

Islamic Personal Law in Europe: A Chance for the Integration of European Muslim Community

Beata Polok*

Abstract

The influx of immigrants from Muslim countries has initiated a discourse on the incompatibility of *Sharia* rules with European values and has given rise to certain questions regarding the application of Islamic law in several European countries. The right of Muslim women to wear a veil is one of the most evident examples of the controversy amongst the Muslim communities living in Europe. Though European governments place emphasis on the integration of Muslims and their rights, so far the criticism of Islam has failed to facilitate this process. This article is an attempt to answer the question of the ways in which Islamic law is perceived through the prism of the Council of Europe, European Court of Human Rights (ECHR), and legislation of selected European countries. The author attempts to answer the question of whether or not it is possible to implement Islamic law in Europe while respecting European principles and values.

Keywords: Islam, *Sharia*, Muslims in Europe, Integration, Council of Europe, Human Rights

Introduction

The influx of Muslims in Europe as a result of the migration crisis has unleashed the debate about legal differences between Islamic and Western cultures. Many non-Muslim European citizens treat Muslims as “outsiders” who should retain the status of guests and obey the law of the region. Growing fear and hatred against Muslims in Europe have caused a wave of Islamophobia. Geert Wilders is one of the most well-known European politicians responsible for driving the wave of hate directed towards Muslims. A surprising finding is that the anti-Muslim atmosphere is created in countries where Muslims constitute less than 0.5% of the country’s population.¹ For

* PhD Candidate at Uniwersytet Śląski w Katowicach.

¹ According to Pew Research Centre Report from 2017, the countries with the largest number of Muslim populations in Europe are: Cyprus (25.5%) France (12.5%), Bulgaria (12.5%)

example, J. Kaczynski, one of the most influential Polish politicians, said that Muslim refugees are bringing diseases into Europe.² Another example of anti-Muslim activities could be observed in Slovakia, where in 2007, legal changes practically made it impossible for the Muslim community to become a recognised religious group and enjoy the same rights as other religions in the country.³

The presence of Muslims in Europe is not a new development.⁴ Muslims ruled Spain, southern areas of Italy, and France from the 8th to 15th centuries. From the 11th to 19th centuries, Muslims were living as a minority group under Christian rulers. John Esposito observed that while everyone is aware that in 1492 Christopher Columbus was sent off to the New World, only a few know that the year also marks the fall of Granada and the beginning of the campaign to drive Muslims out of Spain and Western Europe.⁵ During the 1950s, after World War II, many Muslim migrants were recruited for the workforce by European governments and businesses to rebuild the destroyed continent, and since then, several generations of Muslims have been born in France, Britain, Germany, and other European nations.

In recent years, the refugee crisis, which started in 2015, has caused a high influx of people from Muslim-majority countries into Europe. Immigrants – including asylum seekers, refugees, and economic migrants – are arriving in Europe to seek better living standards. A research conducted by the Pew Research Centre in 2016 shows that the Muslim population in Europe

United Kingdom (9.7%) and Austria (9.3%). For comparison, Central European countries like Poland, Czech Republic, Slovakia and Hungary are inhabited by 0.1 to 0.4% of Muslims. Europe's Growing Muslim Population (Pew Research Centre, 29 November 2017) <<http://www.pewforum.org/2017/11/29/europes-growing-muslim-population/>> accessed 29 January 2020.

² Wojciech Czuchnowski and Michal Rolecki, 'Kaczyński straszy epidemią muzułmanów' (*Gazeta Wyborcza*, 14 October 2015) <<http://wyborcza.pl/1,75398,19019396,kaczyński-straszy-epidemia-muzułmanow.html>> accessed 29 January 2020.

³ Michaela Moravicikova, 'Religion, Law and Secular Principles in the Slovak Republic' *Strasbourg Consortium* <<https://www.strasbourgconsortium.org/content/blurb/files/Slovakia.1.pdf>> 615.

⁴ John L. Esposito, *What Everyone Needs to Know About Islam* (Oxford 2002) 175.

⁵ Ibid.

has increased from 19.5 million (3.8% of general population) in 2010, to 25.8 million (4.9%) in 2016.⁶ Moreover, the number of followers of Islam is constantly growing with new mosques being built and churches becoming either deserted, or being converted into restaurants, clubs, or apartments.⁷ This phenomenon shows that Islam has strengthened its position on the Old Continent, while many young Europeans are moving away from Christianity. In fact, it is anticipated that by the year 2050, the Muslim population in Europe will increase to 7-14% of the population. In the face of the growing number of followers of Islam in Europe, Muslim law is becoming a major political, social, and legal challenge, and the term *Sharia* is increasingly being used in the public, political, and legal discourse.

