

## **Sharia Law in Canada – Also Possible in the Netherlands?**

### **1. Introduction**

In 2004, Canada received world wide media attention for allegedly introducing Sharia law, to be applied by Sharia tribunals established for that purpose. As one Canadian columnist wrote: ‘Well, we all thought the Netherlands or France would be the first to adopt some form of Sharia law (...). So, Canada has become the first country in the West to kowtow to immigrant Islamic demands that they not only have a right to settle in the country and practice their religion unhindered, but also have the right to bring their own laws with them.’<sup>1</sup>

The columnist and most of her colleagues got their facts wrong, however, or at best presented a distorted view of these facts. First, the ‘Sharia law’ in question is here confined to matters of family law. Second, the Muslim communities in neither the Netherlands nor France have raised the issue of incorporating their own Sharia family law into the legal system of the host country. Third, Sharia family law has not been ‘implemented’ as such in Canada.

The latter is of particular importance: what, then, *is* the status of Sharia in Canada? And does this development justify the concern of some Dutch politicians that it may spark similar initiatives in the Netherlands? What are the legal implications of a possible application of Sharia family law in the Netherlands? These questions are also at the heart of the studies of Frans van der Velden, whose vast legal knowledge combined with infectious enthusiasm and eagerness to understand a different legal system as Sharia law have served as my guidance for many years. It is not my intention to make a case in favour or against the Sharia, but to provide insight in the legal difficulties that may arise in nationally oriented legal systems that want to cater to communal legal systems. Before these issues are discussed, however, we need to briefly address the ambiguity of the term ‘Sharia.’

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1 Val MacQueen, ‘Canada’s Sharia Option’, *FrontPageMagazine.com* (10 May 2004).

## 2. Sharia, what Sharia?

The term ‘Sharia’ is as vague as it is powerful. To non-Muslims, it invokes images of corporal punishment, veiling and subduing of women, and harsh rules of social conduct. To Muslims, on the other hand, Sharia mostly stands for all that is good, being the code of conduct inspired by divine benevolence.

With regard to the subject-matter of the Sharia, we are again stranding in ambiguity. According to orthodox Islam, the Sharia is deducted from the Koran (the Word of God) and the Sunna (the example of the prophet Muhammad). Both Koran and Sunna, however, contain few rules that can be considered legal, i.e. that pertain to the structuring of a society, the rights and obligations of individuals and institutions, procedures for conflict resolution, etc. Generations of Muslim scholars embarked upon elaborating a corpus of rules deduced from the Koran and Sunna. During the first centuries of Islam, several schools of legal thought developed with different, sometimes even contradictory opinions and rules. The ensuing corpus is called *fiqh* (although often also called Sharia), and is effectively the product of human intellectual effort. This is also recognized by Islamic orthodoxy which distinguishes between rules mentioned in the Koran and Sunna that are fixed and undisputable, and the rules developed by the Muslim scholars.

The *fiqh* is very voluminous in literature, but restricted in substance because it closely follows the legal subject-matter of the Koran and Sunna. That means that only a few legal terrains are covered (mainly family and contract law, and a little criminal law) but that most are left outside the scope of the Sharia, such as state law, procedural law and criminal law.

The legal field that receives most attention in Sharia law is family law. This also means, however, that within the *fiqh* many different and even contradictory rules of family law abound. In one school of legal thought, for instance, the wife has no autonomous recourse to divorce, while another school grants her several causes on which she may base her application for a divorce. In one school of legal thought abortion is absolutely forbidden, while other schools allow abortion up to a period of the first four months of pregnancy.

The legislators of modern Muslim states have gratefully made use of this diversity when introducing or revising their family codes. And so, since the end of the 19<sup>th</sup> century, we can see a variety of national family codes that are similar, but not the same. Both Morocco and Iran will argue that their national family code is based on Sharia, but allow for different interpretations. The result may be compared to, for instance, Dutch and Spanish law, that are different although they draw from similar legal sources.

