

# The Role of Sharī‘Ah Law in Family Affairs of the Western Muslims

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## Abstract

Law requires respect from the community for that reason it must recognize all cultural opinions and reflect them as well. It has the ability to define and demark the social boundaries. In a society where presence of migrants generated legal pluralization the uniformity in family law could be negotiated due to cultural veracity. Contrary to various other dimensions of Sharī‘ah, Muslim family laws are not only prominent but also majority of these laws are still practically valid and applied by the Muslims in Muslim and non-Muslim countries. These laws are still regulating the personal and family affairs of the Muslims inhabiting in West. Therefore, it will be suitable to discuss how Western legal frameworks deal with religious liberties and faith-based laws and how it effects the Muslims in the West. The nature of guidance that are sought from Sharī‘ah law by Western Muslims and its interaction with Western family laws is also part of the current debate of validity of Sharī‘ah for the Muslims in the West which is included in this part of the study. Doctrine of conflict of laws in Islamic Jurisprudence and in western Jurisprudence is also a part of study. Effects of conflict of family laws on Western Muslims discussed in last part of the study. This research is an effort to describe role of Sharī‘ah in family affairs of the Muslim minorities in west and the challenges faced by the Muslims and host countries related to preservation of individual and collective identities and integration.

**Keywords:** Family law, Conflict of laws, religious liberty, minorities, ethnic, legal framework, Islamic jurisprudence, Muslim lands, Western Countries

## 1-Introduction

Generally Muslim jurists claim that Islamic law regulates actions and conduct of Muslims, irrespective of territorial boundaries. The whole structure of Islamic law was evolved in such a way that Muslims could regulate their lives in this world. The Islamic legal system is based on divine revelation, considered valid, perpetual, irrevocable and binding on all Muslims irrespective of their geographical or territorial locations.<sup>1</sup>The effectiveness of Islamic law within the jurisdiction of a Muslim state is beyond any doubt. However, its jurisdiction on the Muslims living in non-Muslim countries as minority is debatable question among classical as well as contemporary scholars. No doubt Muslims are bound to follow Islamic law, wherever they are but to what extent? This is a question that has generated debate among scholars from the early period of Islam till today. In post-colonial world the legal systems of the Muslim countries are as it were created by the colonial powers. Many traditional laws have been replaced with the post-colonial Western laws. In spite of these fundamental changes in legal systems and laws Muslim family laws are intact and protected. Secularization of laws in many Muslims countries has not affected it much. The strength and importance of Islamic

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<sup>1</sup>N.J. Coulson, *A History of Islamic Law* (UK: Edinburgh University Press, 1964), 75-85.

family laws are still vital and significant for Muslims communities around the world. Their community is constructed and identified on the basis of family units which are originated, regulated and organized by the rules of Islamic family law. The dynamic, diversified and flexible aspect of Islamic legal tradition is demonstrated through and Islamic family law. Islamic family laws are crucial for all Muslims whether living as minority or majority as it reflects their attachment and connectivity with their faith and religious tradition.

Like the Muslims of Muslims majority countries, the Muslims living in Muslim minority countries are also like to comply Islamic Family laws in their family matters particularly matters related to marriage divorce and division of inheritance. This the reason that Muslims inhabitants of migrated lands are in search of new reconciliatory approaches to resolve the conflict between Muslim family laws and family laws of the migrated lands particularly in the united states and western Europe. Moreover, the matter of balance between religious and citizenship obligations also need to be resolved. The present study is aimed to explore various answers to the question “How the contemporary scholars deal with the issue of application of Sharī’ah on the personal matters of Muslims living in non-Muslim societies?” The research is also evaluating the challenges that Migrated Muslims are facing for application of religious laws in the personal matters in their new destinations.

## **2-Religious Liberty and Immigrants in Western Legal Frameworks:**

European Convention on Human Rights<sup>2</sup> treats liberty of perception, moral and faith and contemplated as the fundamental units of a democratic society. It does not allow any type of prejudice on account of faith. As per this convention these values govern human conduct and assist in the development of person’s identity. It not only effects the identity and believes of the believers but it is also not irrelevant for the nonbelievers.<sup>3</sup> Right of religious freedom is not unlimited, certain law, objectives and proportion-based restrictions are imposed. In few cases this right is restricted especially when freedom of others needs to be secured from undue influence. Freedom to change religion is given in Article 9 of European Convention on Human Rights.<sup>4</sup> Professing any religion or believe is person’s private matter. Freedom of religion essentially includes public and private demonstration of one’s believes, through worship, teaching, practice, application and compliance. As per Islamic teachings Muslim communities are obliged to follow rulings of Islamic law to design their family lives. Muslims in the West on the basis of European law’s rules of freedom of religion, considered that they can rightfully follow their religion in family matters. The European Court of Human Rights in 2003 decided that religion only extends to individuals’ personal life and it has not come under the ambit of right to freedom of religion, due to its wide upshots, and freedom of religion must strictly be reduced to individual’s matter.<sup>5</sup> Rights of ethnic minorities are also protected by many international agreements due to collective rights content. For instance, article 27 of the

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<sup>2</sup> Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950

<sup>3</sup> Andrea Büchler, *Islamic Law in Europe: Legal Pluralism and Its Limits in European Family Laws* (Farnham, Surrey, England ; Burlington, Vt: Ashgate, 2011),14.

<sup>4</sup> Ibid.

<sup>5</sup> The European Court of Human Rights, decided in the Refah Partisi (The Welfare Party) and Others v. Turkey case see for details; Refah Partisi (The Welfare Party) and Others v. Turkey, ECHR Grand Chamber, Judgment of 13 February 2003, (Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98), notes 127 and 128.

International Covenant on Civil and Political Rights<sup>6</sup> or article 5 of the Framework Convention for the Protection of National Minorities, enacted by the Council of Europe in 1995,<sup>7</sup> provide protection of culture and identity to the minorities.

There are significant human rights features related to cultural status as the idea of law in Islam is based on religion. In Islam, Islamic law governs every area of a person's life and if faith is taken by way of a central fragment of traditional individuality, there may be a clash between laws and culture, hence need to be resolved.<sup>8</sup> The law on the other hand is heavily based on the culture of society and in fact represents the social, cultural and political circumstances of that area from the time it evolves. Moreover, religious recognition is given to those customs that are legally recognized and respected more due to the perception of their being little human influenced. Association between law and culture is as powerful that an individual feels himself totally exotic, if he finds that law applicable to him is not associated with his culture, it could put him in isolation. Law not only requires respect from the community but it must recognize all cultural opinions and reflect them too, it has the ability to define and demark the social boundaries. Similarly, in a society where presence of migrants generated legal pluralization the uniformity in family law could be negotiated through cultural integrity. In case of family laws of Europe, relevancy of Islamic legal norm is crucial. Possible accommodation or integration of family law rules of Islam into state legal structures are significant challenges both to European democracies and contemporary Islamic legal thought. Importantly, length of legal and normative pluralism and openness and flexibility of family laws of Europe to absorb multiplicity of cultures, are also important to discuss. The family and family values still remain a symbol of hope, though despite of its total transformation into a new shape. Logically it's not possible to have common Western family values because it contradicts with what ought to be with, what is, and Muslim migrant population with traditional family forms and values, re-traditionalized. Presently, different kind of family structures such as modern, traditional exists in Europe. Correlation amid state and faith was defined through the constitutionalism. It was used to rule public and private areas of individuals' life. However, in twentieth century increased migrations towards Europe created a threat to the relations between faith, state and society. The immigrants desire to join their new home lands to nurturing global communities but insist to intact their attachment with their original lands. Faith plays significant part in this whole process. Immigrants leave many belongings behind including their property and relatives but take their faith with them. Muslim immigrants found many opportunities in their new homelands through faith based Islamic organizations. These organizations extend accord to Muslim immigrants in in their host states and help them to protect their identities, interests and collective aims. European countries, have to review and reconsider their political norms, rules of nationality and citizenship since national identity is embedded in history, and many countries confronting these issues have designed different strategies and plans of action to tackle the current situation. Cultural uniformity and variability, shared distinctiveness, conviction of place, tradition and homeland are some of the issues which needed to be settled by the European countries.