The purpose of this article is to find an answer to the question of whether it is possible to incorporate elements of Islamic law to the European legal order without compromising fundamental European values such as gender equality, freedom of religion, and equality of citizens before the law. The first part of the paper briefly discusses the debate on the compatibility of Islamic law with universal human rights standards, which are largely considered to be in line with European values. The second part analyses the judgments of the European Court of Human Rights (ECHR). The judgments of the Court are binding on all member states of the Council of Europe,⁸ and it possesses extraordinary authority and credibility. It is, therefore, pertinent to understand the Court's position on *Sharia* law, and the implications of such judgments in Europe. Alongside this examination, position of the Parliamentary Assembly of the Council of Europe (PA) – which is one of the two main statutory bodies of the Council of Europe that elect judges of the ECHR –⁹ would also be surveyed. Part three presents selected examples of the de facto and de jure adaptation of Islamic law into the legislation of few European countries such as the UK, Germany, Spain, and Italy. To make the final conclusion discussed in part four of the paper, it seems necessary to discuss long-winded the problem of the Muslim veil in Europe, which remains one of the most significant flashpoints in the debate over Islamophobia, integration of Muslims in Europe, and incompatibility of Islamic values with European standards.

⁶ (n 1).

⁷ Nilufer Göle, 'The Public Visibility of Islam and European Politics of Resentment: The Minarets-Mosques Debate' (2011) 37 *Philosophy and Social Criticism* 387.

⁸ Malcolm N. Shaw, *International Law* (6th edn, Cambridge University Press 2018) 347.

⁹ Statute of the Council of Europe 1949, art. 10.

Contradiction between Sharia and the European Human Rights Standards

It is widely believed that the elaborated standards of universal (and ipso facto European) human rights are mainly derived from Christian traditions. It is posited that the equal dignity of people had key roots in Christianity, and the spread of the religion introduced reforms based on the notion that all people stand equal before God.¹⁰ For example, in 2005, several European leaders suggested it would be favourable to refer to the Judeo-Christian identity in the preamble to the European Union Convention.¹¹ Despite its origins, over the centuries, human rights have been subjected to long-lasting secularisation, and their original religious assumptions are constantly subjected to critical analysis.¹² Consequently, nowadays one of the pillars of democracy is the secular nature of the state, especially European secularism – which is unappreciative of overt manifestations of religiosity and asserts that full respect for human rights is possible only under a secular state.¹³

However, in Islam, a decisive rejection of the principle of separation of state and religion is observed, the lack of separation between secularism and religiousness is a characteristic feature of Islam, which rejects demarcation for secular and religious law. God is considered to be absolute, and His precepts regulate most matters of the mundane world.¹⁴ The law that was first revealed to Muhammad (P.B.U.H), according to the traditional point of view, should not be subject to any discussion, change, or even modification. As N. J. Coulson observes, “law does not grow out of and is not moulded by society as in the case with Western systems... In the Islamic concept, law precedents and moulds society; it [i]s eternally valid [and] dictates the structure [that the] State and society must ideally conform [to].”¹⁵ Several Muslim scholars have furthered this traditional inclination in the Islamic thought. For instance, S. H. Nasr argues that changes in *Sharia* law

¹⁰ Justin Taylor, ‘The Christian Roots of Human Rights’ (*The Gospel Coalition*, 1 August 2016) <<https://www.thegospelcoalition.org/blogs/evangelical-history/the-christian-roots-of-human-rights/>> accessed 29 January 2020.

¹¹ Madeleine Heyward, ‘What Constitutes Europe? Religion, Law and Ideology in the Draft Constitution for the European Union’ (2005) 1 (1) *Hanse Law Review* 227–235.

¹² Andrzej Bisztyga, ‘Zachodnia, a islamska koncepcja praw jednostki’ (2013).

¹³ Maurits S. Berger, ‘Understanding Sharia in the West’ (2018) 6 (2-3) *Journal of Law, Religion and State* 236.

¹⁴ N.J. Coulson, *A History of Islamic Law* (Edinburgh University Press 1964) 75.

