

## Who's Afraid of Islamic Family Law? Dealing with *Shari'a*-based Family Law Systems in the Netherlands<sup>1</sup>

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### Abstract

In the Netherlands, where views of Muslims and Islamic family law are highly politicised, the application of Islamic family laws by Dutch courts is a topic of heated political debate. Especially polygamy and unilateral divorce by men (*talaq*) are thought to have a strongly negative impact on the position of Muslim women in the family. In order to assess the gendered impact of Islamic family laws in a European context, this article takes a closer look at Dutch state courts' decisions. It asks how the application of Islamic family laws can be understood against the background of Dutch political discourses on Islam, family law and women's rights. While in public and political debates, Islamic family laws are frequently thought to be women-unfriendly, this article shows that the encounter between Islamic family laws and Dutch law often has severe impact on the position of Muslim men living in the Netherlands.

### Keywords

Islamic family law in Europe; Private international law; *talaq* divorce; sexual nationalism; public policy; gender.

### Introduction

In April 2011, Dutch extreme right-wing politician Geert Wilders called for legal change to prevent *shari'a* being applied in Dutch courts through private

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international law (hereinafter PIL). In an interview in the national right-wing newspaper *De Telegraaf* Wilders stated that:

I am shocked by the large-scale application of Islamic law in the Netherlands. Not by so-called *shari'a* courts, which former minister Hirsch Ballin claims do not exist, but by our own courts [...] This [application of Islamic law] is backward Islamic law, which disadvantages women. [...] All laws and treaties should be adjusted so this can never happen again.<sup>2</sup>

To illustrate his point, Wilders mentioned several examples of how Dutch courts applied Islamic law in court cases regarding migrant families on issues such as paternity, *talaq* divorce (repudiation), and marital property. In conclusion, Wilders claimed that so-called public policy exemptions (measures to *not* apply foreign laws when they conflict with Dutch norms) were a mere farce.<sup>3</sup>

As this quote demonstrates, the application or recognition of family law emerging from states with some form of Islamic family law is commonly discussed as a cultural conflict, which is immediately connected to the position of women. This tendency has influenced political as well as academic debates on Islamic family law in the West (See for a discussion of arguments used in Dutch legal academic debates: Van Den Eeckhout 2001).<sup>4</sup> In the European context, many academic debates on '*shari'a* in the West' focus on the application of Islamic legal principles in the context of alternative dispute resolution, especially in the United Kingdom (Bano 2007, 2012; Bowen 2011; Grillo 2015; Tas 2013). Proponents as well as opponents see alternative dispute resolution institutions such as the UK *shari'a* courts as spaces where migrants and minorities can have their 'own' norms applied to solve conflicts outside the legal framework of the state. In addition to studies on alternative dispute resolution, there is a body of largely legal literature on the interaction of 'foreign', especially Islamic, cultural concepts and European law and courts, including those of the Netherlands (Hoekema 2005; Hoekema and Van Rossum 2008; Mehdi and Nielsen 2011; Rutten 1999, 2011, 2013; Shah et al. 2016). Much of this literature focuses on the way judges deal with -or should deal with- foreign legal concepts and culture-based legal claims of migrants or religious minorities.

What these two fields of scholarly literature have in common is that the application of Islamic family law in a Western context is systematically connected to issues of identity and belonging of Muslim minorities. These groups are commonly assumed to want their 'own' family norms and law applied in family issues (See for example: Menski 2001; Yilmaz 2002). However, there is more at stake than just the identity-based wishes of minorities. In the context

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<sup>2</sup> '*Sharia al in Nederland*' *De PVV eist dat er een verbod komt op het gebruik van islamitische wetten door Nederlandse rechters*. Paul Jansen in: *De Telegraaf*. April 11, 2011. All translations in this article are mine.

<sup>3</sup> '*Sharia al in Nederland*' *De PVV eist dat er een verbod komt op het gebruik van islamitische wetten door Nederlandse rechters*. Paul Jansen in: *De Telegraaf*. April 11, 2011.

<sup>4</sup> Each country has its own private international law, which is, in spite of its name, national law. Additionally, an international framework of conventions exists. Of particular importance is *The Hague conference on private International Law*, consisting of a range of international treaties on, e.g., the recognition of marriage, divorce, child protection or maintenance obligations.

of migration, transnational families arrive with legal relationships established in another legal system.<sup>5</sup> They may apply for recognition of legal family relationships for very practical reasons, such as establishing the legal parentage of children or receiving social security benefits. Furthermore, for transnational and migrant families, family law is closely connected to migration law and nationality, and the recognition or non-recognition of foreign family statuses can impact on their right to stay in the Netherlands. As some authors have argued, private international law is used by European governments in conjunction with restrictive migration policies (Shah 2010; van den Eeckhout 2002). In this article, I argue that the application or recognition of Islamic family laws is connected to inclusion and exclusion of certain types of (migrant) family relationships by the Dutch state. As van Walsum, Jones, and Legêne demonstrate in their historical analysis of the interaction of colonial family law and Dutch immigration policies:

In the economic and political climate of the first decade of the 21st century, norms concerning family relations and sexuality are again being mobilised to physically exclude specific categories of migrants from legal residence within Dutch territory, while symbolically excluding specific categories among the legally resident population (including Dutch nationals) from substantive citizenship (van Walsum et al. 2013: 169).