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<sup>6</sup> See for details, Donders, *Towards a Right to Cultural Identity* (Antwerp: Intersentia Eekelaar, 2003); "The End of an Era," *Journal of Family History*, 28(1) (2003):108–122. Ehringfeld K, *Eltern-Kind-Konflikte in Ausländerfamilien* (Berlin: Duncker & Humblot, 1997).

<sup>7</sup> *Ibid.*

<sup>8</sup> Büchler, *Islamic Law in Europe?* 20-50.

In a nation-state, faith and racial based associations are reflection of the diversification of the state. It is also important that the identity of a nation as a society is demarcated through a shared background and customs or via its collective set of administrative bodies that administer the public.<sup>9</sup> In this regards diversity of actions and policies is found European countries. In France national identity is based on citizenship, legal and political equality of its citizens<sup>10</sup> and policy of inclusion and assimilation with the separation between state and religion.<sup>11</sup> Germany permitted ethnic affiliation. Complete segregation between church and state does not exist which means state and religion can co-exist. It allows public expression of religion. Freedom of religion is available to all religions equally in Germany.<sup>12</sup> Religions are not treated equally in Switzerland, although diversity is one of the most important features of Swiss nation<sup>13</sup> but Roman Catholic and Evangelical reformed churches are recognized as official churches in common law and are granted distinct benefits. United Kingdom represents an established state church by uniting religion and state. The monarch, is the symbol of special link between crown and church and holds the positions of head of country and supreme governor of the church of Britain.<sup>14</sup> Spain provides equality between religions. Every state has its own public policy to deal with religious diversity and to accommodate various religions.<sup>15</sup>

During latter period of the 20th century Muslim immigration to developed countries increased as a result of more economic, financial and job opportunities. Muslim population is still increasing day by day in the European countries. The Muslim communities in Western countries are divided on the basis of origin, history and objectives and owe distinct status depending on the unique and specific state of affairs of migrated country.<sup>16</sup> In addition to this, these communities have diversified conceptions and relations with their religions. Apart from differences of job opportunities and prosperous future, the Muslim communities of United Kingdom have a variety of historical background of former British colonies.<sup>17</sup> These Minority Muslim groups have variant cultural, ethnic, religious and family systems but not significantly contradictory with the majority's beliefs and systems. Most of these immigrants are from India, Pakistan, Bangladesh and African countries. Especially those who are born and educated in Britain have adjusted some of their customs and principles to fulfil the requirements of majority, but continued to preserve and manage a large amount of their native traditions.<sup>18</sup> They actively built mosques, Islamic centers and established Muslim

<sup>9</sup> Töpperwien, *Nation-State and Normative Diversity*, (Basel: Helbing & Lichtenhahn, 2001),42.

<sup>10</sup> Ibid, 101,110.

<sup>11</sup> Ibid, 152.

<sup>12</sup> Büchler, *Islamic Law in Europe?*, 22.

<sup>13</sup> Töpperwien, *Nation-State and Normative Diversity*, 233.

<sup>14</sup> Rosman, *The Evolution of the English Churches 1500–2000* (Cambridge: Cambridge University Press, 2003), 29.

<sup>15</sup> Cesari, "Muslim Minorities in Europe: The Silent Revolution," in *Modernizing Islam: Religion in the Public Sphere in the Middle East and Europe*, ed. J.L. Esposito, F. Burgat, (London: Hurst & Company, 2003), 265.

<sup>16</sup> Hussain, "The Holy Grail of Muslims in Western Europe: Representation and their Relationship with the State," in *Modernizing Islam: Religion in the Public Sphere in the Middle East and Europe*, ed. J.L. Esposito, F. Burgat (London: Hurst & Company, 2003), 215.

<sup>17</sup> Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralism in England, Turkey and Pakistan* (Aldershot: Ashgate, 2005), 55.

<sup>18</sup> Poulter, "Ethnic Minority Customs, English Law and Human Rights," *International and Comparative Law Quarterly*, 36(3)(1987): 589-590.

organizations. They managed to provide halal foods for their fellow Muslims. Usually Imāms of British Mosques represent their own religious communities and act as facilitators between state and communities. The circumstances in United Kingdom show that the Britain approach at state level about religious diversity and liberty of faith is moderate. It is particularly flexible for Muslim minorities.<sup>19</sup>

France is prominent with the large number of Muslim populations. Due to the colonial past, mostly immigrants are from North and West parts of Africa. They were allowed in France to fulfil considerable need of labor in the past. Especially following Second World War, majority of the immigrants came to France as workers with the intension of going back to their homelands. But later on, despite of many difficulties, they opted to reside permanently in France. Many of their family members joined them in their new homeland France. The emerging Muslim communities in France changed the situation of immigrants due to their specific religious and cultural needs and possible societal roles. French state system mainly provides religiously secular environment in almost every institution including educational institutes, to propagate integration. Immigrants are forced to assimilate. It is reported that fifty percent of the Muslim population of France is French national.

In Germany, strict restrictions are imposed for getting nationality, although few relaxations were given in past few years to promote integration in second generation of immigrants. In spite of that number of Muslims who obtained German nationality are limited.<sup>20</sup> Before 1980 Germany was not considered immigrants’ dream destination. But during economic-boom, migrant workers were engaged in millions with the intention of eventually sending them back to their homeland. Islam was considered a foreign issue. The German Muslim community is led by Turk immigrants. The growth of this particular community is unique as its Islamic identity is relatively new idea.<sup>21</sup> The settlement of Muslim communities in Switzerland is an outcome of economic and job opportunities for Yugoslavians and Turks. This opportunity was also open for emigrants from Balkans and Africa. The rank given to refugee personnel in Switzerland was uncertain for many years. They were essentially used to fulfil the requirement of labor.<sup>22</sup> Recently due to change in political situation, immigration policies have been restricted more. Spain with a rich history of Islam in past, recently can be distinguished by emigration. Muslim immigrants in Spain mostly came from North Africa, Arab world, Eastern and South-Eastern Europe, after its accession to European Union in 1986.<sup>23</sup>

These migrations are creating challenges for policy makers in European countries as they gradually established themselves from mere individuals to families and generations with specific defined identities. This transnational attribute of present migration is a test for legal systems of states because of various differences such as ethics, family systems, cultures and relationships with land of origin.<sup>24</sup> The marriages of

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<sup>19</sup> Ibid.

<sup>20</sup> Büchler, *Islamic Law in Europe?*, 25.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Hussain, “The Holy Grail of Muslims in Western Europe: Representation and their Relationship with the State,” in *Modernizing Islam: Religion in the Public Sphere in the Middle East and Europe*, ed. J.L. Esposito, F. Burgat (London: Hurst & Company, 2003), 215–250.

<sup>24</sup> Grillo, “The Family in Dispute: Insiders and Outsiders,” in *The Family in Question: Immigrant and Ethnic Minorities in Multicultural Europe*, ed. R. Grillo, (Amsterdam: Amsterdam University Press, 2008), 15.

