The modalities of applying sharia in the West (with the Netherlands as case study)

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A. Introduction

The notion of Sharia in the West is by its nature dynamic. The wish of devout Muslims in Western societies to live in accordance with the rules of Islam – which includes religious rituals of prayer, burial, fasting as well as marriage, divorce, contract, gender codes, and participation in and interaction with European society – is met by responses from those Western societies. As I have elaborated elsewhere, these responses can be of a political-legal nature, i. e., allowing or prohibiting certain Islamic practices based on legal premises, or of a cultural-religious nature, i. e. allowing or prohibiting such practices based on customs or prejudices.[1] When this 'Western' response is negative, it will invoke a counter response from the Muslims involved: should they persist in their wish to uphold that rule of Islam, or abandon it, or practice it in an adapted form that is permissible to the Western society where they live?

This on-going dialectic of Muslim desires, followed by Western responses and Muslim counter-responses creates the dynamic that makes up 'Sharia in the West'.[2] This is not to say that Sharia in the West is in constant flux. To the contrary, Muslims who consider adaptations or even changes of Sharia do so within the epistemic confines of the legal tradition that makes up Sharia. The often-heated discussions of what is, and what is not allowed in terms of exceptions or adaptations to the rules of Islam take place with strict consideration of the parameters set out by this legal tradition.[3]

In this article, I want to focus on the third tier of the Sharia-dialectic, that is the manners in which Muslims respond to the Western responses regarding Sharia. While the first tier (Muslims want to live in accordance with rules of Islam) often refers to a traditional, mostly conservative form of Islam, and the second tier (Western political-legal and cultural-religious responses to those Muslim wishes) mostly refers to a caricatural Islam as represented by the Taliban or Saudi Arabia,[4] the third tier refers to an Islam that is quite diverse, as we will see below. I contend that this

[1] See *Berger* Journal of Muslims in Europe 2 (2013), 115.

[2] See *Berger* Journal of Law, Religion and State 6 (2018), 236.

[3] See, for example, *Jabir al-Alwani,* Towards a Fiqh for Muslim Minorities. Some Basic Reflections, The International Institute of Islamic Thought, 2003; *Petersen* Journal of Muslims in Europe 10 (2021): Issue 3 (Oct 2021), 357.

[4] See, e. g., *ECoHR,* Refah vs. Turkey, 13 February 2003, Nos. 41340/98, 41342/98, 41343/98 and 41344/98; European Parliamentary Assembly of the Council of Europe, Resolution 2253 (2019) 'Sharia, the Cairo Declaration and the European Convention on Human Rights'.

diversity – I call it modalities – is what makes up the core of 'Sharia in the West'. In the following, I will provide a categorization of these modalities, not as a reflection of an existing typology used by the Muslims, but as a tool to help us understand the mechanism of these processes.

B. 'Sharia'

Before we discuss the various modalities, some clarity needs to be given to the notion of Sharia. The purpose of this discussion is not to contribute to the theoretical discussion of 'what is' Sharia, but rather to provide insights that will help us understand the nature of the various modalities under discussion here.

'Sharia' is a term that can take several forms and imaginations. In its origins it is a legal science, representing an intellectual process of rule-finding rather than a corpus of law.[5] The early Islamic scholars of law (8th–12th century CE) were not so much interested in the rule itself, but in the path (literally: *shari'a*) that would lead them there. The main tool to practice this kind of law was *ijtijad,* which is usually translated as 'interpretation' but is closer to 'the intellectual effort to find the rule'.[6] The early Islamic legal scholars developed numerous methodologies that would help them in doing so. These methods rather than their outcome are what constituted the core of Sharia.

