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FORMS AND PROBLEMS OF LEGAL RECOGNITION FOR MUSLIMS IN EUROPE

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FORMS AND PROBLEMS OF LEGAL RECOGNITION FOR MUSLIMS IN EUROPE[1]

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The presence of Muslims in Europe is in itself not a new phenomenon, but their presence in large concentrations in the cities of Western Europe is. With 2 million in France, 1.5 million in West Germany and 1 million in Britain[2] and, more significantly perhaps, concentrations of tens of thousands in individual cities throughout the continent, there are inevitably implications not only of a social and enonomic nature but also legal implications.

The Muslims of Western Europe have over the last decade been engaged in extensive organizational activity. Some of this activity has sprung from local, community based organizations centred on small mosques, sufi orders and nationality groupings. At the other end of the scale has been the activity of "non-community organizations" working at a national and international level[3]. Distinctions between the two levels can be made more clearly in some countries than in others, and in a few countries it cannot be made at all. In any case, the distinction is becoming increasingly invalid as the two levels meet, interact and coordinate their activities and structures. One inevitable consequence of these developments is that comparisons are made with the parallel institutions of other religious communities, and particularly with the Christian churches. Today all European states regard themselves as being more or less secular, favouring no one religion, guaranteeing freedom of worship and assembly to all religions. So Muslims feel it to be particularly onerous that they should not both as individuals and as communities share in the legal privileges of the Christian churches.

What such privileges consist of clearly varies from one country to another. In, for example, Scandinavia and West Germany the established churches' finances are secured through the tax-collecting machinery of the state. In Germany it is passed on to the recognized religious communities to administer independently, while in Denmark

the established church is part of the state. This automatically accords those churches great material benefits to which the unrecognized communities, be they Christian or Muslim, have no access. In such countries, where churches have recognition as corporate bodies in public law, the aim of Muslim organizations is to gain at least some of such privileges. In Britain such corporate recognition of a religious community is alien to the legal system, and here the efforts of some Muslim organizations to secure a legal recognition of the presence of the Muslim community has taken the form of asking for the recognition of Muslim family law as part of English domestic law. We shall look at examples of current efforts to gain recognition in these two different contexts in more detail later. But to underline the element of continuity in the question we shall first look at survivals of historical Muslim communities in Western Europe and the circumstances of their recognition.

* * *

From the late 18th century the Ottoman empire was gradually forced out of most of its European provinces culminating in the defeat at the end of the First World War. As the borders of the empire withdrew, so substantial Muslim populations found themselves under new governments. In differing circumstances such communities secured a degree of legal recognition and protection in Austria and Greece.

The dual monarchy of Austria-Hungary acquired a substantial Muslim population at the occupation of Bosnia-Herzegovina in 1878, and before long there was a resident mufti in Vienna[4]. An act granting privileges as a religious community was passed with special reference to the province. When the Habsburg government in 1909 precipitated the so-called Bosnian crisis by making the province an integral part of the federal monarchy an immediate necessity was to make this special act into one with general application. This was not an easy process and met with opposition from some quarters. A new act was finally promulgated on 15 July 1912 with the title "Act...relating to the recognition of the followers of Islam of the Hanifite rite as a religious community". Some of the provisions relate specifically to Bosnia-Herzegovina and

lapsed when the province became part of Yugoslavia at the disintegration of the Habsburg monarchy. The application of the act was extended to Burgenland by government order no. 176 of 1924.[5]

The act is significant for its omissions as well as for what it does state[6]. Article I grants recognition to Hanafi Muslims "in the kingdoms and states represented in the Imperial Council" as a religious community in the terms of the Constitution of 21 December 1867, in particular Article 15, according to the following provisions:

> 1. The formal legal status of the followers of Islam is to be regulated by decree on the basis of autonomy and self-determination, though under state supervision, as soon as the establishment and maintenance of at least one religious congregation (Kultusgemeinde) has been secured.
> ....
> Pious foundations for Islamic religious purposes may be established even before the constitution of a religious congregation.

Section 2 allows religious functionaries from Bosnia-Herzegovina to be invited to serve elsewhere in the empire. Although the reference to Bosnia-Herzegovia means that this section has become obsolete, it has been read to imply that religious functionaries in Islam - as in other communities - must be Austrian citizens.[7]

Sections 3-6 subject the activities of an Islamic community and its functionaries to considerations of public order and the law of the land. Sections 7-8 relate to registration of births, deaths and marriages and have been superseded by later legislation.