Norms about what constitutes proper family relationships exclude some categories of migrants from access to the Netherlands, for example by refusing to grant resident permits to spouses in polygamous marriages. If people are already living in the Netherlands, they can still be excluded symbolically through not legally acknowledging family relationships. Of special importance in this context is the concept of public policy or *ordre public*.<sup>6</sup> Judges may use this concept to refuse recognition or avoid application of foreign laws they consider unacceptable. As Mahmood and Danchin write, *ordre public* 'has broadly been understood to encompass those fundamental rules, values, or principles that together define and are incorporated into the collective identity of the state itself. This conception inevitably results in privileging those majoritarian sensibilities, traditions, and customs that have become intimately linked with the legal and political order' (Mahmood and Danchin 2014: 148). By using public policy exemptions, Dutch courts can thus enforce values considered central to Dutch family law and the collective identity of the Dutch state, such as monogamy, thereby excluding some kinds of migrant family bonds. As I will argue below, in the Dutch context this national identity is closely connected to gender and sexuality politics.

In this article, I focus on two interrelated and especially controversial legal issues: *talaq* divorce (often translated as repudiation, a divorce form, which, in principle, is only accessible to men), and polygamy. It is mainly based on an analysis of court

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<sup>5</sup> For the purpose of this article, I will use the term 'Islamic family laws' for all family law systems based in some way on the principles of Islamic law or *shari'a*. Although there are large differences between Muslim-majority states with regard to codification and law reform of *shari'a* principles, legal concepts, such as the *talaq* divorce, tend to be treated similarly in Dutch legal practice.

<sup>6</sup> In Dutch: *openbare orde*. While the English legal term *public policy* might look strange to Dutch or French readers, the term 'public order' in English has a different meaning.

judgments, Dutch parliamentary debates, and newspaper articles.<sup>7</sup> In addition to these written sources, I also use interviews with divorced spouses as well as lawyers, translators, NGOs, and other professionals involved in court cases of migrant and mixed families in the Netherlands, Morocco, and Egypt.<sup>8</sup>

For court judgments, I conducted a search of the Dutch database of the judiciary *rechtspraak.nl*.<sup>9</sup> As only a small proportion of family cases are published; and judgments by higher courts are overrepresented, published judgments tend to be 'special' cases, and cannot necessarily be seen as representative of all such cases in the Netherlands. However, as the application of Islamic family laws is such a topical issue, I consider it likely that such cases are published relatively often, as controversy or public interest play an important role in courts' decisions to publish a judgment. Regarding the issue of *talaq*, I conducted a systematic analysis of jurisprudence published on *rechtspraak.nl* since its inception in 1999 using the word *verstoting* or repudiation. Of the 87 cases found, 35 cases involved the recognition or application of *talaq* divorce in the Netherlands.<sup>10</sup> These 35 cases mostly involved family laws from countries where *talaq* is (or was) a main or sole method of divorce for men: Morocco (13), Egypt (6), Somalia (5), and Pakistan (3).<sup>11</sup> Most family members (also) had – or had applied for – Dutch nationality, and several cases involved nationality-mixed families. The majority of cases (24 of 35) dealt with a conflict between family members and the Dutch government, rather than between spouses.

Below, I first set the stage by further exploring the Dutch debates on Islamic family laws, in particular the 2011 political debate on private international law

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<sup>7</sup> For newspaper articles, I used the database *Lexis Nexis*, which contains Dutch national and regional newspapers and weeklies. Parliamentary debates are published on the Dutch government website: *overheid.nl*.

<sup>8</sup> Interviews were with 26 spouses divorced from mixed and migration marriages living in the Netherlands, Morocco or Egypt and 34 professionals from these countries. Interviews took place between 2009 and 2012. See (Sportel 2016).

<sup>9</sup> *Rechtspraak.nl* publishes a selection of anonymised judgments from all courts in the Netherlands. In 2015, over 25,000 judgments were published on this website. While only 1–2% of all lower court judgments get published on *rechtspraak.nl*, the percentage is 9–15% for the higher courts. The highest courts publish all judgments. For more details on publication policies of courts, see <https://www.rechtspraak.nl/Uitspraken-en-nieuws/Uitspraken/Paginas/Selectiecriteria.aspx>. Search terms used include *openbare orde* (public policy), *verstoting* (repudiation), *polygamie/polygaam* (*polygamy/polygamous*), and *bigamie/ bigaam* (*bigamy/bigamous*). For a valuable database of judgments on Muslim minorities see also the website of the RIMO, the Dutch association for the study of law of Islam and the Middle-East: <http://www.verenigingrimo.nl/database>.

<sup>10</sup> The other 52 cases were not relevant for the analysis. In 19 of these cases the term repudiation was used in a symbolic sense, not referring to *talaq* divorce. In 16 cases an earlier divorce by repudiation was mentioned, but without direct relevance to the case, e.g. in cases concerning child custody. In seven cases the word was used as part of an article of a law, e.g. that a marriage had *not* ended by repudiation and was therefore still valid. Furthermore, in eight cases there were multiple judgments on the same case. Two judgments were unclear about the details of the case and therefore excluded from analysis.

