

Responding to sharia in the Netherlands

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Confusion and anxiety reign in the Netherlands when it comes to issues of sharia, in particular so-called sharia courts and Islamic marriages. It has repeatedly initiated parliamentary debates and national inquiries. This article analyzes what forms of sharia one may or may not discern in the Netherlands. It addresses the question what we mean by sharia and, more importantly, what Dutch Muslims think of it, and puts the discussion of sharia in the wider context of the Dutch legal system. This article argues that while public and political opinion might disapprove of sharia, most of its rules as practiced by Dutch Muslims are allowed by the Dutch legal system. The article then continues by analyzing the nature of the concerns of Dutch public and political opinion regarding sharia, finding that these concerns may be grouped into three categories: sharia's alleged infringement of legal order, in particular the concepts of equality and rule of law; its infringement of social order, in particular the integration and position of women; and the infringement of national order, which combines the legal and social arguments as they relate to national security. The overall concern is the extent to which Dutch Muslims are, and want to be, part of Dutch society, and sharia appears to function as the ultimate litmus test in that respect. The main conclusion of this article is that the way in which Dutch Muslims practice Islam and its rules of sharia is not that different from that of other orthodox religious communities in the Netherlands; the main difference between the two is that Dutch Muslims' behaviour is more conspicuous since they live predominantly in the secularized urban areas, while their Christian orthodox counterparts are mostly concentrated in rural areas in the so-called 'Bible belt'.

Key terms: Sharia; Sharia in the West; Sharia courts; Islamic marriage.

Introduction

News about 'applying sharia' and the introduction of 'sharia courts' in Canada in 2004 and the United Kingdom in 2008, and again in 2012, made headlines in the

Dutch press and prompted concerned MPs in Dutch parliament to ask the government whether a similar situation existed, or might occur, in the Netherlands. The leader of the ruling Christian Democrat Party (*Christen Democratisch Appèl*; CDA) in 2005 expressed his apprehension of similar developments in the Netherlands in an interview in the weekly *Elsevier* on 22 February 2005: “Thousands of Muslims acknowledge that they seek explicitly to endorse the Sharia. A large majority feels at home here, but we must prevent that by means of peer pressure within a closed community they feel obliged to submit themselves to such a [Sharia] tribunal.” A report in 2010 commissioned by the Minister of Justice concluded that sharia courts do not exist in the Netherlands and that Dutch Muslims had little interest in establishing them (Bakker 2010), but failed to put the worries to rest.

Similar concerns were raised in the press and in parliament in 2005 and 2008 with regard to so-called ‘Islamic marriages’, that is marriages that are concluded religiously but are not registered with the civil registrar. To some, these practices were a sign of deliberate unwillingness on the part of young Muslims to integrate in Dutch society. To others, it was a sign of radicalization among Dutch Muslims, and the Dutch anti-terrorism agency NCTb called it a threat to national security (NCTb 2006). Later research, however, showed that these reactions were not justified. One report saw little evidence of radical motives among Muslim youth for entering into Islamic marriages without registering them, but pointed to a variety of causes for doing so, ranging from piety combined with ignorance of the law, to the fact that some Muslims registered their Islamic marriages with the consulates of their countries of origin, so that the marriage was recognized under that country’s law (Van der Leun & Leupen 2009). Another study demonstrated that Islamic marriages were also used strategically by Muslim youth to ensure their personal choice of a partner vis-à-vis their parents’ choice (Moors 2013).

While sharia courts and Islamic marriages refer to legal instruments of Islamic law, the notion of a ‘creeping sharia’ was also cause of concern, predominantly voiced by the *Partij Voor de Vrijheid* (‘Freedom Party’; PVV) (see De Ruiters in this issue). They repeatedly initiated parliamentary debates and frequently asked ministers questions about sharia. In 2007, for instance, they asked the Minister of Finance whether he shared the PVV’s opinion that the popularity of Islamic banking was “unwanted and improper” (the Minister answered that he did not share this view).¹ And in 2011, the PVV called for an all-

¹ ‘Vragen van de leden Wilders en Van Dijck (beiden PVV) aan de minister van Financiën over het bericht dat Islamitisch bankieren sterk in opkomst is’, ingezonden 22 juni 2007 (Kamervragen 2006-2007, 2140). <https://zoek.officielebekendmakingen.nl/kv-2060719000.html>.

out ban on any use of sharia within the Netherlands, including the Dutch courts (their concern was not shared by the other parliamentarians).²

In short, confusion and anxiety reign when it comes to issues of sharia in the Netherlands. In this article I will analyze what forms of sharia we may, or may not discern in the Netherlands, and I will put the discussion of sharia in the wider context of the Dutch legal system. But before we do so, we must first address the question what we mean by sharia and, more importantly, what Dutch Muslims think of it.

Defining sharia

For the clarity of the discussion I propose to define sharia on the basis of the question ‘What do Muslims do and want in terms of sharia?’ rather than ‘What is sharia?’. The latter question will lead us to the classical legal scholarship of Islam (see Hallaq 2009; Kamali 2008), or to the practices and laws applied in Muslim countries (see Otto 2011). But if we take the needs and practices of Dutch Muslims as our starting point, we do more justice to everyday reality in the Dutch context.³ It means that we move away from the theological-legal study of sharia, and that we must instead determine what rules are adhered to by, or otherwise relevant for, Muslims in the Netherlands.

From this perspective it is striking that so little is known about what Muslims in the Netherlands mean by sharia. Only one survey has been conducted in 2004 among Dutch Muslims, and it found that 51 per cent of the Dutch Muslims interviewed favoured a Muslim political party, and 29.5 per cent thought that the political programme of such a party should be based on sharia.⁴ (The subsequent newspaper headlines reporting that “one third of Dutch Muslims favour Sharia” were therefore entirely wrong). The only other two similar studies that I am aware of were conducted in the United Kingdom in 2006 and 2007: the first found that 40 per cent of the Muslims interviewed support the introduction of sharia in Muslim-dominant areas (ICM 2006, 14), while the latter found that 28 per cent of British Muslims would prefer to live under sharia law (Mirza 2007). What is of interest to us here is that none of these surveys defined sharia, nor asked their respondents to do so, therefore leaving us ignorant of what Dutch and English Muslims mean by sharia.

