INTRODUCTION TO COMPARATIVE LAW

(2 -3 BAC)

PART I

CLASSIFICATION OF LEGAL FAMILIES

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by

Prof. Dr. Nicolas de SADELEER

Full Professor, UCLouvain, Jean Monnet Chair

1. State of the question. Whereas hard sciences and other social sciences are underpinned by the same concepts and opinions, which are discussed internationally, there is no such thing with respect to the legal systems. Indeed, lawyers have a propensity to insularity. They are intent upon concentrating chiefly on their own legislation and case law. As a result, one has to deal either with Dutch, French, or Belgian law. In spite of on-going internationalisation, the legal world is still divided.

2. Course's aim. The aim of this course is to impart fundamental knowledge of general principles of comparative law. This broad aim will be achieved by:

- Introducing you to the fundamentals of comparative law.
- Comparing different legal systems, among which Roman-Germanic law, Common law, and Muslim law. For each legal family, one identifies the historical background against which the system has developed, the main sources of law, the interplay between institutions, as well as the organisation of courts.
- Demonstrating how distinct these legal families are.
- Informing you about the manner in which courts in France, Belgium, England and Germany adjudicate tort cases.

Admittedly, the lectures (23 hours) afford the students a glimpse into the formation of various legal institutions, which develop in parallel. In a globalised legal world, these lectures should offer students an overview of the main law families.

3. Course's materials. With the aim of facilitating the lectures, this textbook offers a bare outline of the lectures as well as a number of judgments that have been analysed in the course of the lectures.

4. Method. It goes without saying that we endorse an Anglo-Saxon educational approach. Students should *not learn by hearth* these notes. They are called on to take an active part during the lectures in commenting the cases that will be analysed. The students cannot limit themselves to look at the powerpoint slides on the account that this is a legal topic. What is more, there is a correlation between the attendance to the lectures and the success rate. Last but not least, understanding comparative law requires a certain level of *maturity* that is not likely to be acquired without studying seriously and reflecting upon the social and political issues entailed by the wide diversity of legal orders.

5. Final Examination and Grading. The final examination will be a test of 2 hours. All areas of the course will be examined. The examination will consist of theoretical questions as well as case law analysis. You need to be well prepared (grappling with the terminology, understanding the cases, ability to systematically develop legal arguments, etc.).

Warning. Under no circumstances can you limit yourself to studying certain sections of my notes. You must know the whole subject. What's more, in 2023 1/3 of students failed their June exam because they didn't come to the lectures and didn't study my course notes properly. On the other hand, most students who came to my lectures and studied seriously did well.

6. Terminology Though this is in any way an exam on the legal terminology, students are nonetheless called on to use the relevant terminology be it in tort law, or in Muslim law. You are encouraged to look at the index.

INTRODUCTORY CHAPTER

Section I – Originality of the discipline

1. What comparative law means?

The terms "comparative law" suggest an intellectual activity with law as its object and with comparison as its process. Put is simply, comparative law is the study of similarities and differences between different legal systems. It affords us a glimpse into the formation of various legal institutions, which develop in parallel.

a) Comparative law is more than the mere study of foreign laws

As a consequence, the mere study of foreign law stops short of being comparative law. This discipline requires a specific comparative analysis of the legal issues that are the subject of such exercise. Therefore, a critical comparison is needed.

b) Comparative law has an extra-territorial dimension

One can compare different legal provisions within a single system. This would be the case regarding the respective scope of Art. 1382 and Art. 1384 CC. However, such an exercise is anything but comparative law. It requires comparing a legal system or a legal device to other international legal systems or other legal regimes pertaining to other legal systems. → It has thus an extra-territorial dimension!

c) Is comparative law a legal branch on its own rights?

A first group of academics take the view that comparative law is nothing more or less than a methodology. Accordingly, its main task consists in acting as a tool for the study of internal structures of legal knowledge.[1] In stark contrast, a second group of scholars asserts that comparative law is a legal branch in its own rights. It acts not so much as a method but

[1] G. Samuel, 'Comparative Law and Jurisprudence', *International and Comparative Law Quarterly*, Vol. 47, 1998, p. 817.

rather as an independent scientific and educational discipline. In effect, the importance of this legal branch has increased significantly in the present age of internationalism and economic globalisation. As a result, comparative law has become 'a relatively independent and scientifically detached educational discipline having its own subject, method and sphere of application, playing its own role in the system of legal knowledge and education, and also having its special social designation.'[2]

2. Origin

Aristote drew its political principles from the study of 150 Greek and barbaric constitutions. Charles de Montesquieu (1689-1755) has been considered to be the first comparatist in modern times. In *L'esprit des lois*, he rejected rightly the concept of universal law; instead, he took the view that diverse societies give rise to legal diversity. Nevertheless, CL is a rather new field of law. It started around 1900, with the world exhibition in Paris, thanks to the input of Edward Lambert and Raymond Saleilles, two famous French law professors. The 1900 international congress for Comparative Law was dominated by a belief in progress: there was a need to develop a common law of mankind: « *world law must be created* ».

Its original goal was to reduce diversities in law of each nation; in so doing, it made an endeavour in harmonizing different legal systems.

➔ That being said, Comp L has developed ever since. Given that the belief in progress is fading away, this discipline has become much more sceptical.

Nowadays, it has its own journals, congresses, chairs,….

3. Why comparative law is needed?

Whereas hard sciences and other social sciences are underpinned by the same concepts and opinions, which are discussed internationally, there is no such thing with respect to legal systems.

[2] Ibidem.

Indeed, lawyers have a propensity to insularity. For instance, the teaching of law has remained both positivistic and legicentric. Lawyers are intent upon concentrating exclusively on their own legislation and case law, albeit a few exceptions as regard EHRC or EU law. One must deal either with Dutch, French, or Belgian law. As a result, lawyers are a bit stuck with their *own* methods and principles whereas the world is becoming more and more globalized. Most of students in law will specialize in one branch of Belgian law (administrative, family), and won't be acquainted with foreign modes of reasoning.

That being said, 'intensive processes of international cooperation in the second half of the 20th century occurring alongside scientific and technological progress and changes in the political, economic and cultural life of societies, the integration of European countries in the European Union', the development of European law and of a new European legal order, make comparative law an indispensable component of academic curricula of many law schools and universities in Europe.[3] In St Louis, for instance, there has been an awareness that common law should play a more significant role in legal education. Henceforth, comparative law's aim is to put an end to such narrow mindness.

Hence, comparative law has developed continuously since the XIXth c. on the account that:

- technological developments have made the world smaller;
- national isolationism is on the wane ;
- comparative law offers the gradual approximation of diverging viewpoints.

4. Methodology

Comparative law can be practiced on a large and a smaller scale.

Macrocomparison: the scholar compares the spirit and style of different legal systems instead of concentrating on individual legal problems and their solutions.

= comparing spirit, rationalism, principles and style of different legal systems.

= broad approach, not concrete program.

Research is carried out into:

- Different techniques of legislation;

[3] Djalil I. Kiekbaev, 'Comparative Law: Method, Science or Educational Discipline?', online publication.

- Different methods of statutory interpretation;
- Different styles of judicial opinions.

Examples of macrocomparison.

- Role of supreme courts in reviewing the constitutionality of laws,
- Functioning of federalized systems,
- Differences between different civil courts/procedures.

Microcomparison: Unlike macrocomparison, microcomparison is dealing with specific legal institutions. The list of possible illustrations is endless (torts, contracts, sale, inheritance, etc.). In this connection, a few examples will suffice. For instance, why is a manufacturer liable for the harm caused to a consumer by defective goods? What are the rights of an adulterine child? What are the regimes of strict liability as regards workers' protection?

Is there a clear dividing line between micro- and- macro comparisons?

Microcomparison reaches its limits. It may work only if one takes into account the general context in which specific legal regimes evolve.

By way of illustration, no one could, for instance, give a true picture of the US law concerning strict liability without having knowledge of its general legal background (e.g. jury trial). In a similar vein, in order to compare the functioning of administrative courts in Germany and in France, one needs to understand the political system of each country and their mistrust of general court regarding the review of State's measures.

Which approach do we contemplate in this course? Given that we shall study the major legal systems (common law, roman law, Islamic law, Chinese law), this course is placing emphasis upon macro comparison. However, on the account that we shall delve into more particular issues such as tort law, this course embraces to some extent a micro comparison approach.

5. Comparisons between comparative law and other legal disciplines

Comparative law is mostly a technique. As a method, it can be used practically in all legal disciplines**.** Bearing this in mind, it must be distinguished from:

- **Private international law**

  Positive law (law as it stands)

- **Public international law**

- **Legal history**

  More intellectual (how the legal system functions)

- **Sociology of law**

a) Private international law (PIL):

This legal branch can be defined as a set of procedural rules that determines which legal system and which jurisdiction apply to a given dispute. E.g. matrimonial law: a Moroccan and an Italian are seeking divorce in Belgium whereas they were married in Germany.

→ Which court will be competent to adjudicate the case?

→ Which legal rule will be applicable?

The EU has been adopting an array of regulations that provide for the key rules in this area.

- **Rome I** Regulation (EC) No 593/2008 governs the choice of law in the EU.
- **Rome II** Regulation EC) No 864/2007 creates a harmonised set of rules within the EU to govern choice of law in civil and commercial matters.
- **Brussels I** Regulation (EU) No 1215/2012 deals with jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- **Brussels IIa** Regulation (EC) No 2201/2003 sets out rules determining which court is responsible for dealing with matrimonial matters and parental responsibility in disputes involving more than one country.

Although the two legal disciplines interact, PIL or conflict of laws, is a part of positive national law (*droit international privé belge*, for instance) whereas comparative law is a genuine intellectual approach. However, comparative law can be extremely useful for international private lawyers in order to determine the most suitable legislation and jurisdiction.

b) Public international law: Public International Law is the law of the political system of nation-states. The law of nations (treaties, international agreements, protocols, conventions,

international principles, and customs) is by and large deemed to be a supranational system of law.

Comparative law helps to understand the manner in which general principles of international law can be moulded. In effect, two conditions must be fulfilled:
a) **consistent and continuous State practice**;
b) ***opinio iuris*.** The *opinio juris* must be supported by State practice.[4] . An important question is what constitutes State practice. Policy statements, commentaries by governments on draft treaties, legislation, decisions of national courts and executive authorities, pleadings before international tribunals, statements made within international organizations[5] and the resolutions adopted by those bodies are all examples of State practice, which should be taken into account when considering a new legal standard as a principle of customary international law. [6]

In addition, the methods of comparative law can also be extremely useful in interpreting international agreements.

c) Legal history: Legal history is the study of how law has evolved and why it changed. Legal history is closely connected to the development of civilisations. Legal history is consecutive in time whereas comparative law is coexistent in space. However, there is more than this. Legal history often involves a comparative element (e.g. roman law is lectured with a view to letting the Belgian students understand their contemporary civil law). Conversely, lawyers dealing with comparative law really must take into account the historical circumstances in which the legal institutions under comparison evolved.

d) Sociology of law: Sociology of law is studying the causal relationship between law and society. A sociological perspective on law does not mean that the focus is placed on a single legal regime but on law in a social context. Therefore, sociologists try to understand the sociological background against which a certain legal regime unfolds.

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[4] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA),* ICJ Rep [1986] 111, at para 184.
[5] These institutions can be instrumental in the creation of customary rules.
[6] Brownlie, *Principles of Public International Law,* 5th ed (OUP, 1998)5.

→ sociological point of view: how legal institutions influence our lives (divorce was patriarchal last century, however, it is subject today to the principle of non-discrimination).

→ legal point of view : how changes in society influence the legal order.

The two disciplines have a great deal to learn from each other but have much of the same method.

Section II - Functions of CL

1. Interpretation of national rules of law

A practical use of CL lies in the interpretation of national rules of law. Although a foreign rule cannot be used to bypass unequivocal national rules, it could be used as a tool to interpret domestic law. For instance, where there is a gap in our legal system, this can be filled by a court referring to the solution found in a foreign legal system.

In Europe, several courts are receptive to comparative analysis. By way of example, during judicial proceedings the European Court of Human Rights more and more often reckons upon comparative practice in analysing the judicial decisions and national legislation of member states. To name another example, constitutional courts in Europe are facing relatively similar issues: constitutionality of gay marriage, issues of discrimination between sex, issues of affirmative action, supremacy of EU law over constitutional law, etc. As a result, they are keen in understanding the manner in which other constitutional courts are adjudicating similar cases.

>< *American isolationism*: American courts (in particular the Supreme court) are unwilling to look at other countries legal approach. The Bill of Rights is exclusively an American product.

Supreme courts having to resolve antagonistic interests: Constitutional case law on the validity of 'homosexual marriage'

How to strike a balance between the right of Member States (in the EU) and the States in the USA between their sovereign right to prohibit mariage to opposite-sex couples and the citizens'

rights to move from one State to another. Both the US SCt and the CJEU had to resolve complex cases related to this issue.

In the USA, States are competent to allow or to prohibit same-sex marriage; this gives rise to difficulties given that couples move across the USA. In *Obergefell v. Kasich,* the **US SCt** obliged all 50 States to perform and recognize the marriages of same-sex couples on the same terms and conditions as the marriages of opposite-sex couples, with all the accompanying rights and responsibilities. All states are thus obliged to issue marriage licenses to same-sex couples and to recognize same-sex marriages validly performed in other States.[7]

We guess that the CJEU took into consideration the developments in US constitutional law. Romania does not recognise marriage between persons of the same sex ('homosexual marriage'). A Romanian national and an American national, who got lawfully married in Brussels, contacted the Romanian authorities to request information about the procedure and conditions under which the US citizen, in his capacity as a member of the Romanian family, could obtain the right to reside lawfully in Romania for more than three months. The Romanian authorities informed the spouses that the American spouse only had a right of residence for three months, on the ground, in particular, that he could not be classified in Romania as a 'spouse' of an EU citizen as Romania does not recognise marriage between persons of the same sex. The **CJUE** ruled that family members of a EU citizen (Romanian), could be accorded such a right of residence in Romania on the basis of Article 21(1) of the Treaty on the Functioning of the EU (EU citizenship).[8]

2. Law making process

Comparative law has a key role in the lawmaking process. Nowadays, the drafters of national legislation take into consideration the foreign experiences (e.g. the influence of Dutch law on gay marriage, adoption by gays or euthanasy; the influence of French law on the Belgian lawmaker prohibiting the burqa, see below). Comparative legal studies are clearly needed in order to foster a significant legal reform.

- Prior to the enactment of legislative proposals, the European Commission usually carries out comparative analysis encompassing at least 27 countries.
- After the Berlin wall was pulled down, significant changes occurred in the legal systems of Central European countries such as Poland, former Eastern Germany, Rumania, etc. In countries formerly dominated by communist regimes, new legal regimes were influenced by Western legal principles (the principle of equality, the

[7] *Obergefell v. Hodges*, 576 U.S. 644 (2015).

[8] Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări* (2018).

right to property, right to a fair trial, etc.). In order to reconstruct the legal systems, the lawyers delved into comparative law.

Whenever it is proposed to adopt a foreign solution, which is deemed to be superior, two questions must be asked whether:

a) Has it proved satisfactory in its country of origin?

b) Will it work in the country where it shall be implemented?

3. International Unification of the Law

Many legal fields such as private law, trade law, labour law, transport law, business law are subject to international agreements. The treaties concluded are subject to international public law. CL plays a significant role in preparation of projects for the international unification of law, whose aim is to reduce and eliminate, so far as desirable and possible, the discrepancies between the various national legal systems. The method is to draw up a uniform law based on work by experts in comparative law and to incorporate it in an international agreement. Accordingly, the international treaty will oblige the parties to apply a uniform law instead of their municipal or domestic law. In preparing these agreements one needs to find out a common denominator to all countries. As a result, lawyers are appointed with the aim of comparing national legislations.

Several international organisations are proposing to their members uniform legal regimes. For the convenience of representation, we have been chosen but a few treaties.

a) Council of Europe

To guarantee the respect for its fundamental values, the Council of Europe elaborates relevant uniform legislations. The European Conventions and Agreements worked out by the Council of Europe thus serve each Member State as a basis for harmonising and amending their own legislation. These agreements, some of which never entered into force, do cover a swathe of subject-matters ranging from Human rights, Social affairs (European Social Charter, Status of migrant workers), IPR (patents), Culture (Heritage, protection of archeological heritage, landscape, television production, cinematographic co-production, transfrontier television), Extradition and visas, Civil law (children's rights, environmental

damage), Criminal law (abolition of death penalty, terrorism, traffic, sexual abuse, sexual exploitation, corruption, cyber criminality, racism, environmental criminal law, transfer of sentenced persons, offences to cultural property, international validity of criminal judgments, etc.), Bankruptcy law, Tax law (mutual administrative assistance), Public law (protection of minorities, local self-government), Privileges, Health law (drugs, doping, exchange of therapeutic substances), to Animals Welfare (protection of animals for slaughter, animals kept for farming purposes).

Examples of the Council of Europe's treaties

Social Issues

- European Convention on Social Security
- Convention on Social and Medical Assistance
- European Convention on the Status of Migrant Workers

Criminal Law

- European Convention on Mutual Assistance in Criminal Matters
- European Convention on Extradition
- European Convention on the Suppression of Terrorism
- Convention on the Transfer of Sentenced Persons
- Convention on the Protection of the Environment through Criminal Law
- Convention on Cybercrime
- Criminal Law Convention on Corruption
- European Convention on Offences related to Cultural Property

Civil Law

- European Convention on the Adoption of Children
- European Agreement on Au pair Placement
- European Convention on Products Liability
- European Convention on Civil Liability for Damages caused by motor vehicles
- European Convention on the Exercise of Childrens' rights
- Convention on the Adoption of Childrens
- Civil Law Convention on Corruption
- Convention on the Establishment of a Scheme of Registration of Wills

b) European Union

The European Union (EU) shares the same values – human rights, democracy and the rule of law (art. 2 TEU) – than those of the Council of Europe. For the EU Member States, the uniformity is achieved through the harmonisation of the Member States domestic laws and

practices. Two legal instruments are widely used in order to achieve this objective: directives and regulations (art. 288 TFEU).

- **directives** = EU directives lay down specific end results that must be achieved in every Member State. Against this background, national authorities have to adapt their laws to meet these goals, but are endowed with sufficient room for manoeuvre to adjust their domestic legislation.
- **regulations** = In contrast to directives, regulations are directly applicable. They are on a par with national laws. Accordingly, they don't have to be implemented by the national authorities. They are therefore the most direct form of EU law - as soon as they are passed, they have binding legal force throughout every Member State. Member States are called on to abrogate any contradictory legislations.

Given that the EU counts 27 Member States, the identification of a common denominator to all these countries (some of which are part of the common law (UK but Scotland, Ireland, Malta) and others which are former Communist states) has become somewhat challenging. In effect, it is a lot easier to find a common denominator for Benelux (only 3 countries) or for the Nordic Council (5 countries, all Scandinavian with the exception of Finland).

c) Unidroit

The International Institute for the Unification of Private Law (Unidroit) is an independent intergovernmental organisation with its seat in Rome.

Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States. The main objective is to prepare harmonised uniform rules of private law as model laws or as international agreements.

The uniform rules drawn up by Unidroit have traditionally tended to take the form of *international Conventions*. The following international agreements were adopted thanks to Unidroit.

- Convention relating to a Uniform Law on the International Sale of Goods (The Hague, July 1, 1964)
- International Convention on Travel Contracts (Brussels, April 23, 1970)

- Convention providing a Uniform Law on the Form of an International Will (Washington, D.C., 1973)
- UNIDROIT Convention on International Financial Leasing (Ottawa, 1988)
- UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995)
- Convention on International Interests in Mobile Equipment (Cape Town, 2001)

However, the low priority which tends to be accorded by Governments to the implementation of such conventions and the time it therefore tends to take for them to enter into force have led to the increasing popularity of alternative forms of unification in areas where a binding instrument is not felt to be essential.

Such alternatives include *model laws* which States may take into consideration when drafting domestic legislation on the subject covered. In other words, they are free to decide whether to follow or not these model laws. They are relevant examples in illustrating this trend:

- Principles of International Commercial Contracts
- Principles and rules capable of enhancing trading in securities in emerging markets
- Model Law on leasing
- Model Franchise Disclosure Law

d) UNCITRAL

Given that disparities in national laws governing international trade created obstacles to the flow of trade, the UN General Assembly established in 1966 the United Nations Commission on International Trade Law (**UNCITRAL**). This organisation's general mandate is to further the progressive harmonization and unification of the law of international trade. UNCITRAL is deemed to be the core legal body of the United Nations system in the field of international trade law.

By way of illustration, the Convention on contracts for the international sale of goods (Vienna 1960) establishes a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract.

c) Limits to the unification process

So far, all unification of law has been limited in its geographical area of application. Often schemes for the unification of law are designed to apply only within a limited area (Scandinavia, Benelux, EU).

Moreover, unification cannot be achieved so easily: one must find what is common to the jurisdictions concerned that could be incorporated into a future uniform law or an international agreement. Given that unification of civil or commercial law is rather difficult to achieve, one must think of alternative means of achieving the goal of unification through Model Laws. However, adoption of model laws is a matter of recommendation rather than of obligation.

Section III - Methods of comparative law

How comparative lawyers are proceeding? Given that this recent discipline has not yet an established set of methodological principles, a detailed method cannot be laid down in advance. As there are no textbooks laying down a specific methodology, practitioners will have to use their common sense, intuition, creativity. In other words, only sound judgment, common sense, intuition can be of any help. Put it simply, one needs to apply a rule of thumb.

Often it is the feeling of dissatisfaction with the solution applied in its own legal system, which drives one to inquire whether perhaps another legal system could provide for a better legal solution.

Investigation begins with setting the right hypothesis: in practising comparative law, one notices that the national regime is deemed to be insufficient to provide the solution. Admittedly, there is a need to look at other regimes with a view to improving the national system.

Every country has to address the same issues, but each country has developed its own mechanism to address them. At this stage, we can lay down an informal procedure of Comparative Law:

1. Premises: functionalism
2. Scope *ratione territoriae* investigation
3. Comparison
4. Critical evaluation

1. Basic methodological principle: Functionalism. Although each legal system faces essentially the same problems, they solve these problems by quite different means. The question to which any comparative law study is devoted must be posed in purely functional terms (not conceptual). For instance, one is likely to be interested to know how foreign laws protect the victims of an accident, the aggrieved party, etc. In effect, the level of legal protection may differ significantly from country to country.

2. Scope. As a matter of course, the researcher is determining the scope of his investigation. Which legal system should he choose? How many legal systems should he encompass? Must his/her selection be based on mastering the official languages?

→ What determines the scope? Finance, language, relevance of the foreign system,…
→ Which legal system is worth studying?

As a matter of course, it is difficult to assert how the comparatist should delimit the scope of his research. It makes more sense to focus on US trust law than on Belgian competition law. Fairness of trial has received more attention in the UK than elsewhere. Flemish environmental law is more interesting than environmental law in Moldavia.

Last, it must be noted that a vast number of legislations often extensively imitate mature legal system. These affiliated systems are less interesting to compare than more original systems. By way of illustration, France has developed a parental system according to the Code Napoleon whereas Italy has an impressive wealth of ideas on private matters (codification of 1942). In sharp contrast, the legal systems of Spain and Portugal do not justify very intensive investigation.

3. Building a system. The next step in the process of comparison is to build a system. One encounters, as a matter of fact, problems of syntax and vocabulary. One needs to focus on concepts that enable the interpreter to embrace heterogeneous legal institutions, which are

functionally comparable. If one finds that different countries meet the same need, one must ask why. Indeed, this is a tall order given that the reasons explaining the success or the failure of a legal regime may lie anywhere in the whole realm of social sciences.

4. Critical evaluation of what has been discovered. One has to compare different legal systems with a view to improving its own legal system by:

- taking over a system which is successful in other countries; the solution provided for by the foreign legal order will appear clearly superior, better of, worse than the one of the legal order at issue.
- eschewing the mistakes made in other countries.

The comparison should assess whether the foreign legal institution has been efficient and could serve as a model for other countries.