Article II makes implementation of this act the responsibility of the ministries of education, home affairs and justice.

In the debates prior to adoption of this act the question of Islamic marriage law had caused certain problems. The act of 1874 (RGBl no. 68/1874) had specified the manner in which recognition was to be gained. But it apparently had remained inoperative because it failed to deal with the question of Islamic marriage law[8]. The new act takes account of this in Article I, partly in sections 7 and 8, dealing with registration, and partly in section 6, which grants the

protection of the law to "the teachings, instructions and customs of Islam...insofar as they do not conflict with the law of the land."

The crucial question raised by this act and its continued existence in the Austrian statute books is the nature of the recognition granted[9]. Jurists have not agreed on whether the recognition stated in the act is effective at promulgation, with the form dependent on the creation of a congregation according to the provisions of section 1, or whether recognition only becomes effective at such time as a congregation satisfactory to section 1 be established. The debate depends essentially on whether the preamble and section 1 of Article I are read independently of each other or together respectively.

Another question has been whether the act has not been effectively made a dead letter by later legislation. The Treaty of St Germain of 1919 guaranteed freedom of worship to all religious communities regardless of existing forms of recognition. Section 1, 3rd paragraph, of the 1912 act also makes the establishment of pious foundations independent of the act and, therefore, presumably subject to Austrian law on charitable foundations. The combined effect, it has been argued, is to leave this act with no effects which cannot be achieved under other statutes. It is probably not without significance that this latter argument was advanced in the 1930's, when the political atmosphere in Central Europe combined with the earlier cession of the main Muslim population centres to Yugoslavia made it possible to ignore the small Muslim population that remained in Austria.

Through nearly the whole of the history of post-Habsburg Austria there has been an organized Muslim community in Vienna[10]. At various times a reorganization has taken place, most recently with the establishment of the Muslim Social Service (Moslemischer Sozialdienst) in 1964. In 1971 this organization helped start a process whereby the Austrian state was obliged again to take up the question of the 1912 act. In a letter of 26 January 1971 the Federal Ministry of Education was asked to grant recognition to an Islamic religious congregation in Vienna under the terms of the 1912 act[11]. Also involved in this move were the Muslim Students' Union, the Union of Turkish Workers of Vienna and the Iranian Islamic Students' Society.

The bureaucratic processes involved have been extremely time consuming, but since 1971 the application was given the strong support both of Chancellor Kreisky and Cardinal Koenig. The applicants have had to draw up a constitution for the Islamic community in Austria. From the draft of 1978 it appears that the application now relates to an umbrella Islamic organization which will consist of a number of local congregations not restricted to Vienna. Prior to first elections under this draft, the members of the Muslim Social Service and the Muslim Students' Union would constitute the membership.

The reaction of the government as well as the concerns of the applicants quite plainly reject some of the arguments of the 1930's relating to the continued value of the 1912 act. By its acceptance of the application the government has recognized the continuing validity and application of the act. It is also clear that the guarantee of religious freedom combined with the rights of pious foundations under charity law were not a sufficient substitute. The tax privileges and access to religious instruction enjoyed by other religious communities were not extended to the Muslims.

Following some required redrafting of the constitution for the Austrian Islamic community, recognition was finally granted by the Federal Ministry of Education and the Arts in a letter to the Muslim Social Service dated 2 May 1979:

> ....
> In accordance with the provisions of Article I, section 1, of the law of 15 July 1912, RGBl. No. 159, relating to the recognition of the followers of Islam of the Hanifite rite as a religious community, and with reference to sections 4 and 5 and the last paragraph of section 6 of the law of 20 May 1874, RGBl. No. 68, relating to the legal recognition of religious communities,
> Approval is granted:
> 1. to the establishment of the first Islamic religious congregation of Vienna;
> 2. to the constitution of the Community of Muslim Believers in Austria in accordance with the law of 15 July 1912, RGBl. No. 159, relating to the recognition of the followers of Islam of the Hanafite rite as a religious community.
> ....