Muslim immigrants with partners of their motherland or motherland of their close relatives are important due to many reasons. Working as an institution in modern world is one of the main reasons behind tough and volatile characteristic of immigrant communities of Europe. The economic benefits stem to those who organize their internal dealings on that foundation then it becomes more crucial, when they are overextended worldwide. As soon as it is presumed that family resources are detained mutually, it implies they ought to be circulated amid lineage conferring to the norm of 'from each as per his capability to each as per his necessity'; like a small-scale worldwide organization, conveying resources, notions and recruits interregional to get the most out of their joint benefits.<sup>25</sup> They set their mutual connections on the pattern where elders are supposed to offer support and guidance to the youngsters, and youngsters normally presumed to obey their elders. As a result of such a collectivity substantial benefits are attained and access to every potential resource shared between the members of network to escalate associates' substance, fiscal and spiritual sanctuary when intervals become difficult. This global expansion has rather strengthened their family unity and relationships.<sup>26</sup>

### **3-Western Legal Frameworks on Family Affairs:**

Muslim countries all over the world are sharing many commonalities due to common faith but European Muslims are divided in different groups with distinct religious practices and believes. Europe undoubtedly is converting into the garrison of ethnic, religious and cultural diversity. That diversity also creates fear of domination of alien legal norms over local ones, more specifically Muslim family law has started becoming stronger in many European countries. With the increase of Muslim migrants in Europe their family law rules clearly highlighted the clash with the host land as family law norms are main source of identification for Muslims. Europe conversely reached to that contemporary modern and liberal form after long and hard struggle. Religious based Family law matters always remained an important point of concern for European states due to the reason essential amendments have been made in family law codes. Now family system of European states is more liberal, flexible and based on the choices of individuals. Muslim migrants in Europe demand reflection of religious and cultural diversity in laws. They also desire weightage to Islamic values and concepts in family laws as protection of cultural and religious identities comes under fundamental human rights and granted by international treaties.<sup>27</sup> Legal system of Europe tries to accommodate Muslim immigrants under the umbrella of private international law rules. But Europe represents multicultural public where cultural and religious identity and family laws are associated in different ways and hence escalate many other problems.<sup>28</sup> Religion in Europe particularly for Muslims is not just for self-identification, due to staying in non-Muslim societies they want to establish and reinforce their religious affiliations publicly.<sup>29</sup>

Islamic family law remained intact and protected even during colonial period and secularization of many Arab and other Muslim States could not replace it, which

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<sup>25</sup> Ballard, "Human Rights in Contexts of Ethnic Plurality: Always a Vehicle for Liberation," in *Legal Practice and Cultural Diversity*, ed. R. Grillo, R. Ballard, A. Ferrari, A. Hoekema, M. Maussen, P. Shah, (Farnham: Ashgate, 2009), 308.

<sup>26</sup> Ibid.

<sup>27</sup> Büchler, *Islamic Law in Europe?*, 1-4.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

shows its strength and importance for Muslims.<sup>30</sup> Muslim religious community is formed and identified on the basis of family units originated with the rules of Islamic family law.<sup>31</sup> Islamic legal tradition is dynamic, diversified and flexible and Islamic family law rules exhibit the same. Islamic family law rules are essential for all Muslims whether living as minority or majority.<sup>32</sup>

A verity of responses to Muslim Family laws is found in the European countries. Spanish law equally recognizes civil and religious marriages and Islamic marriages are not only allowed and recognized with compulsory state registration, but also have legal effects and consequences.<sup>33</sup> In English legal system Muslim marriages do not need civil marriage ceremonies, mosques are authorized to register marriages themselves, like all the other religious communities.<sup>34</sup> But civil marriage registration is still a necessity for a religious wedding conclusion in the legal systems of Switzerland and France.<sup>35</sup> In Germany however, this prerequisite has been abrogated but status of religious marriages in civil law require clarification.<sup>36</sup>

Divorce is also governed by laws of European countries regardless of the fact that it has religious and cultural dimensions too, therefore, harmonization and collaboration between them is crucial. In case of Muslim divorce for instance in Germany, conflict-of-laws rules would be applicable. But divorce by repudiation may be objected and taken as against the principles of gender equality and human dignity, but other forms of Islamic divorces are acceptable.<sup>37</sup> The marriages could be dissolved without following conventional divorce procedures and court intervention has also been reduced in Europe due to the possibility of administrative divorces.<sup>38</sup> Due to the contractualisation of family law, the court powers in divorce matters are challenged. Similarly owing to the confinement of underlying purpose of law to equitable distribution of assets, compensation and consequences of the dissolution of the relationship, even in England and some other states consequences of divorce could be resolved through mediation or alternative dispute resolution.<sup>39</sup> Apart from this, family laws nevertheless play protective role with compulsory rules in areas relating to children and financial matters to ensure smooth and just outcomes. The informal settlement of disputes through processes of counseling and mediation is opening more avenues for Sharī'ah councils to

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<sup>30</sup> Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 149.

<sup>31</sup> Poulter, "The Claim to a Separate Islamic System of Personal Law for British Muslims," in *Islamic Family Law*, ed. C. Mallat, J. Connors (London: Graham & Trotman, 1990), 147.

<sup>32</sup> Nasir, *The Islamic Law of Personal Status* (Leiden: Brill, 2009), 34.

<sup>33</sup> For details see Article 59 of Código Civil; Martínez-Torrón, "The Legal Status of Islam in Spain," in *Islam and European Legal Systems*, ed. S. Ferrari, A. Bradney (Aldershot: Ashgate, 2000), 56.

<sup>34</sup> Welstead, Edwards, *Family Law*, (Oxford: Oxford University Press, 2008), 24.

<sup>35</sup> For details see Article 97 para (3), ZGB (Switzerland); Article 165 and Article 191 of the Code Civil (France).

<sup>36</sup> Büchler, *Islamic Law in Europe?*, 70.

<sup>37</sup> Bano, "Muslim Family Justice and Human Rights: The Experience of British Muslim Women," *The Journal of Comparative Law* 2, no.2 (2007): 54; Martín-Casals, Ribot, "The Postmodern Family and the Agenda for Radical Legal Change," in *The International Survey of Family Law* (Bristol: Jordan Publishing, 2008), 411–436.

<sup>38</sup> Büchler, *Islamic Law in Europe?*, 112-114.

<sup>39</sup> Poulter, *Ethnicity, Law and Human Rights: The English Experience*, (Oxford: Clarendon Press, 1998), 234.

make remarkable services in family law field for Muslim minorities.<sup>40</sup>

Factually conflicts-of-laws rules under private international law allow even more accommodation of Islamic family law rules than the accommodation provided by European laws practically. When a law or norm confront with other form of law or norm it would ultimately institute self-identification process. Contemporary European family-law rules are not based on religious or customary norm like Asian and African countries but in few recent years Europe has tried to harmonize family-law codes to allow more integration of different communities, cultures and nationalities.<sup>41</sup> Family law rules of any society based on cultural dimensions generally represent remarkable distinctions within a society, however family law in European countries is more contractual in its essence, and individuals' liberty is over and above the family law codes.<sup>42</sup> The perimeters between public and private spheres must be reanalyzed by taking into account the plurality of cultural identities within a society.

#### **4-Doctrines of Conflict of Laws in Western Jurisprudences:**

The jurisdiction related to conflict of laws is an emerging phenomenon in the contemporary legal thought. The principles of conflict of laws are applicable in family matters of European countries where one of the parties in the case is a foreign national, since cross-cultural related family issues are not the primary focus of these rules. But the relationship between cultural diversity and family law mainly revolve around the regulations of conflict-of-laws. These rules decide the suitable valid commandment in family disputes of foreign nationals.<sup>43</sup> The acceptability of foreign country's law in host country and its applicability are crucial issues. For instance, matters such as marriage contracts of minors, divorces, polygamy, legitimacy of children, marriage between people of different faith etc. are dealt with the application of conflict-of-laws rules. Law has a cultural aspect and undoubtedly it is fragment of every culture, as the cultural identities are maintained and protected ultimately to make the rules and implement them accordingly.<sup>44</sup> The origin and culture of immigrants are the crucial factors to determine the suitable rule for them in case of disputes in Europe. All European countries are not addressing this issue in same way. For instance, acts of private international law of Germany, France and Spain are different from Switzerland and England. German, French and Spanish codes of Private international law, in determining many issues of family law consider nationality a basic factor, aiming to protect the cultural affiliation of particular individual, although in Switzerland and England law of residence or domicile is taken into account to ascertain applicable legal order. In concluding marriage contract family law rules of the country of the spouses are applied in Germany.<sup>45</sup> Under German legal system distributive application is done in which preconditions in respect of compatible legislative enactment are judged in accordance with those several law canons. For example if one of the spouses is qualified to get hitched in accordance with the ruling of the state of his nationality, yet not eligible to espouse according to the law of the state of his other spouse's nationality, can lawfully accomplish espousal but principally it will be

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<sup>40</sup> Poulter, *Ethnicity, Law and Human Rights: The English Experience*, (Oxford: Clarendon Press, 1998), 234.

<sup>41</sup> Büchler, *Islamic Law in Europe?*, 19-20.