Calling for the implementation of the Sharia is therefore shrouded in ambivalence: it invokes powerful connotations, but says very little on the legal subject-matter. This was indeed one of the criticisms among some Muslim organizations in Canada in their response to the proposed Sharia tribunal, especially since it claimed to provide arbitration for all Muslims without acknowledging the legal differences of the vari-

ous Islamic sects in Canada. Some of these Muslim organizations claimed that there is no such thing as a monolithic Sharia family law that applies to all Muslims.<sup>2</sup> Similar problems of agreeing to a unified Sharia have obstructed the efforts of Muslims in the United Kingdom.<sup>3</sup>

The content of Sharia family law will not be a matter of discussion here, however. The focus of this article will be on the *implementation* of Sharia family law in a non-Islamic country, irrespective of what form it takes. Reference hereafter to 'Sharia family law' therefore does not mean a specific set of rules, but rather the concept of a religious family law for Muslims.

Nonetheless, I do recognize that the subject-matter of a specific Sharia family law in a specific country will probably be the key to ultimately accept or reject the application of that law. If this Sharia family law is for instance interpreted in the sense that men and women have equal rights (as some contemporary Muslim scholars argue to be the case<sup>4</sup>), the implementation of Sharia might not be problematic at all. But this is not the issue here; in the following I will discuss the principal question of implementing a religious communal law, based on the situation of Sharia in Canada and the Netherlands.

### 3. Sharia in Canada

#### 3.1. *Misunderstandings*

The commotion in Canada surrounding the implementation of Sharia family law hinges on the wrong perception that Canada has actually implemented such a law. That is not the case. In Canada, the Arbitration Act of 1991 allows for private parties to choose their own rules to settle a dispute. The debate whether Sharia law could be one of those chosen rules arose when the privately founded Islamic Institute of Civil Justice, established in Ontario in 2003, came to the conclusion that the Islamic principles of family and inheritance law could be upheld within the

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2 See for instance: Muslim Canadian Congress, 'Submissions by Muslim Canadian Congress', 26 August 2004 ([http://www.muslimcanadiancongress.org/MCC%20Submission%20to%20Marion%20Boyd%20-\[Final\].pdf](http://www.muslimcanadiancongress.org/MCC%20Submission%20to%20Marion%20Boyd%20-[Final].pdf)); Canadian Council of Muslim Women, 'Position Statement on the Proposed Implementation of Sections of Muslim Law [Sharia] in Canada', 25 May 2004 ([http://www.ccmw.org/Position%20Papers/-Position\\_Sharia\\_Law.htm](http://www.ccmw.org/Position%20Papers/-Position_Sharia_Law.htm)).

3 Poulter, 'The Claim to Separate Islamic System of Personal Law for British Muslims', in Chibli Mallat et al. (Eds.), *Islamic Family Law*, (London, 1990).

4 Abdullah Ahmed An-Na'im, *Towards an Islamic Reformation*, (Cairo, American University of Cairo Press 1992), p. 180-181. Not as revolutionary, but in a similar vein are Fatima Mernissi's *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam* (Reading, Addison-Wesley, 1991) and Amina Wadud Muhsin's *Qur'an and Woman* (Kuala Lumpur, Penerbit Fajar Bakti, 1992).

framework of the 1991 Arbitration Act. The Islamic Institute was then to serve as a 'Sharia Court' conducting arbitrations according to Islamic personal law.

The outcry against this initiative was partly the result of the comments made by the president of the Islamic Institute, Syed Mumtaz Ali. A retired Egyptian lawyer residing in Ontario, he had been campaigning for the recognition of Islamic law in Canada since the 1960s. Mumtaz Ali stated: 'Once an arbitrator decides cases, it is final and binding. The parties can go to the local secular Canadian court asking it to be enforced. (...) The court has no discretion in the matter.'<sup>5</sup> The proposition of the Islamic Institute was to offer membership to Muslims, who would then be bound to settle personal disputes only in this forum, without recourse to the courts of Canada and Ontario.<sup>6</sup> Moreover, he claimed that Muslims in Canada had a moral obligation to have their family disputes exclusively settled by the Islamic Institute.<sup>7</sup>

These comments were not in congruence with the factual and legal situation in Canada. First and foremost, the issue of Sharia family law only played a role in the province of Ontario, which in this case provides for different rules than other provinces, as we will see later. And Mumtaz Ali's contentions that the Islamic Institute holds some coercive power which would allow it to exercise exclusive jurisdiction over Muslims in personal status matters, or that its decisions are not subject to judicial review by Canadian courts, is not correct.