<sup>11</sup> Other nationalities/legal systems included Afghanistan, Iran, Iraq, the United States, and the United Kingdom. In some cases, multiple countries were involved. In four cases the nationality or legal system involved was not mentioned or removed for privacy reasons.

and the application of Islamic family laws by Dutch judges. I argue that these political debates should be understood against the background of general discourses on Islam, Muslims, family law and women's rights in the Netherlands. Secondly, I zoom in on Dutch court practice and analyse how Dutch judges deal with the application or recognition of Islamic family laws, with particular attention to their use of the concept of public policy. I will take a closer look at cases in which controversial Islamic legal forms such as *talaq* divorce and polygamy play a role, and investigate the issues at stake in these cases. I demonstrate how most of these cases are not initiated by family members making identity-based claims, but rather by the Dutch state, particularly in the context of migration control. Furthermore, existing measures to 'protect' women from *talaq* divorce because of gender inequalities produce new and different gender inequalities, excluding some men from Muslim-majority countries from remarriage or citizenship.

## Sexual Nationalism and Debates on Islamic Family Laws in the Netherlands

As in many other European countries, Islam and Islamic family law systems have a controversial reputation in the Netherlands, in particular regarding the position of women. Although civilizational discourses on the position of women in Islam have a long colonial history in the Netherlands, Prins and Saharso (2008, 2010) situate the beginning of the current discourse on migration, Islam, and the position of women in the early 1990s. Conservative Liberal (VVD) leader Bolkenstein initiated a 'national minorities debate' by speaking about fundamental European values, such as freedom of speech, tolerance, and secularism, and by rejecting the idea of cultural relativism (Prins and Saharso 2008: 366–367). Tolerance of homosexuality is a relatively recent addition to these markers of modern Dutch culture, starting from the early 2000s (Mepschen et al. 2010), having 'switched sides' from being a sign of colonial depravity to a marker of civilization (Bracke 2012: 249). This new discourse on the acceptance of homosexuality has been termed 'sexual nationalism' (also: homonationalism) (Bilge 2012; Dudink 2011; Mepschen et al. 2010; Bracke 2012).

In these highly gendered public discourses, gender equality and (male) homosexuality form a central demarcation line between 'White native Dutch' and migrants. Migrants, in particular Muslims, who do not share 'proper' Dutch norms on gender equality and sexual diversity are considered a threat to the nation (Roggeband and Verloo 2007; van Walsum et al. 2013). Although these civilizational discourses on gender equality and homosexuality have different histories and subjects (Bracke 2012), they are intertwined, and have similar exclusionary effects on Muslim minorities. Therefore, in this article, I will use the term sexual nationalism for both.

Since the early 2000s, these discourses on sexual nationalism have quickly become mainstream, a process in which the famous gay populist politician Pim Fortuyn (assassinated in 2002) played an important role (Bracke 2012). In 2004, Dutch politician Geert Wilders started his populist *Partij voor de Vrijheid* (PVV, Freedom Party), aiming to restrict Islam and stop immigration (especially of Muslims) to the Netherlands, next to proposing lower taxes, improved health care and leaving the European Union. The PVV quickly gained

popularity, and won 13.1% of votes in parliamentary elections in March 2017, which makes it the second-largest party in the Dutch Parliament.<sup>12</sup> However, while the PVV takes an extreme position in this debate, the basic premise of sexual nationalism which links gender equality, sexuality, and Dutch national identity to the exclusion of Muslim minorities is widely shared across political party lines.

Below, I analyse in more detail a 2011 parliamentary debate that followed the publication of Dutch politician Wilders' statement quoted at the beginning of this article. While there have been many more debates on Muslim minorities in which the concept of Islamic family laws plays a role, this debate dealt directly and at length with the application or recognition of Islamic family laws in Dutch courts and received considerable attention in the Dutch media.

### *The 2011 Private International Law Debate*

After publication of Wilders' call for an end to the application of *shari'a* on the front page of the largest Dutch newspaper<sup>13</sup> – as quoted at the start of this article – one of the PVV MPs submitted the following motion to Parliament:

[...] noting that in the Netherlands *shari'a* is everywhere now;  
Noting that issues like polygamy, repudiation and other Islamic laws are legitimised in Dutch courts by private international law;  
Considering that *shari'a* is a barbaric system that does not belong in Dutch law in any way;  
[we call] on the government to modify or terminate treaties and laws, bilateral or multilateral, with all Islamic countries, in order to banish the *shari'a* completely from our legal system [...].<sup>14</sup>

The Dutch Parliament debated this motion in an emergency debate (*spoed-debat*) in September 2011.<sup>15</sup> The Minister of Justice formally responded to the PVV's motion with a letter to Parliament, in which he explained the working of Dutch private international law and the public policy exemption:

The application of foreign law in the Netherlands and the recognition of legal facts established abroad are always limited by Dutch public policy. This means that the willingness to apply, under certain circumstances, foreign law ceases when the foreign law conflicts with fundamental principles of the Dutch legal order. [...] Among the fundamental principles of our law are, among other things, the principle of equal treatment of men and women.<sup>16</sup>

In the letter, the Minister of Justice outlined the general rules of PIL while paying specific attention to the examples mentioned by the PVV, arguing whether

<sup>12</sup> Kiesraad Kernegevens Tweede Kamerverkiezingen 2017.

<https://www.kiesraad.nl/adviezen-en-publicaties/rapporten/2017/3/kernegevens-tweede-kamerverkiezing-2017/kernegevens-tweede-kamerverkiezing-2017>

<sup>13</sup> 'Sharia al in Nederland' De PVV eist dat er een verbod komt op het gebruik van islamitische wetten door Nederlandse rechters. Paul Jansen in: De Telegraaf. April 11, 2011.