5. Overcoming a flurry of challenges. However, the difficulty faced by the comparatist is the following: one does not have to look at the problem with the eyes of its own system. A number of hurdles have to be overcome.

- Mastering the legal culture. The comparatist must assess the extent to which custom or case law provide proper solutions. As a result, he must eradicate the preconceptions of his native legal system.

➔ Continental law: emphasis placed on abstraction and generality;

➔ Common Law: more inductive and produces more specialised legal institution to solve a specific problem.

- Mastering the foreign language. The meaning of legal terms may differ! The vocabulary is tricky.

➔ The comparatist must overcome the terminological hurdles and assess whether "the apple is not hiding a pear or vice versa".

- Mastering the concepts ingrained in other legal systems. Each country has developed its own concepts. One may quickly grapple with unknown legal concepts. Are we are comparing "apples and pears"?

- Torts and '*responsabilité civile'* are not the same.

- Liability and responsibility mean something different.
- A Scottish lawyer will have problem understanding *'l'enrichissement sans cause'* or '*la théorie de l'équivalence des conditions'*

Institutions may be very different. For instance, the distinction between administrative courts, criminal courts and civil courts doesn't exist in all countries (UK, Scandinavia).

To conclude with, in order to analyse correctly how foreign legal systems function, one needs to set aside the concepts of its own legal system.

-Access to the relevant documentation. Although many legislation are placed on internet, it is uncertain whether they are still in force. In addition, there are no legal textbooks on Internet; one needs to get access to the right library!

Foreign law might appear unclear on the account that the solution is provided by customs (or social practice), by the case law, etc. In order to understand another legal system, one needs therefore to understand how the foreign society works.

For instance, the lawyers don't necessary play the same role in these societies:

USA: 1 lawyer for 200 people
Belgium: 1 lawyer for 1000 people
China: 1 lawyer for 25000 people.

As a result, the comparatist should rely upon the expertise of foreign lawyers,

6. Concluding remarks

As a result, a comparative study shouldn't end up with a compilation. A textbook of comparative law should not try to stuff the student with an overload of foreign data. It should rather lay out the different approaches to a single problem, state the critical arguments, which illuminate it, indicate which is the best solution to follow. Such a critical analysis could help to develop a sense of how national law can be improved.

CHAPTER II- THE IDEA OF FAMILY OF LAWS

1. Introductory remarks

Lawyers are frankly obsessed with definition, classification, systematisation, conceptualisation, … (civil law, public law, etc.). Indeed, like other legal experts, comparatists lawyers are trying to divide legal devices into specific fields, to classify legal systems into families. In so doing, they gather distinct legal orders into a broader family. A Nigerian lawyer shares much more in common with a lawyer from Ghana than with a lawyer from Ivory Coast on the ground that they were former British colonies and that their respective national legal systems belong to the common law family.

Hence the idea of classification is to identify, to compare, to highlight the core elements of similar legal orders with a view to attaching them to a broader cluster of similar legal systems.

- Italian legal system + French legal system + Belgian legal system
  = Roman-Germanic law

- Arabic legal system + Lebanese legal system + Syrian legal system
  = Islamic law

This classification exercise is somewhat remote from positive law; it is more a genuine intellectual exercise.

However, classification remains the subject of an ongoing debate. For instance, the way in which one should draw the dividing line between public and private law in France has always been dogged with controversies. In effect, different legal disciplines may interfere to such an extent, or even overlap (because society becomes more complex) that classification becomes nugatory. Moreover, families of law are likely to disappear or to fade away (Socialist law surviving in Cuba, China, North Korea and Vietnam) whereas other families are likely to gather momentum thanks to social upheavals (Islamic law).

2. The need to define broad families

Each political society in the world has its own set of laws. Moreover, each system has been developing its own concepts as well as vocabulary, arranging rules into proper categories, setting out original techniques for expressing and interpreting rules of law. It follows that each legal system constitutes a system in its own rights.

However, it would be impossible to understand from the outset hundreds of legal systems. For the sake of clarity, legal systems need to be classified into broader families of laws. Indeed, legal systems may share similar institutions and basic legal rules with other ones. As a result, they share a number of similarities in terms of legal techniques and institutions that enable the comparatist to draw analyses.

It is therefore possible to gather laws into **families** and compare and contrast them with each other. In that sense, the comparatist should give consideration to the fundamental elements of the families through which the rules to be applied are themselves discovered, interpreted and assessed.

Accordingly, the classification of legal systems into a limited number of families of laws simplifies by and large the presentation of the law.

Hurdles to overcome

The question arises as to whether this classification is a genuine intellectual approach far away from positive law. Perhaps some systems could be grouped into families. But how does one decide what these groups should be? Upon which similarities, relationship should one place emphasis? Put it another way, which common qualities are the crucial ones? Supposing one knows what these groups should be, how does one decide whether a particular system belongs to one group rather than another one?

Grouping is difficult:

- Is it possible to divide such a diverse legal world into but a few legal families?
- How do we decide which families are the salient ones? According to which criteria?

- Which are the features that could lead to say that this legal system belongs to this family?

The coexistence of different families within one legal system

It often happens that several legal systems co-exist together in a single state. In this connection a few examples will suffice.

The sources of **Nigerian law** are the Constitution, legislation, English law (common law, doctrines of equity), customary law, Islamic law, and judicial precedents. By virtue of being a British colony, English Law became a source of Nigerian law (the Common Law of England, Doctrine of Equity, English law made before October 1, 1960 (independence day) and that was not abrogated). Common law has been complemented by Nigerian legislation (Acts of National Assembly or Acts of Parliament or Acts of the States given that each state has its own legal system). Customary laws are accepted by the indigenous people to whom they relate. They can encompass marriage, divorce, succession and inheritance, land and chieftaincy matters. In addition, much emphasis has been placed in Nigeria upon judicial precedents. In particular, it must be noted that Sharia has been instituted as a main body of civil and criminal law in 9 Muslim-majority states and in some parts of 3 Muslim-plurality states since 1999.

Sharia law is encapsulated in Article 244 of the Nigerian Constitution (Chapter VII on Judicature. That provision reads as follows:

‘(1) An Appeal shall lie from decisions of a Sharia Court of Appeal to the Court of Appeal as of right in any civil proceedings before the Sharia Court of Appeal with respect to any question of Islamic personal law which the Sharia Court of Appeal is competent to decide.

(2) Any right of appeal to the Court of Appeal from the decisions of a Sharia Court of Appeal confer by this section shall be:

(a) exercisable at the instance of a party thereto or, with the leave of the Sharia Court of Appeal or of the Court of Appeal, at the instance of any other person having an interest in the matter, and

(b) exercised in accordance with an Act of the National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the Court of

Similarly, Article 245 of the Constitution deals with Customary Courts.

‘(1) An appeal shall lie from decisions of a Customary Court of Appeal to the Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question of Customary law and such other matters as may be prescribed by an Act of the National Assembly.

(2) Any right of appeal to the Court of Appeal from the decisions of a Customary Court of Appeal confer by this section shall be:

(a) exercisable at the instance of a party thereto or, with the leave of the Customary Court of Appeal or of the Court of Appeal, at the instance of any other persons having an interest in the matter;

(b) exercised in accordance with any Act of the National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the Court of Appeal.'

Israeli law is a mixed legal system reflecting the sheer complexity of the history of the State of Israel. Its legal system is based on common law.[9] That being said, it has been influenced by a swath of sources ranging from the civil code of the Ottoman Empire (personal status and marriage law in the hands of the religious courts), German Civil law, religious law. For instance, personal status and marriage law in the hands of the religious courts (Jewish Halakha and Muslim Sharia in relation to family law). To some extent some legal developments were influenced by European codification (brought by European Jewish lawyers after WW II). For instance, during the 1960s the Common Law in areas of contracts and torts was codified. Since the 1990s the Israeli Ministry of Justice, together with leading jurists, has been working on a complete recodification of all laws pertaining to civil matters. Moreover, the Israeli courts have been influenced in recent years by US law.

Quebec's legal system was established when New France was founded in 1663. Given that Quebec became an English colony in 1763 (Treaty of Paris), it has therefore a *bijuridical* legal system on the account that it mingles former French legal approach (the Civil Code of Québec, Code of civil procedure, etc.) with common law. Since 1866, the Province of Quebec applies the Civil Code of Lower Canada. A new *Civil Code of Quebec* was enacted in 1991, and came into force in 1994. This Code repealed both the *Civil Code of Lower Canada* and the *Civil Code of Quebec* of 1980. In contrast, in areas of law under federal jurisdiction, Quebec is, like the other Canadian provinces, subject to common law.

The Civil Code consists of ten books:

- Persons
- The family
- Successions
- Property
- Obligations
- Prior claims and Hypothecs
- Evidence
- Prescription
- Publication of Rights
- Private international law

Scottish law is a hybrid or mixed legal system, containing common law as well as civil law elements. Scots law recognises four sources of law: legislation, legal precedent, specific academic writings and custom. There are important differences between Scots Law and English law in several fields (property, criminal law, trust law, inheritance, family law) whereas there are greater similarities in areas as commercial law, consumer rights, taxation, employment law and health and safety regulations.

[9] The United Kingdom was granted a Mandate for Palestine on 25 April 1920 that ended in 1948.

Federal States. In addition, it must also be noted that federal states such as Belgium, Switzerland, Germany, Spain, and USA have been developing a formidable body of law in grating legislative competences to their regional entities.

3. Factors contributing to the juristic style of families of laws

Five factors are likely to influence the style of a legal family:

- historical background
- mode of thought
- distinctive institution
- legal sources
- ideology

(i) Historical background

Trading issues shaped the legal culture in all continental countries. There was no centralised power in Western Europe.

➔ Historical factors gave rise to the discovery of Roman Law: as a result, most continental countries were shaped by Roman Law.
➔ History = key factor in shaping law. That's why one has to keep history in mind.

History explains why the French and the German legal systems have much more in common with each other than with common law.

(ii) Modes of thought

The differences between CL and G/Rom family correspond to differences in mentality due to historical events.

> E.g.. On the continent, during the *ançien regime* the King was vested with much power. As a result, the courts were endowed with little power.

Furthermore, Napoleon Bonaparte in concentrating all legislative and executive powers gave little independence to the French courts.

>< in England, the courts were known to be more independent than their French counterparts.

G/R family is characterised by abstract legal norms, well-articulated systems, the influence of professors on the law-making process, and the need to codify and to foster a complete (free of gaps) legal system.

In sharp contrast, Common Law marks a gradual movement from decisions to decisions. In a nutshell, common lawyers pay heed to the case law and gives emphasis to the role of judges. As a result, such a legal system does not purport to be complete.

- G/R: deducing solution from rule (theory, systematisation); Abstract in terms of legal construction
- CL: deducing solution from cases (precedents);

	Roman/Germanic Law	**Common Law**
Sources of law	Solution will be found in statutes Emphasis on codification	Case law No codification, even statutes are based on a casuistic approach
The manner in which rules are framed	General and abstract rules This trend is embedded since 18th c. Such rules can apply to a wide range of a issues for a fairly long time.	Gradual shift from case to case
Legal technique	Deduction of a solution from legal rules	Emphasis on a casuistic approach
Coherence	Well-articulated system No gaps	Reluctance towards completeness ➔ reinforcing the power of courts and the role of case law
Practitioners	Law professor = more prestigious	Courts play a more prominent role

As a matter of course, the differences in style correspond with the differences in mentalities attributable to different historical events.

The Role of Principles in both families
« The challenge however lies in the significant difference between the roles that legal principles play within these two families. Civil law jurisdictions are guided largely by statute law, whilst common law jurisdictions also recognize judge-made law as binding. Within civilian systems, judges are not allowed to create rules.[10] When adjudicating on a case, common law judges are firmly guided by the need to

[10] See French Cciv., Art 5.

adhere to the doctrine of precedent, whilst civil law judges are not bound to follow precedents. For instance, in contrast to the approach followed by common law courts, a number of civil law courts apply teleological rather than historical methods of interpretation in relation to treaties; they seek to give effect to what they 'conceive to be the spirit rather than the letter of the Treaties'.

This distinction has significant consequences for the concept of principles in both families. The concept of principle is analyzed differently from respectively civilian and common law perspectives.

Common lawyers do not generally take legal principles as their starting point, but proceed by reference to specific cases. Conversely, civilian lawyers tend to start with principles before focusing on the individual facts of the case ».

N. de Sadeleer, *Environmental Principles: from Political Slogans to Legal Rules*, 2nd ed. (Oxford, Oxford University Press, 2020) 16-17.

(iii) Distinctive institutions

Each legal order is likely to develop institutions or legal regimes that are likely to be taken over later on. By way of illustration, the trust is typical to CL whereas the ombudsman has been developed in the Scandinavian countries. The concept of obligation is fundamental in G/R family whereas that concept is unknown in English legal thought.

(iv) Legal sources

The sources of G/R family have to be linked to the importance of the lawmaker whereas CL is related to the key role played by courts in shaping the law.

According to a German scholar, the importance given to the lawmaker is embedded within the intrinsic nature of the legal family:

The codification movement, which failed to prosper in England …, expresses another characteristic feature of continental legal thought, namely the view that, ideally, the rules should all be contained in a major enactment which the judges are dutifully and obediently to apply. If a court is doing more than applying the law when it makes a decision, the decision itself can have no force as law bound the very case in which it is rendered.
This view squares with the constitutional theory propounded by Montesquieu, and generally accepted on the Continent, that the legislative, judicial and executive powers should be kept separate.
The German and the common lawyer thus have a quite different perceptions of the role of the judge'

(N. HORN et al., *German Private and Commercial Law*, Oxford, Clarendon Press, 1982, 11-12)

(v) Ideologies

Before the end of the cold war, socialist law would be ranked among the major legal systems of the world. It was deeply marked by the Marxist-Leninist ideology.

4. A wide array of classifications

Of course the whole exercise of classification is of a didactic nature. So far, scholars have proposed various classifications. To give just but a few examples:

Classification of **ESMEIN**	Roman Germanic Anglo-Saxon Slav Islamic	
Classification of **ARMINJON, NOLDE, WOLFF**[11]		Islamic French (all the countries that codified their law either in 19th or in the first half of the 20th century, using the code Napoléon as their model) German Scandinavian English Russian Hindu
Classification of **DAVID**[12]	Roman-Germanic (comprising those legal systems where legal science was formulated according to Roman law) Common Law Socialist Law Hindu, far-East, African, Jewish, …	
ZWEIGERT and KÖTZ[13]	Roman family Germanic family Common Law	

[11] *Traité de droit comparé*, Paris 1950-1952.
[12] David proposed the classification of legal systems, according to the different ideology inspiring each one. See David, R., *Droit comparé*.
[13] *An Introduction to Comparative Law*, 3rd edition, Oxford, OUP. These two authors claim that, to determine such families, five criteria should be taken into account, in particular: the historical background,

Nordic families
Families of laws of the far East
Religious families

At this stage, I would like to make a few remarks.

1. These various classifications depend on various criteria (language, subject-matters, culture, politics, ideology, religion, history, etc.). Arguably, the outcome of classification differs according to the criteria selected.

None of these classifications is less valid than another. In other words, they are all valid in their own rights provided they are based on objective criteria.

- So far, comparatists have been chiefly giving emphasis to private law in order to achieve their grouping. As a consequence, such groupings may be highly relative.

- Much depends on the period over which the classification is taking place. Does it make any sense to speak about 'socialist law' nowadays?

2. These classifications are far from being perfect. We have to be aware that on the one hand, German private law has been deeply influenced by Roman Law. On the other, German constitutional Law was conceived in line with US constitutional law. In fact, US lawyers were heavily involved in the writing of the German constitution. At an early stage, unlike other constitutions of European countries, the German constitution provides ground for judicial review of constitutional law.

→ Regarding constitutional issues, German law is closer to the US system
→ With respect to civil law, it is much closer to the other legal orders belonging to the German-Roman family.

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the characteristic way of thought, the different institutions, the recognized sources of law, and the dominant ideology.

4. Furthermore, any legal system is a product of society at a certain time in history → so these legal families will eventually change (thanks to the EU process of harmonisation).

    a. E.g. Chinese law quickly evolves with economic development.
    b. E.g. African nations live under indigenous customary law that, as a matter of course, evolves with lifestyle, language, urbanisation, etc.
    c. E.g. All African legal systems have been influenced by the legal systems of European colonisers.

5. To conclude with, one's division of the world into legal families is vulnerable to alteration by historical events as well as by the subjective perception of the scholars carrying out that kind of exercise.

5. Mattei's three paterns of law

Professional Law

This grouping encompasses the common law as well as the Romano-Germanic family. The hallmarks are:

- the rule of law (see Article 2 TEU)
- the separation of legal and political decision-making and
- the secularization of law.

The legitimacy of this system is justified by the fact that impartial and independent courts are empowered to review decisions enacted by public bodies.

Political Law

- Politics and law are not separated.
- Law is the outcome of political processes.
- Both the legislative and the executive powers are not subject to judicial review.
- Authorities are free to determine the content of their action.

This grouping includes African and South American countries, swathes of Asia (Korea, China,…).

Traditional Law

As far as religious systems are concerned, impossibility to separate the law from the religion. The interpretation of the law remains in the hands of clerics whereas in the professional western legal realm lawyers are considered as professionals. This grouping includes 1) Muslim countries 2) India 3) Asian countries where Confucian conceptions of the law prevail. By way of illustration, the *Quoran* does not enshrine principles, it merely provides in a somewhat chaotic fashion *ad hoc* decisions.

CHAPTER III - ISLAMIC LAW

WARNING: In this chapter we analyse Sharia law from a theoretical perspective. As a matter of course, this short summary does not do entirely justice to the diversity, the complexity and the richness of this legal system. Of importance is to note that only but a few countries apply traditional Sharia law. In most Muslim countries, Sharia law blends with a mixture of Western legal devices. As a result, these legal regimes are much more complex than the traditional vision explained below. In addition, it is fair to say that the author of these notes does want to disregard Muslim religion or hurt the feelings of the faithful. He merely wants to depict Sharia law from a theoretical point of view. His analysis is positivistic and does not entail value judgments. This chapter contains no image that could be considered as offensive.

I. INTRODUCTION

Regarding the traditional religious family (Mattei scheme), Islamic Law is a case in point on the account that it gives practical expression to the religious faith of the Muslim. In other words, Islamic law is one of the facets of Islamic religion itself.

In fact, one needs a minimum general knowledge of Islam to understand Muslim law, or Islamic law. In effect, the meaning of the word 'Islam' is "submission or surrender to Allah's (God's) will." Therefore, Muslims must first and foremost obey and submit to Allah's will. Mohammad the Prophet was called by God to translate verses (Ayat) from the Angel Gabriel to form the most important book in Islam, the Qur’an.

Given that there are over 1.2 billion Muslims today worldwide, over 20% of the world's population, the importance of Islamic law cannot be belittled. Our Western societies are influenced by Muslim faith. By way of illustration, the Belgian population counts 638.000 Muslims whereas the French population counts 4.700.000 Muslims.

II. SHARIA: STATE OF QUESTION

Literary 'the way to follow', ***Sharia*** is the Arabic word for Islamic law. Therefore, the term Sharia refers to the body of Islamic law. This law constitutes *'a divinely ordained path of conduct that guides the Muslim towards the fulfilment of his religious convictions'* ([14]). *Sharia* may stand as a **symbol of ideological unity of all Muslim communities** ([15]).

Given that Sharia specifies how the Muslim should conduct himself in accordance with his religion, Sharia governs both public and private lives of those living within an Islamic state. As a result, Sharia governs many aspects of day-to-day life, politics, economics, banking, business law, contract law, and social issues (prayer, fasting alms, pilgrimages, etc.).

Islamic legal theory recognizes that the divine revelation did not start out in a comprehensive fashion. It took several centuries of work by Islamic jurists to extract the full content of the recognized sources of law.

As a result, Islamic law does not conform to the notion of law as found, for example, in common law or civil law systems. Rather than a uniform and unequivocal formulation of rules it is a **scholarly discourse** consisting of the opinions of religious scholars, who argue, on the basis of what the law should be. This discourse is based on:

- the text of the Qu'ran,
- the Prophetic *ḥadiths*,
- and the consensus among the first generations of Muslim scholars,

According to Islamic orthodox views, these efforts are directed not in formulating a new law but to the discovery of a law, which already exists.

III. SOURCES OF ISLAMIC LAW

Shar'iah law has several sources from which it is possible to draw its guiding principles. It consists of:

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[14] K. ZWEIGERT & H. KOTZ, *oc,* 54.
[15] Ibid., 55.

- the ***Qu'ran*** which is the sacred book of Islam ;
- the prophet's ***Sunna*** ;
- classical *fiqh* derived from consensus of legal scholars (***ijma***);
- classical *fiqh* derived from analogy (***qiyas***).

Given that this broad definition of Sharia lumps together the revealed with the unrevealed, the sources are rather of a different nature and are not of equal importance.

- ***Qu'ran***: a fundamental revealed source
- ***Sunna***: a fundamental revealed source
- ***ijma***: a legal consensus
- ***qiyas***: a juristic reasoning by analogy.

Qu'ran as well as *Sunna* are nothing more than historical bases. It follows that Islamic law is mostly based upon *Fiqh*.

FIRST SOURCE : *QU'RAN*

The *Qu'ran* is the holy book of Islam. It is the collection of the utterances of the prophet Muhammad, which are based on divine revelation.

The *Qu'ran* is unquestionably the primary expression of Muslim law. The *Qu'ran* contains:

- 114 *sourates* (chapters)
- 6219 *ayats* (verses) among which 550 have somewhat a legal content (70 related to personal statute, 13 related to procedural law, 13 to criminal law, 10 to constitutional law, 25 to international law).

Therefore, the *Qu'ran* is far from being a legislative document on the account that it contains a great number of moral precepts of general nature (compassion, retribution, fairness in commercial dealings). There is neither legal logic nor thematic approach.

For the convenience of representation, we have chosen but a few examples.

For instance, the Qur'an admonishes those who oppress others and transgress beyond the bounds of what is right and just: *"The blame is only against those who oppress men with wrongdoing and insolently transgress beyond bounds through the land, defying right and justice. For such there will be a chastisement grievous (in the Hereafter)"* (42:42). As a matter of law, such a precept of proper ethical behaviour (take pity on the weak and helpless) does not entail any legal obligations.

Only a few statements in the Koran amount to legal rules capable of direct application. By way of illustration, the taking of life is allowed only by way of justice (i.e. the death penalty for murder), but even then, forgiveness is better. *"Nor take life - which Allah has made sacred - except for just cause..."* (17:33).

Another case in point is the Sharia prohibition specific interest or fees (known as *riba*, or usury) attached to a loan or a debt. Several verses of Sourate 2 expressly prohibit any increment on a loan or debt. Riba is considered amongst the seven heinous sins.

275. Those who devour usury will not stand…
276. God will deprive usury of all blessing, but will give increase for deeds of charity
278. O ye who believe! Fear God, and give up … usury.

By the same token, verse 310 of Sourate 30 reads as follows: '*You who have believed, do not consume usury, doubled and multiplied, but fear Allah that you may be successful'.*

To sum up, given that here is no real attempt to deal with any one legal topic comprehensively, the *Qu'ran* is not akin to a code of law. This is well explained by Coulson.

Legal nature of Shar'iah

For the first community of Muslims, founded in Medina under the leadership of the Prophet Muhammad in A.D. 622, Islam meant obedience to the will of Allah transmitted to His community through his Messenger in a series of revelations which occurred piecemeal, through Muhammad's lifetime and which, duly collected and written down, form the Quran.

But the Quran is not essentially a legislative document. It contains a great number of oral precepts of a general nature relating to such matters as just retribution, fairness in commercial dealings, and compassion for the weaker members of society, but these

norms are not generally translated into any legal structure of rights and duties. Thus, wine drinking and usury are simply declared to be 'forbidden'. Polygamy is permitted, a husband being allowed to have up to a maximum of four wives concurrently, provided he treats his wives with impartiality; but nothing is said as to the precise legal significance of this proviso or as to any remedies a wife may have in the event of its infringement. In short, the Quran is not a code of law (in the sense that it does not attempt to be comprehensive) but the basic formulation of the Islamic religious ethic.