¹⁵ *Ibid*, 85.

are completely unacceptable and the state is devoid of its legislative function, as Allah is the only legislator and people must obey His orders.¹⁶ Iranian President Khamenei in his speech also presented his opinion on the hierarchy of *Sharia* in the universal system of human rights saying, “when we want to find out what is right and what is wrong, we do not go to the United Nations; we go to the Holy Koran. For us the Universal Declaration of Human Rights is nothing but a collection of mumbo-jumbos by disciples of Satan.”¹⁷

This approach leads to the lack of acceptance of the principle of national sovereignty in the doctrine of Islam where there are no separate spheres which belong to “God” and which belong to “Caesar”. In Islam, God is Caesar, and the Sovereign power only represents Him on the earth and exercises His authority on His behalf.¹⁸ A. Rahim noted that in Islamic Jurisprudence, the application of *Sharia* has a personal character and is not affected by the constitution of the particular society. If a Muslim person crosses the border of one state, the same law binds him because *Sharia* law still applies to his conscience.¹⁹

The different perspectives regarding the perception of human dignity in the European and Islamic concepts of human rights is often underscored. Human dignity, in the occidental sense, is a basic source of rights and freedom. Individualism, which is one of the most important ingredients of human dignity, was the driving force for the development of human rights concepts. European philosophers such as Grotius, Locke, Voltaire, Rousseau, Mill, Montesquieu, or Kant were famous supporters of the individualism theory.²⁰ According to some authors, the concept of individualism is not well-established in Muslim societies because Islamic civilisation has not created an intellectual climate conducive to protecting human rights and liberties as a

¹⁶ Seyyed Hossein Nasr, *Ideals and Realities of Islam* (Warszawa 1988) 95.

¹⁷ Eva Brems, *Human Rights: Universality and Diversity* (Brill 2001) 192, as cited in Edward Mortimer, ‘Islam and Human Rights’ (1983) 12 (5) *Index on Censorship* 5.

¹⁸ Dilwar Hussain, *Brytyjscy muzułamnie 9/11 I 7/7, Islam i obywatelskość w Europie* (Warszawa 2006) 98; Roland Robertson, *Sociology of Religion* (Penguin 1976) 127-138.

¹⁹ Abdur Rahim, *Principles of Muhammadan jurisprudence* (Andesite Press 1988) 47, as cited in Werner Menski, ‘Legal pluralism and South Asian minorities in Britain’ (*Academia.edu*) <https://www.academia.edu/35295870/Legal_pluralism_and_South_Asian_minorities_in_Britain?auto=download> accessed 29 January 2020.

²⁰ Michael Haas, *International Human Rights: A Comprehensive Introduction* (Routledge 2008) 35.

priority and main responsibility of the state.²¹ On the contrary, the interest of the Muslim *ummah* is often more important than the well-being of the individuals, and Islamic law mainly focuses on obligations imposed on man, rather than on the conception of the rights granted to him. Consequently, the Western notion of the interest and good of the individual as the antithesis of general well-being is theoretically absent in the Islamic social thought.²² According to J. Donnelly, not only did most of the non-western traditions not practice human rights, but they also did not even develop such a concept. Historically, human rights are a product of Western and European civilisation.²³

One of the main characteristics of ‘human rights’ as a term is its universal character, but the question remains as to whether there is only one universal conception of human rights. As often noted, conflicts between different cultures and traditions are caused by the conflicts between different communities of judgments.²⁴ In fact, there are three main schools of thought regarding this issue.²⁵ The first is universalism, which claims that all human rights should be respected all over the world, regardless of the culture or traditions prevailing in a given country, and therefore *Sharia* law and religious authorities should not limit individual rights and freedoms. In this approach, European values are considered to be universal and Islamic law is seen in opposite of these values. Another point of view is strict cultural relativism, which recommends that due to the multiplicity of beliefs and cultural differences, individual countries should have the freedom to set their own standards regarding human rights issues. Lastly, moderate cultural relativism accepts a basic set of universal rights and freedoms that are fundamental and important for all cultures, but disagrees with the claim that all laws must be applicable to all states or cultures.²⁶ In Islamic countries, there is functioning of a number of cultural and legal traditions such as discrimination against women, religious minorities, freedom of speech, or corporal punishments that

²¹ Jason Morgan-Foster, ‘Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement’ (2014) 8 (1) *Yale Human Rights and Development Journal* 67, 85.

²² *Ibid.*

²³ Jack Donnelly, ‘Human Rights and Dignity: An Analytic Critique of Non-Western Human Rights Conception’ (1982) 76 (2) *American Political Science Review* 303.

²⁴ Michael D. A. Freeman, *Lloyd’s Introduction to Jurisprudence, The Philosophy of Human Rights* (Sweet & Maxwell 2014) 1290.

²⁵ (n 21) 70.