<sup>14</sup> Motie van Klaveren. Kamerstukken II 2010/11, 29614, 30.

<sup>15</sup> Handelingen II 2011/12, 6, item 13.

<sup>16</sup> Kamerstukken II 2010/11, 29614, 28, p. 1–2.

or not such cases were against Dutch public policy. For example, on the applicability of foreign law in divorce cases, he wrote:

Where this foreign law conflicts with Dutch public policy, it will not be applied. This can be seen, for example, with the [issue of] repudiation. In some foreign legal systems, men have, under certain conditions, the competence to repudiate their wives. Dutch courts consistently hold that such inequality between men and women under Dutch law is not acceptable and that Dutch law is used in such a situation, instead of the law designated by private international law.<sup>17</sup>

In the parliamentary debate that ensued, two main arguments can be detected. First of all, similar to the Minister, the political parties participating in the debate used public policy almost exclusively in terms of equality between men and women, or, more broadly, human rights. MPs made a strong connection between gender equality, human rights, and the Dutch legal system, which is in line with the general Dutch discourse on sexual nationalism. For example, a MP from the Socialist Party (SP) stated:

[...] The recognition of foreign law is thus limited by conflicts with the fundamental principles of the Dutch legal system. That's a very nice, good protection, solid as rock. Now I hear the PVV MPs claim that in their view the law should not be in conflict with human rights either. Logical! But it seems to me that if things are contrary to human rights, they will also be contrary to public policy in the Netherlands and therefore already not allowed in the Netherlands.<sup>18</sup>

An interesting second argument in this debate concerned the question of what constituted Islamic law, and whether the PVV was right in equating the application of, for example, Moroccan or Somali family law to the application of '*shari'a*'. Especially the left-wing parties in Parliament condemned the PVV for instilling fear in the minds of the general public by making them believe *shari'a* law had arrived in the Netherlands. For example, a Labour Party MP (Partij van de Arbeid, PVDa) stated:

A Somali woman had a child by another man during her marriage. She went to the Dutch court because she did not want her husband to be on the birth certificate of the child. The judge said: 'your child was born in Somalia, so Somali law is applicable. Somali law says that your child does not belong to your husband; so you can simply have the birth certificate adjusted. You need not worry, because it's all arranged well' [...]. Mr. Van Klaveren [of political party PVV] tries to scare people by telling tales, pretending *shari'a* would be applied here. No, the judge helped this woman neatly on the basis of international law... [...] The article by PVV-leader Wilders literally uses the words 'massive use of Islamic law in the Netherlands'. This supposedly was the result of research by his party. These are quite strong claims. They evoke a doomsday scenario. They stir up fear. [...] Not a single judgment made a reference to religious rules. In all the judgments that were sent to us, reference was either made to Dutch law or to the law of another country, but never to religious rules.<sup>19</sup>

<sup>17</sup> Kamerstukken II 2010/11, 29614, 28, p. 5. This is limited to Dutch judges applying foreign law in divorce cases; the rules for the recognition of *talaq* conducted abroad are slightly different, as will be outlined below.

<sup>18</sup> MP Gesthuizen of the SP [Socialist Party], Handelingen II 2011/12, 6, item 13.

<sup>19</sup> MP Van Dam of the PvdA [Labour Party], Handelingen II 2011/12, 6, item 13.

This MP used one of the PVV's examples to show that, contrary to what the PVV claimed, the application of Somali law by a Dutch court protected the rights of the woman involved. Thus, while opposing the PVV's interpretation of the case, the underlying assumption that *shari'a* law is bad for women was not challenged. Rather, the speaker interpreted this example as a failure in judgement by the PVV, who were wrongfully calling the application of Somali law Islamic. The Socialist Party [SP] responded even more strongly in condemning the PVV for bringing up the issue of recognition or application of *shari'a*-based family laws in the Netherlands:

The party [PVV] aims to install fear in the Dutch populace and puts immigrants in a bad light. Nasty. Very nasty. Is the PVV abusing the fact that many people – lay people – do not know that there is such a thing as private international law? I want to state very clearly that the SP [Socialist Party] is against the horrors of *shari'a* law. Everywhere, but certainly in the Netherlands. And, more generally, the SP is opposed to the application of any rule which is contrary to our fundamental values such as equality between men and women or the protection of minors.<sup>20</sup>

Like the Labour Party MP, this speaker made a distinction between *shari'a*, which is something to be avoided, and the application of foreign family law from Muslim-majority countries. Some MPs even joked about stoning women or chopping off hands to stress how far-fetched they considered the PVV's accusations of Dutch judges applying *shari'a* law. In the end, no party other than the PVV voted in favour of the parliamentary motion. Dutch newspapers reporting on the debate drew similar conclusions. They interpreted the debate as a defeat for the PVV, calling the claim that Islamic family law was applied in the Netherlands 'nonsense' or a 'political mistake'.