Certainly the Quran does contain any regulations of a more strictly legal tone. These range over a wide variety of subjects and constituted far-reaching reforms of the customary tribal law of Arabia. New criminal offences, with attendant penalties were introduced-such as the penalty of flogging for fornication and for an unproved accusation of illicit sexual relations. The ***legal status of women*** *was greatly improved in a variety of respects, inter alia by the rule that the dower or payment made by the husband in consideration of marriage, belonged to the wife herself and not, …., to her father or other guardian who had given her in marriage. And yet most of these rules have the appearance of ad hoc solutions for particular problems. There is no real attempt in the Quran to deal with any one legal topic or relationship comprehensively. Its regulations set out to modify the existing customary law in certain particulars rather than to supplant that law with an entirely new system.*

The 'general nature of Qur'anic law is aptly illustrated by the provisions relating to the institution of divorce by unilateral repudiation, or talaq. Under the patriarchal customary law of Arabia the right or a husband to terminate his marriage at will by simply repudiating his wife was undisputed. The Quran makes no attempt to deprive husbands of this power, but simply urges them not to abuse it, speaking of 'releasing wives with consideration' and 'making a fair provision' for wives who are so repudiated. An existing legal institution is subjected to new moral standards directed solely, so far as the Quran itself is concerned, at the individual conscience.'[16]

[16] J. Coulson, "Islamic law", in *An Introduction to Legal Systems*, p. 54-65.

SECOND SOURCE : SUNNAH (or the Muslim Way of Life)

The *Sunnah* is the second source of Islamic law after the *Qu'ran*, and is incorporated in many books of *hadith*. The *Sunnah* gives more detailed information than the *Qur'an.* It is there to support and to interpret the fundamental text. On the account that it is a revealed source, it can be placed on equal footing with the *Qu'ran*.

Sunnah means "way" or "custom", and therefore, the *sunnah* of the prophet means "the way of the prophet", or what is commonly known as the *Prophet's traditions*. It includes traditions about what the Prophet during the 23 years of his ministry. Accordingly, the Muslim community has to behave consistently with what the Prophet

- said (sayings)
- did (deeds)
- permitted (allowances)

Sunnah must be made distinct from both:

- *fiqh*, which are opinions of the classical jurists,
- the *Qu'ran,* which is revelation, not record.

Traditions regarding the life of Muhammad and the early history of Islam were passed down orally for more than a hundred years after the death of Muhammad in 632. Two centuries later, the scholars of the Abbasid period were faced with a huge corpus of miscellaneous traditions, some of them contradicting each other. Many of these traditions supported differing views on a variety of controversial matters. As a result, scholars had to decide which hadith were to be trusted as authentic narrations and which had been invented for various political or theological purposes.

For this purpose, they used a number of techniques which Muslims now call the *« science of hadith »* (about 3000). The commonest technique consisted of a careful examination of the *isnad*, or chain of transmission. Each hadith was accompanied by an isnad: A heard it from B who heard it from C who heard it from a companion of Muhammad.

The overwhelming majority of Muslims consider ***hadiths*** to be essential supplements to and clarifications of the Qur'an, Islam's holy book.

The ***hadiths*** are collection of traditions relating to the sayings and deeds of the Islamic prophet Muhammad. Many contemporary Muslims – in particular Sunni Muslims - regard the collections of **Bukhari** (صحيح البخاري)[17] and **Muslim** (صحيح مسلم)[18] who classified the hadiths in the ninth century a.d. as particularly reliable, and tend to accept them as sure and certain, although they were compiled two centuries after the death of the Prophet. It is said that al-Bukhari collected over 300,000 hadith and included only 2,602 traditions in his *Sahih*. Hadith collections are, as a consequence, regarded as important tools for determining the *Sunnah*, or Muslim way of life, by all traditional schools of jurisprudence. That being said, Sunni and Shi'a Islam rely upon different sets of hadith collections.

THIRD AND FOURTH SOURCES : THE ROLE OF FIQH

Neither the *Qu'ran* nor the *Sunnah* could answer all questions. In situations when Muslims have not been able to find a specific legal ruling in the *Qur'an* or *Sunnah*, the consensus of the community is sought, or at least the consensus of the legal scholars within the community. It follows that the primary source of Islamic law – the *Qu'ran,* - can be subject to the interpretive power of a later source.[19]

Fiqh is the process of interpreting positive law within a systematic body of rules and principles.

By definition, *Fiqh* is the Islamic Jurisprudence. *Fiqh* in Islamic terminology means to extract religious rulings on practical matters from the main sources of Islam (i.e. Qur'an and *Sunnah* as well as other sources). *Fiqh* literally means to "*comprehend and understand*" (Qur'an 3:7 and 4:162). The science of *Usul al Fiqh* engenders the ability to have knowledge of *Shari'ah* rulings through study. The real beginning of Islamic law, as law, took place one hundred years after the death of the Prophet when non-formal and administrative practices began to be formally expressed by jurists in a doctrinal form.

Fiqh covers not only civil and criminal law but also food, hygiene and prayer.

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[17] Sahih al-Bukhari is a collection of hadith compiled by Imam Muhammad al-Bukhari (d. 256 AH/870 AD) (rahimahullah). This collection is recognized by the overwhelming majority of the Muslim world to be the most authentic collection of reports of the *Sunnah* of the Prophet Muhammad.

[18] Sahih Muslim is a collection of hadith compiled by Imam Muslim ibn al-Hajjaj al-Naysaburi (rahimahullah). Along with Sahih al-Bukhari, this collection is considered to be one of the most authentic collections of the Sunnah of the Prophet.

[19] H.P. Glenn, *Legal Traditions of the World* (Oxford, OUP, 2004) 189.

This jurisprudence (*Fiqh*) is made up of the **rulings (*Fatwah*)** of Muslim Islamic jurists **(*Ulama*)** with the aim of directing the lives of the Muslims.

When a Muslim has a question that needs to be answered from an Islamic point of view, s/he shall ask an Islamic scholar to answer her/his question ; the answer is known as a "fatwa". In other words, a *fatwā* is an Islamic religious ruling, a scholarly opinion on a matter of Islamic law.

Fatwā are deemed to be binding precedent by those Muslims who have bound themselves to the scholar who handed them down. The people who pronounce these rulings (an issuer of fatwā is known as Mufti) are supposed to be knowledgeable, and base their rulings in knowledge and wisdom. They need to supply the evidence from Islamic sources for their opinions. Fatwās generally set out the scholar's reasoning in response to a particular case. Given that Islam is very non-hierarchical in structure, it is not uncommon for scholars to come to different conclusions regarding the same issue. Of importance is that the binding effect of *fatwā* is likely to vary. Since there is no hierarchical priesthood or anything of the sort in Sunni Islam, *fatwā* is non-binding for Sunnis, whereas in Shia Islam it could bind an individual depending on his relation to the scholar.

By way of illustration, a person who is going to be on a 12 hour flight may not be able to perform his/her prayers on time. So s/he might ask a Muslim scholar his opinion on the matter. The scholar might advise him/her to delay his/her prayer until the airplane lands. His opinion is likely to be supported with evidence extracted from the *Qu'ran or the Sunnah*.

The **Ulama's** are Muslim scholars who are specialized in Islamic law (mufti, qadi, faqih). When the *Ulama*'s reach a consensus on an issue, it is interpreted as ***Ijma***. Sunni Muslims regard *ijma* as the third fundamental source of *Sharia* law, after the divine revelation of the *Qu'ran,* the prophetic practice or *Sunnah*.[20] *Ijma* means the consensus of the *ummah*. In other words, this is an agreement among the qualified scholars, or followers of Islam. It is a genuine product of schools of law. In reality, *ijma* referred only to the consensus of traditional Islamic scholars (Arabic *ulema*) on particular points of Islamic law.

Given that the Prophet Muhammad once said that *« My community will never agree upon an error »,* such a consensus is deemed infaillible. This hadith is often cited as support for the validity of *ijma*.

[20] For Shia, the status of ijmā is ambiguous.

Attention should be drawn to the fact that *Ijma* has nothing to do with the custom of western legal systems. In order that a rule of law be admitted by *ijma*, it is not necessary that the mass of the faithful support it. The unanimity required is that of competent persons, those whose special role is to discover and reveal the law (the legal scholars of Islam which are the heirs of the prophet).

Various proponents of liberal movements within Islam criticize the traditional view that ijma' is only a consensus among traditional Islamic scholars (Arabic *ulema*). They claim that truly democratic consensus should involve the entire community rather than a small and conservative clerical class.

The issues with which the scholars of al *Usul* are primarily concerned include the following:

- Logic and its predications
- Linguistics
- Commands and Prohibitions
- Deeds (in particular, those of the Prophet)
- Consensus *al Ijma'*
- Narrations relating to the Sunnan
- Analogical reasoning *al Qiyas*
- Following a specific school of legal thought *Taqlid*

To conclude with, if the *Qur'an* consists of some 500 verses, the work of the Islamic jurists now fills libraries.[21]

[21] R. Arnaldez, *La loi musulmane* (1993) 85.

FOURTH SOURCE : QIYAS

The main sources could not provide for all the possible situations of everyday life.

Given these limitations, the *Shar'iah* judge can use the legal precedent to decide new case law and its application to a specific problem. In other words, the judge can use a broad legal construct to resolve a very specific issue. The *Qiyas* are not explicitly found in the *Qur'an, Sunna*, or given in the *Ijma.*

Sunni Islam uses *qiyas* as the fourth source, whereas *Shi'a* Islam uses 'aql' (intellect).

In Sunni Islamic jurisprudence, ***qiyas*** is the process of analogical reasoning from a known injunction to a new injunction.

According to this method, the ruling of the *Quran* and *sunnah* may be extended to a new problem provided that the precedent and the new problem share the same operative or effective cause (***illah).***

However, a hard core of traditionalists still adamantly reject the validity of these interpretative processes.

Example of *qiyas*

(i) For example, a computer crime or theft of a computer is found neither in the Qur'an nor Sunna. Nonetheless, the act of theft as a generic term is prohibited. As a result, the judge must rely on logic and reason to create new case law or Qiyas.

(ii) The rule as regards the minimum dower payable by the husband on marriage was unclear.

In the Maliki school, an attempt has been made to base the rule of the minimum dower on *qiyas*. A rough parallel has been drawn between amputation of the hand, as the penalty prescribed by the Koran for theft, and the loss of a woman's virginity as the physical result of marriage. Since the Prophet had ruled that the penalty of amputation was not applicable unless the stolen goods reached a minimum value of three dirhams, the husband in respect of marriage should pay the same sum.

(iii) For example, qiyas is applied to the injunction against drinking wine to create an injunction against cocaine use.

1. Identification of a clear, known thing or action that might bear a resemblance to the modern situation, such as the wine drinking.

2. Identification of the ruling on the known thing. Wine drinking is harram, prohibited.

3. Identification of the reason behind the known ruling ('illah'). For example, wine drinking is haram because it intoxicates. And intoxication is bad because it removes Muslims from God's mindfulness.

The reason behind the known ruling is applied to the unknown thing. For instance cocaine use intoxicates the user, removing the user from mindfulness of God. It is therefore prohibited.

THE USE OF STRATAGEMS OR HIYAL

The Sharia is highly formalist: it requires that the letter of the law rather than its spirit be respected. Many formal rules can therefore be circumvented provided that there are not directly violated.

Through the use of contract considerable changes can be made in the rules suggested, but not imposed by Muslim law. Therefore, there are possibilities for developing Muslim law through private contract.

Marriages

Polygamy and husband's repudiation of his wife are permitted. However, Muslim countries allow husbands and wives to stipulate at marriage that the wife will be allowed to exercise her husband's prerogative, and as a result, will be at liberty to repudiate herself or that she will be able to do so if the husband does not remain monogamous. Other contracts could

award the wife substantial damages if she is unjustly repudiated by her husband.

Loans bearing interests – device of a double sale

Loans at interest are rendered impermissible by the prohibition of usury (*Riba*) in the *Qu'ran*. This prohibition prevented the creation of a favourable environment for trade. As a result, the device of the double sale has been used with a view to circumventing that prohibition. In that case, the borrower is selling some object to the lender, which the lender immediately sells back to the borrower at a higher price. The increased price represents in fact the agreed rate of interest payable by a future specified date.

Hanafi and Shafii courts generally accept the validity of such hiyal.

It is also possible to hold that the ban on interest loans applies only to physical persons. Therefore, banks are exempted from this obligation.

IV. SUNNIS AND SHIITES: THE GREAT DIVISION

Within the Muslim community different schools are admitted, each of which maintains a particular interpretation of Muslim law. One has to distinguish between the Sunnis and the Shiites.

The Shiites

Shiites have their own version of Sharia Law. Among the various sects the numerically strongest group is that of the Shiites (mostly in Iraq and in Iran).

Shiites differ from the Sunnites in their **concept of constitutional law (caliphate).** The Shiites consider the divine character of leadership. The caliphate can be hold exclusively by a member of the Prophet's family. The successor of Mohammad must be made between the descendants of Ali, his son in law, who were twelve in number. Accordingly, they consider themselves as legitimists.

To understand the schism, one has to look at a major historical event. The Muslim world quickly became divided after the death of the Prophet given that he did not regulate his succession. The **battle of Kerbala** has a central place in Shia history and tradition. It took

place between a small group of supporters and relatives of Muhamad's grandson, Husayn Ibn Ali and a larger military detachment from the forces of Yazid, the Ummayad Calife. Huseyn was killed and beheaded in the battle, along with most of his family and companions. In contrast to the Sunnis, **Shiites** believe that the fourth caliph, Husayn Ibn Ali, had previously been nominated by Muhammad as his heir. They are taking the view that the rulers who followed Muhammad as illegitimate. Instead, the rightful successors of Muhammad are believed to be Ali and eleven divinely-appointed Imams of his lineage. Given that the twelfth Iman did not have any heir (931 AD), Shiites are facing the absence of a legitimate religious figure.

The imams (*ayatollahs*) play in the Shiite world an almost exclusive role as source of law and provider of opinions (*fatwahs*) (see the role of Ayatollah Kohmeini in Iran).

	Sunnis	**Shia (or Shi'ah)**
Origins	Theology developed especially in 10th cent.	A small part of the Muslim community believed that the Prophet's son-in-law and cousin, Ali, should be Caliph. They understood that the Prophet had appointed him as the sole interpreter of his legacy, in both political and spiritual terms. Thus the killing of Ali's son Husayn in 680 AD (battle of Kerbala) is a major event
Did Muhammad designate a successor?	No. The calife is a human leader designated by the Muslim community.	Yes. The Calife must be seen as the infaillible manifestation of God and the perfect interpreter of the Qur'an
Current adherents	940 million (90% of the Muslim population)	120 million (10% of the Muslim population)
Primary locations	The majority of Muslim countries	Iran, Irak, Yemen, Pakistan, Afghanistan, Azerbaidjan
Religious authority other than the Qu'ran	ijma' (consensus) of the Muslim community	Infaillible Imams
Sources of Muslim law	Sunnis consider all Hadith and Sunnah narrated by any of twelve thousand companions to be equally valid.	Shi'as give preference to sunnah and hadith credited to the Prophet's family and close associates.
Hiearchy of the clergy	None	There is a hierarchy to the Shi'a clergy and political and religious authority is vested in the most learned who emerge as spiritual leaders.

Sunni Islam

On the other hand, the **Sunni** branch takes the view that the first four caliphs - Mohammed's successors - rightfully took his place as the leaders of Muslims. They recognize the heirs of the four caliphs as legitimate religious leaders. The calife has to be elected, it can also be destituted. The caliphs ruled continuously in the Arab world until the break-up of the Ottoman Empire at the end of the First World War.

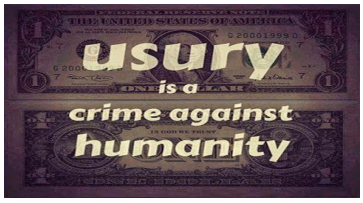
The four schools of Sunni Islam are each named by students of the classical jurist or *ulama* who taught them. The *Sunni schools* are:

- **Shafi'i** It has spread Far-East (Indonesia and Malaysia)
- **Hanafi** has the greatest number of adherents. It has spread North and East (Turkey, the Balkans, Central Asia, Indian subcontinent, Egypt, China)
- **Maliki** prevails throughout the Western part of the muslim world (North Africa, West Africa and several of the Arab Gulf states)
- **Hanbali** (Arabia). That school endorses a literal interpretation of the Qu'ran. It has long held sway in Saudi Arabia.

These schools share the same fundamental structure of doctrine and the same basic legal institutions. Indeed, these four schools share most of their legal sources, but differ on the particular *hadiths* they accept as authentically given by Muhammad and the weight they give

to analogy or reason (*qiyas*) in deciding difficulties. As a result, they differ both in terms of substantive and in terms of sources of law.[22]

For instance, the grounds of divorce vary from school to school. They are also important differences in the extent of the prohibition of *riba* (usury). The differences result from the different *hadiths* adopted by each school and the particular forms of *ijma*, which they had developed.



Nevertheless, each law school recognized the legitimacy of diverging interpretations. According to the Prophet, '*difference of opinion within my community is a sign of the bounty of Allah'*. It follows that the different versions of the holy law are seen as divinely ordained.

Since the notions of difference between schools and consensus (*ijma*) are inherently reconciliable within Islam, it follows that Muslims may freely change schools when the need presents itself.[23] As a result, there is no notion of conflict of laws or evasion of law within Islam. Exit from a given school to join another is always possible.

The following extracts summarize the historical developments of Sharia.

Historical development of Sharia

'Up to the year A.D. 661 Medina continued to be the centre of Muslim activity. During his lifetime Muhammad was accepted as the supreme arbitrator of the community and solved legal problems, as and when they arose, by interpreting the relevant Quranic revelations. After the Prophet's death in 632 the mantle of his judicial authority was assumed by the Caliphs, who succeeded to political leadership (...)

[22] Glenn, above, 195.
[23] Glenn, above, 196.

Under 'the hegemony of the Umayyad dynasty (A.D. 661-750), Islam was transformed from the small and closely knit religious community of Medina into a vast military empire with its central government at Damascus. Local governors were appointed to control the affairs of the conquered provinces, and it became standard practice for the local governor to delegate his judicial powers to an official known as the qadi. It was the activities of the qadis, or judges, that produced a growing diversity in Islamic legal practice.(...)

Many scholars now devoted themselves to the task of documenting the sunna through the collection and classification of hadiths, and during the latter part of the ninth century several compilations of hadiths were produced which claimed to have sifted the genuine from the false. Two such manuals in particular, those of ***al'Bukhari*** *(870) and* ***Muslim*** *(875) have always enjoyed a high reputation as authentic accounts of the sunna of the Prophet.*

But despite this activity in support of Shafi doctrine, his dream of a basically uniform and common law for Islam was not to be realised. In fact, as a result of his work two more schools of law were formed in addition to those which already existed.(...)

Geographically, from medieval times onwards, the division between the schools was well defined, inasmuch as the courts in different regions of Islam had gradually come to apply the doctrine of one particular school-whether as a result of the voluntary adoption of a school by the population of a given area or because the political authority appointed judges who were wedded to the doctrine of a particular school.

Thus, broadly speaking ***Hanafi law*** *became to predominate in the Middle East and the Indian Sub-continent,* ***Maliki law*** *in North, West and Central Africa and* ***Shafi law*** *in East Africa and parts of the Arabian peninsula, Malaysia and Indonesia. The* ***Hanbali school*** *did not succeed in gaining any real territorial do until it was officially adopted by the political Wahhabi movement, ..., since when it has been the law applied by the courts in Saudi Arabia.*

It is true that the several schools have the ***same fundamental structure of doctrine and the same basic legal institutions****. (....) The philosophy of the mutual orthodoxy of the schools should not obscure the fact that geography and history created a four-fold division in the legal practice of Sunni Islam.*

***Sunni**, or orthodox' Islam is the term used to distinguish the vast majority of Muslims from certain minority groups or sects of Muslims who diverge from the Sunnis on basic theological issues and tenets.*
*Among these important sects the numerically strongest group is that of the **Shi'a**, who oppose the Sunni belief that Muhammad was the last person to have contact with the divinity and maintain that after his death divine inspiration was transmitted to the line of his descendants through his surviving daughter Fatima. These descendants of the Prophet are recognised by the **Shi'a** as rulers, or Imams, by divine right. The Shi'a possess their own particular version of Sharia law (….).”*[24]

By way of illustration, Shiite law and Sunni law differ as regards **the position of the female and non-agnatic descendants of the deceased vis-à-vis the collaterals**.

- The former recognizes that any lineal descendant will totally exclude all collaterals (brothers, sisters and grandparents) from inheritance. As a result, rights of inheritance are awarded to certain close female relatives (wife, daughter). It follows that the rights of females prevail over the rights of the extended tribe. Accordingly, Shiite law rests firmly upon the predominance of the narrower tie of relationship existing between parents and their descendants.

- In contrast, in Sunni law, the daughter does not exclude male agnate collaterals, however remote. It recognises the claims of agnate collaterals, that should prevail over the claims of the descendants. From a Sunni perspective, Qu'ran is rather an adaptation of customary tribal rules from Arabia than a real departure from tradition. From a practical point of view, Sunni law endorses the concept of the extended family or tribal group.

Although there are many aspects of the laws of inheritance upon which the Sunni schools are divided among themselves, the fundamental scheme of succession common to them all. In particular, they all subscribe to the basic principle, that is the male agnates who have pride of place as legal heirs. In total contrast, Shii law wholly

[24] N.J. Coulson, “Islamic law”, in *An Introduction to Legal Systems*, p. 54-65.

repudiates the of the agnatic tie. As for the male agnates,' the Shi'a Imam Jafar is alleged to have said, 'dust in their jaws.' According to Shi'a law, all relatives, male and female, agnate and non-agnates, are integrated into a single system of priorities, under which parents and lineal descendants exclude brothers and sisters and grandparents, who in turn exclude uncles and aunts and their issue.

It is perhaps in the position of the female and non-agnatic descendant of the deceased vis à vis the collaterals that the divergence between the two systems is at its most apparent. In sunni Law the daughter does not exclude male agnate collaterals, however remote, while dauhger's children, male or female, are totally excluded by any male agnate collateral. In Shi'a law, on the other hand, any lineal descendant will totally exclude all collaterals from inheritance.

This distinction has both a social and juristic significance. From the standpoint of social relationships Sunni law, recognising the claims of the agnate collaterals, embodies the concept of the extended family or tribal group."

N.J. Coulson, "Islamic law", in *An Introduction to Legal Systems*, p. 65

V. DEVELOPMENTS AFTER THE 19th CENTURY

During the 19th century the history of Islamic law took a sharp turn due to new challenges the Muslim world faced.

Firstly, societies underwent transition from the agricultural to the industrial stage.

Secondly, new social and political ideas emerged and social models slowly shifted from hierarchical towards egalitarian. Secularist movements pushed for laws deviating from the opinions of the Islamic legal scholars. In this connection, let's mention the role played by 2 key political figures in the course of the XXth c.

- **Mustafa Kemal Atatürk** introduced a radical departure from previous reformations established by the Ottoman Empire. For the first time in history, Islamic law was separated from secular law, and restricted to matters of religion. He ushered in major legal reforms. By way of illustration, on 1 March 1926, the Turkish Criminal Code was passed. It was modelled after the Italian Penal Code. On 4 October 1926, Islamic courts were closed.

- **Gamal Abdel Nasser Hussei** overthrew of the monarchy in 1952. Served as president from 1956 until his death in 1970. He had used ulema (scholars) as a counterweight to the Brotherhood's Islamic influence.

Thirdly, the emergence of Western hegemony greatly affected the legal systems in the Islamic world. In effect, the West had risen to a global power and colonized a large part of the world, including Muslim territories. As a result, Islamic influence has been quite diluted. Western-style legislation prevailed but for rules on marriage, filiation, inheritance, family life, etc.. Islamic law remained thus peripherical to public life.