* * *

Modern Greece has similarly inherited a Muslim population from the Ottoman empire but in circumstances which have differed markedly from those prevailing in Austria. Following the First World War and the campaigns of Kemal Atatürk, Greece found inself with a Muslim population in Western Thrace, today amounting to perhaps 150,000[12]. A sizeable Greek Orthodox minority continued to live in Turkey, especially in the region of Istanbul. The status and privileges of the Muslims of Thrace were determined in one of the Treaties of Sevres of 10 August 1920, and was signed by that country and the allied powers. When the main treaty was rendered inoperative by the revolution of Kemal Atatürk a new treaty complex was negotiated and signed at Lausanne on 24 July 1923. The main peace treaty contained clauses relating to the Greek minorities in Turkey in its Part I, section III.[13] The status of the Turks of Western Thrace was regulated by a protocol which made the provisions of Sevres part of the Lausanne treaty.[14] Turkey was not directly a signatory of either the related Sevres treaty cr the Lausanne protocol, but became a party directly through its accession to other parts of the Lausanne complex.

Article II of the Sevres treaty guaranteed freedom to practice any religion within the limits of public order and morals.[15] Articles III-IV dealt with nationality, and Article VII guaranteed equality of legal, civil and political rights regardless of language or religion. Article VIII established the equal right of minorities to set up and run their own "charitable, religious and social institutions, schools and other educational establishments,..." Particularly relevant to Muslims was Article XIV:

> Greece agrees to take all necessary measures in relation to Muslims to enable questions of family law and personal status to be regulated in accordance with Muslim usage.
>
> Greece undertakes to afford protection to the mosques, cemeteries and other Muslim religious establishments. Full recognition and all facilities shall be assured to pious foundations (wakfs) and Muslim religious and charitable establishments now existing, and Greece shall not refuse to the creation of religious and charitable establishments any of the necessary facilities guaranteed to other private establishments of this nature.

Responsibility for overseeing the implimentation of the treaty was placed with the League of Nations, whose consent had to be obtained for any modifications. Article I stipulated that Articles II-VIII "shall be recognised as fundamental laws, and that no law, regulation or official action shall conflict or interfere with these stipulations, nor shall any law, regulation or official action prevail over them." The terms of those articles were duly incorporated in the Greek Constitution in its articles 37-42. Article XIV, although not of the same constitutional status, effectively still applies today, and matters of marriage, divorce, succession, maintenance and guardianship remain under the jurisdiction of the Chief Mufti[16]. One final point to be made is that because the status ofMuslims in Greece is a matter not primarily of domestic law but one of treaty obligation, it is dependent on the continued effectiveness of the treaty. So, for example, if Turkey were to violate the Lausanne provisions relating to the Greek minorities in Turkey, the Greek covernment might feel free to revoke the privileges accorded its own Muslim minorities.

* * *

The question of the legal recognition of the Islamic community in various European countries is a matter of some importance, in particular in that majority of Western European sta tes which have the concept of a public law corporation (the German Körperschaft des öffet-lichen Rechts). Austria's act of 1912 is an aerly example of recognition in such a system. There are clear advantages to the Muslim community in gaining access to the privileges from such recognition, and there is a strong case for arguing that to withhold recognition would be inequitable. In many of the countries concerned - this is certainly so in Austria and the German Federal Republic - the tax authorities collect church taxes and hand them over to the recognized churches. As a result the massive funds of the recognized churches are often an exaggerated reflection of the commitment of their membership. On the other hand, the non-recognized communities must spend time and effort to secure funds.

An equally important point is that in some states recognition

grants the right to denominational religious instruction in the state school system. Withholding this privilege from Muslims has the doubly unfair consequences of forcing them to make suitable arrangements in their own time and of laying the onus on them of withdrawing children from religious instruction in the schools.

Experience has shown, however, that even when there is a willingness to grant recognition, the way ahead to do so has been beset by problems. Inevitably, the organized institution of a recognized religious community becomes potentially powerful by the mere fact of receiving and administering the funds collected by the tax authorities. This potential power is extended by the institution's status, now reinforced in law, as a mediator between the secular authorities and its membership in matters related to religious identity. There are here the seeds of conflict between rival institutions claiming recognition on behalf of the same religious community.

The Austrian claim for recognition has been fortunate in that the few organizations involved have from the beginning worked cooperatively. The situation in West Germany has tended in the opposite direction. The multiplicity of Muslim organizations there has mitigated against recognition, both because apponents could argue that it was not clear who should be recognized and because of the sometimes intense rivalries among the various organizations.

