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Jocelyne Césari  
Alexandre Caeiro  
Dilwar Hussain

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## **EXECUTIVE SUMMARY**

- 1) What is the attitude of European Muslim communities toward Fundamental Rights? First the discourse and theological approach on Human Rights has to be distinguished from its practice. The dominant discourse of European Muslims on Human Rights reflects the vast apologetic trend that attempts to demonstrate the compatibility of Human Rights and Islam. Some more innovative voices are trying to address the gap between the Islamic tradition and the Fundamental Rights but they seem to still be in a minority, albeit growing. However, this domination of a conservative public discourse on Human Rights does not automatically imply acceptance by most Muslims of the Human Rights agenda on a daily basis. Rather acceptance is revealed in our study of the adjustment of Islamic prescriptions to the requirement of secularized civil law and particularly in issues such as equality between genders.
- 2) Such an evolution at the grass root level is often neglected due to the emphasis on Islam and politics imposed by national and international agendas. The irony is that there is no influence (not to mention basic knowledge) of documents such as the Cairo Declaration or the Islamic Declaration of Human Rights among Muslims in Europe. The main concerns of European Muslims seem to be: forced marriages, equality of women in marriage, divorce, custody of children and discrimination that they face (Islamophobia).
- 3) Hence, the major area of conflicts between Islam and Human Rights is not politics but on Civil Law and culture as demonstrated in the debate over secularism and Islam. The highest divergence between Muslims and non-Muslims seem to concern the questions of morality and sexuality as shown in the debate over the headscarf but also on the question of sexual orientation.
- 4) Our research shed light on the evolving status of Muslim women. A silent revolution is happening: women are more and more involved in the critique of a

patriarchal discourse often presented as Islamic discourse as demonstrated in our case study on forced marriages in the United Kingdom. There is however the same socio-economic and educational divide among women as among men. In other words, a large sector of the Muslim female population is lacking social and cultural capital and is therefore less vocal. Perhaps due to this, they cannot or do not want to challenge the dominant conservative male narrative.

- 5) The influence of very conservative or radicalised strands of thought among some of the Muslim youth in Europe is an obstacle to the relationship between the HR discourse and Islam. The rejection of the cultural and political principles of the West spread out through booklets, videos and web sites is not without its effects and should be acknowledged.
- 6) The consequence lies in the tension between the two poles of the western Muslim communities: one, reformist and open to influence; the other conservative and much less interactive. The evolution of this tension will be determined not only by Muslims themselves, but also by the various policies of western governments for the integration and institutionalization of Islam.
- 7) The major cause of misunderstanding between Muslims and non-Muslims concerns the recognition of Islamic specificity in the different European societies. The important question raised by the Muslim presence in Europe is: how the protection of specific subcultures can favour individual emancipation instead of stifling it? The Rushdie Affair was an illustration of such a dilemma when British Muslims claimed the right of Islam to be protected by the Blasphemy Law (that applies only to Anglicanism). Sometimes, Islamic groups collectively request rights that limit individual freedom. However, our report demonstrates that the largest trend is adaptation, accommodation and bricolage. “If we simplify to an extreme, we can state that minority rights are compatible with cultural liberalism when a) individual freedom is protected within the group, and b) they promote equality, and not domination, between groups within the different European

societies.”<sup>1</sup> In the case of Muslims, it would seem that the first condition has been met. The second condition is the most problematic since Islam as religion and a culture is still perceived as alien and external to Europe. To promote equality between cultures involves a redefinition of public culture and the status of Islam within this public culture both at the level of the Nation States and the European Union. In the post 9/11 context, some of the Muslim claims champion the European conception of Human Rights, for example by arguing that laws such as the bans on religious symbols from French public schools is contradictory to Fundamental Rights.

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<sup>1</sup> Kymlicka, Will (1995), *Multicultural Citizenship, A Liberal Theory of Minority Rights*, Oxford: Clarendon Press, p. 153.

## HUMAN RIGHTS AND ISLAM IN EUROPE

### INTRODUCTION: ISLAM AND HUMAN RIGHTS – THE CONTINUOUS CONTROVERSY

There is a particular conception of freedom and social justice that was articulated in the Universal Declaration of Human Rights (UDHR) and in subsequent treaties. The key feature is that these rights are due to all human beings by virtue of their humanity, without distinction on such grounds as race, sex, religion, language or national origin. This “Human Right paradigm”<sup>2</sup> is embodied in the International bill of Human Rights which encompasses UDHR (Universal Declaration of Human Rights) of 1948, the ICESCR (International Covenant on Economic, Social, and Cultural Rights) and ICCPR (International Covenant on Civil and Political Rights) of 1966. All these are the founding documents of liberal internationalism as a secular universalism. Since the beginning of this international order, Muslim countries have expressed objection or resistance. Let us recall that the Saudi delegate did not sign the UDHR in 1948.

The historical and cultural origin of the “Human Rights paradigm” is often used by certain Muslim countries as a justification of their non respect or non ratification of Human Rights covenants. This resistance in the name of authenticity is often posed as a conflict between Islam and Human Rights. The argument is that Islam stresses an individual’s obligations to society rather than individual rights that cannot be violated by governments. But although most Muslim regimes are authoritarian and have poor HR records, it does not mean the Islamic political culture influences HR practices in these countries. Actually it is quite the contrary as demonstrated by Daniel Price<sup>3</sup>. In other words, Islamic culture or religion are insignificant to explain the violation of HR by

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<sup>2</sup> An-Na’im, Abdullahi (2000). “Islam and Human Rights: Beyond the Universal Debate”, American Society of International Law, *Proceedings of the 94<sup>th</sup> Annual Meeting*, April 5-8, Washington D.C, pp 95-101.

<sup>3</sup> Price, Daniel (2002). “Islam and Human Rights: A Case of Deceptive First Appearances”, *The Journal for the Scientific Study of Religion*, 41(2), pp. 213-225.

Muslim countries. It is therefore very difficult to use or Islamic political culture as a justification for torture or government-sponsored violence against individuals. In addition to replicating the results of other studies that found religion to be an insignificant determinant of HR practices, the study of Daniel Price confirmed that in order to implement HR practices, the important variable is the democratic nature of the regime. These results are further validated by the current debate on the constitutions of “new” Iraq and “new” Afghanistan. Even the questions raised in the current debate such as: Will Islam be “a source of inspiration” rather than “the sole source of inspiration” for law? What role will/should religious parties play in democratic elections? What place for political participation will women achieve in the new democracies in Iraq and Afghanistan? Are more related to a certain kind of political culture than to the so-called specificity of Islam.

These recent debates demonstrate that the political interest for the relationship between Islam and Human Rights persists. It derives from the following paradox: Although majority of the Muslim countries joined the international community and its laws in 1948<sup>4</sup> and so doing accepted the UN charter of which article 1 affirms members’ commitment to encourage respect for HR, there is increasing critique and resistance from Muslim countries to apply Human Rights code. Therefore, there are uneven records of ratifying HR conventions among Islamic countries, especially Saudi Arabia, Iran, Pakistan, Turkey and the United Arab Emirates.

The resistance toward the international liberal order built post 2<sup>nd</sup> World War became obvious in the 70s. The failure of the post colonial State can explain this increasing resistance. We need to recall that most of the post colonial states seek to create secular national identities to trump confessional ones. It means that Muslim countries went through a process of secularization in almost all domains (economy, politics, welfare, etc.). The only domain that was not affected by secularization was Family Law except in Tunisia and Turkey. Moreover, almost everywhere in the Muslim world, Islam remained

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<sup>4</sup> With the exception of the Saudi UN representative who condemned the Declaration on the ground that it reflected Western culture. In 1972 the OIC (Organization of Islamic Countries) Charter endorsed fundamental Human rights and reaffirmed commitment to the UN charter and Fundamental Human rights.

religion of the State or religion of the majority. These states are strong enough to repress dissent, but are unable or unwilling to modernize their societies. One of the consequences of this combination of oppression and socio-economic failure was the emergence of political Islam as secular nationalism failed to deliver the goods across the Middle East.

With the end of the cold war, the distrust towards liberal secular universalism became even stronger. The Human Rights discourse lost prestige because it was associated with the US and the US was allied to authoritarian states, i.e. the failed national secular project. The war on terror has increased this negative image of the US and the West. With the American intervention in Afghanistan and Iraq, Human Rights are increasingly seen, in the Islamic world, as an ideological accomplice of American imperialism.

Two opposite political and intellectual attitudes can be identified. The first one is defensive and rejects Human Rights as an alien concept that is basically hostile to the Islamic Tradition. It has been adopted by some regimes such as Iran in the first stage of the Islamic Revolution, the Sudan under Nimeiri or Afghanistan under the Taliban<sup>5</sup>. However, complete rejection remains limited in time and number. Some countries like Algeria, Morocco, Tunisia, Turkey and Libya have progressively accepted citizens' initiatives to create Human Rights organizations. The evolution of Turkey in the last five years is particularly striking. After arguing for so long about the historical and cultural exceptionality of Turkey, (the "Sevres treaty syndrome"), the reforms engaged are showing a clear compliance to the HR paradigm<sup>6</sup>.

The second and dominant attitude is embrative, i.e. it embraces Human Rights as an exclusive achievement of the Islamic culture<sup>7</sup>. What is currently dominant, especially at

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<sup>5</sup> In January 1985 the Nimeiri regime convicted Mahmud Muhammad Taha of apostasy and chose to publicize both the trial and his subsequent execution by hanging. Or in February 1989 when Khomeini called for the murder of author Salman Rushdie.

<sup>6</sup> Major Reforms in parliamentary elections, freedom of political expression has been made in the last decade. However, some improvements are still needed especially in the implementation of major laws such as the law on Public meetings and demonstrations voted in July 2003. See Human Rights Watch reports on [www.hrw.org](http://www.hrw.org)

<sup>7</sup> We borrow this terminology to Bielefeldt, Heiner (1995), "Muslim Voices in the Human Rights Debate", *Human Rights Quarterly*, 17(4), pp. 587-617.



the political level, is an islamicization process of HR. In other words, the emphasis is more on redefining these rights in an exclusively Islamic framework. Since the 1980s, some international Islamic statements reflect this conservative position: the Universal Islamic Declaration of Human Rights (1981), the Draft of the Islamic Constitution (Al Azhar, 1979), and the Cairo Declaration of Human Rights in Islam (1993).

The Islamic Law is the exclusive yardstick to integrate the scope and content of HR. For example, Art 25 of the Cairo Declaration states: “The Islamic Law is the only source of reference for the explanation or clarification of any of the articles of the Declaration”. Despite Art 1 that affirms equality of all human beings, differences in terms of basic rights continue to exist. Art 6 presupposes the predominant role of the man as head of the family and states: “Woman is equal to man in human dignity and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage. The husband is responsible for the support and welfare of the family”.

Art 10 violates the principle of equality by giving Islam a privileged status above other religions: “Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or atheism”. This assertion is at odds with religious liberty as it is enshrined in the Human Right paradigm.

How much of this debate is relevant to Muslims living in Europe? The question is strategic for two main reasons. First, the dominant negative perceptions of Islam and Muslims are reinforced by the ongoing controversy on Islam and Human Rights. In the post 9/11/2001 context, it hampers the integration of Muslims and may create political disturbance. Second, the prospect of Turkey and Bulgaria’s accession to the European Union will affect the European religious and cultural balance. In October 2004, the European Union Enlargement Chief voiced satisfaction with Turkey's reforms as Ankara presses for formal negotiations on its EU membership bid. After Turkey's Prime Minister confirmed a new penal code which will not include a controversial clause on adultery,

Enlargement commissioner Guenter Verheugen said there were “no more obstacles” for Turkey on its path towards opening accession talks<sup>8</sup>.

### **Strategic Importance and European dimension of the debate on Islam and Human Rights**

With more than fourteen million Muslims living in the major countries of the European Union, making up almost 3% of the population, Muslims are the largest religious minority in Western Europe.<sup>9</sup> In terms of both the total number of Muslims and the ratio of Muslims to the total population, six countries stand out, namely France, Germany, Great Britain, the Netherlands, and Greece. In each of these countries the Muslim population makes up between 3% and 7% of the country’s total population. With the exception of Greece, these are also the countries that imported large numbers of immigrant workers during the 1960s. To the North: three Scandinavian countries (Sweden, Denmark, and Norway) have a Muslim population of about 1%. To the South: Italy and Spain, with approximately the same proportions of Muslims, are currently emerging as new destinations for Muslim immigrants.

A striking fact is the ethnic diversity of European Muslims. Arab Muslims are the most numerous (3.5 million living in Western Europe) of which approximately 45% are of Moroccan origin. The second largest ethnic group is that of Turkish Muslims (numbering approximately 2.5 million, and spread throughout Europe). The third major group (of more than 800,000 people) has its roots in the Indian subcontinent: India, Bangladesh, Pakistan, and Afghanistan.

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<sup>8</sup> *The Guardian*, October 7, 2004.

<sup>9</sup> It is difficult, indeed impossible, to obtain accurate statistics, because in the majority of European countries no formal census data on religious affiliations don’t exist. The only substitute statistic that might be taken into account is the number of immigrants born in countries where Islam is the principle religion. However, Muslims who have become citizens through either naturalization, or because they were born in the country (a right specific to certain States), will not be taken into account by such statistics. Dassetto, Felice, Marechal, Brigitte, Nielsen, Jorgen (2001), *Convergences musulmanes, Aspects contemporains de l’islam dans l’Europe élargie*, Louvain la Neuve: Bruylant.

Although the collective imagination of Europe may often see the Muslim presence within Europe as a very new one it has had a remarkably long and sustained history when considered as a Europe-wide phenomenon. One could point to Muslim rule in Spain for almost eight centuries, significant historical presence in parts of France, Italy and Austria as well as trade and diplomatic relations between various European states and Muslim states to chart almost thirteen centuries of presence, since the year 711 - less than a century after the *Hijra* (622). In fact the very first contact came even earlier in 628 when Dihya bin Khalifa (d. 670) was sent to Heraclius the Byzantine Emperor with a letter from Muhammad. In 652 Muslim troops went into Sicily, but the longest presence came as a result of the incursion into Spain from Northern Morocco by Tariq bin Ziyad in 711, whose forces had reached central France by 732. By the time that the Spanish Muslims were expelled in the 15<sup>th</sup> and 16<sup>th</sup> centuries, the Ottomans were in Vienna, remnants of whom formed the early Muslim communities of Germany.

However, it is true to say that the new presence dates mainly to the 20<sup>th</sup> Century, especially after World War Two in the case of many countries. Especially over the last 20-30 years the presence of Islam seems to have become much more visible. An increasing number of Mosques have been erected on the European landscape, the headscarf has become more prominent and various policies have been challenged as a growing second, third and fourth generation seem to be more confident and assertive in their expression of faith. European society is therefore often left trying to understand, study and deal with this 'new' presence of an 'alien' culture.

European Muslims are a minority of the postcolonial era for they come from countries previously colonized or dominated by the major European countries. (While Germany did not have a colonial empire, its ties to the Ottoman Empire do explain the large number of Turkish immigrants). Although the origins of Muslims are more diverse in Holland (with Muslims from Tunisia, Morocco, Turkey, etc.), colonial history still played a role, for example in the recruitment of Surinamese people.

These colonial and postcolonial origins have a direct impact on the European perception of Islam, explaining in particular Europe's delay in realizing that Islam has become a permanent element of its religious landscape. It is, in fact, difficult to explain that, while Muslims have been present in the major European countries for half a century, it is only over the past three decades that Islam has emerged as a cultural and religious fact of life. Muslim minorities in Europe are the result of three major waves of immigration.