²⁶ *Ibid.*

raise serious reservations from the universal human rights point of view.²⁷ For example, Poulter says that Muslims should not apply Islamic personal law in Europe because of the risk that the basic human rights, especially women's rights, will be violated in a discriminatory fashion.²⁸ In today's Europe, Muslim law is often portrayed as fundamentally opposed to the modern concepts of human rights.²⁹

European Council and European Court of Human Rights

The European Court of Human Rights (ECHR), which has the jurisdiction to decide complaints concerning violations of the European Convention on Human Rights, as will be presented in this paper, persistently holds the view that *Sharia* law is inconsistent with the values of a democracy, rule of law, and is contrary to fundamental human rights. One of the most famous judgments in this matter is the case of *Refah Partisi v Turkey*,³⁰ where the ECHR upheld the decision of the Turkish Constitutional Court dissolving a Turkish political party, which aimed to introduce *Sharia* law in Turkey. In its judgment, the ECHR ruled, “*Sharia* is incompatible with the fundamental principles of democracy,”³¹ and therefore, with the standards and values expressed in the European Convention on Human Rights. This verdict is often criticised due to a lack of definition or explanation of the meaning of *Sharia*. M. S. Berger rightly observes that a body like the Court should give some clarification upon this matter, otherwise the ruling becomes nebulous and questionable.³² *Sharia* includes religious rituals such as prayers, fasting or burial, which surely cannot be considered contrary to European human rights values.³³

²⁷ Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (Routledge 1995) 79; Jan Michael Otto, *Sharia and National Law in Muslim Countries* (Leiden University Press 2008) 28.

²⁸ Sebastian Poulter, ‘Muslim Headscarves in School: Contrasting Legal Approaches in England and France’ (1997) 17 (1) *Oxford Journal of Legal Studies* 43-74; Sebastian Poulter, *Cultural Pluralism and its Limits: A Legal Perspective* (CRE Britain 1990) 59.

²⁹ Werner F. Menski, ‘Muslim law in Britain’ (2001) 62 *Journal of Asian and African Studies* 127-163.

³⁰ *Refah Partisi (the Welfare Party) and Others v Turkey* [GC] 41340/98, 41342/98, 41343/98 [13.2.2003].

³¹ *Ibid.*

³² (n 13).

³³ *Ibid.*

In *Molla Sali v Greek*,³⁴ the complainant, Chatitze Molla Sali, inherited the entire property from her deceased husband on the basis of his notarial testament. The validity of the will was questioned by the two sisters of the deceased, who claimed that their brother was a Muslim and therefore, the Islamic law of inheritance should be applied in this case and not the provisions of the Greek Civil Code. They referred to the norms of the Treaty of Sèvres, 1920 and the Treaty of Lusanne, 1923, which provided that Islamic customs and Islamic religious law shall be applied to Greek nationals who are Muslims. The sisters' claims were dismissed by the court of first instance and on appeal. However, later the Court of Cassation overruled the previous judgments and decided that inheritance should be decided on the basis of *Sharia* law. Finally, the appellate Court, as a result of re-examination of Court of Cassation, decided that Muslim religious law should apply in the present case. As a consequence of that decision, the applicant, Molla Sali, was deprived of three-quarters of her inheritance. In her complaint to the ECHR, she claimed that she was a victim of discrimination on the grounds of religion, because if her husband were not a Muslim, she would have inherited his entire property.

For some commentators,³⁵ Molla Sali's case could have been the first step in correction of the negative image of *Sharia* law in European perception of human rights. Some authors have noted that the Tribunal in Strasbourg only recognised the specific and compulsory application of *Sharia* law as discriminatory and did not repeat the previously formulated opinion about the incompatibility of the entire Islamic legal system with European human rights standards. The court also did not revoke the previous Parliamentary Assembly (PA) resolution regarding complete abolishment application of Islamic law in Greece. Unfortunately, PA's response to the Court's ruling in Molla Sali's case was immediate and any doubts were dispelled by the latest PA issued in 2019,³⁶ which states, "various Islamic declarations on human rights adopted

³⁴ *Molla Sali v Greece* 20452/14 [2018].

³⁵ Gregor Puppinck, 'What Emerges from the Molla Sali v Greece Judgment' (*Figaro Vox* 26 December 2018) <<https://eclj.org/religious-autonomy/echr/charia--ce-que-rvle-la-dcision-de-la-cedh>> accessed 29 January 2020.

³⁶ Parliamentary Assembly, Council of Europe, Resolution 2253 (2019), *Sharia, the Cairo Declaration and the European Convention on Human Rights*, <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25353&lang=en>>. The standpoint on the incompatibility of Sharia and European human rights standards has also been confirmed in the following report: Antonio Gutierrez, *Compatibility of Sharia law with the European Convention on Human Rights: can States Parties to the Convention be*

since the 1980s, while being more religious than legal, fail to reconcile Islam with universal human rights.” The PA in its 2019 resolution also repeated the statement expressed in *Refah Partisi*, that the “institution of *Sharia* law and the theocratic regime was incompatible with the requirements of a democratic society.”³⁷ Finally, the PA expressed concern that *Sharia* law and its provisions, which are in clear contradiction with the European Convention on Human Rights, were being applied (officially and unofficially) in member States.³⁸