At various times different organizations have sought recognition in various member states of the Federation. For example, the "Islamische Gemeinde Deutschlands" in Schwetzingen (Baden-Württemberg) sought recognition. The rejection came both from the State of Baden-Württemberg and from other Muslim organizations. On 9 December 1977 the Minister of Religious Affairs stated in the Stuttgart parliament:

> Following a recommendation from the conference of ministers of religious affairs (of the states of the Federal Republic of Germany) the membership of a religious community with character of a public corporation must not fall below 0.1% of the population of the state. The "Islamische Gemeinde Deutschlands" has not shown that its membership satisfies this guide-line. There is also continuing uncertainty over the relationship with the overwhelming majority of the Muslims resident in Baden-Württemberg who are not included in the

Islamische Gemeinde Deutschlands.[17]

It was specifically on this last point that the Islamic Cultural Centre in Cologne and the Islamic Union of Baden-Württemberg protested that the Schwetzingen group had no right to speak on behalf of Muslims in Germany.[18]

In fact the Islamic Cultural Centre had a far better claim to speak on behalf of substantial sections of the Muslim population. While the Schwetzingen group is little more than one congregation the Cologne Centre is the base of the Süleymanli movement in Germany with 160 mosques and closely cooperating with two smaller regional groupings with a further 13 congregations.[19] In early 1979 the Islamic Cultural Centre has duly proceeded to seedk recognition with the ministry of religious affairs in Düsseldorf (for the state of Nordrhein-Westfalen). The request has been given the support of at least one other of the main Islamic groupings in Germany and is being accompanied by a major campaign to win public support.[20] It also has the support of both the Catholic and Protestant churches.

* * *

A European country with a recently arrived Muslim community, which has been granted recognition is Belgium. An early attempt to seek recognition was made in 1971 with a bill put before the Senate on 24 March. The explanatory memorandum introducing that particular bill explains the legal privileges to which access was sought as well as the grounds on which the bill was being introduced:[21]

> There is no state religion in Belgium; all faiths are permitted. However, recognition of a faith involves the granting of legal personality to the organs of this faith and permits the allocation of subsidies and salaries. In Belgium four faiths are recognized: the Catholic, the Protestant, the Anglican and the Jewish faiths.
>
> The number of those who profess these religions is very different. It is estimated that eight million Belgians belong to the Catholic religion, while the number of Protestants, for example, is 43,000. Since the last recognition, put into effect by the act of 4 March 1870 regarding the temporal affairs of religion, in favour of the Protestant, Anglican and Jewish churches, religious life in our country has experienced profound changes, in particular since the Second World War.

The shortage of manual labour, on the one hand, and the rise of countries in the third world, on the other, have caused the immigration into our country of large numbers coming from abroad, in particular from the Mediterranean basin. This is especially the case for a significant group of Muslims, who continue to practice their religion and who can, in that respect, refer to the freedom of religion defined and guaranteed by articles 14,15 and 16 of the Constitution.

A few figures will summarize the situation. Counting only workers in employment, the number of Muslims, according to the latest estimates of the Ministry of Employment and Labour, already amounts to 30,000: 10,000 Turks, 2,000 Algerians, 15,000 Moroccans and 3,000 Tunisians, Libyans and Egyptians. The Islamic Cultural Centre in Brussels estimates the total number of Muslims resident in Belgium at about 100,000.

On the basis of this figure the Centre is seeking to realize a number of projects designed to facilitate the practice of the religion of the Muslim faithful settled in Belgium.

Firstly, there is the matter of a mosque in Brussels. This could be installed in the Oriental Pavillion of the Parc du Cinquantenaire, which the government has put at the disposal of the Centre to serve as oratory and centre for scientific, educational and philanthropic activities. The concessionary deeds were signed on 13 June 1969. At the moment work is in progress with a view to transforming the Pavillion into a large mosque which could accommodate one thousand believers.

For the present, the Muslim community has a prayer house in Brussels - while awaiting the completion of the mosque - and a mosque in Waterschei, where there are manyMuslims. In Liege, Islamic rites take place in a disused chapel, placed at the disposal of the Muslim community by the bishop.

Another objective of this community is to obtain a cemetery for its exclusive use where the believers can be buried according to their rites. The organization of burial grounds is, as is known , regulated by the decree of 23 Prairial, year XII. Article 15 of this decree provides that, in localities where several faiths are professed, each faith should have its own exclusive burial ground. If the local authority only has one cemetery, it must be partitioned so as to provide each faith with a distinct section and a separate entrance. Consequently, the acquisition of a Muslim cemetery must be pursued at the local level.

In conclusion, it seems equitable to us that the Islamic religion from the present moment be placed on the same footing as the other four recognized religions. To this end it is sufficient to amend accordingly the act of 4 March 1870 regarding the temporal affairs of religion.

The proposed amendment affected article 18 of the mentioned act, but the bill was not taken any further.