The vast majority of immigrant Muslims comes from countries where Islam is, if not a State religion, at least the religion of most people in the country. The transplanting of population, that implies interdependency with a majority non-Muslim environment represents an unprecedented challenge to which Muslims are currently inventing responses that vary according to their competency in matters of Islam (in the sense Anthony Giddens gives to this concept<sup>10</sup>).

Questions and doubts on the capacity of these new comers to become full citizens have been raised consistently since the 1980s. Events such as the Rushdie affair, riots in North England, the *hijab* affair in France, discovery of European Taliban supporters has led some to question European Muslims' willingness to accept the political and cultural norms of western democracies. One of the consequences of September 11<sup>th</sup>, 2001 has been the accentuation of stigma via the knotting together of Islam, the poor suburbs, and terrorism. The terrorist attack has indeed hardened the discourse on immigration (in Austria, Denmark, Germany, Greece, Italy, and Portugal), and on security.<sup>11</sup> It is still too

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<sup>10</sup> Giddens, Anthony (1991), *Modernity and Self Identity: Self and Society in the Late Modern Age*, Stanford: Stanford University Press.

<sup>11</sup> The antiterrorist law ratified by George Bush on October 26, 2001, increasing government ability to supervise/control citizens (including their family and people who are not yet citizens) has been followed by comparable initiatives in Europe. In Great Britain, a law on antiterrorism, crime and security issues was also passed on December 14, 2001, giving rise to a real debate on the restriction of public freedom for it, too, increases the power of the police in matters of collecting information and checking up on citizens. In Germany, two laws have been voted on, one on December 8, the second on December 20, 2001. They increase not only the funds available to police forces, but also their powers of investigation. Moreover, these new laws plan to place armed security agents in German planes, and to review the law according to which religious organizations are accorded certain privileges because they are seen as public corporations. The debate on security has been subverted by the events of September 11th and by the taking into account of counter-terrorist measures, as shown by the French law promulgated on November 15, 2001, a law concerned with security issues in daily life, and into which was introduced a whole series of clauses connected with the battle against terrorism during debate at the National Assembly after September 11th, and which amalgamated interior (i.e. national) security, crime, and terrorism, thus contributing to an increase in the ostracisation of the youth living in the poor suburbs. In particular, two measures cited by the

early to measure the consequences of these laws on the religious behaviour of Muslims in Europe, but it is very likely that the consequence will be an increase in the reactive and defensive use of Islam<sup>12</sup>. Another consequence of 9/11 is that the doubts regarding Muslims loyalties is not only expressed in the political but also the cultural arena, as shown by the success of pamphlets and essays such as *The Rage and The Pride* or, most recently, *The Strength of Reason* both by Oriana Fallaci<sup>13</sup>.

When studying Muslims in Europe, one cannot escape the relationships of domination that tend to impose a reference framework which permanently places Islam and the West in opposition to each other. For more than any other religion today, the forms of identifying oneself as a Muslim are profoundly influenced by a narrative (active from the local to the international level) that puts into circulation a whole series of images and stereotypes that make Islam seem religiously, culturally, and politically foreign, strange and exceptional.

In contradiction with such a perception, major sociological surveys demonstrated the acceptance of democratic principles by the vast majority of Muslims living in Europe and the West<sup>14</sup>. They shed light on a vast spectrum of attitudes from isolationism to full

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law (the first one connected with the need for quiet behaviour in the entrance halls to large apartment buildings; the second stating that people who “regularly” do not purchase a valid ticket when using public transport) do not seem to have any relationship with, nor will they have any impact on, more important crime issues or terrorism. One of the paradoxes of September 11th is that in certain European countries, such as France, international logic has not, for the first time, affected the dynamics of the recognition of Islam as a social fact. The way that Islam has settled at the local level is certainly the reason for this. An astonishing and paradoxical dissociation occurs between the Muslim neighbour (about whose religion one might be aware, but that one does not really acknowledge) and Islam, a term still unknown and often carrying with it negative collections of stereotypical images. See Cesari, Jocelyne (2001), “Islam de l’extérieur, musulmans de l’intérieur: deux visions après le 11 Septembre 2001”, *Cultures et Conflits*, n°44, hiver 2001, pp. 97-115.

<sup>12</sup> See *The Integration of Muslims in Europe in the Aftermath of 9/11*, NOCRIME Conference, Paris: February 3, 2003.

<sup>13</sup> Fallaci, Oriana (2001), *La rabbia e l’orgoglio*, Rizzoli (translated into English by the author as *The Rage and the Pride*); (2004) *La Forza della Ragione (The Strength of Reason)*, Rizzoli.

<sup>14</sup> See for example: Nielsen, J (1992). *Towards a European Islam*. London: Macmillan Press, 1992. Goody, J (2004). *Islam in Europe*. Cambridge: Polity Press, Malik, I. H (2004). *Islam and Modernity: Muslims in Europe and the United States*. London, Sterling, Virginia: Pluto Press. Cesari, J. (ed) (2002). *Islam, Citizenship and the Dynamics of European Integration*, Intermediary report to the European Commission by NOCRIME, Paris, July 2002, 100 p.

participation. It appears that religious affiliation matters in the way individual and collective Islamic actors in Europe define themselves as citizens and can be used as a resource in the process of integration.

Broadly speaking, the settlement of Muslim groups in the West has shifted the debate on Islam and modernism from an Arab/Muslim context to a Western one.<sup>15</sup> The old debate over the compatibility between Islamic values and Western political principles continues into the present with one momentous change: it is now also waged by Muslims residing within Western democratic contexts. For these Western Muslims, it no longer stresses issues of Islamic governance. Instead, it centres on issues of pluralism and tolerance. This also brings with it critiques of European and Western practice perceived to be anomalous to the spirit of Human Rights, whether on the domestic or international arenas.

Based upon these previous researches, our hypothesis was **that the settlement of Muslims in the West has created a shift from the importance of Islam as a guide for state governance and that issues of social and personal status (marriage, divorce, individual religious freedom) or economic matters are prevailing in the context of a minority situation.**

It is an unprecedented, but under appreciated, fact that Islamic legal norms are being reconstructed in the West as a function of the principles of dominant European law. To

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- (2003). *Islam in European Cities*, Report to the French Ministry of Equipment, Transport and Housing (PUCA: Plan, Urbanism, Construction, Architecture), Paris, 98 p.

- (2003). *The Integration of Muslim Migrants in Europe: Religious and Political Aspects in the Aftermath of September 11th, 2002*, Intermediary report to the European Commission by NOCRIME, 92 p.

- (2003). *European Muslims and the Secular State in a Comparative Perspective*, Final report to the European Commission by NOCRIME, Paris, September 2003 (in preparation).

<sup>15</sup> As early as the arrival of Bonaparte in Cairo in 1798, the Muslim world has been engaged in a process of renewal in the face of modernity. During the century that followed, major figures in the *salafiyya* movement tried to prove that Islamic tenets could direct the adaptation of Muslim societies to a modern world. In 1880, the first reformist political-religious wave, the *salafiyya*, made famous by Djamel al-Afghani and Mohamed Abduh, based its reformist vision on premises that are opposed to those of the Enlightenment: aiming for more and not less religion. These thinkers attributed the decadence of the Ottoman Empire to its political despotism and superstitious religious interpretations. Western superiority, they held, was solely material and technical, while true progress could only be spiritual and ethical. The rationalization of religious beliefs lay at the heart of the debate, as the chief proponents of the *salafiyya* sought to demonstrate the compatibility between Islam and the technologies and political principles of the West.

date, separatist claims—i.e., demands for Islamic law to be applied in a way that departs from the legal framework of host societies—have been rare. The development of our research and this report (see Chapter 1) shows that there is a great deal of adaptation when it comes to issues of potential conflict between HR and Islamic tradition. Our research also shows (see Chapter 3) that few feel that there is an insurmountable conflict between HR discourse and Islam. This accommodation indicates a shift in Muslim priorities from pre-occupation with issues of governance to recognition of a minority status, where *Shari'a* takes on a more personalised form.

This shift from governance to issues of personal status has a direct consequence on the status of Islam and Human Rights. It is probable that when Muslims in Europe initially began to talk of human rights they referred mostly to issues of injustice in Muslim countries – perhaps Islam was seen as the barrier to human rights, e.g. freedom of religious choice, rights of women, capital punishment etc. – or perhaps the point of criticism was the action of Muslim regimes e.g. the heavy-handed security measures undertaken by Muslim states, the lack of freedom of expression etc. A second perspective is that of the place of the *Shari'a* in the context of modernity and how different approaches to Islamic Reform accept or reject notions of HR. However we also think that as second and third generation Muslims begin to take leadership of the community there is a slow but steady shift towards using the notion of human rights to tackle issues of domestic and foreign European policy – rights of citizenship, action against Islamophobia and xenophobia, treatment of asylum seekers, role of European states in the Middle East, etc. It would be interesting to look at this shift in usage of the concept of HR and examine it.

## **Methodology**

We set out to validate this hypothesis through two different approaches. One is the analysis of case studies on Muslim Family Law mainly in France, Germany, the UK and Belgium. We have analyzed the literature pertaining to such topics from lawyers and Muslim activists in each European country. Such investigation demonstrates the

validation by the silent majority of Muslims of the Human Rights paradigm. Such acceptance does not mean that there is no conflict, but that in case of conflict, the Human Rights perspective is raised and acknowledged. We also looked into the debate on Islam and secularism in France and Germany.

Our second approach is the analysis of the Muslim theological and intellectual discourse in Europe on the compatibility between Islam and Human Rights. The main goal is to identify a specific European discourse on HR that can be differentiated from transnational and international Muslim discourses on this topic. We therefore interviewed some of the most significant European Muslim scholars, activists and thinkers in this arena and also conducted some content analysis of the main literature produced in Europe on this topic.



## CHAPTER 1: GRADUAL ACCOMMODATION OF ISLAMIC LAW TO EUROPEAN SECULAR LAW

In legal practice the question of whether to take Muslim family law into account in the regulation of everyday life is bound to the condition that these laws meet the criteria of protection prescribed by HR and fundamental liberties. That is why the question of personal status appears as the conflicting area along with secularism in the process of integration of Muslims, to the point that some compare the situation to a conflict of civilizations<sup>16</sup>.

Our main argument is the adaptation of to Western legal systems and the acceptance by the majority of Muslims of this situation. This means the implicit recognition of equality between men and women in marriage and divorce, or respect for freedom of conscience, etc.

We looked into the literature and jurisprudence of some of the key European countries in order to find out the arguments used by the courts and by Muslims when conflicts happen. The task was not easy because of the diversity of national laws in Europe and because of the diversity of Muslim groups. A major distinction among European countries concerns the recognition of foreign law. In countries like France, Belgium, Italy and Spain, there is a distinction between national and foreign law. In such countries, a person is connected to his or her national law. In this case, the application within the country of residence of the parties of a discriminatory foreign law is possible. On the Muslim side, we need to keep in mind that Islamic laws on marriage, divorce, custody followed by Muslims in Europe may differ according to school of thought (Hanafi, Shafi'i, Maliki, Hanbali, etc) or the country of origin (Pakistan, Algeria, Morocco etc.). Furthermore, in some cases like Tunisia and Turkey, the family law has been secularized and in theory respects the principle of equality between men and women. However it

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<sup>16</sup> See Mercier, Paul (1972), *Conflits de civilisation et droit international privé: polygamie et répudiation*, Genève; Deprez, Jean (1988) "Droit international privé et conflit de civilisations. Aspects méthodologiques. Les relations entre systèmes d'Europe Occidentale et systèmes islamiques en matière de statut personnel" in *Recueil des Cours de l'Académie de la Haye*, vol 211, 1988-IV, pp.9-372.

does not preclude the persistence of customs that can be discriminatory toward women and can be presented as “Islamic”.

According to these complex circumstances, we can find different and sometimes contradictory attitudes among Muslims toward European secular laws. As already mentioned, the complete rejection of the secular law is rare, except in the case of elements of French secularism as we will demonstrate in chapter 2. But the complete acceptance of European civil law is also rare even if this is so in some cases. The Dutch legal anthropologist Léon Buskens, an expert on Islamic and Moroccan Law<sup>17</sup> who regularly lectures to Dutch judges on these subjects, interviewed in March 2004, said that in the Netherlands one of the main reasons why Islamic Law is not applied in family law cases involving Moroccans is that the women often do not want it: they prefer Dutch Law which they see as more advantageous for them. This observation is confirmed by a study of Moroccan women’s perceptions of conflicts of laws in Belgium: the renowned jurist Marie-Claire Foblets notes that “the application, under Belgian private international law, of Moroccan laws in cases of conflicts of law, is often perceived by these women as an injustice, since they are under the impression that this system seeks to safeguard the interests of the husband above all”<sup>18</sup>. Similar conclusions have been made in France in the study *L’étranger face et au regard du droit*: North African women prefer French Law which they consider as more protective and gender-equal, particularly in cases of divorce and child custody<sup>19</sup>.

However, our research does not validate Jean-Paul Charnay’s recent work, *La Charia et l’Occident*<sup>20</sup>, in which he argues that Muslims in Europe are the first believers in Islamic history to call for the non application of *Shari’a*.<sup>21</sup>

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<sup>17</sup> Buskens, L (1999), “Marokkaans familierecht in Nederland” in Buskens L., *Islamitisch recht en familienbetrekkingen in Marokko*, Amsterdam, Bulaaq.

<sup>18</sup> Foblets, M-C (2000), « Le statut personnel musulman devant les tribunaux en Europe: une reconnaissance conditionnelle » in Kahn P (ed) *L’étranger et le droit de la famille: pluralité ethnique, pluralisme juridique*. La Documentation Française, p. 52 ; See also Foblets (ed) (1988) *Femmes marocaines et conflits familiaux en immigration: quelles solutions juridiques appropriées?* Antwerp / Apeldoorn, Maklu.

<sup>19</sup> See Rude-Antoine’s “La coexistence des systèmes juridiques différents en France: l’exemple de droit familial” in Kahn, P (ed), op. cit. p. 159.

<sup>20</sup> Charnay, J-P (2001), *La Charia et l’Occident*. L’Herne, Paris.

We have found that for the majority of Muslims who accept the legal and institutional framework of the country where they live, adaptation of Islamic requirements to national laws is indeed in progress. Surprisingly, this adaptation has been, in most cases, conducted in an indirect way. That is, it does not come from Islamic legal experts or Muslim theologians, but from European judges.<sup>22</sup> The consequence is the slow and “invisible” construction of a new form of personal Islamic law, which is being adapted to Western secular laws. Of course European judges don’t claim their decisions to be in any sense Islamic but the fact that their decisions are not systematically contested by Muslim theologians, or even more, are endorsed by some of them (see chapter 3) illustrate this adaptation by default. The contours of this evolution can be more or less clear, depending on the country and the Islamic group concerned.

Pearl and Menski call the hybrid legal system now coming into being in England “*Angrezi Shari‘a*”<sup>23</sup>: “While English Law is clearly the official law, Muslim Law in Britain today has become part of the sphere of unofficial law. This analytical paradigm indicates that Muslims continue to feel bound by the framework of the *Shari‘a*. Thus, rather than adjusting to English law by abandoning certain facets of their *Shari‘a*, South Asian Muslims in Britain appear to have built the requirements of English Law into their own traditional legal structures.”<sup>24</sup> This emergent hybrid product is stamped with the seal of Western individualist culture: in other words, it is marked as compatible with the principle of individual freedom. The recognition (even implicitly) of such a principle, is currently redefining Islamic regulations with regards to the status of the individual and

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<sup>21</sup> Through our own experience, it is common however to find many young Muslims who are not even aware of the traditional constraints on women for example, since their background and culture are thoroughly French, or Belgian.