This changed during the end of the nineteenth and early twentieth century. From then on, the emphasis came on the rules themselves. This was the result of two developments.[7] First, the rules of Sharia were being codified. Consequently, there was no need to find the rule on a case-by-case basis, whereby individual legal scholars might come to different outcomes. This outcome was now clear as the rule was set in a national law. The second development was that the role of the legal scholar was replaced by that of the legislator and the judge: the first decided what the rules were, and the second how they were applied and interpreted. These developments had contributed to regard Sharia from the twentieth century onwards as a 'law' rather than as a legal science.[8]

These developments apply to Sharia in almost all Muslim-majority countries (albeit mostly in matters of family law, and only piece-meal in other legal domains). With regards to Sharia in the West, we encounter yet another development. In the West, the Sharia does not apply as a matter of nationalized state law, nor are there religious authoritative bodies that may determine how to interpret the non-codified rules of Sharia. Simply put, the Muslims in the West are on their own when it

[5] *Hallaq,* Shari'a. Theory, Practice, Transformations, 2009, p. 78.

[6] There is no single definition of *ijtihad,* see *Vikør,* Between God and the Sultan. A History of Islamic Law, 2005, p. 73.

[7] Elsewhere I call this a 'revolution' in the sharia: *Berger* in Peters/Bearman (eds.), The Ashgate Research Companion to Islamic Law, 2014, p. 223.

[8] This is highlighted (and deplored) by scholars like *Hallaq* in Haddad/Stowasser (eds.), Islamic Law and the Challenges of Modernity, 2004, p. 21) and *Abou El Fadl,* Speaking in God's Name. Islamic Law, Authority and Women, 2001.

comes to living in accordance with Sharia. There is no-one who tells them what rules of Sharia apply, and how, and when. These Muslims are individually autonomous in deciding what Sharia means and how it needs to be applied in their personal lives.[9] However, this does not mean that there is a free-for-all in terms of Sharia. To the contrary. It appears that most devout Muslims in the West adhere to a rather conservative interpretation of Sharia. Hence the practice of quite a number of such devout Muslims to, for instance, not accept scholarships, loans, or mortgages if those involve a repayment with interest.

What devout Muslims in the West have in common with their fellow Muslims in the Muslim world is that they retain the notion of Sharia in terms of rules rather than as a legal science. However, when confronted with adverse or prohibiting Western responses to their practices of Sharia, these Muslims have resorted to the classical scholarship of Islamic legal science to look for solutions. This is an interesting development by itself, because it might indicate a resuscitation of the ancient legal science. How they do so will be elaborated below.

C. Modalities of Sharia in the West

What I call 'modalities' of responses by Muslims to Western curtailing or prohibitions of Sharia are admittedly generalizations of my own making. Moreover, in the discussion of these modalities below we will see that there are numerous nuances and exceptions. In other words, these modalities are suggestions for a typology, not for the sake of a typology, but to obtain a better understanding of the many ways that Muslims in Europe deal with matters of Sharia. With this in mind, the following modalities present themselves.

I. First modality: Adoption

This 'Adoption' sees to the situation that the Muslim involved requires the specific rule of Sharia to be implemented in full, without compromise, regardless of what the Western response is. This appears to be mostly the case with rules that are specifically mentioned in the Quran and, to a lesser extent, in the hadith. Examples are religious rituals, like prayer, fasting, burial, but also various legal rules like the prohibition of interest, rules of marriage and divorce, inheritance.

What may explain the intransigence regarding these rules is their specificity which Islamic theology describes as 'scripture that is fixed and indisputable' *(nass sarih qati' al-thubut wa qati' al-dalala).*[10] This means that the rule is so clearly stated in scripture (Qur'an or Hadith) that no interpretation is possible. The man's right to unilateral divorce *(talaq)* or he prohibition of a Muslim woman to marry a non-Muslim man are examples of such rules, just like the main rites of burial, fasting, prayer. Denying such rules would therefore constitute an impediment to live in ac-

[9] I elaborate this process in 'Understanding Sharia in the West', Journal of Law, Religion and State 6 (2018), 236.