A new attempt to gain recognition was made in 1972, when a bill with the same preamble as the one quoted above was put before the Senate.[22] A few months later a different group of senators tabled a bill seeking recognition of Islam and humanism.[23] Both bills were referred to thr Justice Commission which investigated the subject during 1973. On 28 May 1974 the Commission presented a report, which proposed that Islam be recognized.[24] The question of recognition of humanism was delayed to allow further investigation. Objections from the sponsors of this second bill had been overruled, and the report had been adopted unanimously by the Commission. For technical reasons the Commision proposed an addition to article 19 of the 1870 act.

The bill was passed by the Senate on 20 June 1974, by the Chamber of Representatives on 17 July 1974, and received the King's signature two days later.[25] While granting recogaition, the act made the establishment of the organizations which would benefit subject to authorization. The responsibilities of finance and oversight were placed on the provincial authorities, whereas the other recognized religions were administered at local authority level.[26]

Regulations governing the organisation of the provincial Islamic authorities, which would be responsible under the act of 1974, was finally granted by royal decree dated 3 May 1978.[27] The decree regulates the composition and election procedures of these provincial Islamic authorities, as well as their terms of reference and rules of procedure. Their financial affairs are placed firmly under the scrutiny of the provincial governor. The Islamic Cultural Centre in Brussels is confirmed as the Islamic body with overnight in religious matters.

* * *

In Western Europe the United Kingdom is the main example of a country where the status of established church does not entail significant privileges in the fields of church income and religious education. Church schools are in a minority, and because of the historical multiplicity of various Christian denominations it is some time since the Church of England has had exclusive control over religious education

in the state school system. Additionally, of course, the concept of a religious community being a "corporation in public law" does not exist, so there is no way in which the Islamic community can be granted "recognition" by the simple expedient of enabling legislation, as in Belgium or Germany, or by government order, as in Austria.

The efforts of Muslim organizations heve therefore tended to be fragmented across a variety of specific issues, such as access to correct diet in shops, schools and places of work; facilities for Islamic burial; the right to time off for Friday noon prayers and holidays at the two festivals; and single-sex education.[28] In Britain, as in most of Europe, many of these points can be, and are, settled at the local level. But some Muslims would like to see legislative support.

The point, however, which for some is a crucial test of future relations between Muslims and British society in general, is whether Shari'a family law can gain recognition as the law applicable to Muslims in Britain. The Union of Muslim Organizations of U.K. and Eire (U.M.O.) held a conference on the subject in Birmingham in 1975. Together with the Anglo-Asian Conservative Society the U.M.O. sponsored a meeting at the House of Commons in January 1977 to discuss the matter of Shari'a family law as well as the points mentioned above. Informal meetings between the U.M.O. and certain members of parliament have taken place regularly since then.

The arguments for introducing Shari'a family law were succinctly put by Shaykh S.A.Darsh, Imam of the London Islamic Cultural Centre, at the Birmingham conference in 1975:[29]

> When a Muslim is prevented from obeying this law he feels that he is failing to fulfil a religious duty. He will not feel at peace with the conscience or the environment in which he lives and this will lead to disenchantment... They firmly believe that the British society, with its rich experience of different cultures and ways of life, especially the Islamic way of life which they used to see in India, Malaysia, Nigeria and so many other nations of Islamic orientation, together with their respect for personal and communal freedom, will enable the Muslim migrants to realise their entity within the framework of the British society. When we request the host

society to recognise our point of view we are appealing to a tradition of justice and equity well established in this country. The scope of the Family Law is not wide and does not contradict, in essence, the law here in this country. Both aim at the fulfilment of justice and happiness of the members of the family. Still, there are certain Islamic points which, with understanding and the spirit of accomodation, would not go so far as to create difficulties in the judiciary system. After all, we are asking for their application among ourselves, the Muslim community, as our Christian brothers in Islamic countries are following in the family tradition and the Christian point of view. The Qur'an itself has given them this right.

While reactions on the practical points were positive, there was generally the response that to allow Shari'a family law to become part of English law would be divisive and retrogressive.[30] It was pointed out that many Christians also object to aspects of the present unified and secular family law of England. Some quarters also remarked that it was far from clear that the request had the support of all Muslims in the country.

Some parts of Muslim family law are more problematic than others. Existing English law of intestate succession would allow a will to be written which would divide an estate according to some kind of Islamic law. There is, however, no evidence of this facility being exploited. Furthermore, one wonders whether a Muslim widow, left one eighth of an estate in certain circumstances, could not successfully contest such a will in the courts.