² Parliamentary debate, 29 September 2011. Transcription available at http://publitiiek.nl/debat/toepassing_islamitisch_recht_29-09-2011/5, last accessed July 15, 2013.

³ This legal-anthropological approach has been advocated by a few scholars, mostly when discussing sharia in Muslim-majority countries; see e.g. Dupret (1996).

⁴ To be more precise: to the question “Should the programme of this [Muslim] party be based on Sharia?”, 10.2% answered “Yes, entirely” and 19.3% “Yes, to some extent” (Foquz Etnomarketing 2004, 10-12).

Some answers might be found on the many Internet sites – both international and Dutch – where these issues are being discussed, and counsel is sought and given (the so-called *fatwas*). Similar insights might be provided by the ‘*fiqh* for minorities’ (*fiqh al-‘aqalliyat*) that has been developed by Muslim scholars outside of the Netherlands in order to provide Islamic solutions that are tailor-made for Muslims in the West (Altikriti & Al-Ubaydi 1999; Caeiro 2011; Hussain 2004). However, while the counsels and opinions voiced on these forums yield interesting information about issues and solutions of sharia debated among Muslims, they do not tell us whether Muslims in the Netherlands actually put these rules into practice. In other words, they may talk about sharia rules, but to what extent do they want or practice them?

We are, therefore, left without quantitative and qualitative evidence of sharia as it is practiced by Muslims in the Netherlands. However, with regard to the quantitative aspect (how much sharia) we may assume that there is more adherence to sharia now than ten to fifteen years ago, given the fact that the second and third generation Muslims in the Netherlands are distinctly more religious than the first generation, and more intent on practicing their religion (De Koning 2008; Maliepaard & Gijssberts 2012; Roex et al. 2010).

With regard to the qualitative aspect (what kind of sharia), we may draw tentative conclusions based on what we know from observations and from existing studies. It appears that what Dutch Muslims do and want in terms of sharia is the following: a) religious rituals; b) rules relating to family law, in particular those pertaining to marriage and divorce; c) rules relating to financial transactions, in particular the ban on interest or usury; and d) social relations, in particular gender relations and relations with the non-Islamic environment. And, if we want to be truly comprehensive, we should include the few radical Muslims who e) justify violent acts with sharia.

Several observations can be made with regard to the first four of these domains of sharia rules. First, they pertain to Muslims’ daily lives, and have little to do with harsh Islamic punishments nor with political views on the need for an Islamic restructuring of Dutch society. Of course, such views might exist among some radical Muslims, just as there are Muslim extremists who interpret sharia as a call for militant action against alleged Western injustices. We will discuss that separately below.

Second, this collection of rules appears quite haphazard, both in scope and in content. From an Islamic legal-theological perspective, however, this set of rules has an internal logic, because all of these rules share a high ranking in the hierarchy of Islamic rules prescribed by classical orthodoxy: they are explicitly mentioned in the Koran, by the Prophet, or by scholarly consensus, and are therefore the first to be followed by any devout Muslim. From the

perspective of the Muslim, therefore, these domains pertain to essential doctrines of their religion.

The final observation is that of the abovementioned rules, only those related to family law and the prohibition of usury or interest can be considered 'law' or 'legal rules'. The other rules pertain to religious rituals or social conduct and, as such, are mostly outside the scope of Dutch legislation (we will discuss the few exceptions below). This is very important, because it is the contention of this article that while public and political opinion might disapprove of sharia, most of its rules, as practiced by Dutch Muslims, are allowed by the Dutch legal system.

Let us now briefly look into each of these forms of Sharia, and see how they relate to the Dutch social-political and legal environment.

Practices of sharia in the Netherlands

Religious rituals and behaviour

The main priority of any devout Muslim is to fulfill his or her religious duties like prayer and fasting, and to observe religious rituals of burial and dietary laws (Dessing 2001; Landman 1992; Sunier 2009). In the Dutch legal system, these are typically matters pertaining to the freedom of religion. Indeed, the Dutch government makes a deliberate effort to guarantee that persons who are limited in this freedom due to restrictions under state control, such as soldiers in army barracks, patients in hospitals and prisoners in jail, can still practice their religion (Berger 2010a, 29-30). During the 1980s the state briefly subsidized the building of mosques with the argument that such financial assistance was needed to guarantee the Muslim community that was too poor to provide such funding, the freedom to actually practice their religion (Rath et al. 1996, 38-40; Shadid & Koningsveld 2008, 57-58).

While many religious duties are a personal affair of the individual believer, several duties also have an impact on society or on the legal system. For instance, taking the oath on the Quran and in the name of Allah rather than on the Bible and in the name of God required the revision of numerous national and municipal laws, often accompanied by critical opposition by Christian parties (Koolen 2010). Similar legal adjustments have been made in the national laws on burial and slaughter, in order to accommodate the particular religious needs of Muslims, Jews, Hindus and others. Another example of the freedom of religion is that Muslims are entitled to religious instruction, i.e. instruction in sharia. While this is usually a private affair of the community or mosque, it is a state affair in the case of the more than forty religious ("Islamic") schools that are part of the national educational system, and in the case of religious programmes on state media, which are both state funded (Shadid 2006; Berger 2010a, 53).

The judicial system has also been confronted with numerous issues relating to religious duties and rituals. Should an employer provide space and time for the daily prayers of its Muslim employees (Berger 2010a, 51-52)? Should a judge authorize the guardian of a handicapped Muslim to annually send 2.5 per cent of his estate to charity in Morocco as a matter of the religious duty of almsgiving (*zakat*) (Rutten 2011)? The most conspicuous example is the headscarf, which is socially often contested but is recognized as such by the Dutch legal system as pertaining to the freedom of religion. It is interesting, therefore, that the many headscarf issues that have been brought before the courts as well as before the Equal Treatment Commission (*Commissie Gelijke Behandeling*) have all been dealt with on the basis of non-discrimination rather than religious freedom: the question was never whether the woman in question was allowed to wear a headscarf (she was), but whether in the given circumstances the prohibition to do so was reasonable and non-discriminatory (*Commissie Gelijke Behandeling* 2003-11).