Due to the commotion and misunderstandings, the prime minister of Canada asked the Attorney General and the Minister Responsible for Women's Issues for advice. The two ministers commissioned Ms. Marion Boyd to write an elaborate analysis of the legal implications of this initiative, which appeared in December of 2004 (hereafter referred to as 'Report').<sup>8</sup> One of the Report's purposes was to clarify matters, raising an accusing finger at the media that 'unquestioningly accepted these misunderstandings as self-evident truths.' Moreover, the fact that statements made by the Islamic Institute 'appear to have been taken at face value by both the Muslim community and the broader community is particularly troublesome.'<sup>9</sup>

The main question addressed in the Report was whether the existing system of Canadian law, in particular the Arbitration Act 1991, does 'sufficiently protect people whose status, language, education, understanding of the law, or other characteristics make them vulnerable to inappropriate resolution of their disputes.' Moreover:

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5 Interview in: Judy van Rhijn, 'First Steps Taken for Islamic Arbitration Board', *Law Times* (25 November 2003).

6 Judy van Rhijn, *op. cit.* note 5.

7 Interview in: Lynda Hurst, 'Ontario Sharia Tribunals Assailed. Women Fighting Use of Islamic Law but Backers Say Rights Protected', *Toronto Star*, 22 May 2004.

8 Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, Ontario, December 2004 (Review Report to the Attorney General and Minister Responsible for Women's Issues, Ontario, Canada).

9 Boyd, *op. cit.* note 8, p. 4

‘Should new types of protection be built into the system for matters of family law or for faith-based dispute resolution in general?’<sup>10</sup>

### 3.2. *Family law and the Arbitration Act of 1991*

In Canada, the jurisdiction in family matters may be federal or provincial, or shared. Marriage and divorce, including custody, access, child and spousal support, are the exclusive jurisdiction of the federal government (Section 91 Constitution Act, 1867 and Divorce Act, 1985). Solemnization of marriage, and property and civil rights are the exclusive jurisdiction of the provincial governments (Section 92 Constitution Act, 1867).

Both the federal Divorce Act and the provincial Ontario Family Law Act explicitly permit mediation in matters of family law, but arbitration is mentioned by neither. The difference between the two is distinct, and of importance in this case. In mediation the conflict is resolved by the parties themselves with the help of a third party of their choice. Mediation is a consensual process from which a party is free to withdraw at any time. In arbitration, on the other hand, parties by mutual consent agree to a set of procedures and rules that the arbitrator of their choice is to follow, but the decision reached by the arbitrator is binding even if one of the parties disagrees with that decision. The Canadian Arbitration Act considers arbitration a form of contract, whereby the parties waive their option to withdraw from the arbitration once they have agreed to arbitration by signing the arbitration agreement.

In Canada arbitration is not only allowed, but strongly encouraged by the state, for several disparate reasons: a) to reduce the workload of the courts, making them the second instance for dispute resolution after private endeavors have failed, b) as a matter of principle to settle disputes by peaceful means, and c) to encourage the adult population to take responsibility for its actions.<sup>11</sup>

As said, neither the federal Divorce Act nor the Ontario Family Law Act mentions arbitration. The (non)permissibility of arbitration in matters of marriage and divorce therefore is for the provincial laws to decide. In the province of Quebec, for instance, family arbitration is not permissible since status of persons and family matters are considered to pertain to public order (Section 2639, Civil Code).<sup>12</sup> In the province of Ontario, on the other hand, arbitration in these matters is allowed. That is why the issue of Sharia family law was raised in this province.

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<sup>10</sup> Boyd, op. cit. note 8, p. 17

<sup>11</sup> Boyd, op. cit. note 8, p. 10.

<sup>12</sup> The motion passed by the Quebec legislature on 26 May 2005, rejecting ‘the use of Sharia in the legal system’ and the use of Islamic tribunals to settle family disputes was therefore more a symbolic gesture.