[10] This is established terminology in Islamic theology and does not have an original source.

cordance with the main principles of Islam as instructed by God, and as such effectively means a ban on Islam. Interestingly, some rules are not that clear in their textual description and therefore need some interpretation, but they are nevertheless considered 'fixed and undisputable', such as the headscarf for women[11] and the prohibition of interest *(riba)*.[12]

It seems – and I deliberately use this word of caution as the evidence is sporadic and of a qualitative nature – that Muslims in the West tend to be not very receptive of any theological rulings that allow for a lenient interpretation of the 'fixed and indisputable' rules. Two examples may illustrate this. One played out in the years 2016 and 2017 in The Netherlands, when the fasting of Ramadan coincided with the period of school graduation exams. Most Muslim high school students were determined to fast, which was a cause of concern to the teachers. During a Muslim parents meeting at one of the schools I was invited to speak about this, but when I informed them about the fatwa by the Egyptian mufti that students during exams are exempt from fasting, they all responded with disbelief and even rage. For them it was inconceivable that fasting could be cancelled or postponed.

Another example is the several fatwas allowing for a limited form of interest on money transfers[13] or mortgage[14] have been met with suspicion and outright rejection by quite a few devout Dutch Muslims (many of whom still live in rental houses because buying a house can only be accomplished with a mortgage which they refuse to take). While these examples cannot substantiate quantitative statements regarding Muslims in Western Europe, they give the impression that these Muslims are stricter in their interpretation of Islamic rules – especially on what is not allowed – than their fellow-Muslims elsewhere.

II. Second modality: Compliance

'Compliance' sees to the situation that a Muslim wants to live in accordance with a specific rule of Sharia but nevertheless complies with the Western response that restricts or prohibits that rule. Most examples of this modality will have to do with dress code or social conduct. Muslims may be required to shake hands when working in particular jobs,[15] or may not be allowed to wear the headscarf[16] or the face

[11] Quran 24:31: "(…) And say to the believing women to (…) not reveal their adornment *(zina)* except that which is revealed of itself, and to draw their veils *(khumur)* over their bosoms, and not to reveal their adornment save to their (male family members)."

[12] See elaboration in next paragraph.

[13] Dar al-Ifta (Egypt), Fatwa 'Is it lawful to receive bank interests?' 28.10.2013 (https://www.dar-alifta.org/en/fatwa/details/6615/is-it-lawful-to-receive-bank-interests); Dow Jones Shari'ah Board, 'Dow Jones Islamic Market Index fatwa', 1998.

[14] 'Purchasing houses with an usurious loan for Muslims living in non-Muslim countries, i. e. taking up a mortgage to buy a house', The Fourth Ordinary Session of the European Council for Fatwa and Research, Resolution 2, 18–22.10.1999, Resolution 2/4.

[15] In some instances, this has led to court cases where, in even fewer cases, the courts decided in favour of the Muslim who did not want to shake hands, see, e. g., Sweden, Labour Court, A-12–2017 (4 November 2018); Netherlands, Tribunal for Human Rights, 2016-142 (22.12.2012), 2016-73 (7.7.2016).

[16] The court cases about headscarves in Western countries are too numerous to mention here. Similarly, the European Court of Human Rights has ruled on quite a few cases regarding the

veil,[17] or a certain long dress.[18] Muslim compliance with such Western responses will in most cases be coerced because the Muslim might not want to jeopardize a job or a school position or face a fine in case it regards a legal prohibition (like the face veil).

These rules are usually not considered to constitute rules that are 'fixed and undisputable'. Compliance would therefore not necessarily constitute a rejection of a principal element of Islam. If, however, the Muslim involved considers this rule to be 'fixed and undisputable' he or she will probably choose not to comply with the prohibition. In the case of the headscarf, for instance, if a restaurant or an employer or a state institution prohibits the wearing thereof, the women wearing a headscarf will in most instances not compromise and either settle for not entering the restaurant or not taking the job.[19] In quite a few instances such cases have been taken to court which has led to very different outcomes.

III. Third modality: Rejection

This modality regards the situation that the Muslim rejects the specific rule of Sharia just as much as the Western response does. Although the Quran contains explicit rules on slavery or certain criminal offenses *(hudud),* very few – if any – Muslims in Europe seem to want to uphold such rules, at least not in a European setting.[20] An exception to this general observation, so it would seem, are the many European Muslims who left for ISIS during 2013–2015.[21] However, it is still debatable to what extent they were driven by Islamic motivations.[22] Also, if they had such a motivation, it is questionable to what extent they would aspire Islamic rules on caliphate, criminal or slavery applied in a European context: even the most radical Muslims in Europe are not known for such ideas, and organizations like

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headscarf, which has evoked prolific academic analysis and commentary (see, e. g., *Ünlü*, Islamic Headscarves: The Other-Religion Effect and Religious Literacy at the European Court of Human Rights, Islam and Christian-Muslim Relations 34:4 (2023), 381).