This resolution can be read as a clear expression of opposition to the Court’s ruling in the Molly Sali case and further as another strong condemnation of *Sharia* law in Europe. Earlier confirmations of the PA position regarding incompatibility of the *Sharia* with the European human rights standards can be found in the resolution titled ‘Freedom of religion and other human rights for non-Muslim minorities in Turkey and for the Muslim minority in Thrace (eastern Greece)’ issued in 2010.³⁹ In the above resolution, the PA states that *Sharia* raises serious questions of compatibility with the European Convention on Human Rights.⁴⁰

At the end of the considerations on the Council of Europe's position regarding *Sharia* law, it should be noted that Albania, Azerbaijan, and Turkey are the countries that belong to both organisations – the Council of Europe and the Organization of Islamic Cooperation. These three countries are signatories to the Cairo Declaration, which is, according to Council of Europe, in clear conflict with the ECHR. Islam is the dominant religion in these countries and is one of the most important factors in shaping their national identities. Therefore, the above arguments and statements presented by both,

signatories to the “Cairo Declaration”? (Doc. 14787) <https://www.ecoi.net/en/file/local/1456044/1226_1547028478_document.pdf> accessed 29 January 2020.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Parliamentary Assembly, Council of Europe (Resolution 1704, 2010), ‘Freedom of religion and other human rights for non-Muslim minorities in Turkey and for the Muslim minority in Thrace (eastern Greece)’ <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17807&lang=en>> accessed 29 January 2020.

⁴⁰ Ibid.

ECHR and the PA, seem to be unfair from the perspective of equal members of the organisation.

Application of Sharia Law in selected European countries

As noted by J. R. Bowen, “nowhere in Europe or North America is the legal system closer to recognising Islamic judgments than in England.”⁴¹ In the United Kingdom, on the basis of the reinterpretation of the Arbitration Act, religious courts, including Muslim courts – called the Muslim Arbitration Tribunals – formally gained the status of common law courts in the first instance in certain categories of cases. The Arbitration Acts states, “the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.”⁴² The judgments of these courts are enforceable like the rulings of the British common law courts, and an appeal against decisions of Muslim Arbitration Tribunals can be lodged in the British common law courts.⁴³

According to some authors, by reinterpreting the Arbitration Act, the United Kingdom legalized the state of parallel judicial jurisdiction of *Sharia* and common law.⁴⁴ The possibility of a situation where same matter can be settled on the basis of different legal systems based on different values was widely criticised and treated as an unnecessary novelty in the British legal system.⁴⁵ Nowadays, it is forgotten that until the second half of the 19th century, Islamic law was applicable in the Judicial Committee of the Privy Council. In 1970s, the Union of Muslim Organisations of UK and Eire submitted to various government ministers a proposal of law that would allow British Muslims to apply Muslim family law.⁴⁶ Historically, it is proven that the British judicial system provided support for the accommodation of Islamic

⁴¹ John R. Bowen, ‘How Could English Courts Recognise Shariah?’ (2010) 7 (3) *University of St. Thomas Law Journal* 411.

⁴² Arbitration Act 1996, s 1.

⁴³ Christine Schirrmacher, *The Sharia – Law and Order in Islam* (Bonn 2013) 57.

⁴⁴ Ihsan Yilmaz, ‘Law as Chameleon: The Question of Incorporation of Muslim Personal Law into the English Law’ (2001) 21 (2) *Journal of Muslim Minority Affairs* 297.

⁴⁵ Arsani Wiliam, ‘An Unjust Doctrine of Civil Arbitration: Sharia Courts in Canada and England’ (2010) *Stanford Journal of International Relations* 40.

⁴⁶ Sebastian M. Poulter, *Ethnicity Law and Human Rights: The English Experience* (Oxford University Press 1998) 20; British Muslims Monthly Survey, Birmingham: Centre for the Study of Islam and Christian–Muslim Relations (December 1996) 15–16.

values in English law, however, this was much earlier and is not a recent phenomenon.⁴⁷

Additionally, it is estimated that 85 *Sharia* councils operate in the United Kingdom as of today.⁴⁸ *Sharia* councils are not considered to be a part of the British legal system and have no official legal or constitutional role in the UK.⁴⁹ Their decisions are not legally binding, but despite the lack of a judicial authority, they are considered as being authoritative in resolving religious issues, and therefore have a real power in their communities.⁵⁰ Another clear example of *Sharia*'s impact on British law is the verdict in *Uddin v Choudhury*,⁵¹ where the court decided that if marriage was concluded in Bangladesh and not registered in Great Britain, it could be later resolved by Islamic *Sharia* Council operating in United Kingdom. After the divorce, the father of the groom demanded the return of the *mehr*, but both the courts of the first and second instance ruled that according to the *Sharia*, the wife is not obliged to return the *mehr*.⁵² This case showed that British law recognised the right of a woman as a result of *Sharia*, as well as a decision of *Sharia* council regarding Muslim marriage and divorce. In 2018, British courts again recognised *Sharia* law by stating that Islamic *nikah* falls under British matrimonial law, despite it not being legally recognised as such.⁵³