In fact, the main areas of contention would be marriage and divorce. It is ironic that, while the English rejection of suggested Islamic family law has been most categorical on exactly these two points, it is here that legislation over the past decades has been most accommodating. But this has been in the area of private international law rather than English domestic law proper. According to English common law a person's domicile, and not nationality, determines the family law to which he is subject.

On the question of marriage English law was for a long time bound by a court decision of 1866, commonly known as Hyde v. Hyde. In it the

judge stated: "Marriage, as understood in Christendom, may be defined as the voluntary union of all others". He drew the implication that English courts could grant no relief, enforce no rights or duties related to a marriage which was actually or potentially polygamous. Strictly speaking this meant that marriages conducted according to Shari'a law or its adaptations in Muslim countries were not recognized as marriages for the purpose of claiming welfare payments, maintenance, divorce, custody, etc.

As Muslim immigration increased after the Second World War this state of affairs became increasingly intolerable and a series of statutes relating to National Insurance contained the following clause:

> ...a marriage performed outside the United Kingdom under a law which permits polygamy shall be treated for any purpose of this Act as being and having at all times been a valid marriage if...the marriage has in fact at all times been monogamous.[31]

Although this clearly went some of the way to improve an invidious situation, account was yet to be taken of marriages which had been or were actually polygamous. In 1971 the Law Commission in a report on polygamous marriages sugrested further reforms, some of which were incorporated in the Social Security Act of 1975. The bias is, however, still strongly in favour of actually monogamous marriages.

A more immediate consequence of the Law Commission's report was the Matrimonial Proceedings (Polygamous Marriages) Act of 1972. While the decision in Hyde v. Hyde had been moderated somewhat as regards national insurance, it still stood in other fields. Sometimes extreme hardship had been caused by English courts refusing to hear cases related to potentially polygamous marriages, even to the extent of regarding the children as illegitimate. The 1972 Act effectively did away with Hyde v. Hyde, telling the courts to hear such cases. It is important to note that the Act kept the whole question firmly within the field of private international law. A marriage entered into by an English domiciliary under a system allowing polygamy is void.[32] In the field of divorce, a point which English law has had problems with arises from its preference for divorces obtained by judicial proceedings,

which talaq usually is not. It has, however, been recognized that English law would recognize a talaq, provided that the law of the domicile of one or other of the parties allowed it. In 1971 the Recognition of Divorces and Legal Separations Act added the criterion of nationality, so that a person domiciled in England but a national or habitual resident of a country which had talaq could obtain a talaq in that country.[33]

In the circumstances of large-scale first generation immigration from countries whose family law is based on the Shari'a, the system of private international law is bound to be tested to an unprecedented extent. This is particularly so in England where the concept of domicile has been defined in the context of Englishmen emigrating to the various parts of the empire. Domicile came to be defined in such a way as to uphold the ties with the mother country. Individuals who had spent many decades abroad and ultimately died abroad often continued to be regarded as English domiciliaries. In general, it has been very difficult to establish in court that a change of domicile has taken place. Courts in the United States, on the other hand, have tended to make such a change easier, because the U.S. was a society of immigrants. There are signs that English courts are beginning to move towards a similar attitude to change of domicile. It would seem, therefore, that while the system of private international law is giving expanded scope for recognition of certain aspects of Islamic family law, immigrants into England may expect that they will increasingly be excluded from benefiting from that recognition.

To judge by the kind of cases that Asian advice centres are dealing with, conflict between Muslim immigrants and the authorities in the field of family law - which would be the main field affected by the introduction of some kind of Islamic law - are concentrated on the question of recognition of marriage and divorce. The authorities particularly involved are social security and immigration. In both, the administrators are often either ignorant of or reluctant to take notice of the current legal position on recognition of marriages or divorces concluded in an Islamic system, and only in a few instances is it possible to appeal decisions to the courts.

Complaints relating to social security are overwhelmingly in the category of refusal to pay grants and benefits to a second wife, because either a polygamous marriage or a previous divorce is not recognized. In relation to the immigration authorities entry permits are sometimes refused wives, especially second wives, when the formalities of marriage have not been fully complied with. In view of the English courts' generally agreeable attitude it seems particularly inconsistent that entry permits are sometimes not granted to second wives of Pakistanis whose marriage has not been registered. The Pakistani Muslim Family Laws Ordinance of 1961 introduced in its article 5 the requirement that a marriage should be registered,[34] but lack of registration did not affect the validity of the marriage, it merely incurred a fine. When immigration officers have refused to recognize such marriages they have in effect been rather more stringent than an English court would have been.