Social relations

Social relations are typically part of the individual's freedom, and a state like the Netherlands traditionally will have little interference in such relations. In the case of the Muslim social relations that are based on or justified with Islam, two issues have received considerable public attention: gender relations and relations between Muslims and non-Muslims.

The most conspicuous example of gender relations is the refusal to shake hands with someone of the opposite gender (Fadil 2009). A famous Dutch case took place on 19 November 2004, when an imam declined the extended hand of the female Minister of Justice and Integration. The refusal of a teacher to shake hands with parents of the opposite gender has on several occasions led to the dismissal of such a teacher, and such dismissals have been contested successfully as well as unsuccessfully in court. This very issue was even a topic of discussion in the Amsterdam municipal council in 2011 and was branded by the mayor as "an undesirable situation".⁵ And in 2012 the Court of Appeal ruled that a municipality was in its right to deny a man a job which demanded interaction with city residents if he was unwilling to shake hands with women.⁶

The problem, of course, is the tension between law and custom. There is no law that prescribes the ways of greeting, but not shaking hands may be considered insulting within a Dutch cultural context. In its *Factsheet 'Handen Schudden'* ('Shaking hands') the Discrimination Office of the The Hague region

⁵ 'Van der Laan: docent moet handen schudden', in daily *De Volkskrant*, 3 February 2011.

⁶ Gerechtshof Den Haag, 10 april 2012, LJN: BW1270. Available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSGR:2012:BW1270>.

concluded in 2008 that shaking hands is a societal convention without any legal basis, so that the law provided no solution and each case had to be judged on its own merits.⁷

The second issue of sharia rules regarding social relations relates to the position of Muslims vis-à-vis Dutch (non-Muslim) society. One part of this issue relates to the question whether a Muslim is allowed to reside in a country under non-Islamic rule (and, by consequence, should abide by the non-Islamic rules and participate in elections of non-Islamic political parties). Islamic scholars provide both answers: some argue that a Muslim should leave a country under non-Islamic rule, while others argue that a Muslims can stay as long as he or she is free to practice the Islamic faith.⁸ The issue is hotly debated among Dutch Muslims, in particular on website forums. However, the discussion appears mostly academic because surveys show that Dutch Muslims are politically as active as native Dutch, although their electoral participation is slightly less than that of native Dutch (CBS 2010), with a preference for the social democrat parties (CBS 2010; Brasse & Huinder 2010).

Interestingly, while there is an active participation of Islamic organizations in Dutch civil society, there is little interest among Muslims to organize politically. On a national level, where a low threshold and proportional representation makes it relatively easy for small parties to gain access to parliament, no initiatives have been taken so far by a political party with an Islamic program. Several Islamic political parties have participated in municipal elections in several of the larger cities, but did so with very little success.⁹ On the other hand, all large political parties – socialists, social democrats, liberals, Greens, Christian-Democrats – have several Muslim candidates in parliament as well as in numerous municipal councils.

Finally, issues related to social relations between Muslims and non-Muslims tend not to focus on the specific interaction with non-Muslims, but on the general issue of living in a social and working environment that is distinctly un-Islamic. For instance, can a Muslim join his colleagues for drinks in a café after work? Can a Muslim work in a restaurant where pork or alcohol is being served, or in a supermarket where such items are being sold? The issue here is not the interaction with non-Muslims, but that working in a non-Muslim

⁷ Bureau Discriminatiezaken, Hollands Midden en Haaglanden: *Factsheet 'Handen Schudden'* (Factsheet 2008/2, update 18-6-2009), available at <http://www.discriminatiezaken.nl/doc/Factsheet%20handen%20schudden.pdf>.

⁸ See several *fatwas* on this subject at IslamOnline: 26 July 2005, 7 and 29 August 2002 (these *fatwas* are no longer available online after IslamOnline.net was taken offline in March 2010).

⁹ The *Islam Democraten* ('Islam Democrats'), established in 2006, won one seat in the The Hague municipal council in 2010.

environment may confront Muslims with certain acts or items that are forbidden by his or her religion. These are questions that are solved by each Muslim on an individual basis: some will argue that there is no problem with them handling the prohibited foods or beverages as long as they do not have to eat or drink them, while others want to clearly stay away from them.

Family law

With regard to Dutch citizens, civil marriage is the only marriage recognized by the Dutch courts. Couples are free to celebrate a religious marriage, but without registration at the civil registrar or notary deed conforming their common law marriage (the so-called *samenlevingscontract*) their marriage is not legally recognized and no marital rights can be enforced. The registration of a civil marriage is supposed to take place prior to a religious marriage;¹⁰ however, the reverse will not invalidate the marriage, but the cleric who conducted that ceremony is considered to have committed a misdemeanor.¹¹ This particular rule, which dates from Napoleonic times when the French Republic wanted to assert its power vis-à-vis the Church, has been re-invoked against Muslim imams who concluded Islamic marriages that had not been registered with the civil registrar. In itself an odd situation if we consider the fact that nowadays in the Netherlands anyone may conclude any kind of relationship with any kind of ceremony. Moreover, in the case of Islam, the imams have no sacerdotal authority, unlike their Catholic or Protestant colleagues, because according to sharia marriage is not a sacrament or holy union, but a civil contract.