We can find many cases dealing with the impact of Islamic law on the legal system in Great Britain, for example, according to the Divorce (religious marriages) Act, 2002, courts are enabled to require the dissolution of a religious marriage before granting a civil divorce.⁵⁴ The law on adoption has introduced a new form of childcare called the “special guardianship”, which

⁴⁷ Muhammad Zubair Abbasi, ‘Shari’a and State Law: Relevance of Islamic Legal History for the Application of Muslim Family Law in the West’ (2015) 2 (3) *Journal of Law, Religion and State* 137.

⁴⁸ Patrick S. Nash, ‘Sharia in England: The Marriage Law Solution’ (2017) 6 (3) *Oxford Journal of Law and Religion* 523–543.

⁴⁹ David Torrance, *Sharia law courts in the UK* (House of Commons Library 2019) 1-16.

⁵⁰ (n 35).

⁵¹ *Uddin v Choudhury* (2009) EWCA Civ. 1205.

⁵² (n 29).

⁵³ Kate McCann, ‘British court recognises sharia law in landmark divorce case’ (*The Telegraph*, 1 August 2018) < <https://www.telegraph.co.uk/news/2018/08/01/british-court-recognises-sharia-law-landmark-divorce-case/>> accessed 29 January 2020.

⁵⁴ Mathias Rohe, ‘The Application of Shari’a Law in Europe: Reasons, Scope and Limits’ 2004 (44) 3 *Die Welt des Islams* 49.

allows Muslims to “adopt” a child, which is considered problematic in classical Islamic law.⁵⁵

Similarly, the law of Spain, which since 1992, allows the application of Islamic regulations in the marriage procedure among Muslims with the simultaneous fulfilment of obligation to register these marriages.⁵⁶ Agreements signed between Spain and Morocco oblige parents who adopted children from Morocco to raise them as Muslims regardless of their parents’ faith.⁵⁷

Islamic law is also applicable in Greece, where *Sharia* courts have been operating since 1923. However, in 2018, the Greek parliament adopted a law that limits the application of the *Sharia* and the compulsory consultation of the Mufti in family matters.⁵⁸

In February 2011, the German Federal Labour Court in Erfurt decided that a Muslim has the right to refuse selling alcohol for religious reasons despite the fact that *Sharia* prohibits only consumption of alcohol and not contact with it, as the German Court itself pointed out. However, according to German court, acknowledging that the plaintiff was a deeply religious man, the court justified the permission granted to him.⁵⁹

In another widely commented case, Christa Datz-Winter, the judge of the Family Court in Frankfurt quoted the Qur’an in a divorce case regarding a 26-year-old German woman of Moroccan origin who was frequently beaten by her husband. According to the judge, the Moroccan woman should have known that “her husband would execute his right to corporal punishment when she married him,”⁶⁰ and quoted verse 34:4 from the Quran, which raises the subject of beating a disobedient wife. After protests and wave of critics,

⁵⁵ The Adoption and Children Act 2002, s. 14 A.

⁵⁶ Agreement between the Spanish State and the Islamic Commission of Spain (1992) <<http://www.religlaw.org/content/religlaw/documents/coagrspstislamiccom1992.htm>>.

⁵⁷ Soeren Kren, ‘The Islamisation of Spanish Jurisprudence Spain Submits to “Adoption Jihad”’ (Gatestone Institute, 20 February 2013) <<https://www.gatestoneinstitute.org/3595/spain-adoption-islam>> accessed 29 January 2020.

⁵⁸ ‘Once Mandatory, Greece Makes Sharia Law Optional of Muslim Minority’ (*The Globe Post*, 2018) <<https://theglobepost.com/2018/01/09/greece-sharia/>> accessed 29 January 2020.

⁵⁹ (2011) 2 AZR 636/09.

⁶⁰ Abigail R. Esmán, *Radical State: How Jihad is Winning Over Democracy in the West* (Praeger 2010) 188.