<sup>42</sup> *Ibid.*

<sup>43</sup> Büchler, *Islamic Law in Europe?*, 36.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*, 37.

directed through German law.<sup>46</sup> Similarly, legal implications of matrimony and nuptial assets arrangements are resolved according to the nationality of the partners or latest joint nationality in the course of wedding. The same can be applicable if one of spouse nevertheless holds that state’s nationality or according to the law of state in which partners usually reside, or most recently routinely resided in the course of their wedding, if one of spouses even so routinely stays around.<sup>47</sup> In exceptional cases where spouses possess many nationalities then they can select the rule which administers their wedding. Divorce is administered according to the rulings that govern the authorized conclusions of the wedlock at the time when divorce petition is filed. But in suits of partners of alike non-German citizenship or joint citizenship in the course of their wedlock and one of the partners even so bears that citizenship at the moment of pursuing for divorce then law of a foreign country can be applied.<sup>48</sup> For the parentage of a child, law of the country in which the kid normally lives, is applicable. Law of the state of relevant parent may be taken into account as well but legal relationship between child and parents is determined on the ground of kid’s usual abode.<sup>49</sup> In France there is no particular law to deal with the issues of private international law. The Code Civil conversely provides conflict of law rules. Therefore, the marriages are regulated via statutes of the state of which each partner is a citizen, but dependent on the restrictions imposed by *ordre public*.<sup>50</sup> If the future spouses are of different nationalities, then they have to fulfil the eligibility requirements to marriage provided through the code of the state of each spouse to which they are citizens. However, they are bound to follow some particular directions of French law.<sup>51</sup> Similarly, the law of the place where marriage ceremony took place, provides the formal requirements of a marriage and legal consequences of marriage are governed through the enactments of the country of their citizenship. If the nationalities of spouses are different then the enactments of the country in which they mutually abode with domiciles is considered.<sup>52</sup> For the Matrimonial Property Regimes<sup>53</sup> in the absence of nominated law, the habitual residence of the spouses after marriage provides the applicable law. But if their usual dwelling is in unlike countries then the code of the state of joint citizenship will be relevant for them. Likewise, foreign divorce law is applicable in the absence of spouses’ French nationality or shared French domicile. The family code of the mother at time of the kid’s delivery provides the rulings for parentage, in case child and parents have their habitual residence in France then French law is applicable.<sup>54</sup>

In Spain<sup>55</sup>, nationality defines the applicable personal law for the individuals.<sup>56</sup> It is pertinent to express that nationality is an important determining factor in

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<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Gutmann, *Droit International Privé*, 6th Edition (Paris: Dalloz, 2009), 156.

<sup>51</sup> Condition *de fond* derived from the Article 3 para (3) and Article 171–1 of the Code Civil.

<sup>52</sup> Condition *de forme* derived from the Article 3 para (3) and Article 171–1 of the Code Civil.

<sup>53</sup> Article 4 para (1) of the Hague Convention and Article 4 para (2), section 3 of the Hague Convention.

<sup>54</sup> Büchler, *Islamic Law in Europe?*, 30-31.

<sup>55</sup> Small number of provisions of the Código Civil (Articles 8–12) provide rules in matters of private international law.

<sup>56</sup> See for details Article 50, Article 9 para (2), Article 9 para(3), Article 107 para(2) of the Código Civil.

international family law as it may provide authentic and honest point of reference<sup>57</sup> but cultural identities may not necessarily be consistent with the legislative structure of that country and applying the law of the country only does not serve the purpose in all cases. Similarly, in case of Muslims, religion has leading role and it dominates their culture and national laws as well. By restricting them to follow the law of foreign nationality would ultimately create less beneficial scenario for Muslims, especially in cases of Muslim women like for instance Spanish law declares that it would dominate in all those suits where codes of woman's nationality do not allow annulment or allow merely in discriminatory manners.<sup>58</sup> Many studies show that majority of Muslim women seek protection in European or western laws rather than the laws of the state of their origin. One of the arguments for not applying the law of origin is to promote integration among the people of foreign society, as the emigrants need to be integrated by adopting the culture, law and nationality of the state of residence. Factually, European countries have very strict and inflexible citizenship requirements which include legal integration by way of liberalization and eventually life of immigrant is pushed toward endless adaptation. Moreover, application of law of an individual's nationality in Private international law to secure person's identity and culture would not serve the purpose due to the lack of compatibility between applicable procedural and substantive law in family matters. Legal systems of East and West are not treated equally, like for instance German courts could not apply religious laws evenly due to the loop between procedure and applicable substantive law. Same is the case with other European courts.<sup>59</sup> For the application of religious laws by a court requires separate training, understanding of different procedure and rule of evidence and authority and a secular court without proper training over religious matters and laws would make the situation even adverse for the applicant. Similarly, content, meaning and effects of laws are allowed to develop in particular context and culture when they are tried to apply forcefully in another culture and context, they lost their effectiveness and authority.<sup>60</sup> The philosophy behind the concept of applicable law based on nationality in private international was to protect and preserve the identity and culture of immigrants, as it was understood initially that these immigrants would ultimately go back to their host countries. But with the passage of time and with the permanent settlement of immigrants and their next generations in West, now Europe is more focusing on integration and avoids nationality-based application of law by introducing reforms in private international law in many European countries. According to European Union legal structure in family-law matters only divorce issues are presently administered under international judicial jurisdiction and recognition of member states' decisions in marital matters by applying national conflict-of-laws norms.<sup>61</sup> There is no uniform conflict of law norms in European countries. A proposal had been forwarded for amendment in applicable law in family matters with the objective of synchronization of conflict of law principles especially in divorce cases but the proposal has failed to attain the approval of all European Union member states.<sup>62</sup>

<sup>57</sup> See for more details Foblets, "Conflicts of Law in Cross-Cultural Family Disputes," in *Europe Today*; "Who will Reorient Conflicts Law?," in *Relations familiales interculturelles / Cross cultural family relations*, Oñati Papers, ed. M.C. Foblets, F. Strijbosch, 1999, 8, 32.

<sup>58</sup> See for details Article 107 para (2), subsection c of the Código Civil.

<sup>59</sup> Büchler, *Islamic Law in Europe?*, 33.

<sup>60</sup> Wasserstein Fassberg, "Religious Diversity and Law," in *Human Diversity and the Law*, ed. M. Bussani, M. Graziadei (Bern: Stämpfli, 2005), 40.

<sup>61</sup> Büchler, *Islamic Law in Europe?*, 35.

<sup>62</sup> Collier, *Conflict of Laws* (Cambridge: Cambridge University Press, 2001), 320; Collins, *Dicey*,

In family law issues English law does not provide the principle of choice of applicable law<sup>63</sup> and the only way out for the spouses are principle of domicile of choice that have inbuilt flexibility to choose applicable law for themselves.<sup>64</sup> Public policy is very important in private international law and the doctrine of public order could offer the opportunity for the implementation of Muslim family code on the individuals, in countries where law is applicable on the basis of spouses’ nationality.<sup>65</sup> English family code considers domicile as an important factor while deciding the cases of conflict of law. Due to this reason many Muslims opt for unofficial Islamic family laws rather than secular English law. For this purpose, numerous institutions/councils of Islamic law have been established over the period of time. These Islamic councils not only represent different schools of thought of Islam and provide dispute resolution mechanism but also fulfil the religious requirement of Muslims living there by performing the role of parallel quasi-judicial institutions. The Muslim minority of Britain choose to settle their family related litigations out of secular English courts and accept the authority of Islamic councils in intra-family disputes resolution.<sup>66</sup> The civil marriage ceremonies of Muslim couples are considered mere engagements by them, thus sexual relationship and divorce could be allowed only after nikāh ceremony as per Islamic law. As couples without concluding civil marriage contacts are not legally considered married under English legal system therefore Muslim couples mostly have to conclude two marriage contracts to accomplish the requirements of two different legal systems.<sup>67</sup> It does not symbolize the lack of trust in English legislative structure rather it is grounded in the cultural and religious requirement of Muslim emigrant community.<sup>68</sup> These religious arbitration institutions protect women in mostly cases.<sup>69</sup> like for instance<sup>70</sup> a woman getting religious divorce certificate is the most common reason behind appeals to a Sharī‘ah council<sup>71</sup> which is being issued after reconciliation process. As a matter of fact in most cases wife’s British divorce is unacceptable for the husband, which forces the wife to apply for talāq/khul‘ in Sharī‘ah council.<sup>72</sup> Similarly, issues of mahr after divorce and other traditional concepts and customary practices are being challenged by the women in the

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*Morris & Collins on The Conflict of Laws*, (London: Sweet & Maxwell, 2006), 878-969.