Accordingly, in Muslim countries, codified state law started replacing the role of scholarly legal opinion. For instance, in most Islamic countries that came under European colonial rule, *Shari'a* criminal law was immediately substituted by Western-type criminal codes (e.g. Nigeria). In 1927, Turkey abandoned the *Shari'a* in favour of the adoption of the Swiss family law in its place. By the same token, the Egyptian civil code of 1949 conceived by Al-Sanhuri has been seen as a model for a number of countries in the region (Syria, Kuwait, Libanon, etc.).

To conclude with, Sharia law has been adapted in a variety of ways to the circumstances of contemporary society. Thus despite the claim to control the totality of human life, the

practical significance of Sharia is nowadays confined to the area of private law. Indeed, several legal disciplines (criminal law, land law, commercial law) could not tolerate anymore the cumbersome nature of Sharia procedure, according to which the plaintiff was obliged to produce two male, adult, Muslim witnesses to support his claim.

However, with the Iranian revolution (1979), Sharia made a vigorous return. It was back at centre stage of political life of most Muslim countries. In particular, after the Arab spring revolutions, in many countries with a sizeable Muslim population (Egypt, Tunisia), the enactment of all modern legislation 'is subject to scrutiny of its compatibility with Islamic law'.[25] What is more, the havoc wrought by ISIS in Irak and Syria and the mayhem caused by Boko Haram came recently to limelight.

J. Coulson's chapter on "Islamic law" in its *Introduction to Legal Systems* highlights the ever-increasing gap between theory and reality.'

'But for two principal reasons the medieval legal manual are far from presenting a factual picture of the laws that govern the Muslims today.

a) In the first place law in contemporary Islam is by no means exclusively Islamic. Inevitably perhaps, in Islam as in other philosophies of life, there has always existed some degree of conflict between theory and reality and of tension between the religious idealism of the doctrine and the demands of political, social, and economic expediency. On grounds of practical necessity Muslim states and societies have recognised and applied laws whose terms are contrary to religious doctrine expounded in the medieval legal manuals. Within the vast geographical spread of Islam and the many different peoples who make up its four hundred million adherents, customary law has always controlled many aspects of life. And in recent times an ever-increasing field of legal relationships has become governed by laws imported from foreign, and particularly European, sources.

Behind this complex diversity of current legal practice the Sharia may stand as a symbol of the ideological unity of all Muslim communities and, in so far as it is applied in practice, may be regarded as the common law of Islam. Nevertheless, Sharia doctrine forms only part of the law applied by Muslim courts.

b) The second reason why the medieval Sharia texts can no longer be regarded as complete authorities for current law in Islam is the fact that the doctrine they expound does not today have a paramount or exclusive validity as the expression of Sharia law. In several Muslim countries now apply laws which are at variance with the dictates of the traditional authorities but which purport none the less to represent a legitimate version of Allah's law. These recent developments have given to Islamic

[25] C. MALLAT, 'Comparative Law and the Islamic Legal Culture', in *The Oxford Handbbook of Comparative Law* (OUP, 2006) 611.

law a new historical perspective. Sharia doctrine, which grew to maturity in the first three centuries of Islam and which then remained essentially static for a period of ten centuries, appears now in the course of further evolution.
It will be evident from these introductory remarks that Sharia law today has been conditioned by a legal history in Islam extending over almost fourteen centuries.

J. Coulson, "Islamic law", in *An Introduction to Legal Systems*, 64.

VI. DIFFERENCE BETWEEN ISLAMIC LAW AND WESTERN LAW

As opposed to Western law which is entirely secular, the system is essentially religious in nature. It follows that the unique ground of validity of Islamic law is that it is the manifested will of the Almighty; it does not depend upon the authority of the lawmaker.

The consequences of this difference are manifold:

1.THEOCRACY: As a theocratic society, Islam considers the state to be the servant of revealed religion. As a result, **Sovereignty is vested exclusively in Allah**. In other words, 'God is the absolute Lawgiver'. '*No other entity, institutions or power, personally or collectively, can have sovereign rights over other members of that community'.* As a result, *'the Islamic State has only a limited derivative legislative power'* ([26]).

Hence, there is **no separation of church and State**. The religion of Islam and the government are one. Islamic law is controlled, ruled and regulated by the Islamic religion. The theocracy controls all public and private matters. For instance, According to Article 1 of the Basic Law of Saudi Arabia, "The Kingdom … is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet (God's prayers and peace be upon him) are its constitution."

2. GEOGRAPHICAL SCOPE: Islamic law stands in sharp contrast to Western law on the grounds that it represents a personal rather than a territorial system of law. Put it simply, obligations tend to be more personal than territorial. In effect, Islamic law is based on religious prescriptions, which are binding to all members or the faith irrespective of geographical or national links. However, according to Western legal traditions, there is one legal system. Within the country's boundaries, all citizens are bound by that system.

[26] SHAMIN, *Islamic law and its Implications for the Modern World,* Ragston, 1989.

Moreover, as soon as they cross the border, they become bound by the legal system of the adjacent country.

3. COMPLETENESS OF AN ALL-ENCOMPASSING LEGAL SYSTEM: Given that Islamic law reflects the will of Allah rather than the will of the human lawmaker, it covers all areas of life and not simply those that are of interest to society. Sharia regulates thus every aspects of life. Indeed, it deals with subjects as diversified as

- **ritual practices and ethic duties**, such as fasting, prayers, alms, and pilgrimage, permissible foods and dress,
- the **prohibition of specific behaviours** (drinking, homosexuality, adultery, fornication,…).
- and those topics which are strictly legal in the western sense of the term.

As a result, Islamic law is intended to be complete supplying the answers to all questions.

4. ABSENCE OF RIGHTS: Sharia is centred on the idea of man's obligations rather than on any rights he might have. The issue of rights, in the subjective sense, is absent from Islamic law.[27] Islamic law does not contemplate an individual potestas.

5. COHERENCE: From a legal point of view, the organisation of the Qu'ran is not systematic at all. Therefore, 'the structure of Islamic law cannot be made systematic, in any western sense.'[28]

6. IMMUTABILITY: Islamic law is in principle immutable given that Islam starts from the proposition that all existing law comes from Allah who at a certain moment in history revealed it to man through his prophet Muhammad. The Allah's law was given to man once and for all. Because Muslim law is based on religious tenets, it is divinely inspired and essentially non-rational.

7. DIVINELY INSPIRED: Because Muslim law is based on religious tenets, it is divinely inspired and essentially non-rational. Muslim lawyers resist abstraction, systematization and codification. For instance, there is no comprehensive theory of obligations such as in the Western European countries. One is also struck by the lack of legal certainty. Since the

[27] Glenn, above, 192.
[28] Glenn, above, 191.

Muslim scholars interpreted the hadiths in different ways, one often encounters various opinions with regard to a single legal issue.

Given that it was stabilised during the middle Age, Islamic law is conservative, not to say archaic. The idea to adapt the fikh to contemporary situations is completely foreign to the whole system. For that reason, Islam regards with suspicion all forms of legal reasoning which enable the law to evolve. As a result, the Fiqh has been unable of adapting to modern societies.

Extracts from 'Islam's philosophical divide. Dreaming of a caliphate', *The Economist*, August 6th 2011, 21

The statistics do not look very encouraging. Of the 50-plus countries where Muslims are in the majority only two enjoy political liberty …
More than most other religions, the founding texts of Islam include very specific injunctions about crime, punishment and family law. By modern standards these commands are anything but liberal. The Koran mandates flogging for unlawful sex, and a strongly held tradition ascribes to Muhammad the view that adulterers should be stoned to death. Over inheritance, the Koran is also specific – a daughter is entitled to have half as much as a son – and the various legal schools of Islam are even more so, setting out with absolute precision the entitlement of each distant relative.
In most understandings of liberal democracy, penal and civil codes are a matter for the people's freely elected representatives to decide, within the confines of a humanly drafted constitution. How can that possibly be reconciled with the notion that such questions have been settled for ever by divine revelation?
Contemporary Muslims acknowledge that the issue is a tricky one. If the Koran is a revelation of God, then its prescriptions cannot simply be dismissed as irrelevant or outdated.

Application of Sharia law in the Western World

Sharia law can be applied in all those States as a source of foreign law in the event of a conflict of laws in the context of private international law. In such cases, however, Islamic law is not applied as such but as the law of a (non-European) sovereign State, subject to the requirements of public-policy.

In addition, recourse to Sharia Councils is provided for by law in a few Western States (the United Kingdom, the Ontario Province in Canada). Such councils operated as arbitration tribunals. However, the recourse to these councils is an option and not an obligation for Muslims living in these entities. The civil courts can take Sharia law into consideration in their own decisions. However, these Sharia Councils decisions cannot undermine the application of civil law and the jurisdiction of the civil courts.

Comparison between Muslim and Canon Law

Like canon law, Muslim law is the law of the church. Beyond this similarity, there are fundamental differences between the two legal systems.

- Muslim law is an integral part of the Muslim religion. It is part of the revealed character of that religion. No authority in the world can change this law. The Muslim who does not obey is a sinner, even a heretic, who must be excluded from his community.

- In contrast, Christianity spread in a Roman society where law was of great importance. Christianity never claimed to replace Roman law. The church did not take the place of Roman law.

- Finally, canon law is not a complete legal system. It is only a complement to Roman law and other civil rights. It is the work of man, not the word of God.

The Christian religion was therefore able to develop in the West in parallel with Roman law. In fact, Roman law was taught in universities approved by the Popes in the Middle Ages[29].

VIII. CRIMINAL LAW

The three major crime categories in Islamic Law are:

1. *Hadd* [plural *Hudud*] Crimes (most serious).
2. *Tazir* Crimes (least serious).

1. Hadd Crimes

Classic Sharia identifies the most serious crimes as those mentioned in the *Qu'ran.* Provisions regarding offences mentioned in the *Qu'ran* (murder, apostasy from Islam, making war upon Allah and His messengers, theft and adultery) and constituting violations of the claims of God (*ḥuqūq Allāh*), with mandatory fixed punishments (*ḥadd*, plural *ḥudūd*).

These crimes have fixed punishments because God sets them. These are ***Hadd*** crimes or crimes against God's law. The punishment prescribed under *Hadd*, cannot not be varied, increased and decreased. In other words, they have no minimum or maximum punishment attached to them. Accordingly, the judge is not endowed with discretion whatsoever.

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[29] R. David et C. Jauffret Spinosi, *Les grands systèmes de droit contemporains,* 11e édition, Paris, Dalloz, 2002, p. 358-359.

- Adultery[30]: death by stoning.
- Highway robbery: execution; crucifixion; exile; imprisonment; or right hand and left foot cut off.
- Theft: right hand cut off (second offence: left foot cut off; imprisonment for further offences).
- Slander (the unfounded accusation of unlawful sexual intercourse): 80 lashes
- Drinking wine or any other intoxicant.
- Fornication: 100 lashes in public and exile for 1 year.

Adultery belongs to the class of *hadd* crimes which are subject to specified punishments.

The Quoran is dealing with **adultery** in the following verses.

- "Nor come nigh to fornication/adultery: for it is a shameful (deed) and an evil, opening the road (to other evils)." [Quran 17:32]
- "The woman and the man guilty of fornication/adultery,- flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment." [Quran 24:2]

According to traditional jurisprudence, four witnesses are required to prove the offense. Making an accusation of zina without presenting the required eyewitnesses is called *qadhf*, which is itself a *hadd* crime.

- "And those who accuse chaste women then do not bring four witnesses, flog them, (giving) eighty stripes, and do not admit any evidence from them ever; and these it is that are the transgressors. Except those who repent after this and act aright, for surely Allah is Forgiving, Merciful." [Quran 24:4-5]

Although stoning is not mentioned in the Quran, all schools of traditional jurisprudence agreed on the basis of hadith that it is to be punished by stoning if the offender is *muhsan* (adult, free, Muslim, and having been married). This view is supported by the following hadith:

'Ubada b. as-Samit reported: Allah's Messenger as saying: Receive teaching from me, receive teaching from me. Allah has ordained a way for those women. When an unmarried male commits adultery with an unmarried female, they should receive one hundred lashes and banishment for one year. And in case of married male committing adultery with a married female, they shall receive **one hundred lashes** and be **stoned to death** »(Sahih Muslim 17 :4191).

[30] In the Shafii, Hanbali, and Hanafi law schools the lashing is imposed for the married adulterer and his partner only if the crime is proven, either by four male adults eyewitnessing the actual sexual intercourse at the same time or by self-confession. In the Maliki school of law, however, evidence of pregnancy also constitutes sufficient proof.

The Quoran is dealing with **apostasy** in many of its verses.

- Make ye no excuses: ye have rejected Faith after ye had accepted it. If We pardon some of you, We will punish others amongst you, for that they are in sin. (Quran 9 : 66)
- He who disbelieves in Allah after his having believed, not he who is compelled while his heart is at rest on account of faith, but he who opens (his) breast to disbelief-- on these is the wrath of Allah, and they shall have a **grievous chastisement**. (Quran 16 : 106)

Until the late 1800s, the vast majority of Islamic scholars in both Sunni and Shia schools held that for adult men, **apostasy** in Islam was a crime as well as a sin, an act of treason punishable with the death penalty. As of 2016, the major schools of Islamic jurisprudence, and most scholars therein, continue to hold the traditional view that the death penalty is required by both the Quoran and Hadiths. However, Western Muslim scholars argue that the death penalty is an inappropriate punishment.

Extract of "Islam and punishment. By the book", *The Economist*, July 4th 2015, p. 52

"Islam's sacred texts are not more bloodthirsty than those of Judaism and Christianity. The Old Testament names 36 misdeeds… as meriting death; the Koran just two hiraba ("spreading mischief") and murder. It says that the family of a murder victim may forgive and therefore spare the killer. Death, stoning, amputation and the lashes are reserved for a small number of serious crimes, including theft and adultery, collectively known as hudud.

Under the Ottoman empire, just one person was stoned to death in 600 years. But since the early 1970s, when only Saudi Arabia ruled according to the Koran, the trend has been for ever-harsher punishments. In 1979 post-revolutionary Iran brought in Sharia; Pakistan, Afghanistan and Sudan soon followed. In 2014 Brunei introduced a strict sharia code; ….

"spreading mischief", literally meaning "waging death against Allah and his angels", is generally now taken to include homosexuality and apostasy. Such definition-stretching is possible since Islamic law relies on not only the Koran, but also thousands of hadith.. For some crimes, judges can choose to order whippings and the like, even if the Koran does not insist on it.

The intertwining of state and religion is only a partial explanation. Though all Muslim countries mention Islam in their constitutions, they differ in the weight they give it. Saudi Arabia and Pakistan regard it as the only source of law. But far more pick and mix. Egypt's criminal code is inspired by those of Britain and France. Across much of Irak, tribal law holds sway.

(….)

Reformist scholars point to Koranic verses and hadith in favour of mercy, and the strict conditions set for the harshest punishments. A conviction for adultery, for example, requires eyewitness testimony from four male Muslims- a high bar. They argue that the use of religion to cloak political decisions is distorting Islam to such an extent that some rulings contradict the Koran. Today adultery is punishable by stoning, whereas the Koran prescribes 100 lashes… According to Sadakat Kadri, a barrister in London…., when Islam was founded that was rather progressive.

(…)

Liberal lawyers in Saudi Arabia want more penalties codified to stop judges using harsher sentences than prescribed: more than half of 2015's sentences have been for crimes for which other sentences were available. Still, a lawyer I Riyadh points out that brings you only so far. "It's impossible to get away from the fact that the current jurisprudence says lashes, stoning and the death penalty are required in certain cases". (…)"

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2. <u>Tazir Crimes (or misdemeanor)</u>

While *Hadd* crimes are crimes against God's law, *Tazir* crimes are crimes against society. Given that these crimes are not mentioned in the *Qu'ran*, they are deemed to be less serious than *Hadd* crimes. They can be administered at the discretion of the judge, called a Qadi. In sharp contrast to Hadd crimes, there is no fixed punishment. Accordingly, the quadis are free to punish the offender in any appropriate way. T*azir* punishments vary according to the circumstances: they change from time to time and from place to place. They vary according to the gravity of the crime and the extent of the criminal disposition of the criminal himself. The judge can choose the punishment (flogging, seizure of property, confinement).

3. <u>*Qesas* Crimes and *Diya*</u>

Islamic Law has an additional category of crimes (*Qesas* crime). Traditional *Qesas* crimes include:

1. Murder (premeditated and non-premeditated).
2. Premeditated offences against human life, short of murder.
3. Murder by error.
4. Offences by error against humanity, short of murder.

This is one of retaliation (or blood money). The victim has a right to seek either retaliation or

retribution. With respect to the former, the family of the victim has a right to seek *Qesas* punishment from the murderer. Punishment can also come in the form of a retribution "*Diya."* *Diya* is paid to the victim's family as part of punishment.

One of the most serious limitations on the efficiency of Sharia courts lay in the rigid system of evidence. The plaintiff bears the burden of proof: the plaintiff must produce two male, adult, Muslim witnesses '*whose moral integrity and religious probity are unimpeachable'*. If the plaintiff fails to discharge this burden of proof, the defendant is offered the oath of denial. Given the rigidity of this procedure, Sharia courts appeared to be unsatisfactory organs for the administration of certain spheres of the law ([31]).

[31] K. ZWEIGERT H. & KOTZ, oc, 67-68.

IX. PRIVATE LAW: THE MARRIAGE

1. Introduction

In Islam, both genders are considered equal in value. At the same time, Islamic law recognizes the differences between genders, resulting in different rights, obligations, and distinct roles.

Marriage is a social obligation and is registered by the *Kazi* who performs a short ceremony. **Formalities** are rather simple: the contract is signed when entering the marriage. Furthermore, permission must be granted by the father.

However, spouses have to fulfil several **conditions**:

- Women have to be chaste. Accordingly, a fornicator can only marry another fornicator.
- Women must choose a Muslim husband to marry; however, men can choose a Christian or a Jewish bride.
- The husband must pay for the wife's expenses.
- The wife is not allowed to leave her house against her husbands will.
- The marriage is aimed to be permanent, but can be terminated by the wife or husband engaging in the *Talaq* (divorce) process.
- The couple inherit from each other.

When a couple are to be married, a man must pay a dowry (*mahr)* to his bride. The dowry belongs to the wife herself and not, as was common under customary law, to her father. It goes without saying that Islamic law improved the legal position of the wife in softening old Arab customary rule that a husband could repudiate his wife at any time without any restriction.

Since divorce is allowed in Islam, the amount promised or paid to the bride forms part of her personal property and is of assistance to her in times of financial need, such as a divorce or

desertion by the husband. While the dowry is usually in the form of cash, it may also be a house or viable business that is put in her name and can be run and owned entirely by her if she so chooses.

The marriage can be terminated by the husband engaging in the *Talaq* (divorce) process. The repudiation can occur only when the husband took equitable account of her needs and made suitable provision for her maintenance thereafter.

2. Polygamy

The Qur'an allows a man to have four wives at any one time[32]:

"*And if you fear you shall not be able to deal justly with the orphan girls, then marry (other) women of your choice; 2, 3 or 4, but if you fear you may not be able to deal justly (with them) then only one.*" (verse 4:3)

According to traditional Islamic law, a man may take up to four wives, and each of those wives must have her own property, assets, and dowry. The husband does not have to seek permission from his first wife. However, his wife can set a condition, before marriage, that the husband cannot marry another woman during their marriage. That being said, Muslim polygamy, in practice and law, differs greatly throughout the Islamic world. In some Muslim countries, polygamy is authorised (Saudi Arabia, Western and Eastern African countries), while in most others it has been prohibited (Tunisia, Turkey, etc.).

3. Dissolution of marriage

Unlike Christianity which has a great antipathy to divorce, Islamic law has always had a more liberal approach.[33] Divorce is allowed in Islam. The Muhammadan law of divorce is founded upon express injunctions contained in the *Qnr'an,* as well as in the Traditions (hadith), and its rules occupy a very large section in all Muhammadan works on jurisprudence.
The *Quran* sets the grounds of divorce in very general terms: *'And if you fear that the two (i.e. husband and wife) may not be able to keep the limits ordered by Allah, there is no blame on either of them if she redeems herself (from the marriage tie) ..'* (Surate 2, verse 229).

Though marriage is a civil contract, a high degree of sanctity is attached to it. Accordingly,

[32] The Prophet Muhammad had nine wives, but not all at the same time.
[33] I. Edge, 'A comparative approach to the treatment of non-muslim minorities inthe middle East with special reference to Egypt', C. Mallat & J. Connors (ed.), *Islamic Law* (London, Graham & Trotman, 1990)46.

divorce should not to be sought readily. Indeed, keeping the unity of the family is considered a priority for the sake of the children. For instance, in the Sunnī tradition, it is said that '*divorce without a valid reason shakes the throne of God'*. By the same token, '*divorce being an evil, it must be avoided as far as possible*'.[34] Accordingly, *Talaq* is permissible inasmuch that the marriage is completely broken. It follows that all means of reconciliation have to be exhausted. According to Muslim scholars, divorce granted on frivolous and flimsy grounds would destroy the stability of family life.[35]

That being said, the legal situation is quite complex.

A. Husband's rights: Talāq

***Introduction*:** The Arabic word for divorce is *talaq* which means" freeing or undoing the knot". *Talaq Hasan* or the triple *talaq* is where a husband repudiates an enjoyed wife by three sentences of divorce.

Of importance is to stress at the outset that this form of repudiation is applied in but a few Muslim countries. Indeed, many countries have been banning this practice (Turkey, Algeria, Tunisia, Indonesia, Pakistan[36], Bangladesh,..). However, Indian Courts still accept *talaq* provided that there is prior arbitration and attempt to reconciliation.

***Capacity*:** Every Muslim husband of sound mind, who has attained the age of puberty, is competent to pronounce *talaq*. It is not necessary for him to give any reason for his pronouncement.

***Grounds*:** Moreover, the husband may divorce his wife by repudiating the marriage without giving any reason. In other words, the husband is endowed with absolute power of divorcing his wife unilaterally, without assigning any reason, literally at his whim.

***Formalities*:** It merely consists of the husband saying three times to his wife at anytime she is not menstruating "*I divorce you, I divorce you, I divorce you"* (Arabic: *talaq*). The husband is not required to file a lawsuit.

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[34] Divorce Under Muslim Law, Legal Service India website, 2009.
[35] Sahih Muslim,*The Book of Divorce (Kitab Al-Talaq),* 261.
[36] In Pakistan, a husband has to notify an arbitration council/Shariat court about the talaq immediately after its pronouncement. The effect of the notice is to freeze the talaq for 90 days during which the council tries to reconcile the wife and the husband. After the expiry of 90 days, the *talaq* takes effect.

- According to **Sunni** law, a *talaq*, may be oral or in writing. It may be simply uttered by the husband or he may write a *Talaqnama*. No specific formula or use of any particular word is required to constitute a valid *talaq*. The words of *talaq* must clearly indicate the husband's intention to dissolve the marriage. As a result, any expression which clearly indicates the husband's desire to break the marriage is sufficient. It need not be made in the presence of the witnesses.
- According to **Shias**, *talaq*, must be pronounced orally, except where the husband is unable to speak. If the husband can speak but gives it in writing, the *talaq*, is void under Shia law. Here *talaq* must be pronounced in the presence of two witnesses. This procedure renders repudiation less straightforward than in the Sunni system.[37]

***Reconciliation*:** According to Sunnī and Shī'a jurisprudence, the couple is supposed to make an attempt to reconcile, with the help of mediators from each family. The appropriate verse from the Quran is:

*And if you fear a breach between the two, then appoint judge from his people and a judge from her people; if they both desire agreement, God will effect harmony between them, surely God is Knowing, Aware. (*Surate 4.35).

The reconciliation should take place during the period of *Iddat.* This period usually lasts three months. If the wife is pregnant, it lasts as long as pregnancy lasts. The waiting period is basically a term of probation during which reconciliation can be attempted. During that period, the wife can not be expelled from her place of residence and cannot be harassed.
In spite of exhausting all means of reconciliation, the hatred between the husband and wife may not fade away. In this case, divorce becomes inevitable.