[17] The so-called burqa ban, in general or only in certain locations, has been passed as law in Austria, Belgium, Bulgaria, Bosnia-Herzegovina, Denmark, France, Germany, Kosovo, Netherlands, Norway, Spain (Catalonia), Switzerland.

[18] The clearest example is the prohibition by the French Minister of Education to wear the *abaya* or *qamis* in public schools as they were designated to be religious clothes, and as such probited under the 2004 Education Law (article L. 141-5-1). This ban was confirmed on 7.9.2023 by the French State Council *(Conseil d'Etat),* ECLI:FR:CEORD:2023:487891.20230907.

[19] A case that got a lot of media coverage in Western European countries in 2016 was that of *Fardous el-Sakka,* a Muslim teacher in Sweden who quit her job after she was told she had to shake hands with male members of staff at Swedish school.

[20] This can also indirectly be deduced from various surveys such as the European Union Agency for Fundamental Rights, 'Second European Union Minorities and Discrimination Survey (EU-MIDIS II): Muslims – Selected findings' (EFRA, 2017) which concludes: "The vast majority of Muslims in the EU have a high sense of trust in democratic institutions".

[21] An estimated 5.000 people from the European Union left to join ISIS (RAN Centre of Excellence, Responses to returnees: Foreign terrorist fighters and their families, 15.7.2017.

[22] International Centre for Counter-Terrorism, The Foreign Fighters Phenomenon in the European Union Profiles, Threats & Policies, April 2016, p. 53; *Dawson/Amarasingam,* Studies in Conflict & Terrorism, 40:3 (2017), 191; *Frenett/Silverman* in de Guttry/Capone/Paulussen (eds.), Foreign Fighters under International Law and Beyond, 2016, p. 63.

Hizb-u-Tahrir that openly call for the re-establishment of a caliphate make clear that this only works in Muslim-majority societies.[23]

An interesting case in this respect is female genital mutilation (FGM) which is explicitly forbidden in most Western European countries and is also rejected by most (but not all, as we will see) Muslims. The practice of 'female circumcision' is not explicitly forbidden by Islam, and while it is completely absent in most Muslim-majority countries, it is widely practiced in certain regions in the world, in particular in Northeast and West Africa[24] where most countries have Muslim-majority populations. The paradox is that these practices are banned in many of those countries[25] and religious leaders have repeatedly said that this practice is not in accordance with their religion.[26]

So, where do European Muslims stand in this? It appears that the cultural background outweighs the religious. For instance, Moroccan or Algerian Muslims do not have any tradition of FGM, even though the Islamic Maliki school that dominates the Maghreb region considers such circumcision 'recommendable' *(mustahab)*. This theological recommendation does not seem to spur the devout European Muslims of Moroccan or Algerian origin to revert to this practice. On the other hand, European Muslims of Somali origin come from a country where this practice is still widespread (99%)[27] and there have been concerns whether they continue to do so in Western European countries.[28] It seems, however, that this practice only applies to those women who had undergone this FGM in their country of origin before they migrated to Europe, and there are indications that they are not intent on continuing this custom with their daughters in Europe.[29]

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[23] *Taji-Farouki,* A Fundamental Quest, Hizb al-Tahrir and the Search of the Islamic Caliphate, 1996, p. 102. See also *Hanif, N.,* The securitisation of Hizb ut tahrir, a comparative case study (diss. University of London) 2014, p. 90–142.

[24] UNICEF, Database Female Gential Mutilation (annually); WHO: Female Genital Mutilation: An Overview (1998) en Eliminating Female Genital Mutilation. An Interagency Statement by OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO (2008).

[25] For instance, Egypt has in 2008 criminalized 'requesting' FGM (but still 87% of the women have undergone this practice) and Guinea has in 2016 criminalized 'authorizing, promoting or performing' FGM (but still 95% of the women have undergone this practice).