In this parliamentary debate as well as in the subsequent media reporting, the discourse on sexual nationalism was clearly present and remained unchallenged. None of the other political parties questioned the PVV's assumption that *shari'a* law is bad for women and as such should be 'impossible [to implement] in the Netherlands'. Rather, the other parties in Parliament, not wanting to support the PVV's motion to change the private international law system, made a distinction between *shari'a* and the family law systems of Muslim-majority countries, ridiculing the PVV for equating the two. While this distinction is technically correct, it is remarkably nuanced, especially when compared to other political debates on Islam, Muslim minorities and law in the Netherlands, in which such details are seldom mentioned.<sup>21</sup> While it is hard to pinpoint the cause of this unexpected nuance, I think it is likely to be connected to the ongoing political struggles between the PVV and other political parties, as the 'Islamisation' of the Netherlands and the 'threat of *shari'a*' are the PVV's main selling points.

<sup>20</sup> MP Gesthuizen of the SP [Socialist Party], *Handelingen II 2011/12*, 6, item 13.

<sup>21</sup> *Shari'a* can be seen as the whole of divine law as well as historical sources, jurisprudence, and legal discussions. These also include all kinds of behavioural and religious norms. While family law systems in some Muslim-majority countries are inspired by these sources, they are codified interpretations that function within the context of modern states, and thus of a different nature than classical *shari'a*. See for a more elaborate discussion: (Otto 2006).

In the next part, I will analyse Dutch court practice as it relates to the application or recognition of Islamic family laws, with particular attention to the use of the concept of public policy by judges. As the 2011 parliamentary debate on private international law was a result of the PVV's analysis of Dutch court cases, the debate was indeed closely connected to issues at play in the Dutch courts.

## Controversies on Islamic family laws in the Dutch courts

Generally speaking, there are two ways in which Dutch courts may have to deal with Islamic family laws: when foreign family law should be applied according to PIL, and in recognising foreign legal decisions or status. In both of these decisions, public policy exemptions can be made. This means that if foreign laws or foreign legal decisions are considered unacceptable to Dutch public policy, they will not be applied or recognised. As shown by the parliamentary debate discussed above, some aspects of Islamic family laws are considered particularly controversial in Dutch legal practice, such as polygamy and *talaq* divorce (repudiation). This controversy is gendered, as these practices are considered harmful for women. Similar to many other European countries (Kruiniger 2015), *talaq* divorce is controversial in the Netherlands for two reasons. Firstly, in many countries with some form of Islamic family law, *talaq* is an out-of-court divorce, and thus lacks a court procedure. Secondly, and more importantly, men and women have unequal access to this form of divorce. This is the main reason why Dutch judges are generally reluctant to apply Islamic family laws in cases of men requesting divorce, as this would mean granting them the right to issue *talaq*. However, as Jordens-Cotran (2007) notes, Dutch judges seem to have no problems with divorce forms or grounds which are only available to women, such as a (*tatliq*) divorce on the ground of non-payment of maintenance (Jordens-Cotran 2007: 420–424).<sup>22</sup> This means that women from countries where *talaq* is the main form of divorce for men, have more options for divorce in the Netherlands than men, as in many cases those women can choose between Dutch law and the law of their country of origin, while for men Dutch law is the only option (Jordens-Cotran 2007: 428; Kruiniger 2008, 2015). This connection between the 'weak' position of women and public policy can be seen as fitting within the Dutch discourse on sexual nationalism.

The recognition of foreign *talaq* divorces is as equally controversial as the application of *talaq* by Dutch courts. Therefore, in Dutch private international law, additional conditions need to be met for the recognition of foreign *talaq* divorces.<sup>23</sup> The most important condition is proof of the consent of the wife.<sup>24</sup> This can be proven either by the fact that the wife is the one to register the divorce or, if a man wants to register the divorce, by a declaration of approval by the wife or, for example, the fact that she has married again. Again, these

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<sup>22</sup> As in most of the legal systems based on Islamic family law only men need to pay maintenance, this is also a highly unequal form of divorce.

<sup>23</sup> BW10:57. This article can be applied to all out-of-court divorces, including some forms of *khul'* divorce.

<sup>24</sup> In a 2011 reform the word 'wife' (article 3 WCE) was replaced by the gender-neutral term 'spouse' (BW10:57).

efforts to 'protect' women from Islamic countries from gender inequality in Islamic family law actually produce gender inequality in another way, which can have at times severe consequences for divorced men from some Muslim-majority countries.

Below, I analyse in more detail a number of cases in which the recognition or application of Islamic family laws plays an important role; as well as the consequences which recognition or non-recognition can have for the men, women, and children involved. The cases are divided into two categories: conflicts between two family members, and conflicts between family members and the state.

### *Disputes between Family Members*

Legal conflicts between family members, in particular divorce disputes, are an important area in which the application or recognition of Islamic family laws can play a role. While the application of Islamic family laws in family disputes is often discussed in terms of identity and accommodating cultural preferences, I will show that there are important financial aspects to these cases as well. Due to the differences between Dutch and Islamic family law systems with regard to marital property arrangements and alimony, significant differences in the financial outcomes of the case may arise, depending on which law is applied. These differences between the legal systems therefore create vulnerabilities as well as options for strategic action, which are both implicitly and explicitly gendered.

Under Dutch law, financially dependent spouses, irrespective of their gender, can claim a right to alimony for up to 12 years after the divorce – if the other spouse has sufficient means. Most Islamic family law systems only provide short-term rights to spousal maintenance, and only to wives.<sup>25</sup> Instead, the *mahr* (dower), a sum of money or goods determined in the marriage contract, functions as a form of income protection for women after divorce. As *mahr* payments do not have similar income checks as spousal alimony, a divorce in a country with some form of Islamic family law (or those laws applied by a Dutch court) can thus be beneficial for women with a high *mahr* in their marriage contract but whose husbands have limited income. On the other hand, women with a low or no *mahr*, as well as dependent men, profit from the Dutch system of spousal maintenance. Another relevant financial issue is that, with regard to marital property, the Netherlands has a regime where communal property is default. This means that, at the moment of marriage all property becomes communal, whereas most Islamic family laws have separated property of the spouses. It can therefore make a significant difference which law is applied in cases of marital property and divorce.