To accommodate their religious family rules, the Dutch communities of Catholics, Protestants and Jews have a long tradition of 'religious courts' where religious family law is being administered to the faithful who seek their adjudication (Vestdijk-Van der Hoeven 1991; Oldenhuis et al. 2007). The Roman Catholic Church has its own diocesan courts that apply Canonical Law; the united Protestant Church Netherlands (PKN)¹² has 'church councils' (*kerkenraden*) that adjudicate on the basis of the 'Church Order and Ordinances'; several Reformed (*Gereformeerde*) churches¹³ have the 'Lesser Councils' that use the Dordtian Church Order; and the Dutch Israelite Church (*Nederlands Israëlitische Kerk*) allows arbitration by its rabbinical courts (the so-called *Beth Din*). There are therefore two parallel legal systems, religious and civil, that more often than not

¹⁰ Article 68 Book 1 Dutch Civil Code.

¹¹ Article 449 Dutch Penal Code.

¹² Established in 2004, the PKN consists of the *Nederlands Hervormde Kerk* (NHK), the *Gereformeerde Kerken in Nederland* (GKN) and the *Evangelisch-Lutherse kerk in het Koninkrijk der Nederlanden* (ELK).

¹³ These are the *Gereformeerde Gemeenten*, the *Gereformeerde Kerken Vrijgemaakt* and the *Christelijke Gereformeerde Kerken*.

do not recognize each other's jurisdiction or decisions. For instance, a Catholic couple may obtain its divorce easily from the court, and both divorcees can remarry at the civil registrar, but the Catholic tribunal will not recognize the civil divorce, and in absence thereof will consider the couple to be married and, if one of them remarries, to be living in a state of bigamy (Berger 2010b, 2011a; Rutten 2008a). The Dutch Muslim community, on the other hand, lacks a similar institutionalized form of adjudication on the basis of religious law and, so it appears, also lacks the will to establish such a body (Bakker 2010). Advice and dispute resolution in family matters does take place, but on an ad hoc basis by individual imams or scholars who are approached for that purpose.

Within the legal framework of Dutch law, the only place where Islamic family law is applied is by the Dutch civil court as a matter of private international law. This is the case when a Muslim who appears before the Dutch court in a family law case has the nationality of a country that upholds an Islamic family law. The conflict rules of international private law may then allocate that national law as the law to be applied by the Dutch court. This has happened in the past to Moroccans living in the Netherlands; their cases of marriage, divorce and inheritance were decided on the basis of Moroccan Islamic family law (Jordens-Cortran 2007; Kruiniger 2008; Rutten 1997). It was against this legal practice that the aforementioned PVV fulminated in 2011, ignoring the fact that this was not by choice of the individual judge, as was insinuated, but by applying Dutch international private law.

Since the 1990s, the application of foreign Islamic family law by Dutch courts has diminished; however, this is mainly because most Muslims in the Netherlands by now have the Dutch nationality, or are considered to have closer ties to Dutch society than to their country of origin. While national Western courts are less and less inclined to apply foreign national laws to residents with a foreign nationality, these residents continue to navigate their way through a legal labyrinth for the practical reason that they often retain strong ties with their countries of origin.

In addition to marriage and divorce, the issue of Islamic inheritance law has been raised. Here, again, two possibilities present themselves: one is the application by Dutch courts through private international law, the other as a form of domestic law. The application by Dutch courts has been limited, mainly because the first generation of Muslims is still alive or the inheritance has been settled abroad, or because specific forms of Islamic inheritance are considered contrary to Dutch public order, such as the unequal shares between brother and sister (Rutten 1997).¹⁴ The possibility of domestic forms of applying Islamic

¹⁴ 'Dochters moslims gedupeerd door sjaria-testament,' in daily *Trouw*, 7 October 2006.

inheritance law has been suggested in the particular case of the will: according to Dutch law, one may dispose freely in one's will, and it has been suggested that for the part of the estate that pertains to the will one could allocate the portions in accordance with the division of Islamic inheritance shares (Rutten 2008b). This raised questions in Parliament and the Minister of Justice emphasized the freedom to testate by means of the will, but added that "it is undesirable when daughters systematically inherit only half of what sons would inherit".¹⁵ The answer was clearly politically motivated because from a legal point of view, Dutch inheritance law has a long history of farmers legating their farms to their sons and leaving a (lesser) sum of money to their daughters.

Financial transactions

Islamic law of commerce is based on the prohibition of interest (*riba*) and usury (*gharar*). These two injunctions are sacrosanct in Islamic law and have resulted in a number of intricate commercial contracts. In the case of devout Muslims in the Netherlands – and in most Western countries, for that matter – these prohibitions have led to a number of problematic situations. One is the impossibility to buy a house, since this is commonly financed by means of a mortgage that, due to its use of interest, is off-limits for a Muslim. Another problem is that savings accounts pay interest.

Since these issues pertain to the freedom of contract, which is quite extensive in Dutch law, people have ample possibilities to come up with solutions or alternatives. In the case of the savings account, for instance, a Muslim may request that interest is not paid, or may have the interest amount being deferred to charity. In the case of the mortgage, a Dutch organization named *Bilaa Riba* ('Without Interest') tried to come up with an Islamic alternative, the so-called 'halal mortgage'.¹⁶ Here, however, the situation proved complicated. There are Islamic contracts that reflect the instrument of mortgage, but such a contract is based on two contracts of sale that take place simultaneously; in most Western legal systems this will result in a transfer tax that needs to be paid twice. In the United Kingdom, the tax law was amended to accommodate this specific need. In the Netherlands, however, the tax authority was not willing to provide such solution, and the 'halal mortgage' has never seen the light.

Nevertheless, Islamic finance has received positive responses from both Muslims and non-Muslims. Considering the fact that finance is an important

¹⁵ See questions in parliament by Groep Wilders dated 11 October 2006, and written answer by Minister of Justice of 22 December 2006 (Tweede Kamer, vergaderjaar 2006-2007, Aanghangsel Handelingen, Nr. 530). <https://zoek.officielebekendmakingen.nl/ah-tk-20062007-530.html>.

¹⁶ Their website www.bilaa-riba.nl is no longer active.

domain of sharia, it is interesting that it has always received enthusiastic support in the public debate and in the media.¹⁷ Moreover, initiatives relating to Islamic finance have been undertaken by non-Muslims as well, including renowned Dutch banks such as Rabo and ABN-AMRO, and Dutch (non-Muslim) lawyers and bankers who specialize in Islamic finance (Berger 2011b; Tjittes 2008).