***Temporal scope*:** The divorce must be pronounced within the term of *Tahr*, a period of purity when the woman is not passing through the period of menses and when during which he has not had sexual intercourse with her. This requirement is not applicable when the wife has passed the age of menstruation or the parties have been away from each other for a long time, or when the marriage has not been consummated.

- According to **Sunni** rite *(Talaq-i-Biddat*), the triple declaration of *talaq* can be made at ounce in a period of purity, either in one sentence or in three. This type of *talaq* is not recognized by the Shias.
- According to **Shiite** rite (*asan talaq*), the husband is required to pronounce the formula of *talaq* three time during three successive tuhrs. Example: 'W, a wife, is having her period of purity and no sexual intercourse has taken place. At this time, her husband, H, pronounces *talaq*, on her. This is the first pronouncement by express words. Then again,

[37] C. Mallat, 'Shi'ism and Sunnism in Iraq : Revisiting the Code', C. Mallat & J. Connors (ed.), *Islamic Law* (London, Graham & Trotman, 1990) 85.

> when she enters the next period of purity, and before he indulges in sexual intercourse, he makes the second pronouncement. He again revokes it. Again when the wife enters her third period of purity and before any intercourse takes place H pronounces the third pronouncement. The moment H makes this third pronouncement, the marriage stands dissolved irrevocably, irrespective of *iddat*.'[38]

***Validity*:** Under Shia law as well as under the Maliki and Shaafi schools of Sunnis, a *talaq* pronounced under compulsion, coercion, undue influence, fraud, or voluntary intoxication is void.

In contrast, under Hanafi law, a *talaq*, pronounced under compulsion, coercion, undue influence, fraud and voluntary intoxication etc., is still valid and as a result dissolves the marriage. However, under forced or involuntary intoxication *talaq* is deemed to be void.

***Completion*:** After the completion of the talāq procedure, the couple is divorced. As a result, the husband is no longer responsible for the wife's expenses.

B. Wife's rights

Conversely, under Islamic law, once a marriage is consummated, a wife has absolutely no right to divorce without her husband's permission. Nonetheless, the wife can divorce her husband under three circumstances.

(i) Dissolution of the marriage according to contractual terms

Firstly, the possibility of divorce has been stipulated in the marriage contract. Accordingly, the wife has the right to repudiate herself. However, the right cannot be granted absolutely, it must be subject to a condition. By way of example, the contract can stipulate that if her husband marries a second wife she will have the right to repudiate herself. This kind of divorce is called 'Delegated Divorce' (*Talaq Taffiz*).

[38] Divorce Under Muslim Law, Legal Service India website, 2009.

(ii) Dissolution of the marriage by mutual consent (*Mubarat*)

Secondly, the marriage can also be dissolved through mutual consent. Pursuant to Surah 4 Verse 128**:** '*If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; ...*'. Where the desire for separation is mutual, there too dissolution by mutual agreement for a consideration to be paid by the wife to the husband is lawful (see below the reasoning held by the Court of Lahore). In such a case it is usual for the wife to offer her husband some compensation if he would release from the bounds of matrimony (usually the amount paid as dower).

(iii) Khula

Thirdly, whereas the man is permitted *talaq*, the woman is allowed to obtain the dissolution of marriage under specific conditions to take *khula*. The most well known story that references khula and serves as the basis for legal interpretations is the story of Jamilah, the wife of Tahbit Ibn Qays :

Narrated Ibn 'Abbas: The wife of Thabit bin Qais came to the Prophet and said, "O Allah's Apostle! I do not blame Thabit for defects in his character or his religion, but I, being a Muslim, dislike to behave in un-Islamic manner if I remain with him." On that Allah's Apostle said to her, "Will you give back the garden which your husband has given you as Mahr?" She said, "Yes." Then the Prophet said to Thabit, "O Thabit! Accept your garden, and divorce her once.

This woman's right is known as *Khula'* (meaning, literally, the putting off or taking off a thing). The court dissolves the marriage on the request of the wife. One of the following grounds has to be taken into consideration:

- her husband is **impotent** (kâli)
- he refuses or is **unable to provide maintenance** (nafaka)
- he is **not paying the dowry** (mahr)
- he is accused of **apostasy**
- or that the wife has been **ill-treated** to such an extent that married-life becomes intolerable (see below the reasoning held by the Court of Lahore).

In sharp contrast to *Talaq*, the woman has to lodge her complaint to a judge, the *Qazi*. Accordingly, she has to prove that she has been subject of bad treatment, that her husband is unable to sustain her financially or that he is sexually impotent. The judge grants her divorce with a full access to all her financial rights. In case the husband was good to her but she does

not want to keep on for an emotional reason, then she can still request *khula*. In this case, the divorce can be granted but without any access for financial rights. In addition, she has to pay the husband the dowry.

As I already stressed, Islam law is far from being monolithic. As a result, differing interpretations of khula exist across Islamic schools of law and regions in regard to the compensation, consent of the husband, role of the court and judge, number of witnesses a woman must have, and the iddah ("waiting") period, and child custody. With respect to compensation, most Islamic schools of law take the view that the husband is not entitled to more than the initial amount of dower (mahr) given to the wife provided that the husband is not at fault (eg impotent). However, some schools suggest that the husband is entitled a greater compensation. With respect to the husband's consent, most schools agree that husband's agreement is not required if the grounds of divorce are related to cruelty or impotence. Only a person versed in Islamic law i.e. a Qazi or Islamic Sharia court judge, can grant the khula without the husband's consent.

To conclude with, it is obvious that there is some disparity between the rights of men and women in matters of divorce.[39]

(iv)Iddah

When a woman is granted a divorce, she must enter a waiting period known as *Iddah*. During this period, a woman is not allowed to remarry until three full menstrual cycles have passed to ensure that she is not pregnant.

[39] S.H. Amin, *Islamic Law and its Implications* (London, 1979) 79.

Kinds of dissolution of marriage	**Initiation**	**Relationship between spouses**	**Court or arbitrators intervention**	**Compensation**
Talaq	Divorce takes place at the initiative of the husband	Arbitrary act of the husband on the account that there is disobedience or non-performance of marital obligations. However, in Iran for instance the husband the husband can repudiate a blameless wife.	Extrajudicial divorce Intervention of Tribal elders	Liability to pay to the wife the *mahr* (dower)
Kula	Divorce takes place at the initiative of the wife	The wife is not endowed with a similar right of repudiation than her husband. The release can take effect provided the husband 'was at fault. As a result, the wife has no right to divorce herself; she can't compel her husband to do so.	Court or *Qazi* Attempt to reconciliation	According to several schools, in requesting a divorce, the wife must forfeit her right with respect to dower or some other property. However, non payment of compensation does not render the divorce void
Mubaraat	Divorce takes place at the initiative of spouses	Mutual consent	Medium of a judicial procedure. A court decree grants the divorce on the grounds that the marriage has irretrievably broken down	Compensation paid by the wife

We shall deal with a case that highlights the differences between the three modes of dissolution.[40]

[40] Asaf A.A.A FYZEE, *Cases in the Muhammadan Law of India, Pakistan and Bangladesh* (2nd. ed. , Oxford, OUP, 2005).

Sayeeda Khanam v. Muhammad Sami
PLD 1952 Lahore 113

Divorce- shiqaq- religious texts considered - incompatibility of temperaments – narrow interpretation- invalid ground to obtain divorce

Facts: The facts of the case, …, are that the wife as plaintiff had sued for dissolution of her marriage with the defendant her husband on the grounds of failure to maintain her for a period exceeding two years' failure to discharge marital obligations without reasonable cause for a period exceeding three years, cruelty, false accusation of immorality, depriving her of her dower, obstructing her in the saying of her prayers, and, as to the clash of temperaments, that the defendant was of irritable nature and changing demeanour and given to imposing his will by force, and further that as a result of the difference in the temperaments of the spouses, the plaintiff had begun to hate the defendant.

In the 50s, in Pakistan (a former part of the British Indian Empire) pursuant to the Dissolution of Muslim Marriages Act 1939, a woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any ground which is recognized as valid for the dissolution of marriages under Muslim Law.

Procedure:

- The **trial court** found that the plaintiff failed to demonstrate the discharge of marital obligations. However, the trial court found that there has been cruelty. As a result, it granted the plaintiff divorce.
- On **appeal**, the district court overturned the trial court's judgment on the account that no cruelty has been proved.
- The plaintiff instituted a **second appeal** before the court of Lahore. The question at issue was whether the **incompatibility of temperaments** of defendant and plaintiff was enough to secure for the plaintiff a **dissolution of her marriage**, as it has been asserted by the district judge. In other words, the question that was addressed by the court of Lahore was whether ***shiqaq*** or incompatibility of temperaments could be regarded as a valid ground for divorce.

Judgment [Cornelius A., CJ] (excerts):
This reference to a Full Bench involves the question whether incompatibility of temperaments between the spouses constitutes a valid ground for dissolution of a marriage under Muslim law, ….

Muslim law recognizes *'shiqaq'* as an adequate ground for divorce. It falls within clause (ix) of section 2 of the Dissolution of Muslim Marriages Act 1939. This clause lays down that a woman married under Muslim Law shall be entitled to obtain a decree for, the dissolution of her marriage on any (other) ground which is recognized as valid for the dissolution of marriages under Muslim law. (…)

It is necessary first to consider the meaning to be given to the phrase, incompatibility of temperaments' [*'shiqaq'*]. The expression is not a term of art, and learned counsel for the parties in the course of an exhaustive argument have been unable to furnish us with any authoritative judicial interpretation of the expression. In the ordinary dictionary meaning, 'incompatibility' may be rendered as 'incapacity for harmonious combination or association', 'incapacity for appearing or being thought of together or of entering into a system of theory or practice.'

'Temperament' may be defined as 'constitution or frame of mind', 'disposition', 'character of mind or mental reactions which are characteristic of an individual'. With reference to the parties to a marriage, the expression 'incompatibility of temperament must be understood in relation to the various forces acting on the couple which compel or induce them in the direction of harmonious and happy association. There are in favour of such a result, a considerable number of powerful factors. Besides the fact that the pair belongs to opposite sexes and may be assumed to possess a normal desire for making a happy union of their lives, there are the various pressures which are exercised by their respective families and by society, and in addition, through the procreation of children, the forces which guide them in the direction of mutual adaptation are greatly reinforced by the affection which accompanies the raising of a family. Where, therefore, it is found that there is such a lack of agreement between the couple as to fall within the full meaning of the expression 'incompatibility of temperament', this must be traced to a total lack of sympathy between them, such as induces a resistance to mutual adaptation, despite the various influences guiding the couple in that direction. There should and must be basically hatred or aversion on the part of one or both of the parties to the marriage to produce such a result.

This finding does not, however, conclude the matter, for the learned Single Judge, in the referring order, has included also the matter of aversion and hatred as between the spouses, as constituting a breach upon which a claim for dissolution could be grounded. In the referring order, the learned Single Judge has placed considerable emphasis upon the Arabic word *'shiqaq'* meaning a breach or separation into two from a condition of unity, as used in verse 35 of Chapter IV of the Holy *Qur'an*. Towards the close of the order, he has used words which convey the impression that, in his opinion, *shiqaq* by itself is an adequate ground for divorce in Muslim law. Elaborate arguments have been addressed to us on this point, and, speaking with great respect to the view of the learned Single Judge, it seems that the texts of revealed scripture do not support his view.

It's unnecessary to elaborate the differences between divorce by *khula* and divorce as sought by the plaintiff in the present case. In *khula*, the marriage is dissolved by an agreement between the parties for a consideration paid or to be paid by the wife to the husband, it being also a necessary condition that the desire for separation should come from the wife. Where the desire for separation is mutual, there too dissolution by mutual agreement for a consideration to be paid by the wife to the husband is lawful, but it is described in that case as *mubar 'aat*. It has been held by the courts in India that for the purpose of dissolving a marriage under either of these modes, it is sufficient that the husband should propose to pronounce *talaq* or otherwise to dissolve the marriage for a consideration and that the wife should accept the proposal; it is not necessary then that the word *'talaq'* should be pronounced but the contract itself operates to dissolve the marriage. (*Muhaminadan Law* by Tyabji, Third Edition, sections 162 and 163). I may refer also in this context to an observation in the learned work of Syed Ameer Ah on Mahommedan Law, Fifth Edition, Volume II, at page 507 in the Chapter entitled '*Khula* and *Mubaraat'*. The passage reads as follows:
When the wife, owing to her aversion to the husband, or her unwillingness to fulfil the conjugal duties, is desirous of obtaining a divorce, ***she may obtain a release from the marital contract by giving up either her settled dower, or some other property****; such a divorce is consequently called* ***khula****.*

In order to differentiate between the separation in this form, and separation by decree of a court on one of the numerous grounds available under Muslim law, I cannot do better than refer to

another passage from the same learned treatise which occurs at the commencement of section 1 of Chapter XV, at page 519:
*According to the Sunni and Shiah schools, when the married parties have no tangible cause of complaint against each other, but a **mutual aversion** due to incompatibility of temper, want of sympathy, etc., they can **dissolve the marriage- tie by mutual agreement**. When the husband is guilty of conduct which makes the matrimonial life intolerable to the wife, when he neglects to perform the duties which the law imposes on him as obligations resulting from marriage, or when he fails to fulfil the engagements voluntarily entered into at the time of the matrimonial contract, she has the right of preferring a complaint before the Kazi or Judge and demanding a divorce from the court.*

The words employed by the learned author are admirably precise and clear. It would appear, therefore, that unless the wife can adduce one or more instances of such behaviour, as will entitle her to present a prayer for dissolution thereon to the *Kazi*, if she finds the marriage tie intolerable for no more specific reason than that there is incompatibility of temperaments between the parties or that she has aversion for the husband, she must by the offer of consideration induce the husband to release her. Once the husband has agreed, the release takes effect, and it would seem that the husband would have a right of suit to recover the consideration in return for which he consented to the arrangement, should there be failure of payment on the part of the wife. The divorce, however, would take effect as soon as there was an agreement.

I propose now to consider in some detail … the words of revealed Scripture as contained in Chapter IV of the Holy *Qu'ura*n with respect to the subject of *shiqaq* as between the spouses.
(..)
***34.** Men are maintainers of women, because Allah has made some of them to excel others and because they spend out of their property; the good women are therefore obedient, guarding the unseen as Allah has guarded; and as those on whose part you fear desertion, admonish them, and leave them alone in the sleeping places and beat them; then if they obey you do not seek a way against them; surely Allah is High, Great.*
***35.** And if you fear a breach between the two, then appoint a Judge from his people and a Judge from her people; if they both desire agreement, Allah will effect harmony between them: surely Allah is Knowing, Aware.*
***128**. And if a woman fears ill usage or desertion on the part of her husband, there is no blame on them, if they effect a reconciliation between them, and reconciliation is better; and avarice has been made to be present in the (people's) minds; and if you do good (to others) and guard (against evil), then surely Allah is aware of what you do.*
***130.** And if they separate, Allah will render them both free from want out of His ampleness, and Allah is Ample-giving, Wise.*
(…)

With these preliminary remarks, I proceed to state what in my view is the intention of the verses which have been reproduced above.

Verse 34 commences with a statement of the reasons for the superiority of men over women, and proceeds to enjoin obedience and right conduct upon good women. Then, it is prescribed, with reference to women who become rebellious to their husband's authority, that the husbands should admonish them, and withdraw their company from them in the sense of refusing to cohabit with them and should beat them. The nature of the treatment enjoined indicates that the husband is not responsible, in any way, for the wife's behaviour, by any conduct on his part. If

by these methods, obedience on the part of the wife is restored, then no further action is to be taken against her.

[**Verse 35**] But if a *shiqaq* (breach) be feared, then an elder holding authority is to be appointed from the tribe of each of the spouses.

Does the word *'shiqaq* 'refer to any kind of breach? Obviously it cannot mean any slight or temporary difference, but must be confined to serious rifts calling for the intervention of tribal elders for the preservation of coherent society. Can it mean a breach from any cause, or is there emphasis upon the cause stated in the preceding verse (i.e., 34)? I incline strongly to the latter view, namely that the breach must be due to refusal by the wife to render obedience to her husband. For in such conduct, there is a breach of the bond of obedience by which the wife is bound to her husband, and on her part, there is also a breach of an underlying though unexpressed term of the contract of marriage, namely that she shall be obedient to her husband.

What the elders are to do, how they are to proceed, what powers they have of a procedural nature, and whether or not they have power to impose their decision upon the couple, is not stated, but the verse declares that if the spouses desire agreement, then Allah will effect harmony between them.

In logical order, after verse 35 should be read **verse 128**; which deals with the converse problem, namely, that of a woman who is faced with unjust treatment or aversion on the part of her husband. In this case, there is no mention of reference to elders or otherwise, but the verse proceeds to say that reconciliation is the best course, and no blame will attach to the couple if they effect reconciliation; then follow certain rules of general guidance, which are intended, in the context, perhaps to minimize the danger that reconciliation may be frustrated by the parties being guided purely by their self-interest, such as that avarice is found in the minds of human beings, and that the people should do good to others and guard against evil. Noticeably, there is no reference here to *shiqaq* or breach between the spouses.

Next in order should be read **verse 130**, which lays down clearly that if the spouses separate, Allah will render them both free from want out of His ampleness. When this verse is read in conjunction with the repeated injunctions in verses 35 and 128, that reconciliation and agreement is the better course, its effect may be appropriately understood to be that, having made every effort at restoring normal relations between themselves, then, if still the spouses cannot agree, and they separate, their action will not merit disapproval. As to how they are to separate, nothing is said in the verse, but there is no doubt of the various processes provided by the law of Islam in this respect, and these divide into three classes, namely,

- **separation, by divorce pronounced by the husband,** [*talaq*]
- **separation by mutual agreement,** [*mubarat*]
- **and separation by judicial decree**. [*Khula*]

As has been seen, the opinion of the learned writer Syed Ameer Ali is that where **there is nothing except incompatibility of temperament, aversion, hatred and dislike, the marriage can only be dissolved by the method of mutual agreement;** it could of course also be dissolved by the husband acting unilaterally, but we are dealing with a case in which the husband is not willing to grant a divorce.

….

[The view of *Imans*] is that the *hakama* [arbitrators] cannot grant a divorce unless they be authorized to do so by the husband; where the husband does not agree, the matter is one for the jurisdiction of the judge.
The same conclusion can also, in my opinion, be drawn from the consideration that in the favour of verses from the Holy *Qur'an* which have been cited above, the provisions for mediation is only made in the case where the wife, without cause furnished by her husband, becomes intolerant of his authority and refuses to perform her marital obligations. There is no such provision in the case where the wife fears unjust treatment, or hatred, avoidance or shunning amounting to desertion, on the part of her husband. The omission cannot be without significance. Where the wife is an injured party, there is first an injunction that an attempt at reconciliation should be made by the parties, having cleared their hearts of selfishness, and acting solely with a desire to do good and to avoid evil. There is then a reference to the permissibility of separation where reconciliation is not possible. How is separation to be effected in such a case surely, either by *khula* or by reference of the injury, as a justiciable issue, to the proper authority, for the wife cannot (except in the rare case of special delegation) divorce herself, and she has no power to compel the husband to divorce her. There must be some fault on the husband's part to justify recourse to the *Qazi*, for the seeking, by a woman, of divorce from her husband, without fault, is severely deprecated.

[*Talaq*] On the other hand, where the wife's determined disobedience and non-performance of her marital obligations is the cause of estrangement, there being no fault in the husband, he can very well deal with the case under his unilateral power of divorce, but it is enjoined that there should first be a reference to tribal elders. This would ensure not only the sanctity and preservation of marriages against the danger that divorces may be given too lightly, but also that marriages are not reduced to contracts of unwilling slavery for the wife. The need of reference to the judicial authority of the State does not arise for there is available the powerful influence of the tribal elders to ensure that everything is done by the parties which is necessary to bring about a proper and complete resolution of the difficulty. Delegation of the husband's power of divorcing his wife to the elders can likewise be ensured, if it should prove necessary.

In either case, there must be more than mere irreconcilability of disposition, or mere hatred or dislike between the spouses to attract the application of these verses from the Holy *Qur'an*. These are, at the most, incidents of the psychology of the spouses in relation to each other. If the couple are incapable of mutual adjustment, that would show that they are psychologically incapable of meeting on a common ground, that they are askew like: the skew lines of the mathematician which never meet. If there is simple aversion or hatred between them, that amounts to no more than a state or feeling. For such a state of affairs, neither of the spouses need be worthy of blame. But the verses clearly do not apply unless there is some fault, in the nature of a wrong action or a wrongful act, on the part of the wife in the first case and of the husband in the second case.

I am accordingly of the opinion that, under Muslim law, such matters as **incompatibility of temperaments, aversion, or dislike cannot form a ground for a wife to seek dissolution of her marriage**, at the hands of a *Qazi* or a court, but they fall to be dealt with under the powers possessed by the » husband as well as the wife under Muslim law as parties to the marriage contract.

4. Recognition of *talaq* by French and Belgian courts

When the wife decides to sue for divorce in France, the husband of Algerian or Moroccan

origin who have emigrated to France travel back to Algeria or Morocco to seek an Islamic divorce (*talaq*) under which the wife receives extremely low financial compensation. The husband then seeks the French court to stop all proceedings in France because the parties are already divorced.

The French courts generally refuse to recognize Islamic divorce decrees. Since 2004, the French *Cour de cassation* has been ruling that Islamic divorces are in fundamental contravention of French public policy since they infringe the principle of equality between spouses that is mandated by the European Convention of Human Rights (Article 5, Protocol VII). It should be stressed that most of the cases adjudicated by the French *Cour de cassation* relate to women who were either French national or were resident in France when the marriage took place.

As regard the validity of *`talâq'* by Belgian courts, see **Cour de Cassation belge, 29 septembre 2003**.

Faits : Bien que résidente en Belgique, la défenderesse a été répudiée par son mari sous la forme *`talâq'* prononcée par un tribunal marocain. Elle a déclaré ultérieurement accepter ladite répudiation. Parant, elle a revendiqué auprès de l'ONSS ses droits d'épouse divorcée, au motif qu'elle avait indiscutablement acquiescé à la répudiation. Selon elle, cet acquiescement avait comme effet que la répudiation n'est pas nécessairement contraire à l'ordre public international belge et peut, en conséquence, produire ses effets en Belgique**.**

Droit marocain: Dans la procédure *`talâq'* la femme n'intervient pas, à proprement parler, pendant la procédure et elle n'est informée de la répudiation que lorsque celle-ci est prononcée (même si elle est convoquée pour la date du prononcé) ; la seule forme de compensation pour l'épouse est l'octroi par le mari, pendant la période d'abstinence (*idda*) d'un lot de consolation (*moutâ*) qui est déterminé en tenant compte des ressources et de la situation de la femme répudiée.

Procédure : La Cour d'appel a jugé que la répudiation prononcée par un tribunal marocain n'était pas contraire aux principes d'ordre public belge et au respect des droits de la défense par application de l'article 570 du Code judiciaire. Par consequent, en sa qualité d'épouse divorcée, la défenderesse avait droit au revenu garanti aux personnes âgées isolées.

L'arrêt de la Cour d'appel du travail de Bruxelles constatait expressément que " dans la procédure *'talâq'*, la femme n'intervient pas, à proprement parler, pendant la procédure et qu'elle n'est informée de la répudiation que lorsque celle-ci est prononcée". La Cour d'appel reconnaissait de la sorte que la défenderesse n'avait pas été entendue lors de la procédure de répudiation et que ses droits de la défense " n'ont guère été respectés au cours de la procédure de répudiation ". La Cour d'appel décida néanmoins que les effets de la répudiation devaient être admis au motif que la défenderesse " a indiscutablement acquiescé à la répudiation et reconnu que ses droits n'ont pas été lésés en déclarant ultérieurement accepter ladite répudiation et surtout en revendiquant ses droits d'épouse divorcée ".

L'ONSS contestait ce régime trop favorable au motif que l'intéressée n'était pas divorcée.