In my research on transnational families and divorce as well as in the analysis of Dutch court cases on *talaq* divorce, requests for the application of foreign family law were often connected to its financial consequences. Lawyers and court personnel I interviewed for this study confirmed this picture. As one

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<sup>25</sup> Depending on the circumstances this period generally lasts around three months, with an extension in cases of pregnancy.

lawyer, specialising in Dutch-Moroccan divorces said: 'Sometimes I ask for the application of Moroccan family law when I submit a request for divorce. This way, one party avoids having to pay alimony to the former spouse. This [wish to apply Moroccan family law] is not because of the client's attachment to Morocco. It's just a trick'.

In cases where spouses living in the Netherlands have links to two legal systems, there are two ways in which they can try to influence which law will be applied to their case: (1) by asking the Dutch court to apply the law of the other country, and (2) by first starting a court case abroad, as Dutch courts will generally not judge a case which is already pending in another court.<sup>26</sup> This last strategy only works if the foreign divorce is subsequently recognised in the Netherlands. For example, in a case between a Moroccan-Dutch husband and a Moroccan-Dutch wife, the husband started a divorce procedure in Morocco only days before the wife submitted a divorce request to a Dutch court.<sup>27</sup> The wife then argued that a Dutch court should deal with their divorce, which would mean that she could claim alimony. She argued that the Moroccan divorce should not be recognised because it was against Dutch public policy and that the husband used arguments in the Moroccan divorce case that were:

[...] reprehensible under Dutch law, and tantamount to an appeal to fault of the wife. A divorce on such arguments may not be recognised in the Netherlands because it conflicts with public policy. Furthermore, a Moroccan divorce procedure cannot be equalled with a Dutch divorce procedure. The husband in Moroccan law has sole authority over the children. The wife has no rights to alimony. This should also make the [Moroccan] judgment non-applicable in the Netherlands.

However, the court rejected these arguments, as the husband had applied for a *chīqaq* divorce, a no-fault court divorce on the ground of irreconcilable differences (very similar to grounds for divorce in Dutch divorce law). According to the Dutch court, such a divorce should be recognised, regardless of the arguments used. Thus, the wife lost the case and her claim for alimony. The attempt by the wife's lawyer to invoke a discourse on sexual nationalism and women's rights similar to that used in public policy exemptions to the recognition of *talaq* divorce failed.

It is important to note that cases of so-called 'forum-shopping', such as the one presented in the example above, are rare. While much debated in legal literature (Borchers 2010; Foblets 1998: 160, 211; Jansen Frederiksen 2011; Vonken 2006), I found few examples of the practice of forum shopping in conflicts between spouses. Only three out of 13 cases of conflicts between family members could have been considered examples of forum shopping.<sup>28</sup> This picture was confirmed by the interviews in my project on transnational divorce. Most

<sup>26</sup> This principle is called *litispendentie* or *lis alibi pendens*. While there is some degree of choice, there are multiple factors determining the applicable laws on the divorce and on the marital property division. For the sake of readability I will not go into these details here.

<sup>27</sup> Gerechtshof Amsterdam, July 2, 2013. ECLI:NL:GHAMS:2013:2311.

<sup>28</sup> Rechtbank 's Gravenhage, February 20, 2012, ECLI:NL:RBSGR:2012:BV6671; Gerechtshof Leeuwarden, August 21, 2012, ECLI:NL:GHLEE:2012:BX9122; and Gerechtshof Den Haag, January 20, 2016, ECLI:NL:GHDHA:2016:374.

interviewees had other priorities than strategically planning their divorce, and many preferred to arrange their divorce as quickly and as straightforwardly as possible. As one lawyer told in an interview:

At the moment of divorce, people can choose their own law or Dutch law. My clients always choose Dutch law. Clients absolutely do not want to appear in court, and with a choice for Moroccan or Egyptian law this is necessary. Also, this way [by choosing Dutch law] people can divorce without having to see each other.

As many people did not seem interested in asking for foreign family law to be applied in their Dutch divorce, it is not surprising that most of the cases in my sample of *talaq* judgments concerned a conflict between family members and the Dutch state, rather than inter-family conflict.