Violence in the name of Islam

The murderer of Theo van Gogh in 2004 justified his horrific act with the argument that he had to defend Islam. Van Gogh was considered the epitome of the Islam-bashing that dominated the public debate since the late 1990s, and which was a source of powerless resentment and anger among Dutch Muslims. The young Dutch Muslim Mohammed Bouyeri, who was born and raised in the Netherlands, and who was a devout Muslim, took the extremist step of stopping Van Gogh by force. His justification was based on a radical reading of sharia: insulting Islam is punishable by death, and the execution thereof is in the hands of any individual believer.

The pressing question was whether many Dutch Muslims shared these kinds of radical interpretations of sharia. In a relatively short time, numerous research reports on radicalism among young Dutch Muslims have been produced (Algemene Inlichtingen- en Veiligheidsdienst 2004, 2006, 2007; Bos 2009; Buijs 2006; Demant & De Graaf 2010; Hrachoui 2006), accompanied by several insightful books by investigative journalists (Groen & Kranenberg 2006; Kleijwegt 2005). A comprehensive picture emerged of the Muslim Dutch youth – mostly Moroccans but also Dutch converts – who had adopted radical notions of Islam. A combination of social factors was identified as contributing to this development: experiences of discrimination, a sense of alienation, identity crisis, international politics, criticism of Islam. These factors coincided with a general tendency among the second generation to turn to Islam as their new identity.

However, while all these factors explained the resentment and anger among young Muslims and their identification with Islam, researchers could not explain why one Muslim would develop political or even violent radical ideas, while the other turned to politics or merely to orthodox forms of Islam (Buijs 2006). An important observation made in another study was that orthodoxy among young Dutch Muslims by itself was not a *sine qua non* for their radicalization (Roex et al. 2010).

¹⁷ See e.g. 'Hoe islamitisch recht en hypotheekrenteaftrek verrassend goed kunnen samengaan' in daily *NRC Handelsblad*, 11 October 2006.

Sharia in the Netherlands – what, exactly, is the problem?

Given the fact that most forms of sharia as being practiced by Dutch Muslims are not contrary to any constitutional or legislative rights that they have as Dutch citizens, what, then, is cause of the recurring and vitriolic objection towards anything that is somehow related to sharia? The arguments put forward in the political and public discourse on this issue may be grouped into three categories: the legal order, in particular the concepts of equality and rule of law; the social order, in particular integration and the position of women; and the national order, which combines all arguments when they are related to national security.

Legal order

The bottom line of this argument is that rules of sharia are contrary to fundamental principles of the Dutch legal order and that, as a consequence, their application in any form should be prohibited. This argument definitely holds in the aforementioned situation of international private law: when foreign rules are deemed applicable by the Dutch court, their application may nonetheless be denied on the grounds of a violation of fundamental principles of Dutch law (known as ‘public order’). It has thus been declared that polygamy¹⁸ and repudiation are violations of the Dutch legal order: polygamy is said to contravene the fundamental principle of monogamy,¹⁹ and repudiation is deemed contrary to gender equality (the Muslim man has the right of repudiation, but not the woman).²⁰

However, the domestic setting out of court provides a different picture. If one were to apply the fundamental principle of gender equality to any kind of relation and situation within the Netherlands, then surely many religious rules in this respect would have to be abandoned: the Catholic church should allow female priests, Protestant schools should be denied their right to refuse non-Protestant pupils and staff, and a Jewish divorce should not be the exclusive prerogative of the husband but also the right of the wife. Clearly, this is not the intention of such fundamental right, not in the last place because there are also other fundamental rights: one is the freedom of religion, and the other the freedom of assembly where, in the closed circle of members and adherents, one is allowed to live in accordance to rules that are contrary to those of the

¹⁸ While ‘polygyny’ would strictly speaking be the correct term to describe the intended practice, as it denotes the practice by which males are allowed to marry multiple wives, the term ‘polygamy’ (which literally means allowing both genders to have multiple spouses) is so common in western discourse on this issue that it will continue to be used here.

¹⁹ Article 33 Book 1 Dutch Civil Code, confirmed as a principle of public order by the Supreme Court (Hoge Raad, 1 July 1993, NJ 1994, 105).

²⁰ Hoge Raad, 9 November 2001, NJ 2002, 279 (see also Van der Velden 2003).

constitution (Akkermans 2005, 32, 34). Nevertheless, a clear tension between these fundamental rights remains – and has already existed for some considerable time, but as of recently seems merely to have been highlighted by the presence of Muslims and their wish to apply certain rules of Islamic law (see for these tensions Rutten 2010, 2013).

From a legal perspective, therefore, Dutch Muslims are allowed to live in accordance with most sharia rules as described above, even if these rules are not in conformity with certain Dutch conventions or constitutional rights. Muslims share this freedom with other religious communities in the Netherlands. The frequently heard argument that the Dutch civil law system does not accept ‘parallel legal systems’ (see further below) is therefore incorrect: all kinds of professional, religious and social communities maintain sets of rules to settle internal conflicts. Perhaps part of the confusion in this respect is that one speaks of ‘religious courts’ and ‘religious law’ as if these Jewish, Catholic, Protestant and (hitherto non-existent) ‘sharia’ courts have equal status to civil law and civil courts. They don’t. In the eye of the state, a religious marriage is the equivalent of a common law marriage, since it is not a registered civil marriage. Similarly, a ‘religious court’ may have great authority among the believers, but from the civil law perspective it is a means by which people have decided to solve their problems, without relinquishing their right of recourse to the civil court.

The singular system of the rule of law demands that everyone is treated equally before the civil court and in accordance with the same civil law, but it also allows people to begin, arrange and end their relationships in ways they see fit. The presupposition of this system is that people voluntarily submit to the rules, codes or norms of their society, group or communities. Consequently, members of communities that have decided to apply certain rules will always have the option to claim their rights under civil law. But this brings us to the next argument against sharia: to what extent are people actually *free* to choose the ways they want to handle their relations?