<sup>63</sup> Collins, *Dicey, Morris & Collins on The Conflict of Laws* (London: Sweet & Maxwell, 2006), 4.

<sup>64</sup> Briggs, *The Conflicts of Law* (Oxford: Oxford University Press, 2008), 24.

<sup>65</sup> See for details Article 17 IPRG (applicable law), Article 27 para (1) IPRG (recognition and enforcement) of Switzerland; Article 6 EGBGB (applicable law), section 328 para (1 ) subsection 4 of the German Code of Civil Procedure; article 12 para(3) Código Civil (applicable law) of Spain; article 3 Code Civil (applicable law and recognition) of France.

<sup>66</sup> Randeria, “Entangled Histories of Uneven Modernities: Civil Society, Caste Solidarities and Legal Pluralism in India,” in *Unraveling Ties*, ed.Y. Elkana, I. Krastev, E. Macamo, S. Randeria (Frankfurt am Main Campus, 2002), 284.

<sup>67</sup> Shah, “Attitudes to Polygamy in English Law,” *International and Comparative Law Quarterly* 52, no.2 (2003):369–400.

<sup>68</sup> Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce and the Sharī‘ah* (London: The Nuffield Foundation, 2001), 32-34.

<sup>69</sup> See for details Keshavjee, “Alternative Dispute Resolution in a Diasporic Muslim Community in Britain,” in *Law and Ethnic Plurality: Socio-Legal Perspectives*, ed. P. Shah (Leiden: Martinus Nijhof, 2007), 170.

<sup>70</sup> See for details Yilmaz, “Muslim Alternative Dispute Resolution and Neo-Ijtihād in England,” *Alternatives: Turkish Journal of International Relations* 2, no.1 (2003):130.

<sup>71</sup> Bano, “Muslim Family Justice and Human Rights: The Experience of British Muslim Women,” *The Journal of Comparative Law* 2, no.2 (2007): 38–66.

<sup>72</sup> *Ibid.*

council. But all Muslim women are not on same page regarding these legal matters. Few believe in cultural and religious identities and authority of Islamic law on them, while others are not interested in these things.<sup>73</sup> The Sharī'ah councils on the other hand do not possess legislative validity and enforcement. In English court for acquiring civil divorce spouse has to dissolve religious marriage under Divorce (Religious Marriages) Act of 2002 which clearly shows that though faith-based wedlock is not acknowledged through the law but it must be dissolved for getting legal divorce due to its normative effects. The judgments of the Sharī'ah councils are always based on the rulings of different schools of jurisprudence, opinion of Islamic jurists, common good, necessity and public interest.<sup>74</sup>

##### **5- Islamic Jurisprudence on Conflicts of Laws:**

Conflict of laws generally direct the disputes related to nationality, authority over foreigners, status of individuals, legal systems, laws etc., but interestingly many areas of public and private international laws are overlapping too. Probably owing to this datum Islamic Jurists did not handle both laws distinctly.<sup>75</sup> Owing to the change in world's political scenario and concepts of states importance of the rules of private international law has increased drastically. Islamic doctrine of conflict of laws includes questions of citizenship and rank of inhabitant foreigners; clash between: Muslim and non-Muslim laws, numerous Muslim laws, numerous non-Muslim laws; change of religion; position of people of Islamic territory in other Islamic land and in a non-Muslim land.<sup>76</sup> The concept of nationality in early period of Islam was constructed on tribal system and people of other Arab and foreign territories could get the nationality, membership and alliance of any tribe through contract.<sup>77</sup> Tribal protection and membership could be sought by different methods and if the protection was merely accorded by one member of a tribe even without the permission of head of the tribe, rendered it compulsory for all members of tribe to respect that promise and contract of protection. However, the concept of nationality in Islam is based on belief and religion of a person actually determines his nationality, it is something which can be acquired, selected and adopted, ethnic and other basis of nationality are not important in Islam.<sup>78</sup> Hence Muslim and non-Muslim lands are identified on the basis of difference of power and authority, even one Muslim territory is foreign for other Muslim territory. The world's concept of nationality now a day's rests on birth and domicile rather than religion or belief. Muslim Jurists also discussed the legal issues related to permanent and temporary residence of Muslim and non-Muslim citizens of an Islamic territory. All Muslims are equally protected within an Islamic state and no discrimination is acceptable as they belong to one nation but Islamic state has no jurisdiction or authority in any other territory over the Muslims who reside in that territory.<sup>79</sup> All religions are protected under Islamic territory and non-Muslims are allowed to stay, by fulfilling the legal prerequisites and submission to the law of the land. During the early periods of Islamic history, non-Muslim aliens could reside in Muslim territory for period of one year and any extended stay over the period of one year could give rise to the fulfilment of legal requirements of

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<sup>73</sup> Ibid.

<sup>74</sup> Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralism in England, Turkey and Pakistan* ( Aldershot: Ashgate,2005), 172.

<sup>75</sup> See for details Hamidullah, *Muslim Conduct of State*.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Al-Qurān 30:22.

<sup>79</sup> Al-Sarakhsī, *Sharh Kitāb Al-Siyar al-Kabīr*, (Lebanon: Dār al-kutub al-‘Ilmīyyah, 1997),v.5, 108-109.

domicile, taxation and other obligations like rest of the non-Muslim residents, in the latter term, however, this time period extended to ten years due to international political realities.<sup>80</sup>

Non-Muslim citizens of Muslim state are called *ahl al-dhimmah*, they enjoy citizenship on the basis of bilateral contract of *dhimmah*, with the state, and pay protection tax (jizyah), ultimately state gives them protection, freedom and honor. Separate courts are established to adjudicate them according to their own religious laws, but if they choose Muslim courts and judges then they can choose. But in cases where nationality is mix or difficult to determine on the basis of belief, then Islamic court must decide the case taking into account the possible benefit of aggrieved party.<sup>81</sup>

In situations where conflict amid Islamic and infidel laws emerge in an Islamic land, for instance if the case is between Muslim and non-Muslim in an Islamic court, Islamic law would be applicable but there are certain exemptions and relaxations exclusively available for the non-Muslims because they are not subject to that prohibition as Muslims. Some jurists hold opinion that a Muslim will not be given death sentence for murdering a non-Muslim since both are not equal in religion, but have to pay blood money only, but Hanafis hold that no alike difference exist amid Muslim and non-Muslim citizens. Hence, they do not favor death sentence for a Muslim murderer who commit homicide of a non-Muslim of foreign country. But *al-Shaybānī* held that a legal alien non-Muslim is protected and liable to be treated on equal footing with other citizens in an Islamic territory.<sup>82</sup> Doctrine of jurisdiction in Islamic jurisprudence is firm and assertive, about the crime if committed in foreign territory with the Muslim who entered that foreign land with permission, does not come within the dominion of Muslim land and if the culprit entered in Muslim territory with permission, he cannot be tried in Islamic court for the crime committed in foreign territory as the place of crime is not under the ambit of Islamic court, but in case if non-Muslim commits crime in Islamic territory and then leave the territory, again if he comes back with permission he must be tried in Islamic court for his crime. Conflict of laws can also arise between two non-Muslim laws within an Islamic land, like for example between Jewish and Christian laws, although Islamic court does not have jurisdiction in this case originally but parties if fail to choose court or tribunal then Islamic court will decide the case according to Islamic law, as for Muslims all non-Muslims are one nation or community.