[26] In Egypt, see *Reuters,* Egypt mufti says female circumcision forbidden, August 9.8.2007; UNICEF press realease: *Al-Azhar Al-Sharif* and the Coptic Church provide their perspective on eleven types of violence against children including Female Genital Mutilation, early marriage and child recruitment, 9.5.2016.

[27] UNICEF, FGM-Somalia, 2021.

[28] *Baillot et al.,* Addressing female genital mutilation in Europe: a scoping review of approaches to participation, prevention, protection, and provision of services, International Journal for Equity in Health, 17:21, 2018.

[29] Per Norway, Sweden, United Kongdom see Fn. 10. Per Portugal see *Johnson* in Hernlund/Shell- Duncan (eds.). Transcultural bodies: female genital cutting in global context, 2007, p. 202. A dissenting voice was expressed by *Elgaali/Strevens/Mårdh* The European Journal of Contraception & Reproductive Health Care, 2005, ed. 10, p. 93.

VI. Fourth modality: Commonality

'Commonality' is the case when the Muslim involved considers the specific rule of Sharia to be equal to the Western rule, so that there is no contradiction between the two. Three cases may serve as examples.

The first is the notion of democracy. While there are Muslims claiming that democracy is against Islam, there are also those who argue that Islam and democracy are compatible, or even that Islam promotes democracy. This argument implies that admittedly the notion of democracy as such cannot be found in Islamic scripture or theology, but that they do contain the elements thereof.[30] Examples of such elements are the election of the early caliphs, the need to rule by consensus and consultation, the rule of law, and the protection of minorities. Granted, these Islamic principles do not always entirely live up to today's standards, but neither do the principles that made up Athene's democracy.

The second example is marriage and divorce. In the case of marriage, quite some European countries have encountered the question of the validity of a religious marriage when only a civil marriage is legally valid. Some have solved this by allowing the conclusion of a religious marriage to simultaneously obtain the status of civil marriage,[31] while other states uphold the strict rule that only a civil marriage is legally valid and require that a religious marriage can only be concluded *after* the civil marriage. In the latter case, it has been suggested by Muslims that the conclusion of an Islamic marriage is effectively not different from a civil marriage, because it only requires offer and consent by the bride and groom in the presence of two (male, Muslim) witnesses. The role of the imam is no religious or legal requirement in Islam, as opposed to that of a Catholic priest, for instance. With this in mind, it has been argued that a marriage between Muslims concluded at the civil registry can be considered to constitute an Islamic marriage at the same time. As far as I know, few Muslims are willing to put this logic into practice. They adhere too much importance to what they consider a 'proper' Islamic marriage.

The same reasoning can be used in the case of divorce. In Islam, the husband is the only one with an autonomous right of unilateral divorce (*talaq,* often pejoratively translated as 'repudiation'). The woman in Islam also has means to obtain a divorce, but she is not autonomous in doing so for she always needs the ultimate decision of divorce to be made by either her husband or the judge. How, then, can this situation be considered equal to the divorce as is practiced in most European laws? The reasoning for that is as follows. First, the divorce in European law is unilateral, to be filed by the spouse without preconditions. In that sense it is exactly like the *talaq,* except that the *talaq* is only for the husband. This can be remedied, however, if the husband cedes *(tafwid)* his right of divorce to his wife, so that she is entitled to exactly the same right.[32] Both

[30] See, e. g. *Abou El Fadl.,* Islam and the Challenge of Democracy, 2004; *Hashemi,* Islam, Secularism, and Liberal Democracy: Toward a Democratic Theory for Muslim Societies, 2009; *Kurzman,* Liberal Islam. A Sourcebook, 1988.

[31] As is the case in England and Sweden.

[32] *Ali/Hussain,* Society, Law And Policy Review 1:1 (2022); *Caroll* Modern Asian Studies, 16:2 (1982), 277.

spouses then have the right of *talaq,* which is not unlike the right of divorce under European laws. If then one of the spouses goes to court to file for a divorce under the national law, such divorce will also count as an Islamic divorce. This construct will prevent the situation of the 'caged woman' whereby the wife has been granted a divorce from the court but is refused a divorce under Islamic law from her husband.[33] To my knowledge, very few cases exist whereby the husband has ceded his right of *talaq* to his wife: either because no-one has thought of that (which seems the prevalent situation) or because it is considered embarrassing to raise that issue during the marriage preparations.