Social order

It is argued that, if a sharia ‘court’ were to exist, Dutch Muslims, and in particular Dutch Muslim women, even though they are formally not obliged to submit their family cases to such court, would be coerced to do so through peer pressure. Such coercion from the family, friends or community puts into question the voluntarism that presupposes the use of that court. In the case of the Netherlands there is no evidence of such peer pressure, firstly because no such courts exist and, secondly, because the degree of peer pressure among Muslims

is little researched.²¹ However, the practice of group coercion among Muslims in matters of family law has been indicated in English studies (Bano 2011; Sachar 2001, 15) and also became apparent in the case of the sharia tribunal in Ontario.²² Ali Mumtaz, the Muslim scholar who intended to found that tribunal, stated that Muslims are under a religious obligation to subject themselves to the sharia-arbitration offered by that tribunal: “[...] a Muslim who would choose to opt out of this stage, for reasons of convenience would be guilty of a far greater crime than a mere breach of contract – this could be tantamount to blasphemy-apostasy.”²³ The coercive impact of such religious arguments was confirmed by the president of Toronto’s Jewish religious tribunal (*Beis Din*) who was quoted as saying: “In this city, we actually push people a little to come [to arbitration by Jewish law] because using the *Beis Din* is a *mitzvah*, a commandment from God, an obligation” (Cohen 2000, 27).

If such peer pressure exists, the next question is whether it is up to the state to prevent such pressure from happening. Two possible answers present themselves. On the one hand, one might take as a starting point the responsibility and autonomy of the individual adult. According to this view, it is up to each and every adult to arrange his or her life in accordance to his or her wishes, even if that means the submission to rules that the general public or constitutional prescriptions might disagree with. The only legal limit is that of criminal law, because the individual freedom does not extend to minors or to abuse. The premise of personal autonomy presumes that all actions are taken voluntarily, and that one always has recourse to the civil law system. Obviously, it is not as simple as that, especially when the pressure is from one’s immediate family or peers. But if the principle is the individual’s autonomy, then by implication peer pressure is one’s personal responsibility unless there is obvious physical or violent coercion involved. In a Canadian case of a woman who was reluctant to sign the arbitration contract for her divorce, but nevertheless did so under what she perceived as social pressure by her family, the Canadian courts – all the way up to the Supreme Court – held that “notwithstanding the

²¹ Such coercion has been researched with regard to marriage, where it appears to exist (Cornelissens 2009; Kuppens 2008), and with regard to the wearing of the headscarf, where coercion seems to occur much less (Motivaction 2011).

²² Canadian Council of Muslim Women, ‘Position Statement on the Proposed Implementation of Sections of Muslim Law [Sharia] in Canada’, May 25 2004, p.2 (formerly available at http://www.ccmw.org/Position%20Papers/-Position_Sharia_Law.htm, now referred to at <http://www.wlumf.org/node/1475> but without a link to the text itself.)

²³ This statement was originally posted at the website of the Islamic Institute (<http://muslim-canada.org/-DARLQADAform2andhalf.html>), but has been removed since. It has been repeated in many publications, among which the aforementioned Canadian Council of Muslim Women (2004).

defendant's emotional upset at the time" there was no evidence of "duress, coercion or undue influence" (Bakht 2004, 9).

The opposite position in this question is that the state has a duty to protect the weak and vulnerable. In the Netherlands, this argument is used in particular with regard to Muslim women who are considered to be in position of double vulnerability: they belong to a relatively young and socio-economically weak migrant community and, within that community, to a religious system that grants them a lesser status (Arib 2009; Algemene Inlichtingen- en Veiligheidsdienst 2007; Amsterdam 2006; Salem 2009; VROM 2007). The latter argument is often illustrated with the situation of the religious marriages without civil registration: the Muslim women are 'trapped' in such marriages since they cannot divorce according to Islamic law, while their 'husbands' may engage into another relationship as a matter of polygamy, which is permitted by Islam (Arib 2009; Rutten 2010; Salem 2009). Also, Muslim women are said to be in particular need of protection against the growing influence of radical conservative forms of Islam in the Netherlands (Algemene Inlichtingen- en Veiligheidsdienst 2007; Amsterdam 2007).

It could also be argued – as this author has done – that a body of authoritative and representative Muslims that adjudicates among Muslims is not only a constitutional right, but might also provide solace in a Dutch Muslim community that is increasingly pious and in need of a central authority with decisive or advisory powers regarding conflicts of religious law (Berger 2009a-b, 2011). It might even be argued that such an authoritative body is especially in the interest of Muslim women: in the aforementioned cases of Islamic marriage where the 'husband' leaves the woman without religiously divorcing her (and therefore leaving her incapable of remarrying religiously), such a body may pronounce the divorce or force the husband to do so (for counter arguments see Arib 2009 and Salem 2009). Of course it all depends on the degree of conservative or liberal views of the members of such a body.

Still, opposition against such bodies, regardless of how they are named or of what their exact function might be, is fierce. The overall argument in this respect is that allowing any kind of sharia or sharia 'court' would obstruct integration: institutionalizing a form of adjudication on the basis of Islamic law, however constitutional that may be, might create a 'parallel society' which would further alienate Muslims from Dutch society rather than integrate them into it. This argument has also been embraced by the national security agency AIVD (*Algemene Inlichtingen- en Veiligheidsdienst*) and has been incorporated into their notion of national security, as we will see in the next paragraph.

National order

According to the AIVD, radicalism is not confined to the process leading to violent action. The Dutch security agency employs a much wider definition of (Muslim) radicalism as “striving towards the creation of parallel community structures with forms of self-defined justice and the propagation of anti-democratic behaviour which could result in polarisation, inter-ethnic and inter-religious tensions and serious social unrest” (Algemene Inlichtingen- en Veiligheidsdienst 2007, 10). This is a broader definition than those used by other Western European security services that mostly confine the definition of radicalism to the use of violence (Berger 2010c, 238).