<sup>22</sup> This is not without certain dangers, given that in many cases the judge does not know Islamic law: Halima Boumiedienne cites the example of a judge who did not understand that ordinary or definitive repudiation can lead, in Islamic law, to an abrogation of the wife’s rights. “African Muslim Women in France,” in Michael King (ed) (1995), *God’s Law versus State Law*, London: Grey Seal, pp. 49-61.

<sup>23</sup> ‘Angrezi Shari‘a’ is an Urdu term that means ‘British-English Shariah’ and refers to the adaptation of the Islamic rules to the British civil Law. David Pearl and Werner Menski (1998), *Muslim Family Law*, London: Sweet and Maxwell, p. 74.

<sup>24</sup> Pearl and Menski, op. cit., p. 75.

the family, the two main areas in which discord arises between Western legal norms on the rights of individuals and the legal norms of Muslim countries.

## **Marriage**

Islamic precepts regarding the family and the individual have been profoundly altered by life in the West. In matters of family law, most Muslim countries privilege a system of norms that accredits polygamy, that gives priority to the husband throughout divorce proceedings (*talaq*), and that does not recognize civil or inter-religious marriages. In no Western country does Islamic law apply in matters of marriage, divorce, inheritance, etc. except for “foreigners” who are citizens of Muslim countries where the Islamic civil Law is applied. They may be European citizens too, for as long as they have the nationality of their country of origin they may come under the laws of that country, except in the UK where it is the law of residence which applies, as discussed below.

The first difficulty is related to the confusion between culture and religion in the discriminatory practices that can affect Muslim women. One case in point concerns forced marriages that seem to occur in some Muslim groups. One must distinguish, of course, between arranged marriage and forced marriage. One fact which often surprises Westerners is that arranged marriages continue to be supported and desired by young people born or educated in Europe, particularly within the Indian and Pakistani populations, where such practices continue to predominate. For the most part, arranged marriages are negotiated by the young people themselves, who agree to marry within the group or family network, or involve the family in selection of the potential spouse. With the advent of exile and emigration, the choice of a husband can be made more inclusive: that is to say, the idea of what constitutes “family” is enlarged to caste (in the case of Pakistanis), area of origin, or even country of origin. At any rate, in all cases of arranged marriage, the choice of spouse both concerns the family and at the same time takes into account the opinions of the interested parties, men and women alike. Nonetheless, it is a

sign of Western influence that girls are becoming more and more involved in every step of their marriages. Seema (not real name) lives in London, where her parents migrated from Gujarat in India more than 25 years ago. A university graduate, she is not at all opposed to her parents being involved in the search for her future husband. She accompanied her parents on a voyage to India whose explicit goal was to meet the family of a potential husband. (Usually it is the family of the young man that takes the first step and contacts a member of the girl's family.) The candidate in question was an engineer, also from Gujarat. The parents of the two families first met in a New Delhi hotel, to get acquainted and exchange information about their children (the young man's income, the girl's modesty), as well as to discuss the amount of the dowry. Later on, the children met privately in the same hotel. Seema asked the young man where he planned to live, and if he would allow his future wife to have a career. After a short time, the two young people decided that they were made for each other.

A forced marriage, in contrast, consists of imposing a partner on a girl or a young man, regardless of or even against their wishes. Young women can find themselves under threat of violence, even death, if they marry outside the community.

Although of Pakistani ethnic origin, Nasreen Rafiq was a British citizen and Scottish domiciliary (Glasgow); prior to 1983, she had not been to Pakistan since she was six months old. In 1983 she was taken to Pakistan, ostensibly for a visit, by her father; until the very last minute the fourteen year old girl did not realize that the wedding preparations she witnessed at the house of her relatives in Pakistan were intended for her own marriage to her cousin. She objected to the marriage; during the ceremony itself she vigorously refused her consent. Nevertheless, she was "married" to her cousin and left in what was to her a foreign country whose language she did not speak, without friends or funds, totally dependent on her "husband" and his relatives (who, although related to her, were strangers to her)<sup>25</sup>.

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<sup>25</sup> Article available at: [http://www.wluml.org/english/pubsfulltxt.shtml?cmd\[87\]=i-87-65cf19647d8228a4ea50b64620282e1d&cmd\[190\]=i-190-65cf19647d8228a4ea50b64620282e1d](http://www.wluml.org/english/pubsfulltxt.shtml?cmd[87]=i-87-65cf19647d8228a4ea50b64620282e1d&cmd[190]=i-190-65cf19647d8228a4ea50b64620282e1d)

There are many cases of forced marriages reported in the British press such as this one: “Yaz had been betrothed to her cousin from birth. Had anybody bothered to tell her, she would have objected strongly. It was, after all, an unlikely match. She was born and brought up in the uncompromisingly urban West Midlands of England, the spirited daughter of Pakistani parents. Her cousin lived next door to the home from where her mother and father had emigrated. It was - still is - a remote, mountainous village near the North-West Frontier, with no running water. Yaz (not real name) was taken there by her sister-in-law, shortly after sitting her mock GCSEs. “I’d done very well, but I was a bit stressed out after studying so hard,” she recalls. “So when Mum offered me a two-week holiday in Pakistan, I thought, ‘Why not?’” From the moment she arrived, she was surrounded by giggling village girls. “I thought they were laughing at my clothes and my hair,” she says. “It was the mid-80s at the time. I was 15 and into Wham! and Culture Club. When they kept saying that I was going to be married, I thought they were joking.” They weren’t. As it happened, Yaz never did tie the knot with her betrothed. Instead, she was forced to marry another cousin who lived across the road in the same village. And “forced” was the operative word. “I didn’t give in straight away,” she says. “I shouted a lot and tried to lock myself away. I even had a physical fight with my uncle, who beat me with a rubber pipe. My sister-in-law kept telling me there was only one way back to England and that was to go through with it. “There was no love, not even lust. I knew nothing about sex. Out of three suitors, all cousins, I chose the one whose parents looked as though they might have the air fare to get me home.”... “It must be happening to thousands of girls,” says Yaz. “In one small village of 400 people, I used to meet other British girls at the communal washing pool. We talked about pop music and what might be happening in Brookside or EastEnders. One of the girls was 13 and already pregnant.”... Her own escape back to Britain is a story with so many twists and turns that it would make an incredible Bollywood movie script - only without the singing and dancing. On the surface, she is now a self-confident nurse of 29 who is studying for a degree, but she has to blink back tears while recalling her ordeal. Her younger sister was even more traumatised, and suffered a complete nervous breakdown. But then her 27-year-old husband raped her at gunpoint on their wedding night. She was 12.<sup>26</sup>

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<sup>26</sup> *The Guardian*, “Stolen lives” by Chris Arnot, May 23, 2001.

The issue is not confined to the Indian subcontinent: “Perhaps the most high-profile case involved Zana Muhsen and her sister Nadia, who were taken from Birmingham in 1980 by their father while in their early teens and forced into marriages in the Yemen. Zana escaped after eight years, but was forced to leave behind her baby son, Marcus. Recent attempts to contact Nadia have come to nothing. When last heard of, she was in poor health and had six children.”<sup>27</sup>

In England, such practices have been the subject of public debate and even a parliamentary report (“A Choice by Right,” 2000). In 1998, Rukhsana Naz was murdered by her brother and her mother for having preferred her lover to the man chosen for her by her family. In response to her murder, the British government created a commission, the Community Liaison Unit, to assist victims of forced marriage. Since its creation, this department has handled more than 500 cases.

The most prominent Muslim leaders and organizations in the UK have strongly condemned such abuses. The Muslim Women’s Helpline, founded in 1989 in Britain, provides counselling service with an Islamic ethos over the telephone. In its 2000 report it notes that “Forced Marriage / Runaway Girls account for nearly 3.5% of the total calls received (i.e., 73 individual cases, which) represent a significant increase in the number of calls on this subject. Much has already been said on Forced Marriage, we pray that by the time the 2001 Report comes out, these figures will have improved, otherwise there is something seriously wrong with the Muslim community.”<sup>28</sup>

In the 2001 report, the coordinator of the Muslim Women’s Helpline, Najma Ebrahim, writes:

“Despite a heartfelt call last year on the need for pro-active participation by community and religious leaders to address the problems experienced by Muslim women, I am sorry to say, there has been negligible response. Is it any wonder then that a Muslim girl forced into marriage resorts to an English court

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<sup>27</sup> *The Guardian*, “Stolen lives” by Chris Arnot, May 23, 2001.

<sup>28</sup> Muslim Women’s Helpline, *Annual Report 2000*, UK.

to get an annulment? There is a real and growing sense of frustration and even anger amongst Muslim women that the upholders of *Shari'ah* don't openly work to end the sorts of abuse Muslim women all too often face as single girls or married women. Lip service is now no longer enough - action is required if more women aren't to become convinced that there is nothing for it but to bypass *Shari'ah* and go to English courts to get justice.<sup>29</sup>

In this regard, one of the major Muslim umbrella organisations in the UK, the Muslim Council of Britain (MCB) has held meetings with British authorities at the demand of the latter to discuss the issue of forced marriages. The MCB has consistently argued that forced marriages are not at all Islamic but only cultural phenomena.

In late 1999, the MCB's Newsletter, *The Common Good*, stated the following:

“A committee has been formed headed by Baroness Pola Uddin of Bethnal Green and Lord Nazir Ahmed of Rotherham to look into the issue of Asian girls being forced to marry. The MCB has made it clear that the controversy surrounding forced marriages is not a Muslim issue, but concerns the Asian community and its culture. It is a practice which has been condemned by the Prophet Muhammad, peace be on him, which unfortunately exists today among the Asian communities in Britain including some Muslims. The committee will attempt to determine the extent of the problem, as well as look at ways that social services and teaching staff can approach the issue. Mike O'Brien the Race Relations Equality Minister, said “*Forced marriages are wrong and we are determined to tackle the issue. The Government must respond sensitively to issues of cultural diversity but multicultural sensitivity is no excuse for moral blindness.*”<sup>30</sup>

But the issue is a recurrent one. Three years later, still in *The Common Good*, it is noted that once again:

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<sup>29</sup> Muslim Women's Helpline, *Annual Report 2001*, UK, p. 3.

<sup>30</sup> *The Common Good*, Vol 1, Issue 2, Dec 1999, p. 5.



“A delegation from the MCB consisting of the Secretary General Mr Iqbal Sacranie, Deputy Secretary General Dr. Muhammad Abdul Bari and Treasurer Mr Ali Omar Ermes met with the Home Secretary on 15 May. The meeting was held to discuss various community concerns from so-called “isolationism” to forced marriages, asylum seekers and Islamophobia...The issue of forced marriages was raised and the delegation responded by stating that this cultural practice was not valid in Islam. However, it was presented and projected as a Muslim-specific problem...”<sup>31</sup>

Ghayasuddin Siddiqui, leader of the Muslim Parliament of Great Britain, has condemned the practice as "inhumane and unacceptable". The absence of consent made such a marriage "null and void", he told a recent gathering of senior police officers, brought together by the Foreign Office<sup>32</sup>. Muslim parents are to be warned by their community leaders not to force their children into marriages to "pay off debts back home". Draft guidance by the Muslim parliament for distribution to mosques, community centres and schools, also instructs Muslim clerics not to marry couples who are not "genuinely happy" to get married, and to challenge parents who they believe are forcing their children to wed. Details of the guidance emerged as the government spelled out its efforts to tackle the problem of forced marriages...Muslim representatives, including Ghayasuddin Siddiqui of the Muslim parliament, warned that ministers were focusing on a "fire fighting" approach rather than encouraging a grassroots change in attitudes. The Muslim parliament is launching a campaign to win over imams and parents to oppose the practice<sup>33</sup>.

The Home Office is considering introducing a new criminal offence to charge parents who force their daughters to marry against their will. It is conceded that “no major world religion condones forced marriage”, but some police and social services were sometimes

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<sup>31</sup> *The Common Good*, Vol 3, Issue 1, Nov 2002, p. 7.

<sup>32</sup> *The Guardian* 23/5/01

<sup>33</sup> *The Guardian*, 7/11/2001

concerned that taking action was seen as meddling in religious traditions or cultural norms.<sup>34</sup>

Forced marriages exist also in France. The Haut Conseil à l'intégration, in its 2003 report<sup>35</sup>, notes that, according to several grassroots organisations, more than 70,000 teenagers are concerned by the issue of forced marriages in France. Particularly prevalent among communities from Mali, Mauritania and Senegal, this practice is developing also among North Africans, Turks and Asians. According to the authors, forced marriages in France are not decreasing but, if anything, on the rise.<sup>36</sup> This has led to the setting up of an inter-ministerial research group in June 2004 by Nicole Ameline, the Minister for Parity and Professional Equality. The aims of this project include a more detailed estimation of the real extent of the problem as well as the elaboration of a number of responses appropriate to the situation of the women involved in forced marriages. The emphasis will be, according to Sakina Bakha of the "Fond d'aide et de soutien pour l'intégration et la lutte contre les discriminations", to help the young girls change these practises from the interior<sup>37</sup>.

The Haut Conseil in its report does not mention Islam specifically, but a member of the association *Voix des Femmes*, Christine Jama, in an article published in *Hommes et Libertés*<sup>38</sup>, argued that "forced marriages are identified, wrongly, to Islam and to Islam only". The editors then added: "Nevertheless, in France, the majority of the women concerned are victims of forced marriages in the name of the Islamic religion, and belong to families of Turkish, North African or Sub-Saharan origin." The author complained, in a letter *Hommes et Libertés* eventually published with an apology<sup>39</sup>.

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<sup>34</sup> *The Guardian*, "Law may counter forced marriages", by Alan Travis, June 30, 2000.

<sup>35</sup> *Les droits des femmes issues de l'immigration – Avis à Monsieur le Premier ministre*, p. 18.

<sup>36</sup> *Les droits des femmes...*, op. cit. p. 19

<sup>37</sup> *Le Figaro*, *La lutte s'intensifie contre les mariages forcés*, 9 June 2004.

<sup>38</sup> *Hommes et Libertés*, n°110 (p. 16-17).

<sup>39</sup> See the full text (in French) at

[http://www.cidem.org/cidem/themes/egalite\\_hommes\\_femmes/ega\\_infos/ega\\_enjeux/ega\\_s005.pdf](http://www.cidem.org/cidem/themes/egalite_hommes_femmes/ega_infos/ega_enjeux/ega_s005.pdf).

The theologian Mohsen Ismail (PhD from Zeituna University in Tunis) has categorically declared forced marriages to be against Islam in an interview published in the most popular French Muslim website, arguing that both the Prophetic Sunna and the traditional juridical schools forbid it<sup>40</sup>. However, generally-speaking, Muslim theologians and leaders have not publicly condemned this practice as strongly as they have in the UK – perhaps because the dominant view in the wider society seems to be that this practice has no Islamic basis. We have not come across in our research a single imam who considers forced marriages to be Islamic.