### 3.3. *The limits of the law*

The freedom to contract one's arbitration process is quite broad, but is ultimately restricted by the law and therefore subject to the scrutiny of the courts. As with contracts, however, these restrictions are of a general nature pertaining to procedure rather than content. An arbitration award will only not be enforced when it is 'unreasonable or patently unreasonable.'<sup>13</sup> However, this does require that the case is brought to the attention of the courts by the parties concerned. Rights are not granted until they are called upon. As long as that is not the case, people may suffer from unjust arbitral awards, as has been admitted by the Ministry of the Attorney General.<sup>14</sup>

This reserved position of the courts becomes very pertinent in the case of arbitration regarding marriage and divorce. One can, indeed, imagine that the parties – and in particular the woman – merely consent to proceedings in order to give in to the pressure of the family and the social environment. Can such pressure, whether explicit, indirect or merely perceived by the beholder, be interpreted as coercion or duress, and consequently invalidate the arbitration award?

The Canadian lawyer and researcher Bakht claims that 'Canadian courts have set a high threshold for the test of duress or coercion', quoting the example of a woman who was reluctant to sign the arbitration contract, but did so nevertheless, under what she perceived as social pressure by her family. The Canadian courts – all the way up to the Supreme Court – held that 'notwithstanding the defendant's emotional upset at the time' the evidence fell short of establishing a basis for finding that the agreement was unconscionable, or that it was entered into under duress, coercion or undue influence.<sup>15</sup>

Coercion may not only apply to individuals, but also to a community. In the case of the proposed Sharia tribunal in Ontario, the coercion exercised upon Muslims to enter into (binding) arbitration is one of the main concerns of several Canadian organizations, in particular women's organizations.<sup>16</sup> Indeed, Ali Mumtaz stated that Muslims are under a religious obligation to subject themselves to the Sharia-arbitration: '(...) a Muslim who would choose to opt out of this stage, for reasons of convenience would be guilty of a far greater crime than a mere breach of contract – this could be tantamount to blasphemy-apostasy.'<sup>17</sup> The pressure of such religious

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13 Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women', 1 *Muslim World Journal of Human Rights* (2004), p. 6.

14 Letter from the Ministry of the Attorney General to the Canadian Council of Muslim Women, 26 April 2004.

15 Bakht, *op. cit.* note 13, p. 9 (referring to *Hartshorne v. Hartshorne*, 1999).

16 Canadian Council of Muslim Women, *op. cit.* note 2, p. 2.

17 This statement was originally posted at the website of the Islamic Institute (<http://muslim-canada.org/-DARLQADAform2andhalf.html>), but has been removed since. It has been repeated in many publications, among which Judy van Rhijn, *op. cit.* note 5 and Canadian Council of Muslim Women, *op. cit.* note 2.

statements on an entire community is not unlikely, since it is also the case in the Jewish community with regard to arbitration using Jewish law. The secretary of Toronto's Jewish religious tribunal (*Beis Din*) is quoted as saying: 'In this city, we actually push people a little to come [to arbitration by Jewish law, MB] because using the *Beis Din* is a *mitzvah*, a commandment from God, an obligation.'<sup>18</sup>

### 3.4. *Religious laws used under the Arbitration Act*

The occurrence of private parties voluntarily agreeing to have their disputes resolved by an arbitrator using a foreign legal system is not new in Canada. The Islamic Institute actually followed the example of several Jewish communities that have created Jewish arbitration tribunals to resolve civil matters, using the Arbitration Act. In her report, the Attorney General made an inventory of religious communities resolving their family disputes by means of arbitration, and discovered a surprising number of religious communities that do so, like the Salvation Army and some evangelical groups, but also the highly appraised Ismaili National Conciliation and Arbitration Board for Canada.<sup>19</sup> In addition, there is the El Noor mosque in Toronto, which has been offering its services of mediation and arbitration officially since 1982, but also prior to that date.<sup>20</sup>

All these communities use their own religious principles and laws to resolve family law disputes of their community members. Under the Arbitration Act, they are allowed to apply rules that might otherwise be unacceptable to Canadian law. Examples are rights which are granted to men but denied to women, such as the right to unilateral divorce without cause<sup>21</sup>, or the difference between men and women in their respective succession rights, or the rule that members of different religious communities may not inherit from each other.<sup>22</sup>

Respondents to Marion Boyd's Report who prefer the use of religious principles in arbitration to solve family law disputes do not share these concerns. By choosing a religious arbitrator and proceedings and rules based on religious principles, they argue, it is more important that the dispute is resolved religiously than that the outcome is in favour of the litigant.<sup>23</sup>

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18 Lynne Cohen, 'Inside the Beis Din', Canadian Lawyer (2000), p. 27, referred to by Bakht, op. cit. note 13, p. 10.