The third example of commonality is that of international law. This may not seem to have direct relevance to the everyday lives of Muslims in Europe, but it does. European Muslims follow international developments, and may at times make their voices heard, whereby Muslims show more interest in issues playing out in Muslim-majority countries. Many of these countries, especially by voice of the Organization of Islamic Cooperation of which almost all Muslim majority countries are member, advocate an Islamic approach to international law.[34] However, when we look at the practice of these states on the international stage, we see that even the most self-proclaimed Islamic states, like Iran or Saudi- Arabia, play by the same international rules that all other states adhere to. When these countries criticize Israel or America, for instance, they do not use Islamic jargon or refer to Islamic legal instruments but demand the use of UN measures and refer to international legal standards.[35] Islamic international law, so it seems, exists in name only.[36] We can observe that all modern Muslim majority states that claim adherence to Islamic law, in particular to Islamic international law, have effectively declared this law to coincide with modern standards of international law.

[33] The term 'caged woman' was coined in similar cases of Jewish women trapped in their religious marriage (*Broyde,* Marriage, Divorce, and the Abandoned Wife in Jewish Law: A Conceptual Understanding of the Agunah Problems in America, 2001). Dutch courts consider, in the case that a couple has been divorced under civil law, the unwillingness of a husband to subsequently divorce his wife in accordance to Islamic law a matter of tort (*Berger* Tijdschrift voor Religie, Recht en Beleid 2011, 99). In England this problem has received longstanding legislative and political attention and has been resolved by the Divorce (Religious Marriages) Act 2002 (*Caroll, Lucy*, Journal of Muslim Minority Affairs, 1997, 17).

[34] *Moinuddin,* The Charter of the Islamic Conference and Legal Framework of Economic Co-Operation among its Member States, 1987.

[35] *Berger,* How Islamic is Islamic International Law?, Keynote lecture in the conference Uses of the Past: Islamic International Law and the Problem of Translation, University of Göttingen, 29.6.2018 (available at https://scholarlypublications.universiteitleiden.nl/handle/1887/63483).

[36] *Westbrook* argues that "Islamic law, at least as imagined by the scholars surveyed here, cannot provide a legal articulation of the world order." ('Islamic International Law and Public International Law: Separate Expressions of World Order', 33 Virginia Journal of International Law, 1993, 819 (898). *Abu Sulayman* argues that, in order to become a comprehensive Islamic international law, a thorough re-interpretation of sources is needed (Towards an Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought, The International Institute of Islamic Thought, 1987).

V. Fifth modality: Adaptation

'Adaptation' sees to the situation that the contested rule of Sharia can be Islamically adapted to fit the Western response. The 'Islamic' nature of the adaptation is key here because it guarantees that the rule of Sharia remains within the realm of Islam and therefore retains its validity. However, adaptation or change is frowned upon in mainstream Islamic law that uses the pejorative term 'innovation' *(bidʾa)* to denounce it. For that reason, Muslim scholars have come up with methods of reasoning that remain within the framework of Islamic orthodoxy. For the purpose of Muslims in Europe, a new approach has been developed called *fiqh al-ʾaqalliyat* ('Islamic jurisprudence for Muslim minorities').[37] The European Council of Fatwa and Research, an organization with scholars who have received the traditional schooling in Islamic theology has taken the lead in this method of thinking by developing an entire corpus of jurisprudence with fatwas based on this new approach. However, the ample academic attention that has been given to these fatwas[38] should not be considered an indication for the popularity of these fatwas among Muslims in Europe, which I, from personal experience, estimate to be rather low: most devout Muslims prefer to stick to the orthodox interpretation of the rules and are not receptive to innovative approaches, however much they may be rooted in that same Islamic orthodoxy.[39]