The concern about ‘parallel societies’, that is communities that isolate themselves from society at large, is shared at the top political level. The Dutch prime minister had already indicated several years earlier, in 2003, that Islamic organisations and schools could impede integration as they might become “prisons for those staying behind”.²⁴ Anxiety about Muslim ‘parallel societies’ as a breeding ground for radicalism was one of the main reasons for parliament to have the Ministry of Justice commission the aforementioned studies on Islamic marriage (Van der Leun & Avalon 2009) and sharia courts (Bakker et al. 2010). However, apart from these studies, the existence and particularities of Muslim parallel societies has to date not been researched.

These concerns deserve closer attention because they illustrate the changes that have taken place in Dutch thinking on religious minority communities. Only thirty years earlier, in the 1970s and early 1980s, the government had introduced the programme of ‘Education in one’s own Language and Culture’ whereby Turkish and Moroccan children received special instruction in their native language and culture. And before that, until the 1970s, Dutch society was structured by means of so-called ‘pillars’ (*zuilen*) that in fact constituted ‘parallel societies’. In this system, each confessional and ideological community – Catholics, Protestants, socialists, liberals – had organized itself as a separate community from grass root level up to the political arena (hence the pillar image) with its own schools, shops, sport clubs, unions, media outlets and political parties. Catholics listened to Catholic radio stations, read Catholic newspapers, sent their children to Catholic schools, bought bread from Catholic bakers, voted for Catholic parties, were members of Catholic unions, etcetera. And the same applied to Protestants, socialists, liberals. Only the leaders of the various pillars would meet to communicate on matters of common or national concern. The Dutch Christian Reformed community, under leadership of Abraham Kuyper, had introduced this concept in the early twentieth century as a

²⁴ ‘Premier: zuil moslims blokkeert integratie’, interview with daily *Trouw*, 3 November 2003.

means of empowerment. They had established their own newspaper, political party and even university (the *Vrije Universiteit* or 'Free University', known by its acronym VU) – all as part of the newly coined concept of 'sovereignty in one's own circle' meaning that state power should not extend to all facets of life. These concepts and ideas gradually disappeared in the seventies, only to be resuscitated by some sociologists and politicians who suggested it as a model for the empowerment and integration of the Muslim community (see analyses by Hoogenboom & Scholten 2008; Penninx et al. 1998; Rath et al. 1996). But as we have seen, by the turn of the millennium the dominant public and political opinion deemed any form of structural internal organization and community formation by Muslims to be not only contrary to integration but also susceptible to radicalization.

The notion of an isolated Muslim community similar to that of the early Dutch pillar society is not only considered an impediment to their integration, as the former prime minister mentioned. Some also are anxious about such communities establishing an Islamic polity, either within their community, or imposed on Dutch society at large. A member of the city council of Rotterdam, a city with a large Muslim population, said in 2005: "In some areas of our city more than half of the population is Muslim. If a Muslim party obtains a near majority vote in that area²⁵ and when the idiots of the Green Left [Party] with their politically correct tendencies join forces with them, we are in for some strange things [...] like polygamy, honour killings, forced marriages, suppression of women. And we don't want that, do we?"²⁶

Provided that these Muslims would do so – we already saw that their enthusiasm in this respect is very limited – it is striking that this politician had such little faith in the Dutch national and municipal rule of law that does not allow such local legal initiatives. But the fear for the Muslims' alleged intention to "implement sharia" is apparently widely shared by the Dutch public. This showed again in the national outrage caused in 2006 by the then Minister of Justice when he said: "If two-thirds of all Dutchmen tomorrow want to implement the sharia, then surely this should be possible?"²⁷ The democratic point that the Minister wanted to make was entirely missed, and so were the statistics: even if all Dutch Muslim adults were to vote for a party that strived for the implementation of sharia, then they would win no more than 14 of the 150

²⁵ In large cities like Rotterdam the municipality is divided into several district councils, each to be elected by the constituency of that district.

²⁶ Interview with Mr. Marco Pastors, leader of the *Leefbaar Rotterdam* ('Liveable Rotterdam') party and alderman in the city of Rotterdam, in *Metro*, 12 March 2005.

²⁷ Interview in weekly *Vrij Nederland*, 16 September 2006.

seats in Parliament. And we would still be struggling with the same question that we started this article with: what is meant by sharia in the first place?

A future for sharia in the Netherlands?

Will sharia ever get a footing in the Netherlands? Let one thing be clear: sharia is already present in the Netherlands, in many forms. Each faithful Muslim lives his or her life in accordance to sharia. Some do so by fulfilling the basic requirements of prayer, fasting, religious burial and following dietary laws. To other Muslims living a 'virtuous' life will suffice to be considered a Muslim observing sharia. And again others will go further by dressing, talking and behaving in ways that they deem in accordance with the rules of sharia.

Articles and arguments by Dutch scholars pointing out that the role of sharia in the Netherlands is limited, or at least not worrisome, are met with scorn.²⁸ Concerns and anxieties apparently prevail, even among judges (Buskens 2011). In some instances, these concerns are justified, as is the case with examples of 'Sharia Councils' in the United Kingdom where presiding clerics tell the woman not to complain too quickly about a beating by her husband.²⁹ Some concerns are also justified, but have little to do with sharia or Islam, as is for example the case with the high crime rate among Dutch Moroccan youth (Wermölder 2005); indeed, Muslim clerics point to their lack of religiousness as the cause of their criminal behaviour.

In many instances, however, it is the perspective taken on the issue at hand that makes all the difference. From a legal perspective, manifestations of sharia-compliant behaviour often fall within the parameters of what is permitted by Dutch law. From a cultural perspective, on the other hand, such behaviour is often experienced as insulting or threatening to Dutch society. "This is not how we do things here", is the underlying reasoning in such matters. People get nervous about mosques, especially if they have minarets, and about Islamic attire and Muslims on the work floor who do not want to go out for a beer, or refuse to shake the hand of someone of the opposite sex, or who demand a brief work break for prayer.