19 Boyd, op. cit. note 8, pp. 56-59.

20 Boyd, op. cit. note 8, p. 60.

21 *Talaq* in Muslim personal status law, *get* in Jewish law. The difference, however, is that in Muslim law the opinion of the wife is of no relevance, while the prevailing tradition in Jewish law demands the wife's consent to the husband's divorce.

22 In the case of the marriage between a Muslim man and a non-Muslim woman, for instance, the man and woman can not inherit from each other.

23 Boyd, op. cit. note 8, p. 61.

### 3.5. *Conclusion*

The Islamic Institute was incorrect in its assertions that it could compel Muslims to submit to its jurisdiction and that its arbitration awards would be outside the scrutiny of the Canadian courts and the general principles of Canadian law. However, the framework of the Arbitration Act within which the Sharia family law was to be applied does indeed allow for much freedom to choose the arbitration's rules and procedures, and the control of the Canadian courts is only marginal, if it is invoked at all. Moreover, Canadian case law assumes that individuals determine their own free will, and that social pressure is not an excuse for choosing against one's wishes. The worries of Canadian interest groups, especially women's organizations, with regard to the initiative of the Islamic Institute therefore appear to be justified, although from a legal point of view one could argue that the Islamic Institute operates perfectly within the framework of the Arbitration Act. One could indeed wonder why so much commotion should arise in this particular situation given the fact that other religious communities have already been practicing this kind of family arbitration for many years.

In the conclusion of her Report, Marion Boyd acknowledges the shortcomings of arbitration in matters of family law in Ontario. She recommends that the Arbitration Act remains applicable to family law – rendering the use of Sharia family law possible – but that stricter safeguards need to be implemented to guarantee the wellbeing and rights of weaker parties, especially women and children.<sup>24</sup> Whether these recommendations will be taken over by the government was unknown at the time of writing of this article.

## 4. **Sharia in the Netherlands**

The Muslim community in the Netherlands numbers some 944.000 souls,<sup>25</sup> which – on a population of over 16 million – makes them in relative terms the second largest Muslim minority community in Europe after France: 5.8% in the Netherlands and 7-8% in France. The Dutch Muslim community is not homogeneous, however, with a large variety of ethnic, national and linguistic differences.<sup>26</sup>

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<sup>24</sup> Boyd, *op. cit.* note 8, p. 133 et seq.

<sup>25</sup> Centraal Bureau voor Statistiek (Statistics Netherlands), 2004.

<sup>26</sup> The three largest Muslim communities in the Netherlands are the Turks, Moroccans and Surinamese, each with ethnic differences (Kurdish Turks, Hindustani and black Surinamese), as well as religious (Christian and Alevi Turks, Jewish Moroccans, Hindu and Christian Surinamese) and linguistic differences (Berber and Arabic Moroccans, and several Surinam dialects).



There have not been any initiatives to introduce Sharia family law in the Netherlands, as there have been in Canada or the United Kingdom.<sup>27</sup> On the contrary, the issue of implementing Sharia is hardly raised by Dutch Muslims.<sup>28</sup> In a poll taken in December 2004, however, a third of the Muslims interviewed said they were in favour of Sharia law.<sup>29</sup> When shortly after this poll the news of 'Sharia in Canada' hit the media in the Netherlands, the leader of the ruling Christian Democrats Party ('CDA') expressed his apprehension of similar developments in the Netherlands: 'Thousands of Muslims acknowledge that they seek explicitly to endorse the Sharia. A large majority feels at home here, but we must prevent that by means of peer pressure within a closed community they feel obliged to submit themselves to such a [Sharia, MB] tribunal.'<sup>30</sup> Similar concerns were expressed by a member of the city council of Rotterdam, a city with a large Muslim population: 'In some areas of our city more than half of the population is Muslim. If a Muslim party were to obtain a near majority vote there<sup>31</sup> and the idiots of the GreenLeft [Party, MB] were to be politically correct enough to join forces with them, we are going to be in for some strange things (...) like polygamy, honour killings, forced marriages, suppression of women. And we don't want that, do we?'<sup>32</sup>

The frightening impact of polls and the Canadian example seem not justified, however. Firstly, as mentioned before, because there are no initiatives from the Dutch Muslim community to introduce Sharia, and more in particular Sharia family law in the Netherlands. But more importantly, because Dutch law provides many more obstructions to Sharia family law than the laws of Ontario do.