Jugement : The cour de cassation overturned the court of appeal judgment on the following ground:

‘Attendu qu'il ressort de l'arrêt que, pour prétendre au bénéfice du revenu garanti aux personnes âgées en qualité de femme divorcée d'un travailleur salarié, la défenderesse se prévaut d'"un acte de répudiation intervenu le 27 décembre 1994, dûment entériné par les autorités marocaines" ;

Que la cour du travail a considéré que, pour apprécier si cette répudiation peut sortir ses effets en Belgique, il lui appartenait de vérifier si les conditions de l'article 570, alinéa 2, du Code judiciaire étaient réunies ;

Attendu que les jugements régulièrement rendus par un tribunal étranger, relativement à l'état des personnes, produisent, en règle, leurs effets en Belgique, indépendamment de toute déclaration d'exequatur ;

Qu'ils ne sont toutefois tenus, en Belgique, pour régulièrement rendus que s'ils satisfont aux conditions énoncées dans l'article 570 du Code judiciaire ;

Que le respect des droits de la défense figure parmi ces conditions ;

Attendu que, si l'arrêt constate que la défenderesse " a été dûment convoquée le 11 octobre 1994 pour comparaître le 10 novembre 1994 devant le tribunal de première instance de Chefchaouen", et qu'elle a déclaré n'avoir "pu se rendre sur place pour des raisons personnelles et matérielles", il considère "que les droits de la défense de la (défenderesse) n'ont guère été respectés au cours de la procédure de répudiation " ;

Qu'en se fondant sur la circonstance que la défenderesse a " ultérieurement accept(é) la (...) répudiation et (...) revendiqu(é) ses droits d'épouse divorcée " et en en déduisant qu'elle " a indiscutablement acquiescé à la répudiation et, ce faisant, reconn(u) que ses droits n'ont pas été lésés ", l'arrêt ne justifie pas légalement sa décision que la répudiation litigieuse satisfait à la condition énoncée à l'article 570, alinéa 2, 2°, du Code judiciaire ;

Qu'en cette branche, le moyen est fondé ;

PAR CES MOTIFS, la Cour casse l’arrêt attaqué.’

Attention should be drawn to the fact that under specific conditions, Belgian law acknowledges the validity of *talaq*, albeit restrictively.

Indeed, Article 57 of the **Belgian Code of International Private Law** runs as follows:
Article 57. Foreign Divorce based on the Will of the Husband

‘§1. A foreign deed establishing the intent of the husband to dissolve the marriage without the wife having the same right cannot be recognized in Belgium.
§2. Such deed can however be recognized in Belgium after verifying whether the following cumulative conditions are satisfied:

1°the deed has been sanctioned by a judge in the State of origin,
2° neither the spouses had at the time of the certification the nationality of a State of which the law does not know this manner of dissolution of the marriage;
3° neither the spouses had at the time of the certification their habitual residence in a State of which the law does not know this manner of dissolution of the marriage;
4° the wife has accepted the dissolution in an unambiguous manner and without any coercion;
5° non of the grounds of refusal provide for in article 25 prohibits the recognition.’

First observation: Account must be taken of the fact that this provision does not mention *talaq*. However, in stating ‘A foreign deed establishing the intent of the husband to dissolve the marriage without the wife having the same right’, the Belgian lawmaker implicitly refers to the practice of *talaq*. Indeed two conditions have to be fulfilled:
a) the unilateral will of the husband to dissolve the marriage;
b) the fact that the wife can’t avail the same right’.

The fact is that *Khula*, as discussed above, does not confer the same right to the wife. As a result, one can’t argue that the recognition of *Khula* fulfils that second condition.

Second observation: Article 57 of the Belgian Code of International Private Law departs from former *Cour de cassation* case-law. In the 29 of September 2003 judgment, the *Cour de cassation* took the view that the divorce is void on the account that the rights of defense flowing from Article 570 of the Judiciary Code were not safeguarded. *A contrario*, the *Cour de cassation* was ready to recognize the unilateral dissolution provided that the rights of the wife were preserved. Article 57 is requesting further conditions with respect to the nationality of the spouses or their residence at the time of the certification of the marriage.

Third observation: As a matter of practice, so far, Belgian courts have been refusing to recognise a number of *talaq* on the grounds that one or several of the conditions were not fulfilled. However, a few judgments recognized the validity of *talaq*.

By way of illustration, two Morrocans were married in Morroco. At that time, they did not have their habitual residence in Belgium. The *talaq* has been sanctioned by a Moroccan court and duly accepted by the wife in ‘an unambiguous manner and without any coercion’. As a result, pursuant to Article 57, a Belgian court will have to reach the conditions that the conditions set out in that provision are fulfilled. Accordingly, the unilateral repudiation should be recognised.

In contrast, such unilateral repudiation can’t be recognized by a Belgian court where, for instance:

- the wife was Belgian at the time of the certification;
- the wife had a residence in Belgium at the time of the certification;
- the unilateral repudiation had not been sanctioned by a Moroccan court.

IX. PRIVATE LAW: INHERITANCE

The Qur'an contains three verses which give specific details of inheritance and shares:

[4:11] Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt. Your parents or your children - you know not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah . Indeed, Allah is ever Knowing and Wise.

[4:12] And for you is half of what your wives leave if they have no child. But if they have a child, for you is one fourth of what they leave, after any bequest they [may have] made or debt. And for the wives is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave, after any bequest you [may have] made or debt. And if a man or woman leaves neither ascendants nor descendants but has a brother or a sister, then for each one of them is a sixth. But if they are more than two, they share a third, after any bequest which was made or debt, as long as there is no detriment [caused]. [This is] an ordinance from Allah, and Allah is Knowing and Forbearing.

[4:176] They request from you a [legal] ruling. Say, " Allah gives you a ruling concerning one having neither descendants nor ascendants [as heirs]." If a man dies, leaving no child but [only] a sister, she will have half of what he left. And he inherits from her if she [dies and] has no child. But if there are two sisters [or more], they will have two-thirds of what he left. If there are both brothers and sisters, the male will have the share of two females. Allah makes clear to you [His law], lest you go astray. And Allah is Knowing of all things.

Muslim jurists are reckoning upon these verses as a starting point to expound the laws of inheritance. They reckon also upon haddith and quiyas. Though they are share the same principles, the laws of inheritance for the Sunnis and the Shiites differ in a number of features due to the acceptation or the rejection of certain haddiths.

Only relatives with a legitimate blood relationship to the deceased are entitled to inherit. Primary heirs are entitled to a share of the inheritance. Accordingly, they are never totally excluded. There are five primary heirs:

1. Surviving Spouse
2. Son
3. Daughter
4. Mother/Father

It must be noted that children are not placed upon equal footing.

- For instance, illegitimate children and adopted children have no shares in inheritance.
- Moreover, a son's share is double that of a daughter's. A daughter is entitled to only half that of the son on the account that women, upon marriage are entitled to a

"dowry" from the husband.

Under certain circumstances, other heirs can also inherit as residuaries, namely the father, paternal grandfather, daughter, agnatic granddaughter, full sister, consanguine sister and mother. This group usually take a designated share or quota of the estates. Their shares are fixed. The share taken by each sharer will vary.

For instance, where the surviving spouse is the widower she will receive :
- 1/8th of the estate, if there are any children,
- and 1/4th where the couple is without lineal descendants.

Indeed, according to **Haddith 958:** 'When the husband dies and he does not leave any children, his permanent wife will inherit **a quarter** of the property and the remainder is for the remaining heirs'.

If the deceased's only child is female, she is entitled to half of the estate. If the deceased also has brothers and a mother, his daughter will receive one-sixth.

ECtHR, *Molla Sali v. Greece* 19 December 2018

The question arose as to whether these inheritance rules can be modified by a public will. The case *Molla Sali* that has yet to be adjudicated by the CtHR epitomizes the restrictions placed by Muslim law upon the inheritance rights of the spouse of the deceased.

The applicant, Ms Chatitze Molla Sali, is a Greek national who was born in 1950 and lives in Komotini (Greece).

On the death of her husband, Ms Molla Sali inherited his entire estate under the terms of a will drawn up by her late husband before a notary.

However, the two sisters contested the will, on the grounds that their brother had belonged to the Thrace Muslim community of the deceased had initiated legal procedures with the aim to challenge the validity of the will drafted by their brother. They argued that the notarised will drawn up by their brother, a Greek national of Muslim faith, was devoid of legal effect because Sharia law only recognises intestate succession. Accordingly, they claimed that any aspect of succession to the proprietary rights of the deceased should have taken place according to Islamic law of inheritance instead of the rules of the Civil Code. As a result, they asserted a claim to three-quarters of the property bequeathed.

They relied in particular on the 1920 Treaty of Sèvres and the 1923 Treaty of Lausanne, which provided for Islamic customs and Islamic religious law to be applied to Greek nationals who were Muslims. Inherited from the Ottoman Empire, Sharia law continues therefore to apply to Muslim populations under Greek jurisdiction after the recapture of Western Thrace.

Article 11 of the Treaty of Athens provides:

"8.1. The muftis, in addition to their authority over purely religious affairs and their supervision of the administration of *vakouf* [public] property, shall exercise jurisdiction between Muslims in matters of marriage, divorce, maintenance payments (*néfaca*), guardianship, trusteeship, emancipation of minors, Islamic wills, and succession to the position of Mutevelli (*tevliet*).

8.2. The judgments rendered by the muftis shall be executed by the proper Greek authorities.

Article 14 § 1 of the Treaty of Sèvres provided as follows:

> "Greece agrees to take all necessary measures in relation to Moslems to enable questions of family law and personal status to be regulated in accordance with Moslem usage."

In accordance with these treaties, the Greek courts have held that Sharia law must apply to all members of the Muslim community of Thrace, in matters of marriage, divorce, and succession.

The two sisters' claims were dismissed by the Greek courts at first instance and on appeal. However, the Court of Cassation quashed that judgment on the grounds that questions of inheritance within the Muslim minority should be dealt with by the mufti in accordance with the rules of Islamic law. …

Relying on Article 14 (prohibition of discrimination), combined with Article 1 of Protocol No. 1 (protection of property), Ms Molla Sali complains of the application to her inheritance dispute of Sharia law rather than the ordinary law applicable to all Greek citizens, despite the fact that her husband's will was drawn up in accordance with the provisions of the Greek Civil Code. She also alleges that she was subjected to a difference in treatment on grounds of religion.

> **Article 14 of the Convention**
>
> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as ... religion ... or other status."
>
> **Article 1 of Protocol No. 1**
>
> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

- *Whether there was an analogous or relevantly similar situation and a difference in treatment*

The ECtHR held that the applicant was in an analogous or relevantly similar situation to that of a beneficiary of a civil law will drafted by a non-Muslim testator.

138. The first task is to ascertain whether the applicant, a married woman who was a beneficiary of her Muslim husband's will, was in an **analogous or relevantly similar situation to that of a married female beneficiary of a non-Muslim husband's will.**

139. The Court notes that during his lifetime the applicant's husband, who was likewise a member of the Thrace Muslim community, had drawn up a notarised public will in accordance with the provisions of the Civil Code, bequeathing his entire estate to his wife. It is beyond doubt that she expected, as any other Greek citizen would have done, that on her husband's death his estate would be settled in accordance with the will thus drawn up.

141. In conclusion, the applicant, as the beneficiary of a will made in accordance with the Civil Code by a testator of Muslim faith, was in a **relevantly similar situation** to that of a beneficiary of a will made in accordance with the Civil Code by a non-Muslim testator, and was **treated differently** on the basis of "other status", namely the testator's religion.

Whether the difference in treatment was justified

It is settled case law that a difference in treatment can be allowed only:

(i) when the authority pursues a "legitimate aim" ;
(ii) and there is a "reasonable relationship of proportionality" between the means used and the aim pursued.

According to the Greek government, the difference in treatment was justified because Greece sought to honour its international agreements and provide protection to the Muslim minority as foreseen in the above-mentioned treaties. Accordingly, the protection of the Thrace Muslim minority was deemed to be an aim in the public interest.

The ECtHR dismissed that argument.

…. Although the ECtHR understands that Greece is bound by its international obligations concerning the protection of the Thrace Muslim minority, in the particular circumstances of the case, it doubts whether the impugned measure regarding the applicant's inheritance rights was suited to achieve that aim. Be that as it may, it is not necessary for the Court to adopt a firm view on this issue because in any event the impugned measure was in any event not proportionate to the aim pursued. (§143)

The ECtHR found that the wording of the Treaties of Sèvres and Lausanne does not provide for any application of religious law (§151).

Further, the ECtHR noted that divergent case law, that has created legal uncertainty that was in conflict with the rule of law (§153).

In addition, the Court noted that several international bodies have expressed their concern about the application of Sharia law to Greek Muslims in Western Thrace (§154).

Last, the Court held that

'157. Refusing members of a religious minority the right to voluntarily opt for and benefit from ordinary law amounts not only to discriminatory treatment but also to **a breach of a right of cardinal importance in the field of protection of minorities**, that is to say the **right to free self-identification**. The negative aspect of this right, namely the right to choose not to be treated as a member of a minority, is not limited in the same way as the positive aspect of that right (…). The choice in question is completely free, provided it is informed. It must be respected both by the other members of the minority and by the State itself. That is supported by Article 3 § 1 of the Council of Europe Framework Convention for the Protection of National Minorities which provides as follows: "no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice". The **right to free self-identification** …. is the **"cornerstone" of international law on the protection of minorities in general**. This applies especially to the negative aspect of the right: no bilateral or multilateral treaty or other instrument requires anyone to submit against his or her wishes to a special regime in terms of protection of minorities.

158. Lastly, the Court notes that the present case highlights the fact that Greece is the only country in Europe which, up until the material time, applied Sharia law to a section of its citizens against their wishes. This is particularly problematic in the present case because the

application of Sharia law caused a situation that was detrimental to the individual rights of a widow who had inherited her husband's estate in accordance with the rules of civil law but who then found herself in a legal situation which neither she nor her husband had intended.'

Concluding remarks:

- A State can "*create a particular legal framework in order to grant religious communities a special status entailing specific privileges*".

- However, the State's wish to preserve a given minority's autonomy and to enhance cultural pluralism could not justify, for the sake of protecting that minority, restricting the fundamental rights of those members of the minority who had decided not to follow its rules and practices. The "*right to free self-identification*" of the minority member is the cornerstone of the reasoning. This right entails the right "*the right to choose not to be treated as a member of a minority*".

- In so doing, the ECtHR has condemned the forced application of Sharia to members of a minority. With that being said, the Court did not condemn Sharia law itself that can still be applied in Greece in as much as the Greek Muslims accept it. Accordingly, the mufti jurisdiction must be optional. What matters is individual consent to be subject to Sharia law.

X. Muslim religion and free speech

'*La liberté de la presse ne s'use que si l'on ne s'en sert pas*'
Le Canard enchaîné

Introduction

Blasphemy, derived from the Latin *Blasphemia*, is generally defined as 'the act or offense of speaking sacrilegiously about God or sacred'.

Under Muslim law, any depiction of the Prophet is deemed to be blasphemous. The K'ran admonishes blasphemy. Verses 5:33 and 33:57-61 read as follows : 'Those who annoy Allah and His Messenger - Allah has cursed them in this World and in the Hereafter, and has prepared for them a humiliating Punishment. Truly, if the Hypocrites, and those in whose hearts is a disease, and those who stir up sedition in the City, desist not, We shall certainly stir thee up against them: Then will they not be able to stay in it as thy neighbours for any length of time: They shall have a curse on them: whenever they are found, they shall be **seized** and **slain** (without mercy).' However, the **Qu'ran** is unclear regarding the punishment for blasphemy.[41]

Various **haddiths** suggest various punishments for blasphemy, including death.[42] By way of illustration, Al-Bukari recalls:
'The Prophet said, "Who is ready to kill Ka'b ibn al-Ashraf who has really hurt Allah and His Apostle?". A companion of the Prophet, Muhammad bin Maslama said, "O Allah's Apostle! Do you like me to kill him?" He replied in the affirmative.

Fiquh (schools of jurisprudence) endorse different punishment for blasphemy, depending on whether blasphemer is Muslim or non-Muslim, man or woman. The punishment can be fines, imprisonment, flogging, amputation, hanging, or beheading.

Accordingly, different Muslim countries applying Sharia (Afghanistan, Bangladesh, Egypt, Iran, Jordan, Kuwait, Mauritania, Pakistan, etc.) have been adopting **blasphemy laws.** These laws limit the freedom of speech and expression relating to blasphemy, or irreverence toward holy personages, religious artifacts, customs, or beliefs. Several legislations (Saudi Arabia, Pakistan legal code) prescribe penalties up to the death penalty for blasphemy. For instance, pursuant to § 295C of the Pakistani legal code, the 'use of derogatory remarks, spoken, written, directly or indirectly, etc. that defiles the name of Muhammad' is subject to a death penalty. Saudi laws are a combination of Sharia, royal decrees and fataws issued by the Council of Senior religious scholars. A wide variety of crimes are labelled blasphemy. Punishments range from prison, fines and lashing.

However, under Western law, blasphemy is not prohibited. It follows that even when a drawing, a picture, or an opinion portrays worshiped subject such as the Prophet it cannot be banned unless it incites violence or racism. Blasphemy can be seen as tasteless, imprudent, chocking, etc. but in as much as it does not discriminate, it is not illegal.

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[41] Saeed, Abdullah; Hassan Saeed, *Freedom of Religion, Apostasy and Islam* (Burlington, Ashgate, 2004) 38–39.
[42] Ibid.

That begs the following question: how to strike a balance between the Muslim sensitivity to cartoon depicting a holy subject and the secular value of free speech that has been embedded in the Belgian and the French cultures for two centuries? In other words, is free speech limitless?

The following section intents upon highlighting this dilemma. In that connection, a first case is discussed: *UIOF v Charlie HEBDO.*

CHARLIE HEBDO is known as a satirical French magazine specializing in lurid cartoons of sacred cow, in particular religions. The magazine has been regularly targeted by extremists because it cherished and promoted its right to offend and provoke both Catholics and Muslims.

The magazine was hit in 2006 after it reprinted inflammatory cartoons of the Prophet, previously published in a Danish newspaper, *Jyllandsbladet*. In addition, other caricatures drawn by French cartoonists were published. You will find herewith a reproduction the most polemic or disturbing ones.

In that connection, it must be noted that the Union des organisations islamiques de France initiated lawsuits firstly before the Tribunal de Grande Instance, secondly before the Paris Court of Appeal to seek interim relief with a view to stopping the controversial publication (see below, Court of Appeal, 12th March 2008). In 2007 the Tribunal and in 2008 the Paris Court of appeal dismissed the UIOF's claims. The claimant could not reckon upon blasphemy given that it is not such an offence under French law.

In 2011, Charlie Hebdo's office was firebombed after it published a special purported to be guest-edited by the Prophet issue.

On January 7th 2015, a dark day for the freedom of the press, 7 of its cartoonists and staff members were murdered by 2 French terrorists claiming that they were avenging the Prophet. In addition, 2 police officers were murdered. This latest terrorist attack was much more insidious than others on the account that it was aiming at punishing Western media in their treatment of Islam. It goes without saying that given that the target was a symbol of free speech, the attack has a chilling effect on the freedom of the press, be it in Turkey, be it in Algeria, be it in Belgium.

The next issue of Charlie Hebdo published one week after the attack features a caricature of Mohamed on its cover. Crying, the Prophet holds a sign reading: 'Je suis Charlie'.

Media outlets around the world republished the Charlie Hebdo's cartoons, one of which, in Germany, was firebombed in retaliation. Moreover, that publication sparked off much worse confrontations in a number of Muslim countries such as Niger, Afghanistan and Pakistan. Needless to say, 'Je suis Charlie' has become a worldwide act of faith of the protagonists of free speech.

Last but not least, account must be made of the fact that these barbaric acts were not related to Islam whatsoever. In effect, Islam enjoins fair treatment of all, including one's enemies: …*Let not a people's enmity incite you to act otherwise than with justice. Be* always *just, that is nearer to righteousness*… (Ch.5:V.9)

Paris Court of Appeal
12 March 2008

On appeal of the judgment handed down by the Paris Tribunal de Grande Instance on the 22nd March 2007

Val Philippe,
Indicted, non appellant
Sie Ed. Rotative
Civilly liable, non appellant

Union des organisations islamiques de France (U.O.I.F.)
party claiming damages, appellant

……

One has to bear in mind that:

Five associations, among which the U.O.I.F., sought before the Tribunal de Grande Instance on 7th February 2006 interim injuctive relief against CHARLIE HEBDO's intention to publish a periodical that had to be printed the next day;

- Given that these subponea were deemed to be void on the grounds that they were in breach of Article 53 of the Law of 29th July 1881, CHARLIE HEBDO published, on Wednesday February 8th 2006, a « special periodical » duplicating among others the caricatures that were published in a Danish newspaper on September 30th 2005;

- Having regard to the public insults hurled at a group of persons for their religion, the Muslim religion, on the account that the fact that 3 caricatures, the one printed on the front page and the two other ones printed on page 3, were offensive;

- the U.O.I.F. had initiated proceedings against Philippe VAL, managing director of CHARLIE HEBDO and the Sie Ed. Rotative on the grounds that this « special periodical » nearly entirely dedicated to the « Caricatures of Mahomet », duplicated caricatures that were already published on September 30th 2005 in the Danish newspaper *Jylland-Posten* that ordered them from 12 cartoonists, and that the periodical displayed a great number of other cartoons, several articles on Muslim fundamentalism and freedom of speech.

