Spanish government has amended Spain's Law Concerning International Adoption in a way that will oblige Spanish parents to comply with the Islamic form of guardianship called *Kafala* until their children become adults. Moroccan children adopted by Spanish nationals will be educated as Muslims regardless of their parents' religions.²² Art 9.1 of the Convention states "*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others*" and Art 9.2 states "*Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and*

¹⁸ <http://www.gatestoneinstitute.org/3753/islamic-law-german-legal-system> Soeren Kern, *Gatestone Institute*, 7 June 2013 [last accessed 15 September 2013]

¹⁹ Lao-Tzu, *Tao Te Ching*, 6th Century BC

²⁰ Michael A. Helfand (note 1)

²¹ <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121019-0001.htm> Inheritance (Cohabitants) Bill [HL] (2012) [last accessed 12 September 2013]

²² <http://www.gatestoneinstitute.org/3595/spain-adoption-islam> Soeren Kern, *Gatestone Institute*, 20 February 2013 [last accessed 8 September 2013]

are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".²³

The reasons given by the Spanish Justice Minister, Alberto Ruiz-Gallardón, for the introduction of the *Kafala* are to prevent Spanish adoptive parents having to comply with conditions imposed by Morocco: convert to Islam or reside in Morocco for some years in order to be considered for adoption. He also added "humanitarian" motives but what really seems to be the case is that he succumbed to Moroccan pressure to implement the *Kafala* within Spanish jurisprudence.²⁴ However, Ruiz-Gallardón's reasons do not comply with what Art 9.2 considers as prescribed by law and necessary in a democratic society for the restriction of Art 9.1 Freedom of Religion of the Moroccan adopted children. On the other hand, it could also be argued that this legal change in the Spanish jurisprudence runs against Art 3 of the Convention on the Rights of the Child (CRC), namely the best interests of the child. The best interests of children are not given primary consideration here. As the famous psychologist Albert Bandura has written, parents are very influential for children who tend to imitate observed behaviours, values, beliefs and attitudes.²⁵ This natural learning process will be curtailed if the children are not allowed to follow their parents' beliefs and values if they so wish.

Netherlands

The New Multiculturalism has also hijacked the public sphere in the Netherlands where a parallel legal system is in place since there are some rules that apply to Muslims and others to non-Muslims. The research study "*Sharia in the Netherlands*" claimed that the Dutch legal system does not contain administration of justice based on sharia. Probably, what it meant was that there is not any official law explicitly mentioning the word sharia.²⁶ Sadet Karabulut, a Dutch MP, stated "*Islam often places women in an inferior position...Men are*

²³ European Convention on Human Rights, available at: [http://www.echr.coe.int/Documents/Convention_ENG.pdf] [last accessed 22 September 2013]

²⁴ [<http://www.minutodigital.com/2013/02/22/los-menores-marroquies-que-sean-adoptados-por-espanoles-deberan-ser-educados-en-la-fe-islamica/>] Dazibao-Ñ, *Mundo Digital*, 22 February 2013 [last accessed 19 September 2013]

²⁵ Albert Bandura, *Social Learning Theory* (1971) available at: [http://www.iku.at/org/content/e54521/e54528/e54529/e178059/Bandura_SocialLearningTheory_ger.pdf] [last accessed 28 September 2013]

²⁶ L.G.H. Bakker, A.J. Gehring and K. Mourik, et al. 2010. Summary. Sharia in the Netherlands: A study of Islamic counseling and conflict resolution among Muslims in the Netherlands. May. Radboud University Nijmegen. [http://english.wodc.nl/images/1900_Summary_tcm45-266259.pdf]

allowed to be polygamous and that is against the Dutch law".²⁷ However, polygamy is part of sharia law legitimised by the Quran and the Sunna²⁸ and is being allowed in the Dutch cities of Rotterdam and Amsterdam for Muslims that contract polygamous marriage in countries where it is allowed.²⁹ This practice puts gender equality at stake. Under sharia law only men are allowed to contract polygamous marriages.³⁰ It follows that the majority of Islamic states have voiced numerous reservations relating to rules of Islamic family law, including polygamy, to the Convention on the Elimination of All forms of Discrimination against Women 1979.³¹ It is therefore surprising that this practice has been legalised in the Netherlands, a country that makes continuous efforts to achieve gender equality, for instance, in sectors like the labour market where the female labour force has gone from 22 per cent in 1960 to 65 per cent in 2007.³² However, it could be argued that in terms of ethnic minorities i.e. Muslim women, the Netherlands is now more pro-sharia and less pro-gender equality than the Arab state Tunisia where polygamy has been prohibited since 1956.³³

Italy

Discrimination against women comes in many shapes and forms under sharia law. Muslim women are not allowed to marry a non-Muslim man while Muslim men are free to marry a non-Muslim woman.³⁴ This Islamic rule violates the Convention. Art 14 states that *"the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex ..."*³⁵ Nevertheless, it has become part of the Italian jurisprudence. Under Italian marriage rules, a woman from Algeria or Egypt, for example, must obtain her embassy's consent in order to be able to marry a non-Muslim in