### ***Islamic Family Laws in Dutch Courts: Family Members against the State***

The recognition of marriage, divorce, or legal relationships between parents and (biological or adoptive) children can lead to conflicts ranging from matters related to nationality to the payment of state pensions. While we saw above that some of these cases are initiated by family members, most are the result of an 'unexpected encounter' (de Hart 2003) with the Dutch state. Dutch embassies are an important factor in this encounter, because of their central role in the recognition of foreign legal statuses. Embassies are often the first point of contact between transnational couples and the Dutch state, as they play a role in the legalisation of documents as well as passport applications. In an interview, the Dutch consul in Morocco explained that they hardly received inquiries from family members about the validity of Moroccan family law matters in the Netherlands. Rather, as he went on to explain, issues regarding validity tended to come up later, after children were born:

Often, problems only become visible when an application is made for a Dutch passport for the children. In the copy of the birth certificate, civil registry information is often noted in the margins. Sometimes a divorce has not been recognised, or it turns out there has been an earlier marriage. The Moroccan municipality registers are not connected to each other. So, in Morocco, it is reasonably easy to conduct multiple marriages in multiple municipalities. [...] For the Netherlands, in case of multiple marriages, the first marriage counts. For example, a man has been married and divorced multiple times, but the first marriage still exists, while he has acquired Dutch nationality based on his second marriage.<sup>29</sup>

In cases like this, the initiative is not with family members themselves, but with the embassy, which checks all family documents for passport applications. It is important to note that these discoveries take place within the context of migration control, where consular authorities routinely investigate whether children are actually entitled to Dutch nationality before issuing passports.

Of the 24 *talaq* judgments which centred on conflicts between family members and the Dutch state, half (12) of them involved nationality issues of spouses

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<sup>29</sup> Interview consul of Dutch embassy in Rabat, October 2009 (translated from Dutch by the author).

and/or children.<sup>30</sup> In all but one of these cases, earlier unrecognised *talaq* divorces led to 'polygamous' marriages in the eyes of Dutch state officials.<sup>31</sup> If a prior *talaq* divorce is not recognised in the Netherlands, Dutch authorities will consider the husband to be still married to his first wife. A next marriage is thus automatically considered polygamous and therefore invalid.<sup>32</sup> These 11 cases were all appeals after requests for Dutch nationality for spouses or children born from these marriages were rejected or revoked. As such, denial of Dutch citizenship probably came as a surprise to family members, especially when Dutch nationality was revoked several years after being granted. For example, in a court case of an Egyptian man married to a native Dutch woman, the marriage was annulled in 2007 by the Dutch state ten years after it had been concluded, because the husband's previous Egyptian divorce by *talaq*, taking place in the late 1980s, was not recognised.<sup>33</sup> The husband was given the opportunity to prove his former wife had consented or acquiesced to the divorce. Finally, the husband managed to track down his former wife and have her sign a statement that they had indeed divorced, but this was deemed insufficient. Thus, the *talaq* divorce was not recognised, and the man was still considered to be married to his first Egyptian wife, which made his second marriage to his Dutch wife polygamous and thus null and void. This meant that the Egyptian man also lost his Dutch nationality, which he had acquired because of his 'second' marriage. In a truly Kafkaesque procedure, the courts at first required the first wife's signature to be legalised by the Dutch embassy, which the embassy refused for procedural reasons. When, finally, the husband managed to get a statement from the Dutch embassy that the embassy only legalised signatures of Dutch citizens, the highest court decided to refer the case to another court to take a new decision based on this procedural ground.<sup>34</sup>

Cases that are not connected to nationality can still have far-reaching consequences for those involved. In the *talaq* cases found, five cases of unrecognised *talaq* divorce led to conflicts over the paternity of children.<sup>35</sup> These

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<sup>30</sup> Rechtbank Den Haag, March 7, 2013, ECLI:NL:RBDHA:2013:BZ5084; Hoge Raad, December 21, 2007, ECLI:NL:HR:2007:BB8076; Raad van State, June 1, 2005, ECLI:NL:RVS:2005:AT6559; Rechtbank Alkmaar, September 15, 2004, ECLI:NL:RBALK:2004:AR2316; Raad van State, January 30, 2013, ECLI:NL:RVS:2013:BY9949; Raad van State, March 23, 2016, ECLI:NL:RVS:2016:805; Raad van State, November 18, 1999, ECLI:NL:RVS:1999:AA5046; Raad van State, February 3, 2010, ECLI:NL:RVS:2010:BL1837; Raad van State, February 27, 2008, ECLI:NL:RVS:2008:BC6036; Rechtbank Den Haag, June 7, 2013, ECLI:NL:RBDHA:2013:CA3170; Raad van State, April 2, 2014, ECLI:NL:RVS:2014:1139; Rechtbank Den Haag, April 12, 2013, ECLI:NL:RBDHA:2013:BZ9565.

<sup>31</sup> With the exception of: Raad van State, February 3, 2010, ECLI:NL:RVS:2010:BL1837.

<sup>32</sup> Being married to multiple spouses can lead to a range of consequences in Dutch migration and nationality law as well as prosecution. Bigamy is a crime only if it was committed after gaining Dutch nationality or residence. It is punishable by four to six years of imprisonment. Article 237 WvS (Criminal code).

<sup>33</sup> HR 21 December 2007, ECLI:NL:HR:2007:BB8076.

<sup>34</sup> Unfortunately, I have not managed to track down this last decision.