Whereas… the Court of appeal is called to review whether Philippe VAL had hurled public insults at a group of persons for their religion, giving rise to a claim for damage lodged by U.O.I.F., party claiming damages;

Taking the view that the first of the three incriminated caricatures was drawn by CABU and the two others were already published in the Danish newspaper;

Whereas on the front page cover, the fist cartoon displays a bearded man, obviously the Prophet Mohammed, holding his head in his hands and uttering: 'It's tough to be loved by assholes';

Whereas on page 3, one of the caricature is deemed to display the prophet Mohammed welcoming on a cloud terrorists and stating: ‘ Stop, stop we ran out of virgins!’, which means according to the party claiming damages: ‘*Arrêtez, arrêtez, nous n’avons plus de vierges*’;

Whereas the third caricature also published on page 3 is deemed to portray the prophet Mohammed wearing a turban alluding to a bomb ready to explode;

Having regard to the fact that U.O.I.F. is arguing that the Tribunal erred in reviewing the case in holding that none of the 3 cartoons were insulting the Muslim community …; therefore:

- the first caricature intents upon stigmatizing the whole Muslim community – and not one or several fundamentalists – depicting them as ‘assholes’, an offensive expression;

- the second caricature regarding the virgins means that the number of Muslim terrorists is so significant that they are requested to wait in front of the entrance to the paradise given that the prophet is unable to provide them with virgins, as requested by the Quoran to reward the ones who accomplish acts of faith with young virgin women;

- the third caricature – the most shocking – in evoking the traditional face of a Muslim, and in particular the one of Prophet Mohammed, alludes to terrorism, in conveying the message that the Muslim religion in its own rights – that’s guiding the Muslim faithful – supports the intention of igniting a bomb hidden under a turban, such a caricature cannot be justified by the freedom of speech;

Having regard to the fact that, on the other hand, the accused party stresses that the insults with respect to a religion have to be hurled at a whole group of persons and not at a part of a community; in addition, an expression - though offending or disturbing – can take part in a broader public debate; furthermore, freedom of speech must prevail over religious sensibility given that under domestic and international law no particular social group can claim a more favourable treatment than others;

Having regard to the fact that the Tribunal, before reviewing successively the three caricatures, made the following observations:

- it set out the context of that publication, in particular the sometimes violent reactions that the publications in Denmark sparked off and the dismissal of the managing director of FRANCE SOIR ordered by the director of that journal that took place just after the publication of these caricatures; these event enticed CHARLIE HEBDO to print these cartoons;
- it rightly stressed that CHARLIE HEBDO was a satirical newspaper, that, in the course of a number of years, has printed an array of caricatures making a mockery of various religions, and that the literary style of caricature, sometimes deliberatively provocative, was contributing to free of speech and the dissemination of opinions;
- it took note that the freedom of speech encompasses, on the one hand, information or ideas deemed to be inoffensive in a particular society, and, on the other, ideas that are likely to harm, shock and disturb, in accordance with the principles of tolerance and pluralism that apply particularly in a nation that is characterized by the coexistence of a swathe of creeds and faiths;

- it drew the attention to the fact that in France, a secularized and a pluralistic society, the respect for religious creeds is on a par with the freedom of criticizing religions, whatever they are, as well with the right to portray worshiped subjects and objects, on the account that blasphemy is not prohibited;

In face of the evidence and the pleas, we are holding that:

- the first caricature, as stressed by the Tribunal, is not aiming at the whole Muslim community given the title 'MUHAMED OVERWHELMED BY FUNDAMENTALISTS' that was published on its side ….;

- the Tribunal did not err in reviewing the legality of the second caricature on the grounds that it ascertained that such a caricature was clearly alluding to the suicide attacks committed by Muslim terrorists; there again the whole Muslim community was not targeted, only terrorists were;

- the third caricature – that is likely to shock and stir turmoil according to the testimonies of the academic Abdelwahba MEDDEB and the political scientist Antoine SFER – has to be understood in a broader context, the one of the publication at issue that is casting a critical eye over some Muslims who in the name of Islam carry out terrorist attacks and not the whole Muslim community; what is more, the front cover of CHARLIE HEBDO sets the tone in stigmatizing the fundamentalists whose actions are hurting the prophet of Islam; and afterwards, numerous articles, cartoons and caricatures contemplate the prophet as 'Jewish, Christian and Muslim gods'; this newspaper highlights, in the guise of a well-known satirical but always well-argued tone, the dangers stemming from religious fanaticism, the political instrumentalization of the Muslim religion as well as the attacks perpetrated against free speech;

- the newspaper is not aiming at creating any confusion between Muslims and terrorists who are committing their crimes in the name of Islam; on the contrary, as Mrs BADINTER testified before the Tribunal, the front cover of the periodical drawn by CABU has be interpreted by an average reader as a means by which one should draw a distinction between the whole Muslim community and the ones who claim their faith in Allah in order to cause dreadful things; indeed, it has to be read as telling readers 'make the difference';

- the incriminated caricatures as well as all other published in the publication at issue have been contributing to a public debate of general interest regarding free speech, that came under attack as a result of the fierce debate and the intimidations sparked off thy the printing of the Danish newspaper;

On those grounds: Given these caricatures are targeting one part and not the whole Muslim community, they cannot be qualified as an insult or a personal condemnation of a group of persons for their religious faith, and they don't exceed the limits placed on free speech, which are subject to a restrictive interpretation under both domestic and international law;
…
Having regard to the fact that the Tribunal correctly held that the publication at issue could not be qualified as an offence …..; the claim in damages is dismissed;

XI. Freedom of expression and the restrictions placed on face covering

A. Introduction. The niqāb is not prescribed in Islam. The question arose whether wearing it was consistent with France's concept of the secular state.

In that connection, the Parliamentary Assembly of the Council of Europe adopted Resolution 1743 (2010) and Recommendation 1927 (2010) on Islam, Islamism and Islamophobia in Europe

35. Adopted on 23 June 2010, Resolution 1743 (2010) states, in particular:

"14. Recalling its Resolution 1464 (2005) on women and religion in Europe, the Assembly calls on all Muslim communities to abandon any traditional interpretations of Islam which deny gender equality and limit women's rights, both within the family and in public life. This interpretation is not compatible with human dignity and democratic standards; women are equal to men in all respects and must be treated accordingly, with no exceptions. Discrimination against women, whether based on religious traditions or not, goes against Articles 8, 9 and 14 of the Convention, Article 5 of its Protocol No. 7 and its Protocol No. 12. No religious or cultural relativism may be invoked to justify violations of personal integrity. The Parliamentary Assembly therefore urges member states to take all necessary measures to stamp out radical Islamism and Islamophobia, of which women are the prime victims.

15. In this respect, the veiling of women, especially full veiling through the burqa or the niqab, is often perceived as a symbol of the subjugation of women to men, restricting the role of women within society, limiting their professional life and impeding their social and economic activities. Neither the full veiling of women, nor even the headscarf, are recognised by all Muslims as a religious obligation of Islam, but they are seen by many as a social and cultural tradition. The Assembly considers that this tradition could be a threat to women's dignity and freedom. No woman should be compelled to wear religious apparel by her community or family. Any act of oppression, sequestration or violence constitutes a crime that must be punished by law. Women victims of these crimes, whatever their status, must be protected by member states and benefit from support and rehabilitation measures.

16. For this reason, the possibility of prohibiting the wearing of the burqa and the niqab is being considered by parliaments in several European countries. Article 9 of the Convention includes the right of individuals to choose freely to wear or not to wear religious clothing in private or in public. Legal restrictions to this freedom may be justified where necessary in a democratic society, in particular for security purposes or where public or professional functions of individuals require their religious neutrality or that their face can be seen. However, a general prohibition of wearing the burqa and the niqab would deny women who freely desire to do so their right to cover their face.

17. In addition, a general prohibition might have the adverse effect of generating family and community pressure on Muslim women to stay at home and confine themselves to contacts with other women. Muslim women could be further excluded if they were to leave educational institutions, stay away from public places and abandon work outside their communities, in order not to break with their family tradition. Therefore, the Assembly calls on member states to develop targeted policies intended to raise Muslim women's awareness of their rights, help them to take part in public life and offer them equal opportunities to pursue a professional life and gain social and economic independence. In this respect, the education of young Muslim

women as well as of their parents and families is crucial. It is especially necessary to remove all forms of discrimination against girls and to develop education on gender equality, without stereotypes and at all levels of the education system."

In face of a growing threat of fundamentalism, both the French and the Belgian lawmakers have been banning different devices concealing the face in public space. The *ratio legis* of these two legislations is that face-coverings prevent the clear identification of a person, which is both a security risk, and a social hindrance within a society which relies on facial recognition and expression in communication. Opponents claim however that the ban encroaches on individual freedoms.

B. The **Belgian Law of 1 June 2011** 'prohibits the wearing of any clothing entirely or substantially concealing the face". It inserted the following provision into the Criminal Code:

"Art. 563bis. Persons who, unless otherwise provided by law, appear in a place that is accessible to the public with their faces completely or partially covered or hidden, such as not to be identifiable, shall be liable to a fine of between fifteen and twenty-five euros and imprisonment of between one and seven days, or only one of those sanctions.However, paragraph 1 hereof shall not concern persons who are present in a place that is accessible to the public with their faces completely or partially covered or hidden where this is provided for by employment regulations or by an administrative ordinance in connection with festive events."

Applications for the annulment of this Law were lodged with the Constitutional Court on the basis, inter alia, of Article 9 of the Convention. The Constitutional Court dismissed the applications in a judgment of 6 December 2012.

Belgian Constitutional Court, 6 December 2012

B.21. The legislature further justified its intervention by a certain conception of 'living together' in a society based on fundamental values, which, in its view, derive therefrom.

…. Whilst pluralism and democracy entail the freedom to display one's beliefs, in particular by the wearing of religious symbols, the State must pay attention to the conditions in which such symbols are worn and to the potential consequences of wearing such symbols. To the extent that the concealment of the face has the consequence of depriving the subject of law, a member of society, of any possibility of individualisation by facial appearance, whereas such individualisation constitutes a fundamental condition related to its very essence, the ban on the wearing of such clothing in a public place, even though it may be the expression of a religious belief, meets a pressing social need in a democratic society.

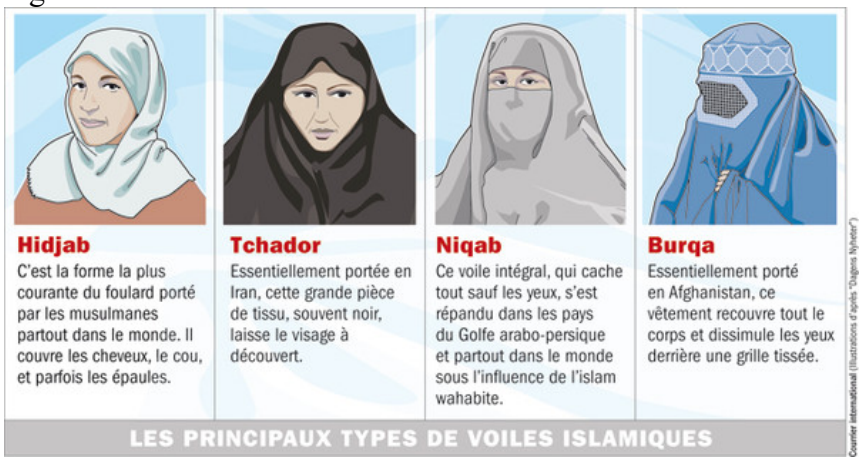
B.22. As to the dignity of women, here too the legislature was entitled to take the view that the fundamental values of a democratic society precluded the imposing of any obligation on women to conceal their face, under pressure from members of their family or their community, and therefore their deprivation, against their will, of their freedom of self-determination.

B.23. However, ... the wearing of the full-face veil may correspond to the expression of a religious choice. That choice may be guided by various reasons with many symbolic meanings. Even where the wearing of the full-face veil is the result of a deliberate choice on the part of the woman, the principle of gender equality, which the legislature has rightly regarded as a

fundamental value of democratic society, justifies the opposition by the State, in the public sphere, to the manifestation of a religious conviction by conduct that cannot be reconciled with this principle of gender equality. As the court has noted in point B.21, the wearing of a full-face veil deprives women – to whom this requirement is solely applicable – of a fundamental element of their individuality which is indispensable for living in society and for the establishment of social contacts.

At the end, the Constitutional court ruled that the prohibition imposed by the Law at issue has no disproportionate effects in relation to the aims pursued.

C. By the same token, the **French law of 2010** (*Loi interdisant la dissimulation du visage dans l'espace public*) prohibits concealment of the face in public space. In particular, it bans the wearing of face-covering headgear, including niqabs and other veils covering the face in public places, except under specified circumstances. The ban also applies to the burqa, a full-body covering, if it covers the face. One of the exceptions to a woman wearing a niqāb in public will be if she is worshiping in a religious place. The law imposes a fine of up to €150, for infringing the ban.
The French law was challenged before the ECtHR which it on 1 July 2014, accepting the argument of the French government that the law was based on "a certain idea of living together".



EctHR, GRAND CHAMBER, CASE OF S.A.S. v. France

(Application no. 43835/11), 1st July 2014

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant is a French national who was born in 1990 and lives in France.

11. In the applicant's submission, she is a devout Muslim and she wears the burqa and niqab in accordance with her religious faith, culture and personal convictions. According to her explanation, the burqa is a full-body covering including a mesh over the face, and the niqab is a full-face veil leaving an opening only for the eyes. The applicant emphasised that neither her husband nor any other member of her family put pressure on her to dress in this manner.

12. The applicant added that she wore the niqab in public and in private, but not systematically: she might not wear it, for example, when she visited the doctor, when meeting friends in a public place, or when she wanted to socialise in public. She was thus content not to wear the niqab in public places at all times but wished to be able to wear it when she chose to do so, depending in particular on her spiritual feelings. There were certain times (for example, during religious events such as Ramadan) when she believed that she ought to wear it in public in order to express her religious, personal and cultural faith. Her aim was not to annoy others but to feel at inner peace with herself.

13. The applicant did not claim that she should be able to keep the niqab on when undergoing a security check, at the bank or in airports, and she agreed to show her face when requested to do so for necessary identity checks.

14. Since 11 April 2011, the date of entry into force of Law no. 2010-1192 of 11 October 2010 throughout France, it has been prohibited for anyone to conceal their face in public places.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Law of 11 October 2010 "prohibiting the concealment of one's face in public places"

In the case at hand, the ban on wearing clothing designed to conceal the face, in public places, raised questions in terms of the freedom of women who wish to wear the full-face veil for reasons to manifest their beliefs (Article 9 of the Convention). The Court examined whether Article 9 was abridged. Article 9 - Freedom of thought, conscience and religion - reads as follows :

1. 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 in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and 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.

(.....)

(iv) Whether the measure is necessary in a democratic society

(α) General principles concerning Article 9 of the Convention

123. As the Court has decided to focus on Article 9 of the Convention in examining this part of the application, it finds it appropriate to reiterate the general principles concerning that provision.

124. As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics,

sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (…).

125. While religious freedom is primarily a matter of individual conscience, it also implies freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists the various forms which the manifestation of one's religion or beliefs may take, namely worship, teaching, practice and observance (…).

Article 9 does not, however, protect every act motivated or inspired by a religion or belief and does not always guarantee the right to behave in the public sphere in a manner which is dictated by one's religion or beliefs (…).

126. In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place **limitations** on freedom to manifest one's religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected (….). This follows both from paragraph 2 of Article 9 and from the State's positive obligations under Article 1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined therein (….).

127. The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and has stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. (…). Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other (….).

128. **Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society**". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position (….). Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society (….).

(γ) Application of those principles to the present case

154. In such circumstances, the Court has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question. The Court has, moreover, already had occasion to observe that in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight (….).

155. In other words, France had a **wide margin of appreciation** in the present case.

156. This is particularly true as there is little common ground amongst the member States of the Council of Europe (….) as to the question of the wearing of the full-face veil in public. The

Court thus observes that, contrary to the submission of one of the third-party interveners (see paragraph 105 above), there is no European consensus against a ban. Admittedly, from a strictly normative standpoint, France is very much in a minority position in Europe: except for Belgium, no other member State of the Council of Europe has, to date, opted for such a measure. (…)

157. Consequently, having regard in particular to the breadth of the margin of appreciation afforded to the respondent State in the present case, the Court finds that the ban imposed by the Law of 11 October 2010 can be regarded as proportionate to the aim pursued, namely the **preservation of the conditions of "living together"** as **an element of the "protection of the rights and freedoms of others".**

158. The impugned limitation can thus be regarded as "**necessary in a democratic society**". ….

159. Accordingly, there has been no violation of …. Article 9 of the Convention.

Concluding remarks

Theoretically, Islamic law is an all-embracing religious system of law.

It is static, not open to amendment, reform or repeal.

In Islamic law, there are set, fixed values, which are independent from the values of the people.

It is the Islamic nation, the *umma*, which has to follow the rules of Islamic law as opposed to attempting to bring the law in line with people's attitude.

Terminology

Fatwa: verdict
Idda: Waiting period upon separation
qadi: judge of Muslim jurisprudence
Khula: divorce
Mahr: dower
Shiqaq: marital discord
Talaq: divorce

CHAPTER IV
ROMANO-GERMANIC FAMILY

SECTION 1. INTRODUCTORY COMMENTS

1. Historical background of the R/G family

At the end of the middle ages, customary law was of no interest from an intellectual point of view. Indeed, local customs were chaotic and fragmented. As a result of the absence of consistent legal systems, Roman law has been rediscovered at the Renaissance by scholars where two crucial events occurred in Europe:

- role of Justice promoted by the church;
- emergence of Natural law.

➔ accordingly, only Roman Law was worth to be studied.
➔ renaissance of study of Roman Law.

In a nutshell, one can assert that:

- there has been a continuous movement towards enlightenment (Rousseau, Voltaire, Diderot, etc.) and rationalism → development of civil law.
- Injection of the principle of justice into practical solutions endorsed by Roman lawyers
- Roman law reshaped further away of original model of Justinian towards modernised Roman law.

➔ Roman law needed to be reshaped, re-systematised, and new principles had to emerge with a view to responding the needs of contemporary society.

As a result, this rejunevated Roman law developed into a *Ius commune*, un *droit commun*, or *ein Gemeines Recht.*

This rediscovery didn't mean Roman Law was practised in its own rights. On the contrary, procedural roman rules were smoothly replaced by a set of specific rules. As a result, Roman law taught in universities moved further and further away from the original model.

Unlike England, in the countries of continental Europe the solutions proposed by universities prevailed. In this way, the R/G family came into existence.

2. Gap between a theoretical and a practical vision of the law

As a result, there was an obvious gap between:

- the universities contemplating a theoretical vision of an abstract legal system and
- the ways in which local laws were applied by courts on a daily basis.

The national legal system was discovered at a later stage/ taught at a very late stage. Amazingly enough, the first chairs on national law were set up at a very late stage:

- Swedish Law: 1620
- French Law: 1670
- German Law: 1741
- English Law: 1743

3. From Revisited Roman law to the code

Codification offered obvious advantages to society: it put an end to the fragmentation of law and the multiplicity of customs (→ set up clear basic legal principles).

But codification meant that the Roman law rediscovered and reshaped in universities would become fragmented, because each code is reflecting national trends. → Division of European law.

This evolution is highlighted in René David's textbook *Major Legal Systems in the World Today*: 'The family as such appeared in the thirteenth century… It began with the renaissance of Roman law studies in the universities… For five centuries the system was to be dominated by the writings of jurists under whose influence legal practice itself evolved. In conjunction with the Natural Law School, these doctrinal authors prepared the ground for the following period – the present one – in which the system appears to be dominated by legislation.'[43]

By the same token, in its book on *European Tort law,* Cees van Dam is also stressing that: 'The traditional *ius commune* disintegrated in the 18th c. with the rise of rationalism and nationalism. He new rulers wanted the identity of the nation to be supported by a national codification, starting with Prussia in 1794, France in 1804, and Austria in 1811. This was the

[43] R. David and Brierley, *Major Legal Systems in the World Today (*Free Press, NY, 1978) 31-32.

beginning of a process of nationalization of the rules of private law. In the course of the next centuries it encouraged the rules to start diverging.'[44]

4. Main features of R/G family

This family encompasses those countries which legal science has developed on the basis of Roman *ius civile.*

a) A feature of this family is that legal scholars (the doctrine) have formulated the law to a great extent. These scholars had a tremendous role in producing the law rather than applying it. Implementing the law was the task of the administration.

b) Another feature is that the law has evolved as an essentially private law, as a means of regulating the private relationship between private individuals. Other branches were developed much later and less perfectly.

> E.g.. Criminal law was developed in XVIIth, in the shadow of civil law. In France, criminal law was seen as regulating the relationship between the victim and its offender, but not as a part of public law.
>
> E.g. France as well as Belgium are still marked by a sharp *summa divisio* between private – public law.
> >< Given that CL is more pragmatic, this division is not as important.

The following table highlights the main differences between public and private law.

	Private law	**Public law**
Definition	Governs the relationships between individuals	Governs the relations of individuals with the State and the organization and conduct of the State itself.
Sub-divisions	Civil law, family law, contract law, insurance law, mortgage law, international private law, etc.	Constitutional law, criminal law, administrative law, environmental law, etc.
Level of State's interventionism	Freedom of the parties; marginal intervention of the public authorities	Definition of the general interest by means of restrictions placed on private activities, whether property rights (expropriation) or freedom of enterprise, (authorisation, restrictions)
Illustrations	No price regulation in	Rental leases governed by public

[44] Cees van Dam, *European Tort law* (Oxford, OUP, 2006) *107.*

	Belgian law; prices are determined by the law of supply and demand	law provisions relating to rental guarantees (*garantie locative*), the layout of the rented property (*préavis locatif*), sanitary requirements, etc.

c) Another particular product of the Enlightenment was the idea of codification, which mirrors the idea that diverse and unmanageable law could be replaced by comprehensive legislation in a transparent order. The code aims at enunciating every rule necessary to solve a problem.

One could not forget the words of Napoleon Bonaparte: *'it is not in winning forty battles that my real glory lies, for all those victories will be eclipsed by Waterloo. But my civil code will not be forgotten, it will live forever'.*

Many countries of the R/G family are still embracing the principle of rationality by enacting a code.

5. Spread of the R/G family

R/G family has a long history bound up with the law of Ancient Rome. But an evolution of more than 1000 years has greatly changed substantial and procedural rules alike.

At present, this family has spread through the entire world and even conquered Latin America, large tracts of Africa, Middle East, Japan Indonesia, and Thailand. Part of this success is owed to both colonisation and the success of codification.

Romano-Germanic Family	Common Law Family
Systematic formulation by the lawmaker of a set of general and abstract rule of conduct	Specific rules flowing from cases adjudicated by courts
Interpretation left to the courts and to the doctrine	Doctrine less influential
Originating from Continental Europe (linked to universities)	Originating from England (linked to royal powers)
Spread significantly around the world ollowing colonisation and also voluntarily	Applied mostly within the confines of the former British Empire

adopted due to convenience	

SECTION 2. SOURCES OF LAW

1. Legislation

Enacted law is the primary source of law. Accordingly, a primordial role must be attributed to the lawmaker.

Codification must be seen as the natural fulfilment of the universities' ideas and endeavours over the centuries.

- Louis XIV enacted ordinances = indication to a national law linked to centralisation.
- Napoleon (1804): Code civil, which was applied to the entire Europe ("Civil Code will live forever").

➔ There is a link between codification of law and centralisation/unity of a state.

However, as discussed above, codification has also provoked the division of European law and fragmented it considerably.

➔ English law was never influenced by the ideal of codification.
>< France: codification

A legal system of general and abstract rules. The whole family is deeply marked by the need for legal certainty as well as foreseeability. That led the lawmaker to set out general rules that refer to abstract concepts grouped together in general categories. Indeed, generality and abstraction guarantee impartiality by drawing a veil of indifference between the norm and the individual situation.

➔ abstraction replaces concrete approach
➔ generality above specific application

- The rules are thus more concise; as a result, fewer rules need to be enacted
- Courts are subordinated to the lawmaker ➔ the role of courts is belittled (no precedent)
  Abstract rule can last for several centuries given that courts can't lay down general rules (they only adjudicate specific cases).
  There is room for interpretation but in a particular context! Anyway, the lawmaker always has the last word.

Autonomous legal system. Formally rational, law is characterised by its axiological neutrality. Lawyers are adamant in refusing to take into consideration any elements external to the legal realm (sociology, value judgment, ethics, ideological considerations). Law defines itself as an autonomous system.

→ axiological neutrality and elements external of legal sphere aren't taken into account.
➔ legal system = objective, autonomous legal system.

An hierarchical legal system. The legal system presents itself as a pyramidal construction with the most general rules at the apex. Systematization confers upon the law the attributes of clarity, simplicity and certainty. The legal system can be portrayed as a pyramidal construction. Such a construction enhances clarity and as a result legal certainty.

- Constitutions: all R/G countries have indeed adopted a constitution;
- Codes: nearly all the R/G countries have adopted the formula of codification;
- Regulations: law forms no more than the skeleton of the legal order; flesh must be given to this skeleton. As a result, the lawmaker relies extensively upon the technical expertise of the executive branch, which adopts regulations with a view to laying down the technical details.
- Administrative directives: they encompass a wide array of non binding acts such as departmental instructions, "*circulaire administrative",* guidelines to civil servants, etc.

Drawing the line between private and public law

Comparative lawyers are mostly interested in private, civil law → germano-romanic family = French civil code (1804) and German civil code (1900).

Private law encompasses - civil law - commercial law - criminal law	⇔	**Public law** = relationship between individuals and the State (adm, constitut) ≈ AR: domaine priviligié du Roi

➔ But nowadays the dividing line has been blurred: contamination of public law by civil law and vice versa.

➔ division typical of germano-romanic family becomes blurred because of the development of new legal spheres (consumers, health, environment, sports, etc.)
➔ Emergence of new legal spheres standing astride both public and private law: what about the law of sports? consumers? environment? → part of public or private law?

2. <u>Case law</u>

The place given to judicial decisions as a source of law distinguishes the RG family from the Common Law. In effect, the creative role of courts has always been hidden behind the screen of interpretation of legislation. It follows that judges have no power of creating rules of law. For instance, Article 5 of the French C.civ. precludes judges from laying down general rules.[45] This task belongs indeed exclusively to the lawmaker. Furthermore, judicial decisions are fragile; a reversal of trend is always possible (*revirement de jurisprudence*). This is based upon the rejection of the doctrine of binding precedent whereby judges must abide by the rules previously applied in an earlier decision. As a result, the doctrine of binding precedent has always been discarded in the R/G family.