Conflict of the laws can be arisen between different Islamic schools of thought, during early period of Islam law suits were normally decided by the judges according to their own understandings, but in latter eras judges and legal officers had to give judgement according to particular school of law, and enforced by the state, but some Islamic states have given choice to the Muslim citizens to be governed by any school of law then conflict of law arises. Conflict of laws situation arises where one of non-Muslim spouses convert to Islam or any other religion, then if husband converted to Islam and wife is Jew or Christian then marriage will continue, but if belongs to other religion she has option either to convert to Islam, or to take separation, if wife converts to Islam then husband would be asked to convert to Islam, otherwise legal separation will take place.<sup>83</sup>

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<sup>80</sup> Hamīdullah, *Muslim Conduct of State*, 317-325.

<sup>81</sup> Ibid.

<sup>82</sup> Al-Sarakhsī, *Sharh kitāb Al-Siyar al-Kabīr*, v.5, 50-52.

<sup>83</sup> Hamīdullah, *Muslim Conduct of State*, 324-325.

### 6-Effects of Conflicts of Family Laws on the Muslims in the West:

Due to the official separation between state and religion in England, recognition of any religious community in any legal sense, or in government policy is not possible, as religious affiliation of a person is not point of concern for the State, even the government refuse to introduce any law on religious discrimination.<sup>84</sup> Ihsan Yilmaz<sup>85</sup> rightly points out that legal recognition and many other relaxations have been granted to ethnic minorities, throughout the history of English legal system which ultimately effected the creation of consistent procedure for marriages in English law.<sup>86</sup> Jews are exempted from the directions related to the formalizing and recording of matrimonies under Marriage Acts 1949–1996 and this legal protection had been afforded to them through the Lord Hardwicke’s Marriage Act in 1753.<sup>87</sup> Unfortunately these exclusions have not been designed for other racial minority sections of the state. During nineteenth and initial twentieth eras English legislative structure gradually granted legal acknowledgement to few faith minorities but new ethnic minorities evolved in later years could not be benefited by those rules<sup>88</sup> although new socio-legal facts have been addressed by English law to some extent. For example, it was decided in a case that Asian marriage legally validated immediately upon registration and relevant spiritual ceremony.<sup>89</sup> In another case to facilitate civil and religious form of wedlock, the Marriage (Registration of Buildings) Act, was abolished to jointly celebrate a religious and civil marriage.<sup>90</sup> Similarly, Jews and Muslims are authorized to slaughter animals with their traditional method according to s1(2) of the Slaughter of Poultry Act 1967 and s36(3) of the Slaughterhouses Act 1979.<sup>91</sup> Similar concessions are available for other minorities too, even holding knives in public places on religious ground are allowed, otherwise a crime under Criminal Justice Act 1988.<sup>92</sup>

Interestingly the word ethnicity has no uniform settled denotation or interpretation in English legal system, at some occasions it is used in the meaning of race.<sup>93</sup> However, in 1991 census, it is understood by means of association or affiliation to

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<sup>84</sup> Ihsan Yilmaz, “Muslim Law in Britain: Reflections in the Socio-Legal Sphere and Differential Legal Treatment,” *Journal of Muslim Minority Affairs* 20, no. 02 (2000): 353–60; Martin McEwen, “Anti-discrimination Law in Great Britain,” *New Community* 20, no. 3(1994):353–370.

<sup>85</sup> Ibid.

<sup>86</sup> A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993), 43; Carolyn Hamilton, *Family, Law and Religion* (London: Sweet & Maxwell, 1995), 20-35.

<sup>87</sup> A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993), 42; Marriage Act, S 26(1), 35(4), 43(3), 75(1) (a), 1949.

<sup>88</sup> See for details Werner F. Menski, “Asians in Britain and the Question of Adaptation to a New Legal Order: Asian Laws in Britain,” in *Ethnicity, Identity, Migration: The South Asian Context*, ed. Milton Israel and Narendra Wagle (Toronto: University of Toronto, 1993), 260; Carolyn Hamilton, *Family, Law and Religion* (London: Sweet & Maxwell, 1995), 20-35.

<sup>89</sup> *Kaur v. Singh*, 1 All ER, 1972, 292.

<sup>90</sup> *Kaur v. Singh*, 1 All ER, 1972, 293; *R v. Bibi* (1980), *R v. Bailey*, *R v. Adesanya*, and *Malik v. British Home Stores* (1980); A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993), 41.

<sup>91</sup> Ihsan Yilmaz, “Muslim Law in Britain: Reflections in the Socio-Legal Sphere and Differential Legal Treatment,” *Journal of Muslim Minority Affairs* 20, no. 02 (2000): 353–60; Martin McEwen, “Anti-discrimination Law in Great Britain,” *New Community* 20, no. 3(1994):353–370.

<sup>92</sup> Ibid.

<sup>93</sup> Roger Ballard and V. Singh Kalra, *The Ethnic Dimension of the 1991 Census: A Preliminary Report* (Manchester: Census Microdata Unit, University of Manchester, 1993), 3.

a socially unique public of some kind.<sup>94</sup> The uncertain and vague meaning of the term ethnicity or ethnic minority had created many hitches, particularly for Muslims owing to fact that minority groups were not being determined on the basis of religions rather on change social patterns.<sup>95</sup> English legal system does not deal uniformly with all ethnic minorities. Sikhs are acknowledged by way of distinct ethnic set within the ambit of the 1976 Act but Muslims are not considered as an ethnic group.<sup>96</sup> Extended common past and a distinct national practice are considered two vital standards to consider a group “ethnic” and to have protection of law according to Race Relation Act, 1976 in England. Religion, is not included in it and just on the basis of religion, a group could not be entitled as an ethnic group. Muslims in England are not an ethnic cluster per se according to the law but whites, Gypsies, Sikhs and Jews are ethnic groups.<sup>97</sup> The most significant attributes of the minority communities in modern times are not to have particular color of skin like white, brown or black yet their fidelity to definite civilizations, practices, faiths, morals and ethical standards that are majorly different and distinct from those of the majority community as emphasized by Poulter.<sup>98</sup>

Conversely, race has never be regarded as an important issue to be discussed in socio-legal debates<sup>99</sup> and ethnicity is not purely racial but mainly cultural, not necessarily noticeable from individual’s appearance.<sup>100</sup> English legal system does not possess a constant, methodical, rational and neutral acknowledgement structure to recognize ethnic minority laws and traditions.<sup>101</sup> Islamic law which is a mandatory religious law for Muslims having the rank of ethics or morals however, no legal authority, in civil and public legal system and due to this basic fact Muslims are bound by alike commandments like all citizens of the state.<sup>102</sup>

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<sup>94</sup> Ibid.

<sup>95</sup> Jansen Johannes J. G, “Islam and Civil Rights in the Netherlands,” in *Muslims in Europe*, ed. Bernard Lewis and Dominique Schnapper (London. New York: Pinter, 1994), 41; Roger Ballard, “The Construction of a Conceptual Vision: Ethnic Groups and the 1991 UK Census (Review Article),” *Ethnic and Racial Studies* 20, no. 1(1997):181–194; Roger Ballard and V. Singh Kalra, *The Ethnic Dimension of the 1991 Census: A Preliminary Report* (Manchester: Census Microdata Unit, University of Manchester, 1993), 3-4.

<sup>96</sup> *Mandla v. Dowell Lee*, 3 All ER 1108 (CA), 1982; *Mandla v. Dowell Lee* 1 All ER, 1062 (HL), 1983; Tariq Modood, *Racial Equality: Colour, Culture and Justice* (London: Institute for Public Policy Research, 1994), 14; Tariq Modood, “Muslim Views on Religious Identity and Racial Equality,” *New Community* 19, no. 3(1993): 513–519.

<sup>97</sup> Sebastian M. Poulter, “Muslim Headscarves in School: Contrasting Legal Approaches in England and France,” *Oxford Journal of Legal Studies* 17, no. 1 (1997):64.

<sup>98</sup> Sebastian M. Poulter, “Cultural Pluralism and its Limits: A Legal Perspective,” in *CRE Britain: A Plural Society: Report of a Seminar* (London: Commission for Racial Equality, 1990), 3.

<sup>99</sup> Werner F. Menski, *Ethnicity, Discrimination and Human Rights* (London: School of Oriental and Asian Studies, 1997), 4.

<sup>100</sup> Ibid.