Forced marriages are an issue in Belgium too. As early as 1986, Jorgen Nielsen has noted that in Belgium “a more common problem than polygamy are cases of marriages forced on Moroccan girls to prevent them marrying a man of their own choice, especially if he is Belgian and non-Muslim”<sup>41</sup>. Young girls of Muslim origin have long been a central element of national integration and public health policies. It has been noted that in order to fight against violence and other forms of gender discrimination within the family, some Muslim girls in Belgium have devised strategies including the quoting of egalitarian Qur’anic verses to the father<sup>42</sup>.

Besides this confusion between customs and religion, Muslims express concern about the legal recognition of the religious marriage ceremony. The *Islamic* marriage ceremony often consists of an community leader or imam who seeks the consent of the bride and groom and the process is witnessed by at least two witnesses, in some cultures reading the *Fatiha*, the first chapter of the Qu’ran is seen to consecrate the marriage. The ceremony generally takes place at the bride’s parents’ home, with only a few guests in attendance. In countries where Islam is a state religion, a religious authority (i.e., with official status) performs the ceremony. The same is not true for Europe where any

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<sup>40</sup> [http://oumma.com/article.php3?id\\_article=46](http://oumma.com/article.php3?id_article=46)

<sup>41</sup> Nielsen, Jorgen (1987) ‘Islamic Law and its significance for the situation of Muslim minorities in Europe’, Centre for the Study of Islam and Christian-Muslim relations, Selly Oak Colleges, Birmingham, p. 27.

<sup>42</sup> See *Les violences exercées sur les jeunes filles dans les familles étrangères et de culture musulmane*, ADRI, Paris, 2002, p. 41.

acknowledged believer can conduct the ceremony and thus make the marriage “official” although most of the Muslims in Europe seek a religious authority, i.e. an imam.<sup>43</sup>

In cases where religious marriage has the same status as civil union (as in Spain or Italy), marriage based on Islamic code is legally binding. In Spain, the recording of the marriage in the civil registry, a requirement for Jewish and Protestant minorities, is not mandatory in the case of Islam. Consequently, polygamy can be given a kind of hidden approval. Any marriage that occurs after the recording of a first marriage in the civil register will obviously have no legal status, but since marriages do not actually have to be registered, contracting more than one cannot be considered illegal.<sup>44</sup>

In the cases of Belgium, the Netherlands, France, and Germany, religious authorities may not proceed with a religious marriage until a civil marriage ceremony has first been carried out by a government official. It is often the case that this order (civil marriage *then* religious marriage) is not respected by the couple, though such divergent practices remain officially illegal. A judge will sometimes even recognize an existing Islamic marriage on the grounds that official acknowledgment was being sought.<sup>45</sup> Our own research shows that many young people are exchanging religious vows, and then allowing a certain amount of time to pass before taking their official vows before a judge. These young couples are not yet married in the eyes of the law, but they can live together as a married couple and take time to get to know each other, as if they were simply cohabiting. Thus if they do decide to split up, there are no legal proceedings to be undertaken. In France, the religious ceremony may also precede the civil marriage

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<sup>43</sup> Conversely, in many Muslim countries, young Muslims unable to afford a normal marriage sometimes seek to circumvent official marriage regulations as well as the social expectations involved in them by performing a “customary marriage” – known as *zawaj urfi*. For this they do not approach imams, who tend to be controlled by the State and tied to the law, but rely precisely on the fact that in Islam any person can serve as witness of the marriage vows.

<sup>44</sup> Javier Martinez-Torron’s “The Legal Status of Islam in Spain,” in Ferrari and Bradney (eds) (2000), pp. 47-61.

<sup>45</sup> Marie-Claire Foblets (2000) “Famille, Droit Familial et tribunaux en Europe,” in Dassetto, Felice, Marechal, Brigitte, Nielsen, Jorgen (2001), *Convergences musulmanes, Aspects contemporains de l’islam dans l’Europe élargie*, Louvain la Neuve: Bruylant, pp. 77-96. This principle allows for the recognition of marriage on the grounds of the existence of a married lifestyle.

ceremony, in contravention of the law—but since imams have no official status in France, this practice cannot actually be regulated.

Throughout Europe Muslim activists are wary of the possible negative effects on *women* of such unofficial marriages, in particular since a “divorce” leaves them with no legal rights, and there have been campaigns warning Muslims against this practice. In Britain, the Muslim Women’s Helpline has been at the forefront of this struggle, publishing advertisements in the local Muslim press and delivering talks on the subject. Islamonline, a prominent bilingual (English-Arabic) Muslim website, invited a British female activist, Shabana Delawala, to discuss the issue live with Muslims earlier this year, on March 3<sup>rd</sup>, 2004<sup>46</sup>. Delawala is the founder of the campaign group ‘Knowledge and Justice’, launched in July 2002, in order to help Muslim women who find themselves in a situation whereby their marriage contracts are not legally recognized. Herself the victim of an un-registered marriage, she wants to raise the awareness of Muslim women (especially in the UK) to the consequences of not having their Islamic marriage contract followed by a civil ceremony. In France, the imams linked to the Union des organisations islamiques de France (UOIF) have been advised not to perform “Islamic marriages” at all<sup>47</sup>.

In Great Britain, purely religious marriages have no legitimacy under the law. Marriage must take place in a legally recognized location and must be recorded in the marriage registry, although the person officiating at the religious ceremony may also fill out the documents for civil marriage. Mosques and Islamic centres were not recognized locations under the Marriage Act of 1949. For some time, the provisions of the Marriage Act could not be extended to mosques and Islamic centre. The main reason invoked by the judge was the necessity of a separate building to perform the ceremony. The amendments of 1990 and 1994 to the Marriage Act lifted the necessity of separate buildings and since

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<sup>46</sup> Live Dialogue session at [www.islamonline.net](http://www.islamonline.net) on March 3<sup>rd</sup>, 2004. See the full discussion at <http://www.islamonline.net/livedialogue/english/Browse.asp?hGuestID=llkq00>.

<sup>47</sup> Personal communication, 2003.

then some mosques and Islamic Centres have been recognized as official buildings where a valid registration of the civil marriages can take place<sup>48</sup>.

## **Polygamy**

First, let us recall that in the Arab world, polygamy is legal and socially accepted, although not very widely practised<sup>49</sup>. Furthermore, in parts of Africa the custom also prevails with some wide practise, for example in Nigeria. In France, there are some statistics on polygamy from an INED-INSEE research published by Michèle Tribalat<sup>50</sup>: among the Black African immigrant population of about 212,000 people (where polygamy is supposed to be most prevalent), 3,500 households are concerned. Generally speaking it looks like a declining practice. Especially among the generations born and educated in Europe.

However, how is polygamy treated by the European civil laws? A sharp difference appears between countries such as France, Germany and Belgium that acknowledge the effects of international civil laws on their soil and countries such the UK where the law of domicile prevails over the foreign law. The key issue here is the difficulty to distinguish between personal law and the relevant jurisdictional law<sup>51</sup>.

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<sup>48</sup> See Yilmaz, Ihsan (2003), "Muslim Alternative Dispute Resolution and neo-ijtihad in England", Turkish Journal of International Relations, vol 2, no1..

<sup>49</sup> Haim Barakat's 1993 *The Arab World* (University of California Press) argues that "Official statistics show that in the 1960s it was practiced by fewer than 2 percent of married Muslim men in Lebanon, 4 percent in Syria, 8 percent in Jordan, 8 percent in Egypt (1951), and 2 percent in Algeria (1955). Research conducted in the 1930s showed that 5 percent of married Muslim men in Syria had more than one wife and that this phenomenon was more widespread in rural than urban areas. In the 1970s, a field study conducted by Safouh al-Akhras showed that only 2 percent of married men in Damascus had more than one wife. Similarly, studies of the family in Baghdad showed that of married men, 8 percent had more than one wife in the 1940s. This percentage was reduced to 2 percent in the 1970s."

There are no official statistics available on polygamy in Iran, but it is prevalent in many small cities and rural regions in Iran.

In Senegal it reaches 47% of marriages according to an Associated Press report (reprinted at [www.religionnewsblog.com/7082-Polygamy\\_still\\_proves\\_popular.html](http://www.religionnewsblog.com/7082-Polygamy_still_proves_popular.html)).

<sup>50</sup> Tribalat, Michele (1995), *Faire France, Une enquête sur les immigrés et leurs enfants*, Paris, La Découverte.

<sup>51</sup> Foblets, Marie-Claire (1999), "Conflicts of Law in cross-cultural Family disputes in Europe Today: Who will reorient Conflicts Laws? In Marie-Claire Foblets and Fons Strijbosh (eds), *Relations Familiales Interculturelles*, Ofnat, International Institute for the Sociology of Law, pp.27-45.

According to the Judge and legal scholar Mathias Rohe, “German law treats polygamous marriages as legally valid provided that the marriage contracts are valid under the law applicable to the formation of these contracts. The reason is that it would not help the second wife or further wives who may have lived in such a marriage for a considerable time to deprive them of their marital rights such as maintenance etc. Thus §34 sect. 2 SBG I, which contains provisions on social security systems, regulates the per capita division of pensions among widows who were living in a polygamous marriage”<sup>52</sup>. This effective recognition of polygamy, incorporated even into German state institutions, is fundamentally different from the solutions found by judges in British courts, as exemplified in the decision not to recognise any of the widows in Court of Appeal in *Bibi v. Chief Adjudication Officer* (1998) 1 FLR 375.

In France, polygamous marriages celebrated abroad will be considered valid in regards to the principles of French international private law. However, since the law of 24 August 1993 related to immigration control and entry and stay conditions for foreigners in France, this marriage will no longer allow the husband to ask for the second wife and their offspring to join him in France under the pretext of family reunion. If he does, he risks losing his “residence permit”<sup>53</sup>. A recent survey demonstrates the total respect by North African families of the ban of polygamous marriages under French Laws. Not to mention that it is forbidden in Tunisian law as well.<sup>54</sup>

In Italy, according to the 1995 Conflict of Laws Reform Act, courts apply the national law of the parties concerned in matrimonial cases or, secondarily, that of the state where matrimonial like is mainly localised<sup>55</sup>. In contrast to other European countries, Italian case law on *Shari‘a*-related conflicts of law is meagre. This is probably due to the relative novelty of the Muslim presence in the country. No judgement for example seems to have been rendered by the Corte di Cassazione regarding the Conflict of Laws Reform Act so

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<sup>52</sup> Rohe, Mathias (2003), “Islamic Law in German Courts”, in *Hawwa*, Vol 1, N° 1, p. 53.

<sup>53</sup> Monéger, F (1994), “Les musulmans devant le juge français”, *JDI*, 1994, pp. 365-6.

<sup>54</sup> Fulchiron, Hugues (1999), ‘L’étranger en France, face et au regard du droit’, Centre de droit de la famille, Université Jean Moulin Lyon 3, Ministère de la justice, Mission de recherché Droit et Justice, Lyon, April 1999, p 192.

<sup>55</sup> Roberta Aluffi, “The Situation of Muslims in Italy”, paper presented at the FIERI Conference on “The Legal Treatment of Islamic Minorities in Europe and in the United States”, Turin, 19-21 June 2003.

far. Italian jurists generally seem to agree on the contrariness of polygamy to the Italian public order. In the potentially divisive case of a polygamous marriage contracted in a foreign country, no explicit decisions have been taken by Italian courts yet. In 1989 there was one case related to the expulsion of the two wives of a Moroccan citizen residing in Italy. Both women opposed the expulsion on the grounds of their entitlement to residence under family reunion. The court in question, the Tribunale Amministrativo Regionale of Emilia-Romagna, suspended the enforcement of the expulsion order but did not come to a decision since the two women had in between obtained a resident permit on other grounds<sup>56</sup>. In one instance only was the Italian Corte di Cassazione confronted, albeit indirectly, with polygamy, in a case related to inheritance (Cass. Civ., sez. I, 2 marzo 1999, n. 1739): an Italian man died, leaving as heirs two daughters of a previous marriage and his subsequent wife, whom he married in Somalia under Somali law. The daughters contested their right to inheritance on the grounds that their Islamic marriage in Somalia was “characterised by polygamy and repudiation” and thus contrary to Italian public order. The Corte di Cassazione rejected their arguments and deemed the marriage valid under Italian law.

However this tolerance does not apply to polygamous marriages performed on French, Belgian or German soil by their nationals. Once again, no particular claim for the recognition of polygamy has emerged among Muslim scholars and leaders in Europe, quite the contrary (see chapter 3). The following opinion from an imam in Belgium reflects a very dominant attitude toward polygamy, especially among North African Muslims.

One example of the intra-community debate on polygamy is related to a request from a Muslim woman in Belgium who was confronted in her social relations with a claim that in Islam a man should be at least bigamous (sic). Unsure of the true Islamic answer, she turned to a local Muslim website - [www.islam-belgique.com](http://www.islam-belgique.com) – for advice. In his answer, the popular Belgium Muslim scholar, Yacob Mahi, explained that there is a multiplicity of possible interpretations of the Qur’an. However, in the case of polygamy (which, as Mahi notes, is often used to discredit Islam), it is a capital mistake to consider it the basis

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<sup>56</sup> Aluffi, *ibid.*



of the Muslim marriage. The relevant Qur'anic verses, according to Mahi, cannot be dissociated from the socio-historical context of the Revelation: Islam took the existing practice into account, but the Qur'an severely limited polygamy, rendering it close to impossible<sup>57</sup>.

Likewise in Germany, the imam of Tariq ibn Ziad Mosque in Frankfurt, Shaykh Ahmad Hulail, has stated that "polygamy is a thorny issue, particularly in the Western countries. The West claims that many of women's rights in the Muslim countries are violated and regard polygamy as one of the signs of this violation. It is true that polygamy is allowed in Islam, but it is to be borne in mind that there are many juristic points to be regarded in that respect"<sup>58</sup>.

Interestingly, there are some current arguments being presented by female legal experts that the Qu'ranic verses on marriage actually favour monogamy. A conference held at the United Nations in Geneva in 2004 on the topic of Islam, Women and Human Rights, co-organised by the European Islamic Conference and the World Islamic Call Society, provided an instructive forum for this debate. In her keynote speech, the Egyptian-born and Al-Azhar-trained scholar Fawzia Ashmawi, from the University of Geneva, declared categorically:

“Although polygamy is allowed in Islam, it is not the rule but the exception. This authorisation is strictly limited and linked to specific social contexts”<sup>59</sup>.

This line of argumentation has been incorporated even by senior European politicians. The French rapporteur, Ms Yvette Roudy, of a 2002 report submitted to the Parliamentary Assembly of the Council of Europe, entitled “Situation of Maghrebi Women”, notes that:

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<sup>57</sup> For the full details of the discussion, see [www.islam-belgique.com/questionParCat.cfm?cat=1&cat\\_name=Mariage](http://www.islam-belgique.com/questionParCat.cfm?cat=1&cat_name=Mariage).

<sup>58</sup> Fatwa published in [www.islamonline.net](http://www.islamonline.net), January 2004.

<sup>59</sup> The conference, entitled “Les droits de l’homme: et la femme musulmane?”, was held in Geneva on April 2<sup>nd</sup>, 2004. For more details on this and other female voices see chapter three below.

“The Koran explicitly states that men may have more than one wife only providing they are able to provide, financially, for all their wives equally, which in fact is practically impossible”<sup>60</sup>.

The British situation is very different from continental Europe. English rules of international private law lay down that a person’s family law is the law of domicile rather than that of nationality. Therefore Muslim immigrants are subject to English or Scottish family laws. Then, problems arise in the case of marriages and divorces conducted abroad. Thus, the UK is the European country in which polygamy has been the most strictly contested. The ban concerns not only polygamous marriages on British soil but also polygamous marriages conducted abroad and even potentially polygamous marriages, at least until 1972<sup>61</sup>.