Three examples may illustrate the workings and outcomes of *fiqh al-ʾaqalliyat*. But before we discuss them, a brief explanation is needed of its reasoning. As we have seen, the orthodox method divides sharia rules between those that are 'fixed and undisputable' and rules that may change with time and place. In the *fiqh al-ʾaqalliyat* an extra dimension of interpretation is added by referring to principles which constitute the foundations of Sharia. First, Sharia is to serve the Muslim, not the other way around. From this the principle of *taysir* is derived, meaning 'to make it easy', which denotes the principle that Sharia intends to make a Muslim's life easier, not harder. For instance, when Ramadan takes place during the summer period, it will be clear that Muslims in Scandinavia cannot survive a strict observance of the rule to fast from sunrise to sunset. While orthodox scholars will shrug and adhere to 'the rule is the rule' because the rule of fasting times is fixed and undisputable,

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[37] *Hassan,* Fiqh al-Aqalliyat. History, Development, and Progress, 2013. It must be noted that Muslim scholars are still exploring this new field of study:, see e. g.: *Alwani,* The Muslim World 104 (October 2014), 465; Introduction théorique à la charîʿa de minorité, Oumma, 26.5.2000 (http://oumma.com/Introduction-theorique-a-la-chari); *Parray,* Journal of Muslim Minority Affairs, 32:1 (2012), 88.

[38] See, e. g., Caeiro, Transnational ulama, European fatwas, and Islamic authority. A case study of the European Council for Fatwa and Research, 2010; *Johansen Karman* Yearbook of Muslims in Europe, Vol. 3, 2011, 655.

[39] There is also criticism from the side of Islamic scholarship: prof *Tariq Ramadan* criticizes the notion of 'Muslim minority' as Muslims in Europe should be considered citizens with the same rights of religious freedom as other citizens (To Be a European Muslim, The Islamic Foundation, 1999), and prof *Abdullah Saeed* from Melbourne University criticizes the creation of a separate Islamic jurisprudence for Muslims in a minority situation (Living in a Religiously Plural Society: A Muslim Perspective on Being Inclusive Today, Rajaratnam School of International Studies (2019), 1).

the principle of *taysir* has prompted other scholars to suggest that the Muslims in Scandinavia to fast in another month of the year, or follow the fasting times of Mecca.[40]

The second principle of the *fiqh al-'aqalliyat* is not to focus on the rule, but on the purpose of that rule. The notion of 'purposes of Sharia' *(maqasid al-Shari'a)* is a well-developed concept in Islamic orthodox theology, albeit for purely theoretical purposes only, and this has been resuscitated to be applied in today's context.[41] The purposes of the Sharia are, in hierarchical order, the faith, life, the mind, offspring, wealth, and honour.[42] From these purposes, the scholars of *fiqh al-'aqalliyat* have derived several notions. One is 'the interests of the Muslim' *(maslaha)*. For instance, when asked whether Muslims should participate in politics of the non-Muslim country where they are citizens, the answer was that they should, because that would serve their interest. Another notion is that necessity breaks law *(darura)*. A famous example is the wanderer in the dessert who is about to die of thirst when he finds a bottle of wine. The scholars agree that he is required to drink that in order to survive, even if he violates a fixed and undisputable rule of Sharia that alcohol is forbidden. The purpose that underlines this rule (protection of religion) is trumped by another purpose of Sharia, namely the protection of life.

Three examples may illustrate the relevance of these 'adaptations' of Sharia. The first is the fixed and undisputable prohibition of interest, which prevents Muslims from taking a mortgage. In most European countries this means that they will not be able to buy a house. A fatwa from the ECFR argued that a mortgage is allowed, based on three considerations.[43] First, the ban on mortgage means that the life of Muslims in Europe is much more burdened than elsewhere, whereas Sharia is meant to make their life easier *(taysir)*. Second, buying a house means upwards social mobility, and that serves the interest of the Muslim *(maslaha)*. And these two combined brings the scholars to the third consideration: necessity breaks law, because the purposes of property and family life trump the purpose of religion which has set the rule prohibiting interest.