❖ ***Organisation of courts***

The organisation of courts varies tremendously from one country to another. However, certain common features stand out:

- hierarchical model ;
- autonomous structure of administrative tribunals ;
- Supreme courts (*Cour de cassation*), which cannot substitute its own decision on the merits of the case, can only annul the decision of the lower court.

≈ division of court system:

- constitutional courts
  PUBLIC
- administrative tribunals

- cassation – appeal – tribunal 1st instance PRIVATE

[45] This provision reads as follows : « *Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises*. »

→ no specialisation of courts due to private issues distinguished from public issues = feature of this family.

➔ this distinction is not found in Anglo-American countries.

❖ ***Judicial decisions***

Roman-Germ family >< CL family = case law as a legal source
↓
Courts prohibited from laying down principles: the matter of the courts is to deal with interpretation.
→ judicial decisions do not create legal rules/sources (= only the task of the law maker/legislative power).

The task of court is to interpret, but not to lay down a rule (avoid to replace the lawmaker).

Decisions are fragile: they may be rejected = "reversal of case law" is possible.

There is a rejection of doctrine of binding precedent (= bind by decision of another court in a similar case judged before).

➔ Germany : legal rule comes from - general legal process
- doctrine "*professorenrecht*".
= more logical, topic is thought in advance.

➔ CL: settle case by case the legal issues.

Thanks to influence of EU law, we are moving towards a more harmonised legal system: the emphasis is placed nowadays upon legislation, even in Great Britain. Maybe the separation between CL and Roman-Germ law will once disappear because the systems are coming closer to each other.

Comp L allows to see rationality of other systems, whether better solution are abroad. (= intellectual process).

➔ law shaped by legal history, political process and tradition.

Even though it is not the primer source of this legal family, it should nevertheless be taken into account. (ECHR: case law is important → trend to give more emphasis on decisions).

❖ ***Cassation***

Courts of cassation are the appellate courts of the highest instance in a number of civil law countries (France, Belgium, Greece, Italy, the Netherlands). The Courts' main purpose is to review lower court rulings on the grounds of legal or procedural error. If set aside, the ruling is said to be *cassé* (French for "quashed"), hence the French name of *Cour de cassation*, or "Quashing Court".

The Court's review is limited to reviewing the decision and the decision-making process on a point of law. Unlike the supreme courts which can rule on both the facts and the law of a case, they do not re-examine the facts of a case; they are only competent for verifying the interpretation of the law. They are typical of countries of Germ-Roman family. Nothing similar exists within the CL family.

Another difference can be pointed. There is no dissenting view of contending judges whereas in many CL regimes, magistrates may express their dissenting opinion.

Features of the *Cour de cassation's* decisions Extract from C. Van Dam, *European Tort Law*, 44.

The main features of the *Cour de cassation's* decisions are its concise wording, its apodictic way of reasoning, and often the lack of reasoning at all. Decisions are generally not more than one page long and therefore are not always crystal clear. The *Cour* does not discuss opinions of legal writers (as is the case in Germany), nor does it make any reference to its earlier decisions (as is the case in English, German, and European cases). French civil procedure law maintains a strict principle of anonymity which prohibits the divulgation of individual diverging or dissenting opinions of named judges. Compromises are enabled because there is no elaboration of the reasoning behind a decision—judges may reach the same conclusion albeit by different routes. A single judgment focusing on a narrowly formulated *ratio* and containing no *obiter dicta* is considered essential in ensuring a uniform interpretation and coherence of the law. This means that in decisions of the *Cour de cassation* the law appears to be self-evident. In this sense the interpretation of Napoleon's Civil Code is still determined by Montesquieu's maxim that the judge is the mouth of the law (*le juge est la bouche de la loi*). Hence, when reading a judgment of the *Cour de cassation* one may hear the mumbling of Napoleon himself.

3. General Principles of Law

Developed in 1946 by the Council of State of France, as reaction to a chaotic and technical development of administrative law.

→ distinction between du droit)
- law stemming from general principles (= Principes généraux
- enacted law (= loi)

→ the first prevails on the second.

E.g. proportionality = result of a genuine judicial process (not encapsulated as such by the law maker!)

>< CL: the concept of general principle is unknown. Either the lawmaker enacts an obligation in a statute, either he doesn't, but the court can't proclaim a principle that is binding.

Nowadays only a few courts lay down new principles; especially the ECJ is very active/productive in that field.

4. Legal Writing

Thanks to the Roman legal scholarship, it has always been considered that the legal rule be doctrinal or legislative in origin. It must be thought beforehand.

Works of legal scholarship is deemed to be a fundamental source of law. It was essentially in the universities that the principles of law emerged in the XIII-XIXth c. ("*professorenrecht*" in Germany). Universities have been gathering momentum from Renaissance to the XIXth c => legal tradition was shaped by university professors (doctrine) >< CL: shaped by courts.

However, with the advent of codification, the primacy of legal writing faded away. Nonetheless, the doctrine is still a very living source of law. Indeed the doctrine:

- creates the concepts, the vocabulary which lawmakers subsequently use ;
- establishes the methods by which statutes must be interpreted ;
- stimulates the lawmakers to take action.

It must also be noted that a distinction between private and public law has been traditionally drawn by scholars. After WWII, most legal systems have attained a high degree of development and perfection: constitutional law, administrative law, public international & EU law, criminal law, law of procedure, civil law, commercial law, international private law, etc.

To conclude with, though legal writing is not a principal source of law, it is still a very living source today (casenotes, law journals, textbooks, etc.).

Features of the French *doctrine* Extract from C. Van Dam, *European Tort Law*, 45.

The French doctrine plays an important role in analysing, explaining and interpreting the decisions of the *Cour de cassation*. This is very useful because, as has been pointed out, these decisions are very concise and apodictic and therefore not always crystal clear. The legal writers are in fact the priests serving the legal mass, mediating between the highest judge and *le peuple*, and whose sermons teach the congregation how to behave. This might explain why the legal authors, mostly academics, generally stand in high esteem, not only in the legal world but also amongst the general public. This is comparable to the German situation but slightly different from the English approach where the judges have descended from their high seat, have learned to talk everyday language, and thus have made legal academic mediators less needed.

Generally, the approach of the French legal writers is practical rather than theoretical. Long commentaries, such as produced in Germany, are rare…

§5. INTERACTION BETWEEN THE LAWMAKER, COURTS AND LEGAL WRITING

➔ There is a continuous interaction between the three spheres: legislation, judicial decisions, and legal writing. In this connection, law journals play a significant role.

➔ Legal writing can be described as a MEDIATE source of law. In this respect, it does not differ so much from UK and USA.

As the discussion below evidences, in Germany, courts take fully into consideration the ideas discussed in academic circles.

Interaction between doctrine and cases law in Germany
Extract from C. Van Dam, *European Tort Law*, 45.
The decisions of the Bundesgerichtshof (BGH) usually contain a comprehensive discussion of the legal problems raised by the facts of the case. Furthermore, case law and academic literature are thoroughly considered. 'A German decision, at the regional appellate or Federal Supreme Court level, addresses itself as much to the scholarly legal community as to the parties of the individual case.' In this sense most decisions of the BGH contain small academic papers as regards the state of affairs in the area of the law at stake. And the BGH refers not only to authors who are in agreement with its line of reasoning but also to those who are of a different opinion. So, the 'correct ones' and the 'wanderers' have equal chances to appear in the case law
Hence, academics play an equally important role in developing civil law as the courts. However, decisions of the BGH may be sometimes easier to read and understand than books and articles of legal writers. The decisions are much more informative than the French court decisions but they are not as juicy as the personal opinions of English judges. German decisions are written in an objective style and dissenting opinions are not allowed, except in decisions of the *Bundesverfassungsgericht* (Constitutional Court).

CHAPTER IV
ENGLISH COMMON LAW

Given that the majority of the 2nd year students who attend this course do also attend the Common Law course given by my colleague Prof. Dr. Fr. Van der Mensbrugghe, this chapter merely sketches the outlines of the subject-matter.

SECTION 1. INTRODUCTORY COMMENTS

In a nutshell, the main features of CL are the following:

1. More than any other legal system, English law has been profoundly shaped by its origin. Indeed, English law is tied to its past, as well as it is attached to traditional forms of legal thinking

> Admittedly, English history helps us understand why differs from other legal systems.

2. England never experienced political upheavals. As a result, its legal system was never significantly overhauled. No revolution at end of 18th c, which brought fundamental changes, such as codification.
➔ England has been marked by a long legal history of 10 centuries, with almost no changes, whereas on continent countries endured a lot of significant changes.

3. No country has clung as firmly on to its own style.

4. In sharp contrast to continental countries, the influence of Roman law has been superficial. Moreover, the idea of codification, born of the Enlightenment, has been discarded. Several attempts were made, but they weren't successful. (>< France: link between codification and the prerogatives of the King).

5. Within the Common Law family, English law occupies a pre-eminent place. CL came into being, historically, in England. Apart from English law, CL includes all the laws of English-

speaking countries such as New Zealand, Australia, Nigeria, Bermudas, etc. As a result, a study of CL requires an understanding of English law.

SECTION 2. EVOLUTION OF ENGLISH LAW

Sketch of the principal outlines of English legal history:

Centralisation of justice and unification of English law

1066: *Battle of Hastings:* Normandy invaded England. William I created a system that was integrated and centralised. The king was deemed to be the supreme ruler.

Given that he wanted to avoid to create huge pieces of land that were too powerful, he started feudalism like in France: all title to land had to be directly linked to the Crown, which is owning all land.

= Structured feudal system: land is property of crown, but managed by civil servants.

➔ Result: - centralisation of power vested in the King.
- unification of justice (courts concentrated in London).

➔ England enjoyed a unified law at a very early stage, and that's why we call it *common law.*

↓

12-13th c: English CL
16th c: French droit commun
18th c: German Gemeinsrecht
→ explains why system lasted so long

Writ as a means of command of the King, and as a procedural means to bring a lawsuit (as a result, lawyers thought no so much in terms of rights as in terms of action).

The whole litigation system was based on *writs:* in order to fill a complaint, the claimant had to seek a privilege and send his request to the King, and later to the Chancellor. As a result, the whole system was based on a favour granted by the King/Chancellor to the claimant.

At the end of XIIIth c, 75 different writs existed. The main issue was to select the correct writ by which the court would be seized. If the complainant didn't choose the correct writ, the case was dismissed.

- The litigation system became very proceduralised: thinking in terms of actions instead of rights < writ system. English lawyers are keen on respecting procedures rather than substantial issues.
- English lawyer are much more interested in describing correctly facts. → CL courts focus more on facts.

➔ Evolution of CL system dominated by procedural thinking = feature < key role of history in order to understand CL system.

Equity *developed* a number of remedies that greatly supplemented the system of pleas in Common law.

Willingness of King to forestall natural justice.

CL = law created by king's court in England. But CL could be paralysed by procedural issues.

CL is opposed to - statutory law
- equity = genuine product of the intervention of king.

In a number of CL cases, the claimant met difficulties to bring his case before a court. → he sought the King's intervention. (no writs)

E.g.. Trust: settlor, trustee and beneficiary: the beneficiaries could request the King's assistance whenever they were excluded under CL system.

CL >< Equity, morality, good conscience. → Equity is an expression of natural justice, to deal with failures of the CL.

King emphasis on Equity because it enforced his powers >< CL: parliament supported CL.

Conflicts between Common law and Equity:

1616 → 1875: compromises were worked out:
- court of CL deals with substantive law;
- court of Equity deals with the rest.
= 2 separate bodies of law.

1875: Equity became an integrating part of CL/English Law. The 2 systems survived side by side and went hand by hand. Courts can apply Equity as well as CL.

Equity is an integral part of English law; all English courts are empowered to apply the rules of CL as well as Equity.

SECTION 3. SOURCES OF LAW

- Monopoly of *practitioners*.
  >< on the continent: codification and universities, textbooks describing law.

  Legal teaching in UK is the sole responsibility of practitioners (and not law professors, like on the continent).

  → Emphasis on practice: focusing on analogies between different cases. (>< Theoreticians on continent).

Doctrine in England
Extract from C. Van Dam, *European Tort Law*, 86.

Academic authors do not play a predominant role in the legal discourse. The main task for academics is considered to be teaching students and doing research. This research, however, was hardly cited by the courts and generally academics stood in somewhat lower esteem than their continental colleagues. This backward position can be explained on historic grounds since common law has been mainly developed by practitioners. Although their position has improved in recent years, academics only play a modest role, much more modest than their German and French counterparts who were involved in the creation of the major civil codes. The restricted role of the academics prevented the development of more general concepts and formulations, let alone building a logical and comprehensive legal system. Common law has been developed in practice during almost a millennium. Hence, it is not surprising that it is very patchy and fragmented. Still, academics do not seem to be inclined to do construction work in this respect. There is some logic in this because such work is hardly satisfactory in a country with a legal tradition in which conceptual and academic thinking has never been of the utmost importance.

- The universities of Oxford and Cambridge were far away from London, where the courts were centralised → As a result, the practising legal business developed in *Inns of Courts*.

➔ The system is utterly complex: given that everything is based on a case-by-case approach, Common Law appears to be rather pragmatic.

ENGLISH LAW	**R/G FAMILY**
English lawyers think of their legal system as case law Rules to be found in the *ratio decidendi* of the judge	Not made up of judicial decisions; principles construed by scholars
Law professors are far less prestigious	Law professors are highly respected Professors reinterpreted Roman law in the light of modern German society (19thc).
English legal rule cannot be understood unless one knows all the facts of the case in which it was enunciated. As a result, facts permeated the structure of English law. Accordingly, the scale of the rule is inevitably narrower English law is over-burdened with legal definitions	R/G legal rule has a greater degree of generality and abstraction Accordingly, the scale of the rule is inevitably broader R/G law is made up of a framework within which it is often easy for the courts to exert their discretion

One needs to know all the facts, which determines the rule to apply = narrow vision Every detail is settled, and can be found in contract drafts ➔ less discretion left to the courts.	degree of generality = broad vision (general and abstract rules) more discretion left to the courts

THE STYLE AND FORM OF THE JUDGMENTS OF THE BGH

B. S. MARKESINIS, *The German Law of Torts, A Comparative Introduction*, 2nd ed. (Oxford, Clarendon, 1990), pp. 6-10

"*A judgment of the German Supreme Court (BGH) presents marked differences both in style and form from the judgments of the House of Lords or the French Cour de cassation. In terms of length, the contrast is greater with the French decisions (especially of the Cour de cassation), which are unparalleled in terseness and peculiarity of grammatical style. For example, a typical German judgment dealing with a contractual or delictual matter, will run to about 2000-2500 words-in a minority of cases reaching the 5000-word range. (Judgments of the Federal Constitutional Court tend to be much longer.) In length they thus tend to be closer to the average American decision than to the longer judgments of the House of Lords. ....*

Like the French decisions, but unlike the Anglo-American equivalents, the decisions of the German Supreme Court are unanimous decisions of the entire court. Clearly this does not mean that there are never any disagreements between the judges trying a particular case; but it does mean that in the published decision there are no open dissents. The court decides by simple majority (judges voting in inverted order of seniority, the presiding judge voting last). Thus, on occasion, the phrasing of the judgment requires very careful drafting in order to express the compromise formula agreed upon by the members of the court. By contrast, dissenting judgments are allowed in the Federal constitutional law and the judges make frequent use of this right.

The legal arguments ... are presented in an abstract manner which is not always easy for a Common lawyer to follow or even to translate accurately. For first of all, the tone of the argument can be highly conceptual, even metaphysical. Sections of the judgments dealing with the protection of human personality (...) are just that, and they will, in turn, generate academic literature which can reach heights of abstraction unthought of in the Common law.

Another difference-especially from English decisions-is the detailed consideration of the views of contemporary (and past) academic writers dealing with the subject before the court. In particular, what is usually referred to as the 'dominant opinion' (herrschende Meinung), which is the opinion on a certain matter as reflected in the majority of writings and decisions, will enjoy strong persuasive authority. Sometimes judgments contain more than a mere reference to academic literature; they can produce an admirably lucid summary of the views of the academic world, only to add immediately-one suspects with some measure of despair-that the solution to the problem should, in the end, depend on common sense and not theoretical constructions, however admirable they may be.

The previous case-law-especially of the Supreme Court itself-is also considered and quoted in the judgments but again in a manner quite different from that adopted by the Anglo-American courts. Rarely will a quote be given in order to distinguish one case before the court from the previous one. More often, it will be given to show what the established practice of the court is on a particular matter and to reinforce the present argument. Many of the differences with Anglo-American law are obviously due to the doctrine of stare decisis which, subject to the rather few special occasions already alluded to in the previous section, is not known to German law. This is not to say, of course, that an inferior court will easily depart from the line taken by the BGH-especially if there is a series of decisions (standige Rechtsprechung)

substantially to the same effect. Statute and custom are, therefore, technically the only true sources of law (though published preparatory works can be used in order to discover the intention of the legislator as part of the technique of interpretation of any law). On the other hand, it is not unknown for the various State Courts of Appeal to 'rebel' against a particular decision of the Supreme Court.

German judges (and lawyers generally) could be accused of leaving nothing to the imagination. Certainly the elegance, humour, and high literary style achieved by some English and American judges are often sacrificed at the altar of accuracy and thoroughness. "

SECTION 3. STRUCTURE OF THE LAW

- No comprehensive reception of Roman law;
- Rigour of CL procedures;
- Need to conform to a traditional framework;
- Legal techniques deeply marked by practitioners (monopoly of legal education) and not professors;
- The complexity and technical nature of CL can only be learned through practice;
- No legal thinking can develop from such a situation.

SECTION 5. JUDICIAL ORGANISATION

A fundamental distinction, unknown on the continent is made between:

- Superior courts;
- All the other courts which are inferior.

Of particular importance are the decisions of superior courts because it's from them that 'precedents' are drawn.

Absence of a "Ministère public":
Furthermore, one should stress the absence of a *Ministère public.* This institution is typical for Roman-Germanic family.

Lower courts

Lower courts adjudicate the majority of cases.

- County courts

- Magistrate's courts

Binding force or the precedent

Since 1966, the House of Lords and the Court of Appeal are not any more bound to treat their own decisions as absolutely binding.

However, the rule of precedent remains of great importance in the Common Law system.

What's a binding precedent? A distinction should be made between:

- *ratio decidendi* (= what the court has stated and has authoritative power: must be applied)
- *obiter dictum* (= what the court has stated but not obliged to follow: persuasive/doctrinal position).

In contrast, the attitude of US courts is more flexible → Supreme Court more often moves away from traditional case law. → dramatic changes occur because society experiences significant sociological and technological evolution: according to political balances, judges of Supreme Court endorse more radical changes in important, controversial issues like abortion, gay rights, etc…
>< UK: stick to CL outwith political influence

Continental law: judgement from Cour de Cassation is usually followed by lower courts → trend towards "doctrine du précédent" but implicit (tendency to follow decisions of higher courts).

Technique of attracting rules (between continent and CL) differs:

- (CL) various precedents are looked by gradually = inductive process through which principles and legal standards are derived.
- (Continent) look to application of law to a particular issue. → no hints to former case-law when giving interpretation of a decision.

➔ UK = judge made law, rather than statute made law!!

SECTION 6. CONCLUSIONS

(i) Rules of CL are often based upon historical accident rather than national design;

(ii) English law has no codes of Napoleonic style;

(iii) Legal rules are situated at the level of judge-made reasoning;

(iv) English statutes have a casuistic character not found in continental legislation;

(v) Spread of CL through the world.

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LEGAL TERMINOLOGY

Act of God: force majeure
Adjudicate: juger, décider, se prononcer
Apportionment of liability: rapartition de la responsabilité
Appellate court: juridiction d'appel
Applicant: requérant
At fault: fautif
Avail: faire valoir
Breach of confidence: cause of action in common law
Breach of a duty of care: violation d'un devoir de prudence
Breach of a statutory duty: violation/non-respect d'un devoir imposé par une réglementation
Burden of proof : charge de la preuve
Carelessness: imprévoyance
Caution: prudence
Custodian of a thing: gardien de la chose
Ceiling for compensation: plafonnement de la responsabilité
Channelling of liability: canalisation de la responsabilité
Claimant: demandeur
Claim for damages in delict: action en responsabilité pour faute
Contractual relationship: relation contractuelle
Contributory negligence of the victim: faute contributoire de la victime ayant contribué à la realisation du dommage (il s'agit d'une cause d'exonération de la RC).
Compensation: dédommagement
Complaint: action en justice
Complainant: demandeur
Copyright: droit d'auteur
Damage: dommages
Damages: dommages et intérêts
(Punitive) damages: damages not aiming at compensating the plaintiff but intended to deter the defendant or others from engaging in conduct similar to that which formed the basis of the lawsuit
Defective product: produit défectueux
Defendant: défenseur
Deliberate wrongdoing: comportement fautif intentionné
Dower: dote
Economic loss: perte
Exemption of liability: exonération de la responsabilité
Evidence: preuve
Falsehood: mensonge
Fault-based liability: responsabilité pour faute
Foresseeability: prévisibilité
Freedom of speech: liberté d'expression
General Principle of Law: principe general de droit
Hazardous activity: activité dangereuse
Intentional harm: dommage intentionnel
Interim measures: mesures provisoires/conservatoires
Interlocutory application: action en référé

Judicial review: contrôle juridictionnel
Jurisdiction: ressort, juridiction, compétence
Obligation of means/result: obligation de moyens/de résultat
Legal remedies: procedures juridictionnelles
Liability for one's own act: responsabilité du fait personnel
Liability for things: responsabilité du fait des choses
Libel: diffamation
Link of causation: lien de causalité
Likely to do mischief: susceptible de mettre en danger
Manufacturer: producteur
Negligence: négligence, faute
Plaintiff: demandeur
Privacy: vie privée
Pure/True omission: omission sans action
Reasonable man of ordinary prudence: homme avisé
Regulatory standards: normes réglementaires
Right to privacy: droit à la vie privée
Right of personality: droit de la personnalité
Right of ownership: droit de propriété
Self-censorship: autocensure
Settled case-law: jurisprudence établie
Slander: calomnie
Strict liability : responsabilité objective (ce régime de responsabilité ne requiert l'établissement d'aucune faute dans le chef du défendeur mais il convient que celui-ci ait cause le dommage dont la reparation est réclamée).
Third party: un tiers
Tortfeasor/wrongdoer : auteur du dommage
Trespass: entrée non autorisée, trouble de jouissance
Trial judge: juge de première instance
Unforseable and unavoidable external cause of the damage: cause étrangère imprévisble et irresistible
Unlawfulness: illégalité
Uphold a judgment: confirmer une décision judiciaire
Victim's contributory negligence: participation de la victime à l'événement à l'origine du dommage
Wheighing/Balancing of interests: balance des intérêts

To abridge a right: restreindre un droit
To aver a right: invoquer un droit
To adjudicate on the merits: décider sur le fond
To be held liable: être tenu pour responsable
To bring an action for libel against: intenter une action en diffamation
To bring proceedings: assigner en justice
To cause damage: causer des dommages
To contribute by his conduct to the damage: contribuer de par sa conduite à la réalisation du dommage
To bring proceedings against: intenter une action en justice à l'encontre de -
To bring a claim for compensation against : engager une action en responsabilité civile à l'encontre de
To bear the costs of: supporter les coûts

To bear the burden of proof: supporter la charge de la prevue
To deliver a decision: rendre un jugement
To enjoy a right: jouir d'un droit
To exonerate from liability : exonérer
To impose liability on the defendant: condamner le défendeur à dédommager
To incur liability: être jugé responsible
To remit a decision to a lower court: renvoyer l'affaire à une juridiction inférieure
To seek an injunction against: faire une requête en injonction
To shift the burden of proof: déplacer la charge de la preuve
To take steps to prevent an accident: prendre des mesures pour éviter un accident
To overturn: opérer un renversement de jurisprudence
To owe a duty of care to -: être tenu par un devoir de prudence à l'égard de -
To uphold/dismiss the decision at first instance: maintenir/renverser la decision rendue en première instance