This strict prohibition appeared to be increasingly inadequate with the increase of Muslim and Hindu immigrants into the country. That is why in 1972 the Matrimonial Proceedings (Polygamous Marriages) Act 1972 made the full range of matrimonial relief available to a marriage whether potentially or actually polygamous. It meant that a potentially (or actually) polygamous marriage contracted abroad by a person resident in England but domiciled in Pakistan is valid in English law. But a Muslim marriage ceremony in general was regarded as establishing a polygamous marriage or potentially polygamous marriage i.e. performed under a civil law that recognizes polygamy even if the marriage itself is not. In these conditions, a person domiciled in England could not validly marry by going through a Muslim ceremony in Pakistan even if this marriage was de facto monogamous. In 1979, Mr Husain, domiciled in England married in Lahore, Pakistan. The wife joined her husband in England where he was domiciled. But in May 1981, the wife petitioned for a decree of judicial separation on the ground of her husband

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<sup>60</sup> <http://assembly.coe.int/Documents/WorkingDocs/doc02/EDOC9487.htm>.

<sup>61</sup> See *Hyde v Hyde* (1866) when an Englishman went to Utah, converted to Mormon faith, married and came back to England. He apostatised from his Mormon faith. His marriage was dissolved in Utah and his wife remarried. But he petitioned to divorce from his wife on the ground of his wife adultery with her new husband. The court decided that the matrimonial law of England could not apply to the parties of a marriage celebrated under laws of polygamy. See Carroll, Lucy (1984), “Definition of a “Potentially Polygamous Marriage in English Law: A Dramatic Decision from the Court of appeal (*Hussain v Hussain*)”, *Islamic and Comparative Law Quarterly*, vol 4, 1-2, 1984, pp.61-71.

unreasonable behaviour. The husband challenged the validity of the marriage on the basis of the existing jurisprudence that voids marriages conducted under polygamous law. But surprisingly, the court declared the marriage legally monogamous and valid in English law. In brief, since this decision only de facto polygamous marriages are forbidden and not potential ones<sup>62</sup>.

However some, such as Prakash Shah, appear very critical of this situation: “While clearly attempting to solve the problem of the potential non recognition of a huge number of marriages contracted abroad, the legislation also ends up preserving the fiction that English domiciled men and women cannot but enter monogamous marriages. This mirrors the assimilationist position of English domestic law that is justified on Human Rights and discrimination grounds”<sup>63</sup>

Prakash Shah also demonstrates and criticizes the fact that the immigration Act of 1988 dramatically restricts the immigration into the UK of a second wife. The consequence is a multiplication of attempts to avoid the prohibition by declaring only one marriage with the risk of increasing the number of unprotected women and children. In *Zeenat Bibi v Secretary of State for the Home Office* (1994) mentioned by Shah where the court of appeal upheld a refusal to allow a widowed mother’s allowance. The case concerned the second wife of a Pakistani man who has been in the UK since 1967. He registered as a British citizen in 1974 and returned to Pakistan to marry and return with his wife in 1975. The couple appeared to be childless and this may explain why they returned to Pakistan in 1989 where the husband married his second wife, i.e., the applicant. The applicant arrived in the UK in 1991 but as a visitor. She later revealed that she had been informed by someone who was educated that if she disclosed her true marital status she would not have a chance of obtaining admission to the UK. After arrival she became pregnant twice. She was declared to be an illegal immigrant and denied the right to remain in the UK<sup>64</sup>.

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<sup>62</sup> Carroll, L., *ibid.*

<sup>63</sup> Shah, Prakash (2003), “Attitudes toward polygamy in English Law, *International and Comparative Law Quarterly*, vol 52, April 2003, pp.369-400, *op-cit* p.379

<sup>64</sup> *Ibid.*, p. 398.

Restrictions on polygamy have been increasingly founded on HR grounds. And especially on the provisions of the European Convention on Human Rights: “The Commission found that excluding surplus wives was a legitimate aim under the second paragraph of article 8 for the preservation of a Christian-based monogamous culture dominant in that society (as pursuing the protection of morals and of rights and freedoms of others). It also recalled its findings in an unpublished Dutch case that a contracting state cannot be required to give full recognition to polygamous marriages in conflict with their own legal order, referring to bigamy laws”.<sup>65</sup>

It can be questioned whether the actual ban of polygamy achieves its abolition. There is now considerable evidence of the practice of polygamy in that one marriage is contracted under Islamic Law while another marriage may take place both under the secular civil law and the Islamic Law. According to Aina Khan, a Muslim solicitor who is a specialist in Islamic family law, “polygamy is becoming more common here (in Britain) than it is even in the parts of the Muslim world. The average man seems to want to exercise his religious right to marry more than once although in my experience they want to do so without the taking on any of the attendant responsibilities”<sup>66</sup>. According to Yilmaz, it is no longer surprising to find in Muslim newspapers “an advertisement from a man looking for a second spouse, or a woman advertising to become a second wife of a married man”<sup>67</sup>.

However, new generations born or educated in the UK show an increasing distrust towards such practices, especially when it comes to divorce.

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<sup>65</sup> Reid, Karen (1998), *A Practitioner Guide to the European Convention of Human Rights*, London: Sweet and Maxwell, p. 277.

<sup>66</sup> Q-News, N° 270-271, June 1997: 8, quoted in Yilmaz 2002: 349.

<sup>67</sup> Yilmaz, I. (2002), “The Challenge of post-modern legality and Muslim legal pluralism in England”, *Journal of ethnic and Migration Studies*, vol 28, N° 2, April 2002, p. 349.

### **Divorce: Practice of *Talaq***

It is within the domain of repudiation (i.e., divorce) that arbitration or attempts at reconciliation between religious law and civil judgments most often become necessary.<sup>68</sup> Repudiation or *Talaq* (that is unilateral divorce decided by the husband) is prohibited by law in all Western nations. In well-organized minority groups, however, a judge may take into account the recommendations of certain religious decision-makers.

For the UK the recognition of Muslim divorce came in an indirect way through the acknowledgement of polygamous marriages contracted abroad. As described above, the Domicile and Matrimonial Proceedings Act of 1973 expanded the jurisdiction of the English Courts by permitting them to entertain divorce petitions in circumstances where one of the spouses had been resident within the United Kingdom for a period of twelve months prior to the presentation of the petition, and irrespective of the domicile of the parties. The Matrimonial Proceedings (Polygamous Marriages) Act, 1972, removed the bar on matrimonial relief previously raised by the fact that the foreign marriage was either potentially or actually polygamous.<sup>69</sup> And the 1983 decision of the Court of Appeal in *Hussain v. Hussain*<sup>70</sup> held that the Muslim marriage contracted abroad by a Muslim man domiciled in England was not void because it was ‘potentially polygamous’.

However, a very sensitive issue is about the contradiction that can happen between religious and civil divorce, in cases known as limping marriages. This term refers to cases where a Muslim woman has been granted a legal divorce by a British court but has not received the Islamic *talaq* from her husband and thus seeks a divorce from a Muslim

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<sup>68</sup> The issue of dowry does not appear to be incompatible with most existing legal systems. The dowry, another element of Islamic marriage, tends to be viewed by western courts as a form of pre-nuptial agreement. Islamic rules on inheritance can be an issue in countries whose legal system is influenced by Roman law (as in the case of most Romance-language countries), but is less frequently problematic in countries with legal systems based on common law, such as the United States or Great Britain.

<sup>69</sup> See Lucy Carroll (1984), “Recognition of Polygamous Marriages in English Matrimonial Law: The Statutory Reversal of *Hyde v. Hyde* in 1972,” *Journal: Institute of Muslim Minority Affairs*, 5 (1984): 81-98.

<sup>70</sup> (1983) Family 26. See Lucy Carroll (1984), “Definition of a ‘Potentially Polygamous’ Marriage in English Law: A Dramatic Decision from the Court of Appeal (*Hussain v. Hussain*),” *Islamic and Comparative Law Quarterly*, 4(1984): 61-71.

court. Zaki Badawi gives the example of a young Pakistani woman in England who refused to marry her cousin. The young man immigrated to England on the basis of a civil marriage. The woman's father married her to the man, in a religious ceremony, against her will. She decided to run away, so as to escape before the marriage could be consummated. Her father died and her brothers put pressure on her in a variety of ways (including death threats) to make her respect her father's wishes. The husband returned to Pakistan, where he married another young woman, but the first woman was never allowed to have another religious marriage ceremony since her husband continued to refuse to grant her a divorce.<sup>71</sup>

As an example of the cases the Muslim Women's Helpline deals with, the 2001 Report quotes the testimony of an anonymous caller, "Siti" (lady in Arabic): "Please, please can you help me. I am so despairing, I feel like ending it all. I am divorced from my husband but he tortures me by not divorcing me religiously. He is happily remarried but I am stuck and no one wants to help me. I contacted (the) Mosque and they said, 'their only job is to make marriages, not to break them'. They don't understand that my husband has left me and the kids for seven years now and he has a new life. I am struggling with no chance of re-marriage..."<sup>72</sup>

In England, there are a number of bodies for reconciliation, and the way they operate is not uniform. Two of the most prominent organizations bear almost similar names and have been established mainly in order to settle disputes between forms of religious and civil marriage: the Muslim Law (Shari'a) Council (hereby MLSC), headed by Dr. Zaki Badawi; and the Islamic Council of Great Britain and Northern Ireland (hereby ISC), whose first chairman was the late Shaykh Syed Darsh. The two councils are based in London and perform similar functions. There even seems to be some overlap between personnel<sup>73</sup>. In both cases, the function of limping marriages has had a catalytic function.

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<sup>71</sup> Zaki Badawi, "Muslim Justice in a Secular State," in King (ed), pp. 73-80.

<sup>72</sup> Muslim Women's Helpline, *Annual Report 2001*, p. 3.

<sup>73</sup> See on this point Nielsen, J (1993), *Emerging Claims of Muslim Populations in Matters of Family Law in Europe*, CSIC paper n° 10, Nov 1993, Birmingham, p. 12.

If a husband refuses to consent to his wife's demand for a divorce, the wife can take her plea to the Shari'a Council, which then tries to offer a form of arbitration.

Under the leadership of Zaki Badawi, a graduate from Al-Azhar, the Shari'a Council seeks to fulfil the Islamic duty of providing leadership and guidance to a Muslim community, even a minority one, according to Abu Hanifa's injunction. It acts as a *qadi*, or Muslim judge, in matters related to marriage and divorce. Located in West London, the focus is on the British Muslim community, but the MLSC has dealt with questions from other European countries as well, from Denmark to Spain<sup>74</sup>. The organization has a membership of around twenty individuals, representing not only the four Sunni schools of jurisprudence (in chronological order of appearance, Hanafi, Maliki, Shafi'i and Hanbali) but also the Shi'a / Imamiyya, and has formal links with the Imams and Mosques Council in Britain. Members meet at least every three months in order to make formal decisions about the pending cases. The majority of these cases concern marital disputes: it is typically the wife who approaches the MLSC seeking the dissolution of their Islamic marriage contract when the husband has not granted her a *talaq*. This may take place either before, after or independently from a civil divorce. The primary objective of the Council is to assist in the reconciliation of the family and it certainly does not want to be seen as a "divorce-issuing office"<sup>75</sup>. The MLSC tries first to contact the husband and eventually decides on the case. It may either dissolve the contract or give a *khulla* – a divorce granted to the wife in compensation for the return of the *mahr* (the sum given to the wife by the husband at the time of the marriage contract). The length of time for completion of the whole process depends on the particular case and may take up to three years if the parties choose to enter into negotiations with the mediation of the MLSC<sup>76</sup>. Sonia Shah-Kazemi's study of the workings of the MLSC suggests women from all ages, social categories and locations in Britain have access to the Council, which is able to provide all of its services by correspondence.

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<sup>74</sup> Shah-Kazemi, Sonia (2001) *Untying the knot: Muslim women, divorce and the Shariah*, London, p. 21.

<sup>75</sup> Ibid, p. 43.

<sup>76</sup> Ibid, p. 12.

In one typical case where the husband persisted in denying his divorced wife the Islamic *talaq* on grounds that she had committed adultery, the MLSC wrote the following letter<sup>77</sup>:

Dear Mr X,

*Assalamu alaykum*

The members of the Shariah Council, after having discussed your wife's application for an Islamic divorce and after looking into your submission of (dates) have unanimously agreed to inform you that:

1. Adultery is one of the most heinous crimes in Islamic law, the punishment for which is death by stoning. But as Britain is not a Muslim state such a punishment may not be carried out here. This punishment can only be administered in a Muslim state after due process.
2. The laws of marriage and divorce for their application do not need the authority of a Muslim state hence a Muslim can marry and divorce in Britain according to Islamic law.
3. On the basis of your letter which allege adultery against your wife we can assure you that she will be punished by Allah almighty for her immorality but we regret that you are not entitled to withhold divorce from her as a measure of punishment in this respect. In Islamic law, divorce is the provision for permanent separation of a couple. It must not be used as a penal instrument. Hence the Shariah Council acting according to Islamic law regrets that it must reject your application in this regard.
4. The Council does not accept your view that as a Muslim you need not recognize an English civil divorce. Muslims are required by the Shariah to observe the laws of the country wherein they reside.
5. According to the rules of Shariah once you have become separated from your wife you have only two options
  - a) secure a reconciliation.

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<sup>77</sup> Quoted in Shah-Kazemi, Sonia, *Untying the knot*, p. 44.



- b) if this cannot be achieved or is not desirable then you must divorce your wife according to Islamic law. There is no option of a suspended state between marriage and divorce available to a Muslim couple at all.
6. Finally the Council has decided to request you to pronounce an Islamic divorce against your wife within 15 day of this letter's postmark so that you can end a merely paper relationship between you and your wife.
- Yours sincerely...

Likewise, the Islamic Shari'a Council of Great Britain and Northern Ireland (ISC) started as a group of imams who were solving conflicts of law in London and it was soon officialized in 1982 under its current name. It derives its authority from its panel of scholars, which represent the London Central Mosque and Islamic Cultural Centre, the Muslim World League, the Markazi Jammiat Ahl-e-hadith, the UK Islamic Mission, Dawatul Islam, Jami Masjid in Bradford, the Muslim Welfare house in London and the Islamic Centres in Birmingham, Glasgow and Manchester. The ISC considers itself a "stabilising facto(r) in the preservation of the community and an aid in stopping the younger members from being swallowed by the non-Islamic environment surrounding them"<sup>78</sup>. The Council has also campaigned for the state recognition of Muslim Family Law, which it views as an "essential right enshrined in the universal declaration of human rights"<sup>79</sup>. It is less inclusive than the MLSC since it represents only the Sunni strand of Islam. Its twenty members are of different ethnicities (Indian, Pakistani, Bangladeshi, Somali) and meet every month in the Islamic Cultural Centre in London<sup>80</sup>. The ISC, based in North East London, draws also on its (informal) representatives in Britain's major cities. 95% of the letters received by the ISC are related to matrimonial problems faced by Muslims in the UK<sup>81</sup>. From 1982 to 2002, no less than 4500 cases have been dealt with by the Council<sup>82</sup>. In most cases, women initiate the proceedings for an Islamic divorce. The ISC first attempts to reconcile the couple. If this fails, the ISC may divorce the couple on any of the following grounds:

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<sup>78</sup> The Islamic Shari'a Council of Great Britain and Northern Ireland, *An Introduction*, p. 6.