²⁷ <http://www.rnw.nl/english/article/sharia-courts-give-hague-shivers> Klass den Tek, *radio Netherlands worldwide*, 29 September 2009 [last accessed 28 September 2013]

²⁸ Javaid Rehman, "The Sharia, Islamic Family Law and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq" [2009] *International Journal of Law, Policy and the Family* 21, (2007), 108-127

²⁹ <http://www.lifesitenews.com/news/archive/ldn/2008/sep/08081404> Thaddeus M. Baklinski, *Lifesitenews*, 14 August 2008 [last accessed 15 September 2013]

³⁰ Jonathan Herring, *Family Law* (2013) 53

³¹ Javaid Rehman (note 1)

³² <http://www.un.org/News/Press/docs/2007/wom1601.doc.htm> Women's Anti-discrimination Committee examines Netherland's policies on prostitution, domestic violence, human trafficking, Committee on Elimination of Discrimination against Women, *General Assembly UN*, 24 January 2007 [last accessed 19 September 2013]

³³ <http://www.theguardian.com/world/2011/oct/20/tunisia-elections-women-grow-anxious> Angeliqe Chrisafis, *The Guardian*, 20 October 2011 [last accessed 19 September 2013]

³⁴ Javaid Rehman (note 1)

³⁵ European Convention on Human Rights [http://www.echr.coe.int/Documents/Convention_ENG.pdf] [last accessed 30 September 2013]

Italy. Consent is unlikely unless the would-be husband converts to Islam.³⁶ This rule in turn comes into question under Art 12³⁷, the right to marry and found a family. What is the difference then between applying this rule and legalising forced marriage? Forced marriage is about losing the freedom to choose the person you want to marry. Women are obliged to marry a man that has been chosen usually by her parents or relatives.³⁸ This is a practice that is legally forbidden in countries like the United Kingdom, Norway, Denmark, Germany, Austria, Malta, Belgium and Cyprus.³⁹ Italy has not taken measures to tackle this issue and, therefore, the current state of affairs is not surprising. Requiring women from Muslim countries to get the embassy's permission is not equivalent by any means to forcing them into an undesired marriage but it is a likely by-product if the woman does not get the embassy's permission she desires. She may find herself having to choose between being alone or marrying a Muslim man, in order to comply with State's requirement. Similar to forced marriage, where parents decide their daughter's marital fate, the Italian state's obstruction of the freedom of women from Muslim countries to marry is also deciding women's marital fates. The encroachment of this marital rule is a clear example of how a multicultural accommodation policy can violate rights of individuals, namely women.

Conclusion

In the first section of this paper I argued that the neglectful attitude and political correctness of politicians such as David Cameron and Angela Merkel are allowing the Muslim Arbitration Tribunals and Islamic mediators to ignore the law of the land and apply sharia law. In the Netherlands, a report on sharia concluded that there were no sharia-based courts operating while it was well known by that time that mosques were delivering rulings in matters that should be the exclusive business of the state. Sharia tribunals, mediation and counselling are acting against the Convention as stipulated in *Refah*. This practice is detrimental to women, children and victims of criminal activity alike as well as

³⁶ <http://www.economist.com/node/17249634> *The Economist*, 4 October 2010 [last accessed 7 September 2013]

³⁷ European Convention on Human Rights [http://www.echr.coe.int/Documents/Convention_ENG.pdf] [last accessed 15 September 2013]

³⁸ <http://www.theguardian.com/world/2013/aug/15/women-forced-marriage-spoon-underwear> Helen Nugent, *The Guardian*, 15 August 2013 [last accessed 2 October 2013]

³⁹ <http://blogs.independent.co.uk/2012/06/10/in-criminalising-forced-marriage-the-uk-joins-a-europe-wide-movement/> Charlotte Rachael Proudman, *The Independent*, 10 June 2012 [last accessed 15 September 2013]

undermining the rule of law. In the second section, I argued that allowing sharia law within the German legal system could have the same expansionist effect as the acceptance of the Islamic mediators in the Netherlands. Therefore, the idea of multiculturalism should be confined to the private sphere and kept away from the public one. I have also demonstrated that the decision of the Spanish government to encroach the *Kafala* within the Spanish legal system goes against Art 9 of the ECHR (freedom of religion) and Art 3 of the COC (the best interests of the child) by not allowing children to follow their adoptive parents' religions. I discussed how the Dutch acceptance of polygamy for Muslims that contracted their marriages elsewhere is not only deliberately allowing a discriminatory practice but is also contradictory to its culture of gender equality, except for when it comes to women from ethnic minorities. I finally argued that Italy's marital rule for women from Muslim countries is against Art 14 and Art 12 of the Convention. This law only applies to women and infringes the right to marry. Furthermore, I have claimed that even though not completely the same this law could be comparable with forced marriage since women can easily find themselves in an undesired marriage and certainly find themselves outside of a desired arrangement.

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October 2013