Datz-Winter was removed and the Moroccan woman was finally granted the divorce.⁶¹

According to J. Wagner, a German legal expert, Islamic mediators solve not only family disputes, but even criminal cases without the involvement of German prosecutors. Application of *Sharia* law in criminal cases sometimes help perpetrators to escape prison sentences in return for paying compensation.⁶² In 2009, an Italian court acquitted a family who beat their daughter as punishment for having a non-Muslim boyfriend. The court argued that the corporal punishment was “for her own good”. The verdict was upheld by the Italian Supreme Court of Cassation.⁶³

The European Union law allows spouses to apply *Sharia* law in the area of divorce and inheritance cases. A European Council Regulation (No. 1259/2010), implementing enhanced cooperation in the area of the law applicable to divorce and legal separation in Article 5, states that spouses may choose the law which should be applicable in divorce cases according to the law of the place where they were residing when the agreement was concluded, or the law of the state of nationality of the spouses.⁶⁴ According to this article, it may turn out that the applicable law will be the law of one of the Muslim countries. However, article 10 of the same regulation provides that if the law chosen by spouses makes no provision for divorce or discriminates against one party, the law of the forum shall be applied. Article 12 supplements this provision by stating that the application of the foreign law may be refused if it is “manifestly incompatible with the public policy of the forum.” A verdict from 2013 issued by the French Court of Cassation ruled that the divorce pronounced by the Algerian court violated the principle of equality of spouses expressed in Article 5 of the Additional Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which states that both the husband and the wife are equal in rights and responsibilities, relations

⁶¹ Shannon Dunn and Rosemary B. Kellison, ‘At the intersection of scripture and law: Qur’an 4:34 and Violence against Women’ (2010) 26 (2) *Journal of Feminist Studies in Religion* 11.

⁶² Joachim Wagner, ‘Judges Without Law: Islamic Parallel Justice Endangers Our Constitutional State’, as cited in Soeren Kern, *Islamic Sharia Law Proliferates Germany* (Gatestone Institute, 2011).

⁶³ (n 59) 188.

⁶⁴ Council Regulation (EU) (No 1259/2010, 20 December 2010)

<<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R1259&from=en>> accessed 29 January 2020.

with children, marriage, and its dissolution.⁶⁵ The court argued that while living in France, the applicant should apply for a divorce in accordance with the principles of European law, which does not discriminate against the spouses on the basis of sex in the divorce proceedings.⁶⁶

Right to wear a Muslim headscarf

The debate on multiculturalism, Islamic law, and the status of human rights in Islam gathered enormous pace during the discussion regarding Muslim women and the issue of headscarf. The situation of women in Islam was, and always is, a “flashpoint for tensions between Muslims and Western world”.⁶⁷ Therefore, it is necessary to allude to the existing debate over the Islamic veil across Europe, however, it is not the main aim of this paper, and only the most important judgments presenting the position of European courts in this matter will be highlighted.

The European Court of Justice in *Samira Achbita v G4S Secure Solutions NV*,⁶⁸ held that a private company can set internal rules which prohibits the wearing of any political, philosophical or religious sign in the workplace, specifically the Islamic headscarf, and it will not constitute direct discrimination based on religion or belief according to EU anti-discrimination law. On the same day, a decision was made in a similar case, *Asma Bougnaoui v Micropole*⁶⁹, concerned the client’s wish that the employee should not wear a Muslim headscarf while performing her tasks. In the second case, the ICJ stated that the employer does not have the power to prohibit a Muslim from wearing a headscarf based only on a customer’s wish or complaint.

⁶⁵ Additional Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe Treaty Series No. 117)
<https://www.echr.coe.int/Documents/Library_Collection_P7postP11_ETSI117E_ENG.pdf>
accessed 29 January 2020.

⁶⁶ Kazimierz Krzysztofek, *Dopuszczalność stosowania prawa szariatu w zakresie spraw rozwodowych i spadkowych w prawodawstwie Unii Europejskiej* (Studia z prawa wyznaniowego 2016) 32.

⁶⁷ Abigail R. Esman (n 60).

⁶⁸ *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* Case no C-157/15 (ECJ, 14 March 2017).

⁶⁹ *Asma Bougnaoui, Association de défense des droits de l’homme (ADDH) v Micropole SA* Case no C-188/15 (ECJ, 14 March 2017).

One of the most famous cases considered by the European Court of Human Rights was *Dahlab v Switzerland*.⁷⁰ Lucia Dahlab was a primary school teacher and taught young children, aged four to eight. In 1995, the school authorities ordered her to remove the headscarf, referring to the regulations governing the functioning of the school, according to which it was forbidden to use “identification means imposed by the teacher on pupils.” The ECHR held that the status of a public school meant that the expectation of the employer (school authorities) that the teacher should remain neutral in their attire was justified. The ECHR jurisprudence recognises the Islamic headscarf as a “powerful external symbol,” which can influence young children.⁷¹ Similar cases were considered by ECHR, and in almost every case, the court ruled that the state is entitled to restrict wearing Islamic headscarves if it is in contradiction with the protection of rights and freedoms of others,⁷² values of the democratic society,⁷³ or is proportionate and aims to prevent social disorder.⁷⁴