<sup>79</sup> The Islamic Shari'a Council, *An Introduction*, p. 6.

<sup>80</sup> Secretary of the ISC, personal communication, London, July 2004.

<sup>81</sup> The Islamic Shari'a Council, *An Introduction*, p. 9.

<sup>82</sup> The Islamic Shari'a Council, *An Introduction*, p. 5.

- the husband suffers certain physical defects
- the husband accuses the wife of unchastity
- the husband is missing for a specific period
- the husband ill-treats the wife
- the husband fails to perform his marital obligations
- the husband fails to provide maintenance in spite of having the means to do so
- the husband refuses to comply with the judge order to divorce his wife for one of the mentioned reasons

According to the secretary of the ISC, the Council is also regularly contacted by solicitors and English judges alike to give its advice on matters related to law. The secretary himself has personally been to the court to explain the Islamic understanding of child custody and the Muslim un-official marriage; in one instance the court has paid the ISC to mediate between a litigant couple of Pakistani origin<sup>83</sup>.

Both the ISC and the MLSC also issue *fatawa*, voluntary legal advice in matters related to Islamic law.

There are however fears these *Shari'a* councils may sometimes serve male Muslim interests rather than protecting women's rights. The MCB Newsletter (Vol 3, Issue 1, Nov 2002) notes:

“The Muslim Women's Helpline Annual Report published in July 2002 calls for greater community involvement in the problem of marriage quality and breakdown. It says that women are growing increasingly frustrated by perceived injustices and great anomalies in the way which the law is administered by *Shari'ah* bodies in the UK. Women who have civil divorces complain about obstruction in securing a religious divorce where husbands are

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<sup>83</sup> Secretary of the ISC, personal communication, London, July 2004.

refusing to cooperate in granting a *talaq*. Some wives find themselves being summarily divorced by husbands with the cooperation of certain Imams who have not even tried to initiate any attempts to understand and sort out the marital problems being experienced.”

In the 2001 report of Muslim Women’s Helpline, the author remarks that:

The anomalies in the application of *Shari‘ah* law by different bodies are becoming ever more difficult to deal with and explain to confused Muslim women. Maintenance, child custody and securing Islamic divorce where the husband is refusing to be cooperative are all areas causing great anger and frustration amongst women. Younger women increasingly question why there is a need for an Islamic marriage if the authorities refuse to cooperate in granting them an Islamic divorce from a husband who has long since abandoned his family, sought a civil divorce but obstinately refuses to release his wife from an Islamic marriage. The long delays in *Shari‘ah* court procedure and the lack of explanation or even sympathy from the men in charge adds to the anger being felt.”<sup>84</sup>

Elsewhere, a *talaq* performed in Germany would be void in accordance with Art. 17, sect. 2 EGBGB. For German law, “exclusive competence to dissolve marriages belongs to the Family Courts. However, a *talaq* which is valid in a foreign legal order applicable to it may be accepted by German law under certain circumstances. There is still a certain variety among judicial decisions, but in general we can say that the *talaq* would be accepted, if the prerequisites for a divorce according to German law are fulfilled.”<sup>85</sup>

Generally speaking, the judge in most countries will indirectly recognise a *talaq* if its effects are discriminatory on the wife. For example, a Moroccan woman, divorced against her will, without having signed any paper, without even having gone to the court.

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<sup>84</sup> MWH, op cit., p. 6.

<sup>85</sup> Rohe op cit, p. 54.

She was repudiated in the summer of 1995 while spending a family holiday in Morocco. With her four children she returned to Val-Fourré where in 1978 she had originally come to join her husband under the policy of family reunion. Back in her native village the husband quickly remarried a younger woman and moved with her to the villa he built with the savings of the household. The abandoned wife is now taking the husband to court in France in the hope that the separation is declared void and illegal.<sup>86</sup>

This is a typical situation in which the French judge has to deal with *talaq*. As described by Marie-Christine Meyzeaud-Garaud<sup>87</sup>, French jurisprudence went through different phases. Interestingly, between 1983 (arret Rohbi, Cass. Ire civ, 3Nov 3, 1983) and 1994, the trend was toward an acknowledgement of *talaqs* pronounced overseas. However, since 1994 (Cass. Ire civ, June 1 1994), the trend has been reversed. Today, the increasing hostility of the judge to recognize the effects of a repudiation carried out in a foreign country is quite patent in France. The shift is partially caused by the adjustment to the principles of the European Convention of HR: equality of the partners (art 14) and the right of the woman to a due divorce procedure (art 6).

In Belgium too, the jurisprudence has been contradictory. A decision by the Court of Cassation of 29 September 2003, dealing with the effects in Belgium of a repudiation which took place in Morocco, highlights the competing objectives of judicial decision-making in cases related to Islamic law. A recently divorced Moroccan lady went to the Belgian court to reclaim revenue owned to elderly people divorced from a wage-worker, with the Moroccan act of repudiation in her hand. Decisions taken by foreign courts on the civil state of an individual are recognised in Belgium independently of any procedure of exequatur as long as they satisfy article 570 of the Judicial Code. But since the respect of the rights of the defence is among these conditions, the Moroccan lady saw her

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<sup>86</sup> Libération (5/7/1996, p. 16)

<sup>87</sup> “La femme face à la répudiation musulmane: analyse de la jurisprudence française”. Paper delivered at the Adda’ wa Mosque, Paris, on March 6<sup>th</sup>, 2004. We thank the author for kindly providing us with a written version of her unpublished paper.

demand refused in Belgium too. This decision gave rise to a debate in the national media<sup>88</sup>.

To resolve the uncertainties related to this jurisprudence, which affects litigants as well as practitioners, Belgium has finally chosen the legislative option. It has been attempting to codify its international private law since 1996, when the Minister of Justice asked professors Johan Erauw of Gent University and Marc Fallon of the Catholic University of Louvain to initiate research towards establishing a code of international private law. After further contributions, the project was submitted to the Conseil d'Etat, and finally deposited in the Senate on July 7<sup>th</sup>, 2003 as a proposed law<sup>89</sup>. In February 2004 year, the proposal was discussed in the Belgian Senate. Article 57 related to repudiation proved to be the most controversial. Despite the prudence of the text, which only recognises the validity of *talaq* under exceptional and rather improbable circumstances, as its opponents readily concede<sup>90</sup>, the article has not been judged sufficient enough in its condemnation of a practice deemed contrary to human rights and the dignity of women. Two senators, Mimount Bousakla (SP.A) and Anne-Marie Lizin (PS), who have also been involved in a campaign to ban the Muslim headscarf from Belgian schools, were at the forefront of this combat, arguing that “to render repudiation exceptional is the equivalent of legalising it<sup>91</sup>. For Senator Bousakla, “it would give a favourable echo to the law of the Islamic sharia”<sup>92</sup>.

## Custody

Other sources of potential conflict regarding Islamic family life concern the religious education of children and child custody regulations, particularly in cases of interfaith marriage. According to Islamic tradition, it is the father who passes on his name and his

<sup>88</sup> See for example [http://www.businessandlaw.be/breve.php?id\\_breve=51&debut\\_art=30](http://www.businessandlaw.be/breve.php?id_breve=51&debut_art=30)

<sup>89</sup> See the official transcript of the debates at [www.senate.be](http://www.senate.be).

<sup>90</sup> See for example the balanced reactions to the proposal in the women's magazine Vie Feminine, ample testimony to the scope of the societal debate generated by this question, at <http://www.viefeminine.be/fr/default.asp?id=50&mnu=50&ACT=5&content=155>.

<sup>91</sup> Le Soir, « Deux femmes résolues contre la répudiation », par Michelle Lamensch, 5/2/2004.

<sup>92</sup> La Dernière Heure, « Lizin: « Non absolu à la répudiation », 5/2/2004.

religion to his children. He is thus legally entitled to custody of the children in the event of divorce from a non-Muslim woman. This means that under Islamic legal orders, the mother usually loses all rights of care. In general, however, Western courts do not recognize such a principle, unless if it happens to be in the best interests of the child. Jørgen Nielsen has remarked that in Belgium “courts tend to grant custody to a Belgian mother if the father is Turkish or Arab, although the father feels entitled and, according to his own law, often is entitled. Consequent cases of removal of children from Belgium jurisdiction by the aggrieved party are not common but cause great suffering as well as attracting media attention.”<sup>93</sup> Given the size of inter-marriages, the question of custody attained unparalleled proportions in the Franco-Algerian case. Nielsen noted that in France, “as a result of a number of instances, when Algerian fathers have removed their children from their French ex-wives to Algeria (which, inevitably, were widely reported in the media), the respective governments have appointed two experts to study the problem and present proposals”<sup>94</sup>. The ensuing bilateral convention of 21<sup>st</sup> June 1988 related to children from Franco-Algerian couples is an original attempt at solving this problem by instituting the free movement of the children concerned between the two countries<sup>95</sup>.

German law takes the welfare of the minor as the paramount consideration for guardianship and custody. As Rohe remarks, “if the application of such strict Islamic rules would significantly contradict the child’s welfare, the German public order will exclude this application”.<sup>96</sup>

Given the scarcity of Italian case law on *Shari‘a*-related issues, the judgment of the Corte du Cassazione of March 8<sup>th</sup>, 1999, concerning the effects of Moroccan law in a matter of declaration of paternity and illegitimate children is remarkable: the court refused to apply Moroccan law and to deny the mother or the child the possibility of filing a suit for the declaration of paternity, which is forbidden according to *Shari‘a*, on the grounds that

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<sup>93</sup> J. Nielsen (1986: 26).

<sup>94</sup> *Idem*, p. 28.

<sup>95</sup> See for an analysis of this convention, Lorcerie, F (ed) (1999) *Les populations d’origine maghrébine et comorienne de Marseille*. Research report, CNRS / IREMAN, February 1999, pp. 173-182.

<sup>96</sup> Rohe *op cit.*, p. 55.

discrimination between legitimate and illegitimate children in contrary to Italian public order<sup>97</sup>.

In the UK the Muslim Women's Helpline, which runs a counselling service five days a week over the telephone (2,800 calls received in 2001), has also signalled in its 2001 Report that lack of cooperation from husbands in the issue of child custody is one of the areas "causing great anger and frustration amongst women".<sup>98</sup>

Custody and also circumcision touch the much debated domain of children's rights and show here also a conflict between Islamic law and European evolution of conception of Human Rights<sup>99</sup>.

### **Synthesis of the chapter**

A new set of Islamic norms is thus being forged in courts of justice located in Europe. In most cases having to do with family life, negotiation is still the strategy of choice. The recognition of individual freedoms and the consideration of each party's best interests lead to compromises that change not only the letter but also the spirit of the Islamic laws, stripping them of the official meanings they have in Islamic societies. One example of this transformation, in which Islamic regulations are "acclimatized" to Western legal norms, concerns the acceptable period of time one's widowhood should last. Traditional Islamic law specifying the amount of time that must elapse before one is allowed to remarry cannot be strictly enforced in European societies.<sup>100</sup> Laws governing inheritance

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<sup>97</sup> Aluffi, *ibid.*

<sup>98</sup> Muslim Women's Helpline, *Annual Report*, 2001, p. 6.

<sup>99</sup> For example, a father, 27, a Muslim of Turkish origin, lost his legal battle on November 25, 1999, to have his five-year old son ritually circumcised against the mother's wishes. The court of appeal ruled that, although under Islamic law the boy was born a Muslim, "a newborn child does not share the conceptions of the parents", and the appeal was dismissed for it would not be in the best interests of the child to be circumcised, with its risk of pain and psychological damage. The two parents live in the Manchester area, and separated in 1996. For more details, see *The Guardian*, "Muslim father loses court fight", 26/11/1999.

<sup>100</sup> In Islam, a divorced or widowed woman may not remarry for three months, or just over four months after her separation or her husband's death, respectively. The goal of such a rule is to avoid any uncertainty regarding the paternity of children born to a new marriage. In traditional Muslim law, several conditions are in place to make sure that this time period is observed, including restricting the freedom of movement of the woman. These conditions are rarely followed to the letter in Europe or the United States.

offer another example of the flexibility involved in translating old practices into new contexts. Once again, the Islamic laws on inheritance, a holistic system elaborated in a context where men had the exclusive obligation of providing for the women, specify that for every part given to the daughter, two parts must be given to the son. This cannot always be strictly adhered to in practice (especially in legal systems influenced by Roman law which ensures that each descendant be provided for equally).<sup>101</sup> In 1975, Zaki Badawi established a ready-made Islamic will to solve the contradiction between European and Islamic norms. For years, according to his own admission, no one came to pick it up<sup>102</sup>, perhaps indicating that Muslims in Europe are generally quite comfortable with Western norms of inheritance.

It is in matters of divorce that changes in Islamic law have been the most significant, but also the most difficult to identify. Even though a divorce can still be officially carried out within religious law, unofficially, it may have been already initiated by the wife herself in the civil court system. In addition, divorce is increasingly a topic of discussion for both members of the married couple. The fact that husband and wife both abide by traditional Islamic law does not necessarily determine the degree of oppression or inequality within a marriage. The status of polygamous marriages and negotiation in divorce proceedings are the two main categories in which Islamic laws find themselves transformed within the context of Western democratic societies.

Another area of conflict between Islamic prescriptions and Legal European orders concerns the definition of the secular public space. Although phrased in the Human Rights rhetoric and conflict of laws, it appears that is more a conflict of cultural perceptions of the public status of religion.

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<sup>101</sup> In these situations, the division of inheritance according to Islamic law is either abandoned or somehow circumvented.

<sup>102</sup> In Nielsen, *Emerging Claims*, op. cit., p. 3. Nielsen offers a different explanation to the lack of success of Badawi's initiative: according to him, in the 70's, as the community was generally quite young, Muslims were not concerned with writing wills at all.



## CHAPTER 2: CONFLICT WITH SECULARISM

Secularization means that political power is defined by its neutral interactions with religious institutions. We should remember that, with the exception of France, this principle of neutrality is not synonymous with separation. In fact, it is realized within various institutional structures, from State religion or the Concordat, to strict separation. It is striking to notice that throughout Europe, Islam's arrival has re-opened a case previously considered "closed": that of the relationship between the State and religions. The multiplicity of Euro-Islam situations sheds more light on the specific political and cultural character of each European country than it does on the so-called singular nature of Islam. The secularization profile specific to Europe can be divided into three modes: cooperation between the State and the Churches, the existence of a State religion, and the separation between State and religion.

The institutional agreements between Islamic organizations and the Secular State are only one aspect of the status of religions within Europe and the United States. Beyond the differentiation of the political and religious spheres and the notion of neutrality lies an ideological meaning to secularization that originated with the philosophy of the Enlightenment. A common denominator of Western European countries is their tendency to consider that the religious is misplaced and illegitimate within the context of inter-citizen social relationships. The idea that religion can not play a role in the general well-being of societies -a mark of the secularized mind- is, in fact, evenly spread throughout Europe, despite the differences in the national contracts between states and organized religion. The consequence of this invalidation of the religious is that the various manifestations of Islam in Europe become troublesome, or even unacceptable. The *hijab* (headscarf) controversy and the status of the apostate as debated during the Rushdie Affair shed light on the tension between Islamic claims and the European conception of secularism.