It is interesting to note that much of what Muslims practice is not that different from what orthodox Protestants or Jews do. The issue at hand is therefore perhaps not Islam as such, but the position of (orthodox) religiosity in a Dutch society that is dominated by secularism. Public manifestations of religion

²⁸ As was lately the case with the sharia-special of the legal journal *Rechtstreeks* (2011.4: *Sharia(&)rechtspraak: rechtsontwikkelingen in de moslimwereld en Nederland*).

²⁹ See e.g. the youtube video *Inside a sharia divorce Court*, especially at 4:02 minutes, available at <http://www.youtube.com/watch?v=Ctyr5FaZJtI> (last visited on 12 July 2013).

in the Netherlands have in the past century gradually receded to places outside the urban areas of the Randstad in the so-called 'Bible-belt', where they live in accordance to their own strict rules. Even the staunchest Christian political party will not refer to God or the Bible during parliamentary debates – not because it is not allowed, but because it is culturally considered *not done* to do so. If this is the case, then the question arises why there is much more commotion about orthodox manifestations of Islam than about similar manifestations in other religions. The answer, to my mind, must be sought in demographics and the 'otherness' of Muslims. The notion of Muslims being alien to Dutch (Christian) society and culture has been discussed extensively elsewhere (Van Donselaar & Rodrigues 2008; Poorthuis & Salemink 2011; De Ruiter in this issue). Demographically, orthodox Muslims have not (yet) receded into isolated communities like their non-Muslim peers but live mainly in the urban areas of the Randstad. They are therefore positioned in a daily confrontation with the public domain that is dominated by a secular or even anti-religious attitude. The Dutch have developed over the years a confrontational attitude between secularism and religion, and this confrontation is made manifest by Islam, not because of Islam per se, but because Muslims happen to live in the crossfire. And as we are currently witnessing, young Muslims deliberately walk into that crossfire to claim their religious identity and to challenge Dutch society that they feel is denying them that identity.

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Réactions à la charia aux Pays-Bas

La confusion et l'anxiété règnent aux Pays-Bas au sujet de la charia, notamment en ce qui concerne les soi-disant tribunaux charia et les mariages islamiques, et ont déclenché de nombreux débats au Parlement et des enquêtes nationales. Le présent article analyse les formes de la charia qu'on trouve aux Pays-Bas. Il aborde la question de ce que nous entendons par la charia – et, chose plus importante, ce que les musulmans néerlandais en pensent – et replace cette discussion dans le contexte plus large du système juridique néerlandais. Je prétends que, même si l'opinion publique et politique désapprouve la charia, la plupart de ses règles, telles que les musulmans néerlandais les pratiquent, sont permises par la loi néerlandaise. En analysant la nature des préoccupations du public néerlandais à ce sujet, on trouve qu'elles peuvent être regroupées en trois catégories : l'infraction prétendue par la charia de l'ordre juridique, notamment les concepts de l'égalité et de l'autorité de la loi; son infraction de l'ordre social, notamment l'intégration et les droits des femmes; et son infraction de l'ordre national, qui combine les arguments juridiques et sociaux en tant qu'ils concernent la sécurité nationale. Plus généralement, les gens sont incertains combien les musulmans font partie de la société néerlandaise et veulent en être, et la charia semble fonctionner comme épreuve décisive. Ma conclusion principale est que la manière dont les musulmans néerlandais pratiquent l'islam et les règles de la charia ne diffère pas tellement des pratiques d'autres communautés orthodoxes aux Pays-Bas. La différence principale est que la conduite des musulmans néerlandais est plus remarquée parce qu'ils habitent pour la plupart des régions urbaines, qui sont sécularisées, tandis que leurs homologues orthodoxes chrétiens sont concentrés plutôt dans des régions rurales, les « coins évangélistes. »

Reacties op sharia in Nederland

Verwarring en paniek regeren in Nederland waar het gaat over sharia en in het bijzonder de zogenaamde sharia-rechtbanken en Islamitische huwelijken. Het onderwerp heeft herhaaldelijk geleid tot debatten in de Tweede Kamer en nationale enquêtes. Dit artikel analyseert welke vormen van sharia men al dan niet kan onderscheiden in Nederland. Het gaat in op de vraag wat we bedoelen met sharia en, belangrijker nog, wat Moslims ervan denken, en plaatst de discussie omtrent sharia in de bredere context van het Nederlandse rechtssysteem. Dit artikel betoogt dat publieke en politieke opinies sharia weliswaar mogen afkeuren, maar dat de meeste regels waaraan Nederlandse Moslims zich houden in feite zijn toegestaan onder het Nederlandse rechtssysteem. Het artikel analyseert vervolgens de aard van de bedenkingen die naar voren gebracht worden in de Nederlandse publieke en politieke opinie met betrekking tot sharia, en verdeelt deze bedenkingen in drie categorieën: de alleged ondermijning van de wettelijke orde, in het bijzonder met betrekking tot gelijkheid en de rechtsstaat; de ondermijning van de sociale orde, in het bijzonder de integratie en positie van vrouwen; en de ondermijning van de nationale orde, waarbij de wettelijke en sociale argumenten gecombineerd worden in hun relatie tot nationale veiligheid. De overkoepelende zorg is de mate waarin Nederlandse Moslims deel uitmaken en willen uitmaken van de Nederlandse samenleving, waarbij sharia lijkt te functioneren als een soort litmustest. De voornaamste conclusie van het artikel is dat de manier waarom Nederlandse Moslims Islam en de sharia-voorschriften beoefenen niet wezenlijk afwijkt van die van andere orthodoxe geloofsgemeenschappen in Nederland, maar dat het voornaamste verschil tussen de twee groepen te maken heeft met het feit dat het gedrag van Nederlandse Moslims meer opvalt omdat zij voornamelijk in de gesecculariseerde stedelijke gebieden wonen, terwijl hun Christelijke tegehangers zich voornamelijk bevinden in plattelandsgebieden in de zogenaamde 'Bible belt'.