When Pakistan left the Commonwealth the Pakistan Act of 1973 was passed in London to regulate the effects of this change of status. Many Pakistanis were worried about losing the privileges in England of being Commonwealth citizens and became UK citizens. The social security authorities have generally interpreted this to mean also a change of domicile, although the two are not necessarily connected in law. As a result they have lost not only the privileges attached to Pakistani nationality (access to Pakistani talaq under the 1971 act discussed above) but also those attached to a Pakistani domicile according to private international law. Although this changed status is related to one particular nationality, it is often felt by those affected as being unfair to them as Muslims rather than as Pakistanis.

Returning to the question of a legal recognition of Islam in England by legislating for the application of Shari'a family law, a blank rejection in the form that has taken place so far seems, perhaps, to be too hasty. The Muslims themselves point out that the English legal profession has had extensive experience of administering an Islamic family law in India. One could add that if the English courts can cope with Islamic law in private international law, why not in domestic law? It is also only since the Matrimonial Proceedings

(Polygamous Marriages) Act 1972 that it has been justifie_ to argue that the English law on marriage is becoming secular. The Hyde v. Hyde decision represented an explicitly Christian view, and it is still effective in English domestic law. However, the arguments against accepting a fragmentation of family law along religious lines remain so strong and numerous that the ultimate response should most probably remain a rejection.

It must immediately, however, be imphasized that the demand for the introduction of Islamic family law is not supported by all Muslims, whether individuals or organizations. Some, while agreeing in principle, oppose the timing, and others disagree on the grounds that there are issues of much more immediate concern. Finally, large groups, mainly unorganized, find the whole question irrelevant to their situation as Muslims in Britain.

* * *

Attempts to seek some kind of legal recognition on the part of Muslims in Europe have, for obvious reasons, taken different forms in various European countries. The legal, political and social contexts have to a great extent determined not only the form of recognition sought but also the host communities' reactions to such attempts. In most European countries Muslims have sought access to at least some of the corporate privileges available to other religious communities. In the absence of such corporate privileges in Britain, one section of the Muslim community there has sought application of Islamic family law. Underlying such widely differing circumstances is surely a concern to establish a corporate existence as a part of the Islamic community as a whole - a particularly important concern at a time when Islam world-wide is experiencing a resurgence ofself-confidence and is experimenting with new Islamic institutions inclusive of the whole community.

The absence of the concept of corporate recognition from the legal system in England may turn out in the medium term to have hampered the development of an Islamic communal existence in Britain. Introduction

of Islamic family law is not something on which the Muslims have been able to agree, either at the level of inter-organizational efforts or as between organizations and the vast number of ordinary Muslims concerned with the problems of everyday life. In mainland Europe the search for corporate recognition has been and is bringing Muslims together at both those levels. Disagreements have been not about the principle of seeking recognition but about which particular body should be recognized. The availability of corporate recognition has thus made the responsibility of unified action urgently desirable.

But the pressures created by seeking corporat recognition go beyond requiring merely unified action. The Austrian Muslim codies, which have recently gained recognition, are the first to admit that their success is only the beginning and not the conclusion of a process. The state, by recognition, has only provided an enabling framework, within which the responsibility for any further development falls squarely on the Muslims themselves. The crucial test of their ability to take up this responsibility, both in terms of the opportunities provided by the law and the state and in terms of their own concerns, lies in the area of religious education. The right now exists in Austria, and in some other countries when recognition is achieved, of teaching Islam to Muslim children as part of the state school system. But this right can only be exercised if the Muslims themselves can develop the curricula and teaching material and provide the teachers acceptable to the education authorities, and to the standards applicable to the other religions recognized.

It is becoming increasingly clear that the complex problem of how to pass on the faith from one generation to the next, in a social and cultural context which is at best neutral and at worst subtly or explicitly subversive, is concerning Muslims of all persuasions and cultural backgrounds regardless of their place in and degree of commitment to institutional structures. The need for corporate recognition in mainland European countries would appear to be reinforcing the movement towards that realization, while the inapplicability of corporate recognition in Britain creates a danger that efforts will be fragmented and dissipated and that consequently a main factor necessary to the continuing vital existence of Islam in this country is weakened.

NOTES

1. I am particularly grateful to Dr S. Balic of Viennaand to the Austrian and Belgian authorities for providing some of the documentation used in this paper.