## The Headscarf Debate

Demands and requests made by Muslims, perceived immediately as suspect, and sometimes as backward, provoke highly emotional reactions. The Islamic headscarf worn by women is interpreted as a sign indicating a rejection of progress, a rejection of individual female emancipation, and provokes the wrath of those groups spearheading the defence of secular ideology: teachers, intellectuals, feminists, civil servants, etc.... The arrival of Islam inside the boundaries of Europe re-launched the dispute over religions in general, as shown by the example of a Norwegian atheist association that sought the right to proclaim for several minutes everyday the non-existence of God in order to offer competition to Oslo's muezzin.<sup>103</sup>

This ideological secularization reached a peak in France, even becoming part of institutional functioning, as demonstrated by the case of the Islamic veil, a source of great controversy. Positivism's influence on the Republican founders of secular society did, in fact, bring the latter to perceive a new entity: the collective social being, and allowed them to turn voluntary acceptance of the data provided by positive science and that of humanity's progress into principles of republican action. They thus played key roles in what was truly an epistemological reversal which had, as its corollary, the rejection of any form of transcendence. This rejection implies more than merely other people's freedom, equality under the law, or neutrality, it corresponds with an "essential will to place man at the origin and center". Due to historical circumstances specific to the French Republic, this rejection of any kind of notion of transcendence has taken on a radical character. The resultant conception of secular society is thus very rigorous: all signs of religion must be excluded from the public arena. Not only is religious instruction banished from state schools, but displaying signs of one's religion has become cause for controversy. When the Muslim veil made its entrance into the Republic's state schools, blazing debates regarding secularization, to which French society had paid little attention, at least since the separation of church and state, were reignited and made the order of the

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<sup>103</sup> The government authorized their request at the same time they authorized the request made by the Islamic association "World Islamic Mission" to sound a call to prayer. Cf. BBC News, March 30, 2002.

day. Above all, it brought into focus the now obvious distortion between, on the one hand, dominant socio-cultural expectations of secularization, and, on the other, its legal definition. In other words, the way most French people perceive secular society has little to do with the laws on secularization. What the law states is, first of all, the separation of the State and religions, and thus the neutrality of public administration, and secondly that the State will guarantee the religious expression of all faiths. Faithful to its long tradition as guardian of the law, the State Council has regularly found itself having to underline the importance of shades of meaning, and has sought to underline since its bulletin dated November 27<sup>th</sup> 1989, that the law on secular society obliges the officers of public services, but not the users, to remain religiously neutral. According to the law, then, the Islamic veil, as a symbol of an individual's membership to a given religion, thus does *not* contradict in any way the prescription of neutrality. This is why, in a general statement which goes beyond the individual case of the veil, the State Council has sought to remind people that "display of a religious sign does not contradict the law on secular society", with the only restriction being in the case of the disturbance of public order.<sup>104</sup> On the other hand -and this is where the shoe pinches- it does contradict the sociologically predominant conception of the notion of the religious within society. The principle of secularization founds and organizes in law the access of all religions, without discrimination, to the public arena, and forbids the State from interfering in this system. This, however, is not the dominant social expectation. What secularization is willed to be is an apparatus for making illegitimate the public affirmation of individual membership to a religion, in general, and to the religion of the Other, in particular. Evidence of this includes the regular calls to order issued by the State Council making null and void those administrative decisions which contravene the principle of secularization. In 2003, the debate went to the next level with the introduction of a bill to ban ostentatious religious symbols in the public schools, eventually passed in March 2004. The Stasi Commission, a delegation of scholars and experts created in July 2003 at the initiative of the French presidency, came out in favour of the law. In a televised speech on December 17, 2003 President Chirac himself endorsed the Commission's decision. Such a law seems to hope

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<sup>104</sup> The Fauroux report on Islam in the French Republic, submitted to the Ministry on December 14, 2000, aligns its conclusions on those of the State Council, which led to the resignation of several of the commission members who were advocates of stricter definitions of secular society.

to bridge, by legislative means, of the gap between the law and public perception. It reveals an authoritarian conception of the law, henceforth charged with the protection of individual freedom—including the protection of individual freedom against the individual's will—and above all with imposing a definition of freedom of conscience based on an idealised and homogenous vision of society. In other words, to be a modern citizen means to reject all public sign of religion. The headscarf ban seeks to “liberate” young Muslim women from the “oppression” of religious symbols.

Islam today has come to embody a representation of women that some find distasteful or loathsome, and consequently debate all over Europe has begun over the *hijab*. The *hijab*, then, can only be perceived as an attack on female dignity once a *reconstruction* has taken place based on what one knows (or thinks one knows) about Islamic civilizations. Such an interpretation of a system of religious symbols, that fails to take into account the people who chose to display them, constitutes in itself an attack on an individual's *freedom of conscience*. In July 1998, the Minister of Baden-Württemberg upheld the decision made by a Stuttgart school to not recruit a Muslim woman as a teacher because she wore a veil. The Minister declared that in Islam the *hijab* was a political symbol of female submission rather than an actual religious requirement.<sup>105</sup> Since then the polemics has been growing on the legitimacy of school teachers to wear *hijab*. In 2002 the Federal Administrative Court upheld the decision of the State of Baden-Württemberg to ban the Muslim teachers. “The court felt encourage in its ruling by a decision of the European Court of Human Rights. The European court of Human Rights regarded the dismissal of a teacher who had taught for three years without problems with children or parents in a Swiss school to be within the margin of appreciation under article 9 of the ECHR and no violation of HR was found”.<sup>106</sup> The Federal Constitutional Court had to decide whether the administrative courts had ruled rightly. Surprisingly it held in September 2003, that as German Law stands there is no legal basis for forbidding the wearing of the headscarf in schools. The Lander are the only institution to decide on such issue. “The core of the

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<sup>105</sup> Source: US Department of State (1998), Germany Country Report on Human Rights Practices 1998.

<sup>106</sup> Malhmann, Mathias (2003), “Religious Tolerance, Pluralist society and the Neutrality of the State: The Federal Constitutional Court's decision in the headscarf case, German Law Journal, vol. 4, no 11, 2003, pp 999-1107.

decision is an allocation of competence to solve the problem, not a material decision on the admissibility of head scarves in German schools itself<sup>107</sup>. In the wake of this ruling, seven German states declared in October 2003 they backed a legislation barring teachers from wearing the Muslim headscarf at a meeting of 16 regional ministers for culture, education and religious affairs in the German city of Darmstadt<sup>108</sup>. In late March 2004, the regional government in Berlin agreed to outlaw all religious symbols for civil servants. On April 1<sup>st</sup> 2004, the southern state of Baden-Württemberg became the first German state to ban teachers from wearing the *hijab*. The state assembly, dominated by a coalition of the opposition Christian Democratic Union and liberal Free Democrats, approved the law almost unanimously<sup>109</sup>. Another five out of 16 states, including Bavaria and Lower Saxony, are in the process of passing similar bans.

In the United Kingdom and in Ireland, the respective Departments of Education leave the responsibility of setting rules on dress codes and symbols to the governors of each school. There have been several incidents of Muslim schoolgirls being denied access to schools due to their wearing of the headscarf in Ireland. However, these cases have been speedily resolved by the Equality Authority which has consistently advised the relevant schools to reintegrate the schoolgirls. In Britain, the wearing of the kippa and turban is protected by the Race Relations Act 1976 under which Jews and Sikhs are considered racial groups, but Muslims (and therefore the *hijab*) are excluded from its provisions. There have been some sporadic cases, such as in Luton and Peterborough, in which schools have attempted to ban headscarves or persuade Muslim girls not to wear them, usually from a belief that they disrupt the school environment. In March 2004, according to the Islamic Human Rights Commission, the Commission for Racial Equality (CRE) determined that a headscarf ban imposed by a school in Luton constituted 'indirect racism'<sup>110</sup>. The school in question subsequently announced that it would be overturning its headscarf ban as of this summer. In another controversial case, on 15 June 2004, the High Court deemed the ban against a Muslim schoolgirl wearing the *jilbab* (a full-length

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<sup>107</sup> *ibid*, p.1104.

<sup>108</sup> <http://www.islamonline.net/English/News/2003-10/11/article08.shtml>.

<sup>109</sup> BBC News, April 1<sup>st</sup>, 2004, available at <http://news.bbc.co.uk/1/hi/world/europe/3591043.stm>.

<sup>110</sup> IHRC, "Briefing: Good Practice on the Headscarf in Europe", 09 March 2004.

gown) by Denbigh High School was appropriate. The ruling came in the wake of the school's decision to expel the 15-year old Shabina Begum in September 2002, following consultation with the local Muslim community which felt the *jilbab* could create tensions between the Muslim pupils who chose to wear it, and those who didn't<sup>111</sup>. The debate was here again framed in terms of "human rights": for Begum, the school had infringed her right to education and to "manifest her religious beliefs", but Judge Hugh Bennett reportedly did not see any violation of human rights. Despite the support of local Muslims, Muslim organizations such as the Muslim Council of Britain have claimed the decision was unfair and amounted to state intervention in the interpretation of Islamic norms<sup>112</sup>.

Sweden, with a Muslim population of 350,000, the largest among northern Europe countries, has had few problems with the Muslim female dress. In an incident in Gutenberg in 2003, two girls wearing the *burqa* (an outer garment often covering the face) could not go to their schools as a result of the school administration's objection. The problem was solved when the girls agreed to take off their *burqas* during the examination periods.

Face veiling has been problematic in the Netherlands too, where it has stretched the limits of Dutch multiculturalism too far. In the course of 2002-2003, two undergraduate students of Moroccan origin in the Department of Arabic, Persian and Turkish languages and Cultures at Leiden University arrived in campus wearing a *niqab* (face covering). Their presence was resented by some staff and students as causing discomfort and impeding interactive communication in the classroom<sup>113</sup>. Urged to act on the issue, the Board of the University banned face veiling just before the beginning of the following

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<sup>111</sup> Another argument put forward by the school was related to safety concerns.

<sup>112</sup> The MCB stressed that "the British Muslim community is a diverse community in terms of the interpretation and understanding of their faith and its practice. Within this broad spectrum those that believe and choose to wear the jilbab...should be respected". Similarly, Massoud Shadjareh of the IHRC argued the High court decision was "like asking different members of the Jewish faith what their religious observance requires and then imposing a liberal version over an orthodox one" (IHRC Press release of 15 June 2004, *Dismay as High Court Rejects Schoolgirl's Discrimination Case – Islamic Dress for Women is not an Arena for Negotiation*, at [www.ihrc.org](http://www.ihrc.org)).

<sup>113</sup> Linda Herrera and Annelies Moors (2003), « Banning Face Veiling – The Boundaries of Liberal Education », *ISIM Newsletter* 13, December 2003, Leiden, 16-17.

academic year, a decision upheld by the Dutch Equal Treatment Commission. The legal argumentations in the Netherlands have avoided specifically Islamic references, preferring for example to use the term “face veiling” to the “niqab”, for otherwise this would be considered a case of direct discrimination on the basis of religion<sup>114</sup>.

There have been some attempts to exclude Muslim schoolgirls for wearing the *hijab* in Belgium, but in court the verdicts so far have mostly been in favour of wearing the headscarf. In parallel to French debates on the application of *laïcité*, two Senators presented a draft law to the Belgian Senate in December 2003 to ban the *hijab* and other overt religious symbols in state schools, a move portrayed as destined to defend the country’s secularism as much as abolish the “inferiority” of women.

In Denmark, both students and teachers have the right to wear the headscarf in public schools. In contrast to countries such as France, it is in the public sector that the *hijab* is most controversial. The Islamic Human Rights Commission reports a high-profile case in the summer of 1999 in which the two largest Danish chains of supermarkets, FDB and Dansk Supermarked, stated that they did not wish to employ Muslim women wearing headscarves to work at check-out desks or other visible places in stores. They claimed that headscarves were unhygienic and not compatible with their principles concerning uniforms. According to the Minister of Labour, this contravened the law on discrimination. The present Minister of Labour, Ove Hygum, has stated in a letter sent on 5th August to the retailers and trade unions concerned that the law on discrimination in employment is violated “if an employer forbids an employee to wear religiously motivated headgear, when the employer’s regulations on uniforms do not contain rules on headgear”. In the year 2000, Islam Amin Bahtiyar, who was denied the chance to be a sales trainee at a store due to her headscarf, resorted to the law. Pointing out that Bahtiyar wore the headscarf as a consequence of her belief, the Odense City Court decided that the store discriminated against her and imposed a fine of 10,000 kronas as compensation. After this decision, many businesses started preparing special uniforms for their employees wearing the headscarf. McDonalds, Toms Chocolate Factory and Co-op

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<sup>114</sup> Ibid, p. 17.

Denmark Companies are among these firms. Special uniforms for nurses with headscarves have also been designed. The Defence Ministry has also started to prepare designs suitable for the headscarf, turban and kippa. Minister for Migration and Integration, Bertel Haarder said the following on the issue: “I am not the minister responsible for the headscarf. What interests me more is the people’s integration in the country rather than their clothes.” Underlining that the headscarf is a personal right and freedom, Haarder said: “If we ban the headscarf in schools, then we have to ban Christmas celebrations and Jewish symbols. We do not have such a prohibitive mentality. While trying to drag the Muslim women from their houses and put them in the business sector, the headscarf ban will mean double-standards and the Muslim women will be isolated from the society. We will not support such a decision.”

### **The Rushdie Affair and the Question of Blasphemy**

The rallying of European Muslims, who wanted to ban the Satanic Verses and have its author, Salman Rushdie, killed is indeed an example of a religious group trying to restrict individual freedom (in this case, to restrict an individual’s freedom of speech) and violate the secular principles of cultural expression. At the time, there was a consensus among specialists of minority rights to consider this controversy as an attempt made by Muslims, notably British Muslims, to obtain the legal capacity to limit the freedom of its members in order to preserve its traditional religious practices. In other words, the Rushdie affair was seen as an important example of a religious and cultural minority trying to introduce the kind of internal restrictions which, according to the dominant liberal conception of minority rights, are unacceptable given that they undermine individual autonomy.<sup>115</sup> In the same vein, Charles Taylor, in favour of minority rights, is nevertheless unable to accept as legitimate the demand that the *Satanic Verses* to be banned. In his opinion, there is an indestructible core of founding freedoms (the right to live, freedom of speech, freedom of religion...) that cannot be put into question out of a need to protect cultural

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<sup>115</sup> Kymlicka, Will (1992), “Two Models of Pluralism and Tolerance”, *Analyse and Kritik*, 13, pp. 33-56.



minorities.<sup>116</sup> Michael Walzer, well known for his relativist approach to values,<sup>117</sup> takes a hardline liberal position and defends Salman Rushdie against his detractors by invoking the fact that immigrants, by their very choice of emigrating to Europe, have made the choice of Western liberalism, and should thus conform to it.<sup>118</sup>

Others who champion multiculturalism, however, such as Tariq Modood and Bhikku Parekh, have criticized such positions, explaining that it is a mistake to see a fight against apostasy as British Muslims' key motivation.<sup>119</sup> Daniel I. O'Neill's analysis of the literature produced by British Muslims during this period illustrates such an interpretation.<sup>120</sup> Unlike their "brothers in religion" of the Muslim world, the principal goal of Western Muslims was not to have Salman Rushdie punished, but to have the *Satanic Verses* banned. Their criticism concerned the attack that the book made on their cultural and religious identity, rather than Salman Rushdie's apostasy.<sup>121</sup> Their charges focused on the way Rushdie used images and pejorative descriptions that were purely orientalist in style, and which thus strengthened the stigmas from which Muslims have suffered.<sup>122</sup> Their list of concerns was thus not primarily aimed at Muslims, but at British society as a way of protecting a culture that was facing discrimination. According to Tariq Modood's hypothesis, if a non-Muslim British citizen were to write a similar book about Islam, to which Muslims reacted in the same way as they had to Salman Rushdie's book, these reactions and demands may not have seemed so contestable in the eyes of liberal and multiculturalist thinkers. If we accept, then, that European Muslims were more concerned by the respect they felt their religious identity was owed, than by Salman Rushdie's "transgression", then the *Satanic Verses* are just as open to criticism as Oriana

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<sup>116</sup> Taylor, Charles, (1994) "The Politics of Recognition" in Gutman, Amy (ed.), *Multiculturalism: Examining the Politics of Recognition*, Princeton University Press, 1994, pp.25-73.