Conclusion

Currently, it is universally accepted to make a clear division between the Western and Islamic world as well as the Western and Islamic standards of human rights. The present debate about the implementation of Islam into the European legal order has been focused on two parts: them and us.⁷⁵ ‘We’ – Europeans – who respect the fundamental principle of democracy, rule of law, secular nature of the state and defending fundamental rights and freedoms, and ‘they’ – Muslims – who deny these values. The persistent repetition by the Council of Europe that Islam is incompatible with the principles of European democracy, conveys an evident message and a clear indication that the *Sharia* law, even in a part, shall never be respected or be considered in the legal systems of European states and Muslims countries that are a part of European Council as well. It is forgotten, however, that such criticism of Islam offends a significant number of Europeans who are no longer guests in Europe but, in fact, its fully-fledged citizens. The European community is

⁷⁰ *Dahlab v Switzerland* App No 65500/01 (ECHR, 15 February 2001).

⁷¹ *Ibid.*

⁷² *Kurtulmus v Turkey* (2006) App No 65500/01 (ECHR, 24 January 2006).

⁷³ *Leyla Şahin v Turkey* (2005) App no 44774/98 (ECHR, 10 November 2005).

⁷⁴ *Köse and 93 Others v Turkey* (2006) App no 26625/02 (ECHR, 24 January 2006).

⁷⁵ Anna Trandafyllidou, *European Muslims: Caught between Local Integration Challenges and Global Terrorism Discourses* (Istituto Affari Internazionali 2015) 3.

predestined to take on the challenge of gradual integration of Muslims, because they have ceased to be a foreign element and have become its own component.

It is obvious that European Muslims, as citizens, have both rights and duties. One of the most important duty is to obey the law, European courts cannot make any concessions while deciding on cases where human rights are clearly violated. In Europe, there can be no consent to discriminate against women, limiting freedom of speech, freedom of religion and belief, or obstruction of the right to court by settling disputes by extrajudicial and illegal authorities. European states have the duty to intervene in situations when the self-proclaimed ‘*Sharia* Police’ patrols the streets, women are beaten by their husbands, and freedom of speech is attacked. Europe has the right to preserve its civilizational identity and both European Muslims and Muslims living in European countries cannot try to enforce their legal standards, which are clearly in conflict with the European principles. On the other hand, the Council of Europe and ECHR should focus more on highlighting the common points between Islam and European human rights standards than openly criticising Islam as a whole. There are some points in Islamic traditions and *Sharia* law such as respect for elders, parents or the obligation to help the poor (*zakat*) from which today's Europe should take inspiration, instead of negating it completely.

The total criticism and complete rejection of the Islamic law turns out to be a fatal mistake. Firstly, Islam is not monolith and it seems legitimate to argue that individual or group misdemeanours should be blamed for possible errors in the interpretation of *Sharia*, and not the entire Muslim community. Secondly, the followers of Allah in this world constitute a rapidly growing religious group, and disrespect or attacks against *Sharia* leads to the closure of dialogue with a more liberal group of believers. The criticism of Islam as a whole lead to an even more resolute rejection of Western values and radicalisation of Muslim views.

It is generally accepted that hijab can be taken out during the control at the airport, for security reasons. For the same cause, it also seems justified to prohibit covering the entire face in public places. However, the prohibiting to cover hair by students in schools, universities, or workplace seems to be an obvious example of discrimination and, somehow, “forcefully” embossing equalisation and attempting to exclude religion from society under the pretext of making the public space free from its outflows. The ban on the burial of

bodies without a coffin in France and the lack of cemeteries with a division into religions group⁷⁶ is also an evident manifestation of the bad will of the state.

European societies must adapt to the permanent and irremovable presence of Muslims within their continent, taking into account the religious and cultural specificity of the Muslim population, and give Muslims the right to decide their legal situation in accordance with their religion, as long as it is clearly not in conflict with the fundamental and universal rights and freedoms provided by the state. It is necessary to conduct an analysis of general interests and risks associated with a particular option. It should not be a problem to inherit, to marry or to be buried in the mode provided for by *Sharia*, as long as both parties are in an agreement to apply this law. The *Sharia* law is already applied in many European countries. As noted by W. Menski, “it is too simple for any state law to declare itself as the supreme law of the land and to ignore factors like religion, customs, and ethnicity.”⁷⁷ In our modern world, European countries must recognise and accept legal pluralism in the current reality.

⁷⁶ Hugh Schofield, ‘Why many French Muslims choose burial abroad’ (*BBC News*, 22 July 2013) <<https://www.bbc.com/news/magazine-23325581>> accessed 29 January 2020.

⁷⁷ (n 19).