<sup>35</sup> Rechtbank Zeeland-West Brabant, February 4, 2015, ECLI:NL:RBZWB:2015:2460; Rechtbank Zeeland-West Brabant, July 11, 2014, ECLI:NL:RBZWB:2014:9406; Rechtbank Zeeland-West Brabant, April 9, 2014, ECLI:NL:RBZWB:2014:9408; Rechtbank Zeeland-West Brabant, March 18, 2015, ECLI:NL:RBZWB:2015:8821; Rechtbank Breda, October 16, 2012, ECLI:NL:RBBRE:2012:BY8035.

all concerned Somali families with (partial) refugee status, who had not yet resided long enough in the Netherlands to qualify for citizenship. In these cases, with the *talaq* not being recognised by Dutch judges, the Somali women were still considered legally married, and their 'husbands' automatically registered as the father of their children. In two cases unrecognised *talaq* had consequences for the recognition of a second marriage in the Netherlands.<sup>36</sup> In one case the consequences included a loss of social security as a widow's pension was awarded to the first rather than the second wife.<sup>37</sup> In only four out of 24 cases spouses discovered the problem at an (relatively) early stage, when they applied for recognition of a foreign *talaq* divorce without any mention of later consequences in terms of paternity, remarriage, social security or nationality.<sup>38</sup>

Thus, as we have seen in the parliamentary debates as well as in the analysis of court cases, the concept of public policy is strongly influenced by a discourse on sexual nationalism, where gender equality and sexual diversity are of great symbolic importance for Dutch national identity. For the issue of *talaq*, the broad concept of public policy has been further specified to require the permission of the wife to be recognised in the Netherlands. This means that earlier marriages, properly dissolved according to the legal systems prevalent in the countries of origin, are still considered valid in the Netherlands, even years later. The interconnected issues of *talaq* divorce and polygamy are controversial to such an extent that they can prevent divorced men from countries where *talaq* divorce is the only legal divorce option for them, such as Egypt, from ever marrying in the Netherlands without the consent of their ex-wife.

However, I do not wish to imply here that courts purposely use the discourse on sexual nationalism to exclude migrants through private international law.<sup>39</sup> While courts apply state policies on the recognition of *talaq* divorce and polygamous marriages, which leave limited space for courts to diverge, references made to sexual nationalism discourses and public policy by divorcing spouses in legal conflicts were not necessarily successful. Rather, measures taken to protect women from Islamic family law in private international law interact with and are used within the context of stringent migration and citizenship policies, leading to the exclusion of especially migrant men, and consequently their (second) wives and children from Dutch residence and citizenship.

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<sup>36</sup> Rechtbank Utrecht, May 1, 2003, ECLI:NL:RBUTR:2003:AF8805; Gerechtshof Arnhem-Leeuwarden, August 25, 2015, ECLI:NL:GHARL:2015:6529.

<sup>37</sup> Gerechtshof Arnhem-Leeuwarden, July 28, 2015, ECLI:NL:GHARL:2015:5723.

<sup>38</sup> Hoge Raad, July 13, 2007, ECLI:NL:HR:2001:AB2623; Raad van State, March 3, 2010, ECLI:NL:RVS:2010:BL6235; Raad van State, May 21, 2008, ECLI:NL:RVS:2008:BD2127; Raad van State, November 25, 2015, ECLI:NL:RVS:2015:3594. Here 'relatively early' means that although some litigants might have chosen another form of divorce if they had known about the problems the *talaq* form of divorce causes in the Netherlands, they can still conduct a new divorce procedure in the Netherlands to solve the problem. Nationality issues arising from unrecognised 'second' marriages may be harder or even impossible to solve.

<sup>39</sup> It is important to note here that I did not study decision-making processes within the courts, but rather the outcomes of these decision-making processes, the judgments.

## Conclusion

The application of Islamic family laws in Europe is often seen as a cultural conflict. In academic as well as in political debates, it is often discussed in terms of identity and accommodating cultural preferences of migrants. In this article, I have demonstrated how the recognition of Muslim marriages or divorces and the application of Islamic family laws in Europe are not just an issue of religious identity and accommodation of Muslim norms by litigants. Even in court cases between family members, requests for the application or recognition of Islamic family laws tend to be connected to financial interests. Moreover, in cases on the recognition of *talaq* divorce, the initiative is often with the Dutch state. None of these cases I discussed centred on demands in which family members requested the Dutch state to recognise their religious or cultural identity. Instead, family members had an unexpected encounter with the Dutch state, in which the validity of their divorce and subsequent remarriage was suddenly questioned, sometimes many years later.

Public and political discussions on Islamic family laws in the Netherlands tie in closely with civilizational discourses on sexual nationalism. Gender equality and sexual diversity have become fundamental for Dutch national identity, especially vis-à-vis Islam. Sexual nationalism is an exclusionary discourse, symbolically excluding people not fitting within ideals of gender equality and sexual diversity from belonging to the Dutch nation. Through the concept of public policy, operationalised in specific rules for recognition of *talaq* divorce, the discourse on sexual nationalism also enters into the decisions of Dutch courts on the recognition or application of Islamic family law systems. Courts applying these policies refuse to acknowledge legal relationships or to apply laws that counter public policy. As such, legal measures taken in Dutch private international law to repair the existing gender inequality in Islamic family laws, such as the non-recognition of *talaq* divorce unless there is proof of the wife's consent, produce new gender inequalities in Dutch courts, making it nearly impossible for some men from Muslim countries to have a divorce recognised in the Netherlands.

Due to the interconnectedness of family, migration, and nationality law, the exclusion of certain types of migrant family relationships, such as polygamous marriages, can have severe consequences for those involved, including the loss of Dutch citizenship. The current academic and political focus on the accommodation of migrant norms in family law and alternative dispute resolution easily overlooks this strong state involvement in the everyday life of migrants and in the application of Islamic family laws in the Netherlands. Efforts to protect Muslim migrant women from Islamic family laws such as *talaq* divorce or polygamous relationships should take into account the consequences of such protections in migration and nationality law, which eventually may hurt women as well as men.

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