#### 4.1. *Family law: civil and religious law*

With regard to Dutch citizens, civil marriage is the only marriage recognized by the Dutch courts. Couples are free to celebrate a religious marriage, but without registration at the civil registrar or a notary deed of cohabitation their marriage is not rec-

27 During the 1970s, the 'Union of Muslim Organisations of UK' has sought official recognition of a separate Sharia system of family law applicable to all British Muslims. This demand was repeated several times until finally rejected by the government in 1996 with the argument that non-secular legal systems could not be trusted to uphold universally accepted human rights. See Poulter, op. cit. note 3; Ihsan Ylmaz, *Dynamic Legal Pluralism and the Reconstruction of Unofficial Muslim Laws in England, Turkey and Pakistan* (London, 1999).

28 An exception is the Arab European League, a Muslim-Arabic organization active in Belgium and the Netherlands, whose leader on several occasions has mentioned his favour for Sharia, without clarifying however what he meant by that. The website clarifies that Sharia is not considered a goal, but an inspirational source for policy making ([www.ael.nl](http://www.ael.nl) and [www.ael.be](http://www.ael.be)).

29 Poll conducted among 488 Muslims by Foquz Etnomarketing, early December 2004.

30 Interview with Maxime Verhagen in: Elsevier, 22 February 2005 (author's translation).

31 In large cities like Rotterdam the municipality is divided into several district councils, each to be elected by the constituency of that district.

32 Interview with Pastors in: Metro, 12 March 2005 (author's translation).

ognized and no marital rights can be enforced. There are therefore two parallel legal systems, religious and civil, that more often than not do not recognize each other's jurisdiction or decisions. For instance, a Catholic couple may easily obtain its divorce from the court, and both divorcees can remarry at the civil registrar. However the Catholic tribunal will recognize their divorce only in exceptional cases, and in absence thereof will consider the couple to be married and, if one of them remarries, to be living in a state of bigamy.

Within the legal framework of Dutch law, there is no option for Muslims in the Netherlands to have Sharia family law applied to them by the courts, unless they have the nationality of a country that applies some kind of Sharia family law. The conflict rules of private international law may then allocate that national law as the law to be applied by the Dutch court. This has happened in the past, but is less and less the case, mainly because most Muslims in the Netherlands by now have the Dutch nationality, or are considered to have closer ties to Dutch society than to their country of origin. And even if the foreign Sharia family law is deemed applicable, many of its rules will be considered contrary to Dutch public policy, such as polygamy, the divorce by *talaq*, and other rules that put women in a disadvantageous position compared to men.<sup>33</sup>

#### 4.2. *Mediation and arbitration*

The near impossibility for a Muslim couple in the Netherlands to have Sharia family law applied to their marriage or divorce, other than a religious celebration, also applies to mediation and arbitration.

Mediation and arbitration are accepted alternatives to dispute resolution in the Netherlands. Arbitration – i.e. consenting to a procedure and submitting to the decision of a third party – is not allowed in matters of family and inheritance law, since these are considered to pertain to public policy that does not permit contractual digression from statutory law. With mediation the parties may consent on using the Sharia to solve their conflict, but the final agreement must be in accordance with Dutch divorce law because the necessary validation by the courts of these 'divorce covenants' can only take place when they fulfill all legal requirements.

#### 4.3. *No Sharia family law at all?*

All roads to application of Sharia family law seem to be blocked. One remains open, however: applying Sharia family law on a voluntary basis. This may be a welcome option to the devout believer. From my personal experience I know of Muslim couples who wanted to regulate their marriage and divorce in accordance with the rules of Sharia family law. In one particular instance, the mandatory three months waiting period after the pronouncement of the divorce (*talaq*) proved the solution for a couple who wanted to be separated for a while without finalizing their divorce yet.

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33 See on the concept of 'public policy' in private international law also the contribution in this volume by A.V.M. Struycken, 'De openbare orde van de Europese Gemeenschap'.