<sup>101</sup> Carolyn Hamilton, *Family, Law and Religion* (London: Sweet & Maxwell, 1995), 38; Campbell Alan McLachlan, *State Recognition of Customary Law in the South Pacific* (London: University College London, 1988), 84.

<sup>102</sup> J. Waardenburg, “Muslim Associations and Official Bodies in Some European Countries,” in *Shadid and van Koningsveld*, ed. in *The Integration of Islam*, 36; The Runnymede Trust (TRT), *Islamophobia* (London: Runnymede Trust, Cited in Q-News, June 1997); Helen L. Conway, *Divorce and Religion* (NLJ Practitioner,1995),1618–1619.

It is certain that the protection of the law is not for all ethnic minorities including Muslims.<sup>103</sup> The British legal system claims to be impartial in terms of religion in family matters, happen to be discriminatory and does not fulfil the requirement of Muslims.<sup>104</sup> Muslims are under compulsion to follow the law available to them rather to demand for acknowledgement of Islamic rules. The country however agrees to admit societal, yet not legal pluralism and hence therefore, implementation of uniform legal system is against the faith and traditional multiplicities of the people<sup>105</sup> because it will compulsorily push the minorities to assimilation.<sup>106</sup> Muslim community in Britain is displeased owe to this existing discrimination in determining their rights on the basis of religion.<sup>107</sup> It seems like British society does not realize the presence of a Muslim public in the state.<sup>108</sup> Muslim spokesmen assert that they do not consider to be a cultural group like Jews and Sikhs and are separated from the expressions of prevailing anti-discrimination statute, and its clear denial of their legal position.<sup>109</sup> Owing to the discriminatory legal position of other minorities including Muslims, the trust level of people over the state and government has decreased over the years, as they intensely believe that natural prerogatives of other than white people are not important for the state.<sup>110</sup> Muslim scholars often emphasize in their writings on the importance of Islamic golden principles of equality, love and support for a society.<sup>111</sup> Muslims, due to these reasons, which is quite natural do not involve in English law but they are expected to

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<sup>103</sup> Werner F. Menski, *Law, religion and South Asians* (London: School of Oriental and Asian Studies, 1996), 265; A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993), 51.

<sup>104</sup> Werner F. Menski, *Law, religion and South Asians* (London: School of Oriental and Asian Studies, 1996), 6; A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993), 41.

<sup>105</sup> Werner F. Menski, "Uniformity of Laws in India and England," *Journal of Law and Society* 7, no. 11(1988): 17.

<sup>106</sup> Jorgen S. Nielsen, *Muslims in Western Europe* (Edinburgh: Edinburgh University Press, 1992), 164; David Pearl and Werner F. Menski, *A Textbook on Muslim Family Laws*, 3rd edn, (London: Sweet & Maxwell, 1998), Chapter 5.

<sup>107</sup> Jorgen S. Nielsen, "Muslims in Britain: Searching for an Identity," *New Community* 13, no. 3(1987):384.

<sup>108</sup> Ibid.

<sup>109</sup> Tariq Modood, *Racial Equality: Colour, Culture and Justice* (London: Institute for Public Policy Research, 1994), 14; United Kingdom Action Committee of Islamic Affairs (UKACIA), *Muslims and the Law in Multi-faith Britain: Need for Reform*, memorandum submitted by the UKACIA (London: UKACIA, 1993); Jan Rathetal, "The Recognition and Institutionalization of Islam in Belgium, Great Britain and the Netherlands," *New Community* 18, no. 1(1991): 106; Tariq Modood, "Muslim Views on Religious Identity and Racial Equality," *New Community* 19, no. 3 (1993): 516; Jean Ellis, "Local Government and Community Needs: A Case Study of Muslims in Coventry," *New Community* 17, no. 3(1991): 359–376.

<sup>110</sup> Werner F. Menski, "Asians in Britain and the Question of Adaptation to a New Legal Order: Asian Laws in Britain," in *Ethnicity, Identity, Migration: The South Asian Context*, ed. Milton Israel and Narendra Wagle (Toronto: University of Toronto, 1993), 6–7.

<sup>111</sup> Tariq Modood, *Racial Equality: Colour, Culture and Justice* (London: Institute for Public Policy Research, 1994), 7; "Muslim Views on Religious Identity and Racial Equality," *New Community* 19, no. 3(1993): 517; Werner F. Menski, "Asians in Britain and the Question of Adaptation to a New Legal Order: Asian Laws in Britain," in *Ethnicity, Identity, Migration: The South Asian Context*, ed. Milton Israel and Narendra Wagle (Toronto: University of Toronto, 1993), 241.

become the part of their adaptation process.<sup>112</sup> Menski argues that it is reality when the law of state ignores social realities and consider them irrelevant then personal laws secure power. Same is the case with Muslims, they are seeking for other solutions by avoiding the state laws, as state laws are not fulfilling what they require.<sup>113</sup> Ground realities show that a lot of significant litigations of all societies, especially Asians are certainly not present in front of formal law courts.<sup>114</sup> Similarly, Muslims apply Islamic law in their everyday lives and Matrimonies containing polygamous, unregistered, child weddings and divorces are established in line with the principles of Muslim law and traditions. Muslims pursue their particular methods to shape their dealings in the society.<sup>115</sup> There is a dire need on behalf of the state to keenly observe the multiculturalism and a socio-legal standpoint and to allow the law to adjust itself in line with fluctuating environments, then it would be possible to terminate prejudice against Muslims and other minorities.

English legal system presently not only permitted Islamic laws and Islamic religious practices but also accepted and accommodated it in variety of ways in secular legal system. Even many scholars like Archbishop were criticized for their schemes and suggestions to create possible harmony with religious laws as additional jurisdictions has already been provided in this regard through which parties can agree to give the power to make binding determinations in civil disputes.<sup>116</sup>

Werner Menski<sup>117</sup> believes that the true recognition of religious law is essential, and rejects the idea of giving priority to some groups over the others under the common law tradition of making exceptions in certain cases, because this type of biasness create negative impact on the society, so therefore Government must take positive measures and provide practical solution to the problems of ethnic minorities by avoiding ethnic and pluralist politics. The interaction between Islam and English law need to be comprehended with reference to the previous interaction and recognition between Islam and the law, is emphasized by Archbishop for offering practical solutions for its implementation in any society.<sup>118</sup> Sara Tonolo asserts<sup>119</sup> that paying attention to the religious values in private international law is pivotal, as the globalization of foundations of private international law do not guarantee that conflict of laws must to transact with

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<sup>112</sup> Ibid.

<sup>113</sup> Werner F. Menski, "English Family Law and Ethnic Laws in Britain," *Kerala Law Times*, no. 1(1988):58; "Asians in Britain and the Question of Adaptation to a New Legal Order: Asian Laws in Britain," in *Ethnicity, Identity, Migration: The South Asian Context*, ed. Milton Israel and Narendra Wagle (Toronto: University of Toronto, 1993), 238–268; Zaki Badawi, "Muslim Justice in a Secular State," in *God's Law Versus State Law: The Construction of Islamic Identity in Western Europe*, ed. Michael King (London: Grey Seal, 1995), 77–79; David Pearl and Werner F. Menski, *A Textbook on Muslim Family Law*, 3rd edn (London: Sweet & Maxwell, 1998); Ihsan Yilmaz, *The Dynamic Legal Pluralism and the Reconstruction of Unofficial Muslim Laws in England, Turkey and Pakistan* (London: SOAS, 1999).

<sup>114</sup> Werner F. Menski, "Asians in Britain and the Question of Adaptation to a New Legal Order: Asian Laws in Britain," in *Ethnicity, Identity, Migration: The South Asian Context*, ed. Milton Israel and Narendra Wagle (Toronto: University of Toronto, 1993), 253.

<sup>115</sup> Ibid.

<sup>116</sup> A Tucker, "The Archbishop's Unsatisfactory Legal Pluralism," *Public Law* (2008), 463, 466.

<sup>117</sup> W Menski, "Law, Religion and Culture in Multicultural Britain," in *Law and Religion in Multicultural Societies*, ed. R Mehdi et al (Copenhagen: DJØF Publishing, 2008), 45.