2. For detailed statistical estimates see K.Ahmad, "Muslims in Europe; an interim report presented to the Secretary General of the Islamic Council of Europe" (London, 1976), with comments by S.Balic, Der Gerade Weg, 1 May 1978, p. 11.

3. For a discussion of this related to Britain, see A.Shamis, "Muslims in Britain: The organisers' view", The Muslim, June-July 1975, pp. 112-114.

4. S.Balic (ed.), Die Muslims im Donauraum (Vienna, 1971), p. 7; A.J.P.Taylor, The Habsburg Monarchy 1809-1918 (london, 1948), p. 267, gives the population of Bosnia-Herzegovina in the late 19th century as 1.8 million, of whom 96% were Serbo-Croats, 25% of whom were Muslims.

5. Bundesgesetzblatt, no. 176/1924.

6. For the German text, see Reichsgesetzblatt (RGBl), no. 159/1912, and the annotated edition in H.Klecatsky and H.Weiler (eds), Osterreichisches Staatskirchenrecht (Vienna, 1958) pp. 622-627.

7. H.Klecatsky and H.Weiler, op.cit., p. 625, give this poinion on the basis of the proceedings of the legislature preparatory to the asoption of the act.

8. Ibid., p. 623.

9. The following discussion is based on the editors' notes in ibid., pp. 622-625.

10. S. Balic, Die Muslims im Donauraum, pp. 7ff.

11. German text in ibid., pp. 82-84.

12. Impact International, 10-23 March 1978, p.6.

13. French text in Great Britain, Foreign Office, British and Foreign State Papers, vol. 117 (1923, pt 1), pp. 552-555.

14. French text of the protocol in ibid., pp.539-540.

15. English text in ibid., vol. 113 (1920), pp. 471-479.

16. I am grateful to the Greek embassy in London for providing this information.

17. Translated from the German text in M.S.Abdullah, "Die Prasenz des Islams in der Bundesrepublik Deutschland", CIBEDO Dokumentation I (Cologne, 1978), p. 8.

18. Ibid., loc.cit.

19. Ibid., pp. 14f. and CIBEDO Information Nr. I (Cologne, 1979), p.2.

20. CIBEDO Information Nr. I, p.1; see also the Frankfurter Rundschau, 17 April 1979.

21. Translated from the French text in Doc. Senat, session de 1970-1971, no.348, du 24 mars 1971.

22. Doc. Senat, session de 1971-1972, no.179, du 3 fevrier 1972.

23. Doc. Senat, session de 1971-1972, no.293, du 13 avril 1972.

24. Doc. Senat, session extraordinaire de 1974, no. 56, 2, du mai 1974.

25. Text in Moniteur Belge, 23 August 1974, and in Pasinomie Belge: Collection complete des lois arretes et reglements generaux 1974 (Brussels, 1975), p. 725.

26. This was made clear in a letter dated 1 February 1978 from the Ministry of Justice to the Ministry of Foreign Affairs, which also made it clear that family law was not in any way affected.

27. Belgium, Ministere de la Justice, Administration des Cultes, Dons, Legs et Fondation, 1e section, 3/35.799/A.G.

28. See S.A.Pasha, "Muslim family law in Britain", an introductory paper presented at a meeting at the House of Commons, 20 January 1977 (unpublished), p.1, where these points are spelt out in detail.

29. Quoted in op.cit. p.2.

30. This is not the place to go into detail about questions of which particular kind of Shari'a law would be applied or the practical problems of administration. In the following discussion the word "English" rather than "British" is used advisedly, since the points made apply to the law of England and Wales and not necessarily to that of Scotland or Norhtern Ireland.

31. The National Insurance Acts of 1956 and 1965 and the Family Allowance Act of 1965, quoted in D.Pearl, "Social security and the ethnic minorities", Journal of Social Welfare Law, vol. 1, no. 1 (Nov.,1978), p. 25.

32. For a more detailed discussion of this act, see I.Saunders and J.Walter, "The Matrimonial Proceedings (Polygamous Marriages) Act, 1972", International and Comparative Law Quarterly, vol. 21, (1972), pp. 781-789.

33. D.Pearl op.cit., pp30f. For a discussion of the possible effects of this reform, see M.Polonsky, "Non-judicial divorces by English domiciliaries", International and Comparative Law Quarterly, vol.22 (1973), pp. 343-349.

34. For a text, see D.F.Mulla, Principles of Mahomedan Law, 16th ed. (Bombay, 1968), pp. 346f.