'I want to have the feeling of not being married, to enjoy that emotional freedom, and at the same time not to have taken the final decision to divorce my husband', the woman said.<sup>34</sup> To have their divorce recognized, however, they had to go to court in order to obtain validation of their divorce.

A quick survey among researchers and members of the Muslim communities has brought me to the tentative conclusion that little or no alternative conflict resolution takes place among Muslims in the Netherlands in matters of family law disputes. Insofar as Islamic principles matter to them in matters of marriage and divorce, one researcher has pointed at two factors that are quite characteristic for Dutch Muslims.<sup>35</sup> First, they share a fundamental lack of knowledge of marriage and divorce proceedings. This leads to the situation that the imam usually is given a central role in determining and conducting the wedding ceremony – a role he does not have in Turkey or Morocco.<sup>36</sup> Another typical feature of Dutch Muslims is that they are primarily concerned with concluding their marriages and divorces before their national consulates. The reason is quite pragmatic: by doing so they obtain recognition of their marital status in their country of origin and in that way safeguard unobstructed travel and visits to their relatives. For Dutch Muslims of Moroccan origin this creates an additional advantage, for both the civil and religious aspect of marriage and divorce are covered in one stroke since they perceive a marriage according to the Moroccan family code (*Mudawanna*) to be both civil and religious.<sup>37</sup>

## 5. Conclusion

The mere mention of the term 'Sharia' seems sufficient to create a pandemonium in countries like Canada and the Netherlands. Fear of a legal system one does not know – even Muslims have a hard time explaining and defining what they mean by it – and an ignorance of one's own Dutch or Canadian legal system appear to be the primal causes of the vehement reactions. In the Netherlands in particular, there seems to be a general apprehension that the Dutch legal system might easily yield to the pressure of the call for implementation of Sharia law. The mistrust in one's own system is quite disconcerting, as is the assumption that such a claim, if not explicitly mentioned, is at least dormant within the Muslim community.

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<sup>34</sup> Private conversation with the author.

<sup>35</sup> The following is based on Nathal M. Dessing, 'An Islamic Wedding in a Dutch Living Room', 10 ISIM Newsletter (2002), p. 31, and idem *Rituals of Birth, Circumcision, Marriage and Death among Muslims in the Netherlands* (Leuven, 2001).

<sup>36</sup> 'The imam's understanding of Islamic marriage practice determined the course of events. (...) No one, however, expressed surprise at the imam's role on this occasion. On the contrary, the couple felt that his presence was essential to render the ceremony valid.' (Dessing, op. cit. note 35, ISIM Newsletter).

<sup>37</sup> Dessing, op. cit. note 35, ISIM Newsletter. This situation does not apply to Dutch Muslims of Turkish origin, since Turkish family law is not based on Sharia family law.

We have seen that Canadian law has not ‘implemented’ Sharia family law. The issue of ‘Sharia in Canada’ is actually a question of arbitration law, in particular in the province of Ontario where arbitration is also allowed with regard to matters of family law. The objections raised against the use of Sharia family law as a procedure for arbitration are valid, but unjustified given the fact that other religious laws with similar unequal or unfair rules have been applied in arbitration for years.

As in Canada, Dutch law does not permit a settling of marriage or divorce by means of any rules but Dutch law. Contrary to Ontario law, however, Dutch law also does not allow arbitration in this respect, even if it were conducted in accordance with Dutch law, because the final decision in matters of marriage and divorce lies, as a matter of public policy, in the hands of the civil registrar and the court, respectively. One might use Sharia law during mediation, but the outcome thereof needs to be in accordance with Dutch law if it is to be effectuated by the mandatory validation of the court.

The possibility of formally introducing Sharia family law in the Netherlands is therefore nil, unless the legislature were to take a conscious decision to do so. However, a couple is perfectly free of course to arrange their civil marriage in accordance with the rules of Sharia law. That could even apply to the conclusion of the marriage itself, since the requirements of marriage in Sharia law are actually those of a civil marriage (offer and acceptance of the bride and groom in the presence of two witnesses). They are also free to seek recourse to any person they deem authoritative to settle marital disputes. Such considerations do not apply to divorce because, contrary to marital life, divorce is supervised and scrutinized by the judiciary and hence leaves very little freedom to arrange matters to one’s own liking.