<sup>118</sup> A Tucker, "The Archbishop's Unsatisfactory Legal Pluralism," *Public Law* (2008), 463, 466.

<sup>119</sup> Sara Tonolo, "Religious Values and Conflict of Laws," *Stato, Chiese e pluralismo confessionale Rivista telematica* (www.statoechiese.it), no.7 (2016):22, ISSN 1971- 8543.

persons' recognitions. The culture, values, civilization and religion determine the personal identity but the application of foreign laws, in European systems misses the true understanding of nature of laws as law involves cultural, religious and ethnic identities which may be collective and individual as well. Although the nature of the law, and its connection with morals and religion in Europe is similar to Islam but recently they are considered unfashionable, apart from this, coordination between legislative structures in diverse individual uniqueness is complicated. In European and Islamic structures, acceptance of some foundations of Islamic code can grow results for European systems. As Islamic legal system would not recognize foreign decisions if they are not in compliance with family law of Islam and Treaty law does not capable to provide effective remedies to these problems, since the Muslim lands customarily do not connect to the Hague Conventions and Religious values probably the main reason behind non-acceptance of this conventional approach. She argues further that It is important to overcome cultural differences, by using appropriate ways as the true character of conflict of laws could offer viable managements for social variances. Similarly, religious values could be used to achieve legal pluralism by offering new explanation of the public policy exclusion. Because application of the public policy exclusion indicates a possible different elucidation of the exception. With the objective of considering religious values and principles for the defense of essential privileges of persons, for instance in polygamous marriage the distribution of estates and retirement income amid spouses of the dead husband or the legacy entitlements of kin. Although use of the comparative legal method, to respect cultural and religious values is good but meaning of boundaries of the communal policy exclusion, in the light of changeability of way outs i.e., freedom of code and law as a fact, would pose potential problems in this regard. Therefore, the notion of public policy must contain necessary standards, similar to faith's morals, private and public rights. Russell Sandberg asserts<sup>120</sup> that religious laws, like EU laws and the verdicts of the European Court of Human Rights have existence beside the law of the land but contemporary legal position is not comprehended properly, although many extending codes have been promulgated to recognize and protect spiritual groups and to give them legal and financial benefits, in the form of exceptions from usually valid enactments. Similarly, faith groups are lawful and allowed to practice their religion and sacred edifices may be registered in lieu of worship and solemnization of wedlock purposes, and the traditional legal position restricts only whatever is restrained by the law. Moreover, discrimination on grounds of religion is condemned and these religious laws get recognition by way of substance of datum or through State enactment or by the Arbitration Act 1996 or through public policy or by way of private international law.

The data presented in this thesis reveals that European Convention on Human Rights condemned any kind of partiality on the bases of faith or religion. In accordance with western thoughts a democratic society cannot deny liberty of faith because human conduct and person's identity would not be governed and developed without this right. The right of liberty of faith is important for both believers and non-believers. However, this right is not unlimited as certain laws, objectives and proportion-based restrictions are imposed. In few cases this right is restricted especially when freedom of others needs to be secured from undue influence. The Muslims in the West are not a homogeneous group. They are divided on the basis of origin, history and objectives. They tend to demonstrate and observe specific rituals primarily under the cultural influence of their homelands. In addition to it, these communities

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<sup>120</sup> Russell Sandberg, "Islam and English Law," *Law & Just.-Christian L. Rev.* 164(2010): 27-44.

have diversified because of various approaches to religious conceptions and relations with their religion. The Muslim communities of United Kingdom historically belong to former British colonies such as Pakistan, Bangladesh, India and other South Asian countries. They are also different on the basis of ethnic, professional and educational backgrounds.<sup>121</sup> These Muslim minority groups have different cultural, ethnic, religious and family systems but not significantly contradictory with the majority's beliefs and systems. The approach of British government to religious diversity and liberty of faith is moderate and flexible. France is also prominent with the large number of Muslim populations from its colonial past. Majority of immigrants who settled in France are from north, west parts of Africa. French state system mainly provides secular environment in almost every social institution including educational institutes. The government policies in France based on the initiatives that asked immigrants to assimilate in French culture, so that they can be part of the French culture and civilization. A Pew Research report of 2017 suggests that approximately 5,760,000 Muslims are 8.8% of French population. In spite of strict restrictions imposed on getting nationality, a sizable Muslim community has been established in Germany. To promote national integration particularly among the second generation of immigrant's German government has extended few relaxations. German naturalization is still not an easy task for the Muslims in Germany. Until 1980s Germany was not favorable and dreamed destination for immigrants. During economic-boom, millions of migrant workers were with the intention of eventually sending them back to their homeland after getting benefits from their skills. Islam was considered a foreign issue, not relevant for it, despite of the growth of leading Muslim society of immigrants which has potential to perform a major role in negotiations with its embraced land.<sup>122</sup> The settlement of Muslim communities in Switzerland is an outcome of economic and job opportunities for Yugoslavians and Turks, and coming of emigrants from Balkans and Africa. But the status of Muslim immigrants in Switzerland was unclear for many years. Initially they were used for labour but recently due to the change in political situation, immigration policies have been restricted more. Spain with a rich history of Islam in past, recently can be distinguished by emigrations. These migrations are creating challenges for policymakers in European countries as they gradually established themselves from mere individuals to families and then to next generations with specific defined identities. These current emigrants are multicultural and multinational and undoubtedly a potential challenge for the legal systems of different countries.

### **7-Conclusion:**

The analysis of this study show that rules of conflicts-of-laws in private international law allow even more accommodation of Islamic family law rules than the accommodation provided by European laws virtually. When a law or norm confront with other form of law or norm it would ultimately institute self-identification process. Contemporary European family-law rules are not based on religious or customary norm like Asian and African countries. In few recent years Europe has tried to harmonize family-law codes to allow more integration of different communities. Family law rules of any society based on cultural dimensions generally represent remarkable distinctions within a society. However, individual's liberty in Europe is over and above the family law codes. Therefore, perimeters between public and private spheres must be reanalyzed by taking into account the plurality of cultural identities within a society.

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<sup>121</sup>Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralism in England, Turkey and Pakistan* (Aldershot: Ashgate, 2005), 55.

<sup>122</sup>Ibid.

The philosophy behind the concept of applicable law based on nationality in private international law was to preserve the identity and culture of immigrants. It was understood initially that these immigrants would ultimately go back to their host countries. But with the passage of time and with the permanent settlement of immigrants and their next generations in west, now Europe is more focusing on integration and avoids nationality-based application of law by introducing reforms in private international law in many European countries. Furthermore, there are no uniform conflict of law norms in European countries hence a proposal had been forwarded for amendment in applicable law in family matters with the objective of synchronization of conflict of law principles especially in divorce cases but the proposal has failed to attain the approval of all European Union member states. Muslim Jurists did not discuss public and private international laws separately due to the overlapping characteristics of both laws. Islamic doctrine of conflict of laws includes questions of citizenship, status of foreigners, clash between Muslims and non-Muslim laws, differences between Muslim laws, conflicts between non-Muslim laws, change of religion and position of people of Islamic territory in other Islamic land and in a non-Muslim land. All Muslims are equally protected within an Islamic state and no discrimination is acceptable. But Islamic state has no jurisdiction in any other territory over the Muslims who reside in that territory. All religions are protected under Islamic territory and non-Muslims are allowed to stay, by fulfilling the legal prerequisites and submitting to the law of the land.

Hence jurists emphasize in their discourses that it's important to give proper acknowledgment to the religious values in private international law since globalization of fundamentals of private international law do not guarantee that conflict of laws must too consider individual's identity. The personal identity is determined by culture, values, civilization and religion but the application of foreign laws in European systems omit the true understanding of nature of laws. Although the nature of the law, and its connection with morals and religion in Europe were alike Islam. But recently these connections are considered outdated and inapplicable. Islamic legal system would not recognize foreign decisions if they are not in compliance with family law of Islam and religious values are the main reason behind non-acceptance of all conventional approaches. There is a dire need for European states to deeply observe the multiculturalism and a socio-legal standpoint and to allow the law to adjust itself in line with fluctuating environments then it would be possible to terminate prejudice against Muslims and other minorities.