The second example is that of a non-Muslim married couple whereby the woman converts to Islam during that marriage. According to fixed and undisputable rules, that marriage would then become invalid because a Muslim woman is not allowed to be married to a non-Muslim man. In a fatwa the ECFR rules that the marriage should nevertheless remain intact,[44] first, because the unwanted breakup

[40] See for these rulings, respectively, Fatwa Nr. 2806, 8.8.2010, Fatwa Council of Al-Azhar (available on https://www.livingislam.org/m/fnl_sv.html#4); European Council for Fatwa and Research – Seminar on Fasting, Stockholm, 9/6/2015.

[41] *Auda,* Maqasid Al-Shariah as Philosophy of Islamic Law, The International Institute of Islamic Thought, 2007.

[42] *Auda,* Maqasid Al-Shariah as Philosophy of Islamic Law, The International Institute of Islamic Thought, 2007, p. 21, and in Maqasid al-Sharia. An Introductory Guide, The International Institute of Islamic Thought, 2008, p. 6.

[43] The Fourth Ordinary Session of the European Council for Fatwa and Research, 18–22.10.1999, Resolution nr. 2/4 (https://www.e-cfr.org/blog/2017/11/04/fourth-ordinary-session-european-council-fatwa-research).

[44] The 8th Ordinary Session of the European Council for Fatwa and Research, 18–22.7.2001, Resolution 3/8 (https://www.e-cfr.org/blog/2017/11/04/8th-ordinary-session-european-council-fatwa-research).

of the marriage would disrupt family life what is contrary to the purpose of family life and, second, because upholding the rule of a void marriage would mean that less women would be inclined to convert to Islam. The third and final example regarded the question whether Muslims are allowed to reside in a non-Muslim country or should 'migrate' *(hijra)* from that non-Muslim land just like the Prophet had done when he left Mecca for Medina. Reference was made to fatwas from the Moroccan scholar *Wansharishi* who had ruled that Muslims should leave Andalus after they had come under Catholic rule,[45] and to a *hadith* that allegedly said the same. Various fatwas responded negatively, however, arguing that the Muslims could stay, provided that they were free to practice their faith.[46] For this they referred to the Islamic history, when Muhammad, threatened by persecution in Mecca, had sent his followers to Christian Ethiopia where they received sanctuary from the king. Others expanded the notion of 'Realm of Islam' *(dar al-Islam),* arguing that this encompasses any place where one is free to practice is Islam, so that may include a non-Muslim country and, by the same token, may very well exclude a Muslim country.[47] And indeed, quite a few Muslims have told me that, although the Netherlands might allow for Islam-bashing as a matter of freedom of speech, it allowed for more freedom of religion for Muslims than Morocco or Saudi-Arabia.

D. Conclusion

I contend that 'Sharia in Europe' is not an adherence to a fixed set of rules, but the resultant of a dialectic dynamic between what Muslims want, what European societies prohibit and allow, and how Muslims respond to that. Muslims actively engage in this dialectic, whereby they try to remain within the confines of Islamic legal structures. It appears that a majority retain a conservative viewpoint with an unwillingness to compromise on certain rules of Islam. But there are others who are seeking solutions within the context of Islamic law, and in doing so have come up with intriguing methods. This article wanted to provide a taxonomy of these activities, not from the perspectives of the methods used but from the perspective of the goals pursued. In doing so, students of Sharia in Europe may get new insights in the mechanisms at play. It shows that European Muslims who want to live in accordance with the rules of Islam constantly navigate the hindrances they encounter, which requires a combination of social resilience, theological flexibility, and creative vigilance. While many European Muslims may experience this as a permanent obstacle course, it has also led to a creative approach to Sharia that is quite unique in the world.

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[45] *El Fadl, Khaled* Islamic Law and Society 1/2 (1994), 146 (170–171); *Miller* Islamic Law and Society 7/2 (2000), 256.

[46] The Sixteenth Ordinary Session of the European Council for Fatwa and Research, 3.–9.7.2006, Resolution 3/16 (https://www.e-cfr.org/blog/2017/11/04/sixteenth-ordinary-session-european-council-fatwa-research).

[47] *Jabir al-Alwani,* Towards a Fiqh for Muslim Minorities. Some Basic Reflections, The International Institute of Islamic Thought, 2003, p. 30–33.