<sup>117</sup> According to Walzer, values such as justice have social meaning and are defined by group consensus at a given time and place. Cf. *Spheres of Justice: A Defense of Pluralism and Equality*, New York: Basic Books, 1983.

<sup>118</sup> Walzer, Michael, "The Sins of Salman", *The New Republic*, April 10, 1989.

<sup>119</sup> Cf. Modood, Tariq (1993), "Kymlicka on British Muslims", *Analyse and Kritik*, no. 15, pp. 87-91.

<sup>120</sup> O'Neill, Daniel I (1999), "Multicultural Liberals and the Rushdie Affair: A Critique of Kymlicka, Taylor and Walzer", *The Review of Politics*, vol. 61, no. 2, Spring, pp. 219-250.

<sup>121</sup> Cf. Ahsan, M.M. and Kidwai, A.R. (eds.) (1993), *Sacrilege versus Civility: Muslim Perspectives on the Satanic Verses*, Leicester: The Islamic Foundation.

<sup>122</sup> See Appignanesi, Lisa and Maitland, Sara (eds.) (1990), *The Rushdie File*, Syracuse: Syracuse University Press.

Fallaci's *The Rage and the Pride (La Rage et l'Orgueil)*.<sup>123</sup> In such a direction, they underscored the fact that freedom of speech is never an absolute, and that the question is how to define the limits between what is acceptable, and what is not.

This rallying against the *Satanic Verses*, particular to Western Muslims, reveals that conflicts do not concern the balance between an individual's rights and collective rights, but the alleged ethnic and cultural neutrality of the Western democratic State and of its public culture.<sup>124</sup> All over Europe, the establishment of Islam has caused the nature of the dominant culture to be questioned as it is placed before its own arbitrariness. In France, this happened with the controversy surrounding the Muslim veil, and the resurgence of a debate on the definition of secular society. In Holland, the meaning of permissiveness was also questioned by Islam's position on the topic of homosexuality<sup>125</sup>. It is without any doubt, however, in Great Britain that the earthquake-like Rushdie Affair created the most stable conditions for a critique of public culture. Like the race riots in 1958 and 1981, or Enoch Powell's speech in 1968, the Rushdie affair was a milestone in the evolution of race relations in Great Britain. Until that point, the debate about multiculturalism had been mainly led by members of the majority population; the role of minorities was mainly passive. Before the Rushdie affair, integration had been seen as the adjustment of minorities to dominant society; after the Rushdie affair, it was understood to be a mutual process which would also transform the majority population.<sup>126</sup> Muslim leaders notably stressed their desire that the existing legislation on blasphemy, which had only been applicable regarding blasphemy against the Anglican Church, be extended to incorporate the Muslim minority (and all other minorities). The consequences of such a request are very clear: political adhesion is seen as a bilateral relationship in which the host society must enter into negotiations in order to reach a consensus that will respect the fundamental aspects of the minority's way of life. For British Muslims, in other

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<sup>123</sup> The important distinction that must be added to such an argument is that Rushdie's work is incontestably a work of literature, whereas Oriana Fallaci had no intention of creating anything literary when writing the pamphlet *La Rage et l'Orgueil*, op-cit.

<sup>124</sup> See Kymlicka, Will (2001), *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*, Oxford: Oxford University Press.

<sup>125</sup> In 2000, an imam declared on Dutch tv that homosexuality is forbidden in Islam, starting a huge debate on the compatibility of Islam with core dutch values of tolerance and pluralism.

<sup>126</sup> Parekh, Bhikhu (1998), "Integrating Minorities", in Blackstone, Tessa, Parekh, Bhikhu, and Sanders, Peter (eds.), *Race Relations in Britain, A Developing Agenda*, op. cit. pp.19-21.

words, associating political adhesion to British culture thus constitutes an attack on their moral and cultural integrity.<sup>127</sup> For sure, such an approach is far from being unanimously received within Britain's political and intellectual spheres, but it *is* a subject discussed in the political arena.<sup>128</sup> What is at stake is knowing to what point history and representations of a political community can be transformed in order to make room for minority cultures.

This evolution towards a more pluralistic conception of the dominant culture now appears as a key topic within the debate about British identity launched by the "Multi-Ethnic Britain" report published in 2000 by the Runnymede Commission (better known as the Parekh Report). This group's work has been violently attacked in the press because it denounced British culture as "racist". The thorniest case is connected with the way British history is taught in state schools, and which is still greatly marked by the historiography of the dominant ethnic and cultural group. However, in 1985, the Swann report suggested that a new school culture could emerge which would have been a mixture of all cultures, a kind of British melting pot. The Swann report, however, also stated that ethnic minorities could not be preserved in their current state, and that they should adapt to be in line with the fundamental values of British society.

Islam thus makes it necessary to rethink the principle of equality between cultures and to contextualize this principle, thus bestowing on the principles of tolerance and pluralism a whole other resonance. The multicultural policies that predominate in European societies do not really allow for equality and pluralism to be rethought along the lines of an incorporation of the minority culture's values. In order to create a place for different minority cultures, one solution would be the emergence of a "societal culture", i.e., organized around a shared language to be used in many institutions (both public and private). Such a culture would not imply that religious beliefs, family customs or lifestyles would have to be shared. Since 1965, American society has presented certain elements of this societal culture insofar as the plurality of lifestyles and religious beliefs is no longer considered an obstacle to successful integration within the nation. In such

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<sup>127</sup> Cf. Bhikhu, Parekh (1990), "The Rushdie Affair: Research Agenda for Political Philosophy", *Political Studies*, 38, no. 4, pp. 695-709.

<sup>128</sup> Cf. in particular the conference sponsored by the Commission for Racial Equality: *Law, Blasphemy and the Multi-Faith Society*, CRE, London: Elliot House, 1990.

conditions, we might wonder whether agreement on shared cultural and social values is still possible. The paradox is that for Muslims, the answers tends to be in the affirmative, whereas non-Muslims tend to answer negatively. As we have seen, acknowledgement of Islam's specific characteristics within Western societies does not resemble, by far, a structured program for recognition of a Muslim minority endowed with special rights, but occurs in fragments within two main sectors: organization of worship and family life. The vast majority of Muslims have adapted to this situation as is shown, for example, by the lack of demand that *Shari'a* be applied.

### CHAPTER 3: ISLAMIC DISCOURSES AND THEOLOGICAL JUSTIFICATIONS OF COMPATIBILITY BETWEEN ISLAM AND HUMAN RIGHTS

This chapter analyses and presents the European Muslim discourse on Islam and Human Rights. First it needs to be located within the transnational literature on Islam and Human rights produced in different parts of the Muslim world.

#### State of the Art

The current Islamic literature is either rejectionist, embracive or conciliatory.

A) The rejectionist attitude is based on the vision that Islam and Western Civilization are incompatible. Conveyed mostly by some Wahabi / Salafi<sup>129</sup> and Jihadi<sup>130</sup> groups, as well as radical, political groups such the Hizb al-Tahrir<sup>131</sup>, this is defined, above all, by an exclusive and hierarchical vision of the world, as well as by a taxonomy of religions which places Islam at the top. A characteristic often shared by such groups is the expanded use of the term “*kafir*”. This term was initially used only for polytheists, not for members of competing monotheistic faiths. But in these missionary movements, it has now been extended to include Jews, Christians, and sometimes even non-practicing Muslims.

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<sup>129</sup> The term Salafi literally means ‘of the predecessors’ it represents a strand of thought which calls for a return to the values and ethos of the age of Muhammad and the first three generations of Islam and can be used to talk of two very different movements – originally it referred to the movement of Jamal al-Din Afghani (d. 1897) and Muhammad Abduh (d. 1905) which sought to harmonise traditional Islamic values with modern thought. The term Wahabi refers to the conservative and purist movement of Muhammad ibn Abdul Wahab (d. 1792), which was later to be adopted by the Kingdom of Saudi Arabia, and whose followers also use the term Salafi. Sometimes the terms Salafi and Wahabi are thus used interchangeably and this can be confusing as it may detract from the original use of the term Salafi.

<sup>130</sup> A broad collection of networks that may not even have contact with each other, but are recognisable from their ideological standpoints. These groups come from a conservative Salafi background but are also highly politicised and radical in nature. They believe that the main vehicle for effecting change in the status quo of the Muslim world is military struggle, hence their name.

<sup>131</sup> The Party of Liberation, Established in 1953 in Palestine.

The world is thus divided into Muslims and infidels, and the West, seen as the breeding ground for moral depravity, is always placed in a negative light. Such logic also informs an essay entitled “The Choice Between the Burka and the Bikini,” by Abid Ullah Jan,<sup>132</sup> in which the author contrasts women’s status in Islam as figures of respect to their status in the West, bound to the dictates of fashion and made the constant objects of western sexual depravity.

Another characteristic common to Tablighis<sup>133</sup> and Salafis is their conservative approach and inflexibility regarding the status of women. The rules determining proper dress for women are presented as absolute and not to be questioned. For some Salafis and Tablighis a woman must cover not only her hair but her face and hands as well. The *niqab*, gloves, and the adoption of the long tunic (*jilbab*) fashionable in Saudi Arabia is common among these circles. Tablighi and Salafi men, for their part, often wear tunics that go down to their ankles, (while Salafi tunics may be slightly shorter). The puritanical interpretations regarding women regulates not only dress, but also women’s roles as a wife, as a mother and daughter, and as a participant (or non-participant) in the community.

An additional criterion is the respective opinions of the various movements on political participation and citizenship in western societies. Much of Salafi doctrine, at least in the West, has traditionally espoused isolation and separatism, in contrast to more outward looking modernist and revivalist movements<sup>134</sup>. However one can see in countries like the UK, a shift among even the very conservative strands of thought.<sup>135</sup>

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<sup>132</sup> [www.allaahuakbar.net/women](http://www.allaahuakbar.net/women).

<sup>133</sup> The Tablighi Jamat (the Company of Preachers), also called Foy et pratique in France, is an outreach movement which originates from India and was founded by Muhammad Ilyas (d. 1944). It is closely related to the reformist-traditionalist trend called the Deobandi school which is very common among Muslims from the Indian sub-continent. The Deobandi school was founded by Rashid Gangohi and Qasim Nanautvi who were 19<sup>th</sup> century reformers.

<sup>134</sup> Shaykh Qaradawi from Qatar is such a figure (see below).

<sup>135</sup> For example, Tablighis, who traditionally rejected political involvement, are now beginning to be far more engaged. A Wahabi/Salafi organization recently emphasized the need for interfaith dialogue and civil society engagement. The Hizb al-Tahrir also organized conferences in 2004 emphasizing the local

B) The embracive point of view seems to be the most widespread. A closer look at the huge apologetic literature on Islam and Human Rights shows that there are two major recurrent arguments. First, perhaps as a result of the confusion between the two senses of the HR discourse, some argue the “natural” consistency between Islam and Human Rights. For example, some Muslims claim that historical formulations of have always secured Human Rights in theory. Mawdudi presents Human Rights as an inherent part of the Islamic Tradition<sup>136</sup>. Along the same line, David Little describes the surprising similarities between Islam and Christianity. All religions are based upon what he calls the “Puzzle of the Human Person”<sup>137</sup>. He argues that both display a belief in the fundamental difference between the “ways of Allah/God” and the “ways of the world” and that both posit a “law of the spirit” that is separate from the “laws of the outer, including civil, life.” Therefore, he writes, Islam does have a foundational belief in religious liberty and “implies a strong burden of proof upon political authorities to show cause for compulsion in religious affairs”<sup>138</sup>. Little concludes that the notions underlying human right formulations with respect to freedom of religion and conscience are relevant to cultures outside the West, such as Islam. However since the rights of non Muslims and women were not equal to those of men and Muslims, the level of protection under is not sufficient when judged by the standards set by the Universal Declaration of Human Rights which requires equal rights for all human beings, without distinction on such ground as sex, religion or belief.<sup>139</sup> Second, the same principles are continuously repeated: Divine Law supercedes Human Law, Collective Rights supercede Individual Rights, Equality between individuals is restricted according to gender and religion.

C) On the conciliatory level, liberal interpretations can be found as well. They acknowledge the presence of some tensions between and Human Rights precepts and call for a cross-cultural dialogue. The moral and philosophical foundation of Human Rights

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community and neighbourhood whereas previously its discourse was always about global political issues and the establishment of the *Khilafa*.

<sup>136</sup> Mawdudi, Abul A'la (1976). *Human Rights in Islam*, Leicester: The Islamic Foundation.

<sup>137</sup> Little, David (1988). *Human Rights and the Conflict of Cultures: Western and Islamic Perspectives on religious Liberty*, Columbia, SC, University of South Carolina, p.27.

<sup>138</sup> Little, David, op-cit p 30

<sup>139</sup> An-Naim, Abdullahi, “Islam and Human Rights beyond the Universal Debate”, *ibid* p 96.

as defined by the Universal Declaration of Human Rights can be found in different religious traditions. However, since the theology is not always consistent with this specific conception of HR, reconciliation requires a re-interpretation of some of the precepts of those religions. What is at stake is a self-critical re-evaluation of some aspects of the *Shari‘a* and its underlying principles<sup>140</sup>.

In this chapter we present the European reflection of this trans-national debate.

### **The European Rejectionist Voice**

Perhaps one dimension of this could be observed in Britain in the 1970s and 1980s, when the Union of Muslim Organizations requested that special statutes be applied to Muslim individuals; or, more recently, in 1991, when the Muslim Society of Canada requested certain rules governing personal status to be included in Canadian law. But in general the rejectionist voices have come either from marginal groups or from radical, highly politicized groups, whose objective is to establish an Islamic State—thus making any effort to reflect upon in a non-Muslim context irrelevant. This is the case, for example, of al-Muhajiroun (the Migrants)<sup>141</sup>, a splinter group of the Hizb al-Tahrir located in Great Britain, which explicitly call for the creation of an Islamic State<sup>142</sup>. It should be stressed that the rejectionist voice is not specifically European but global i.e. coming from different parts of the Muslim world and shaped by the Wahabi doctrine.

The most vocal opponents of a rapprochement between Islam and the West, and hence functioning as a rejectionist voice in this study, are the Jihadi movements, the Hizb al-Tahrir, some of the Wahabi movements as well as other traditional or conservative

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<sup>140</sup> See An-Na'im, Abdullahi (1990). *Toward an Islamic Reformation, Civil Liberties, Human Rights, and International Law*, Syracuse: Syracuse University Press,

Al-Ashmawwy, Muhammad (1989), *L'islamisme contre l'islam*, Paris: La Découverte.

Mahmasani, Subhi, "Adaptation of Islamic Jurisprudence to Modern Special needs" in John J. Donohue and John L. Esposito (eds) (1982), *Islam in Transition: Muslim Perspectives*, Oxford: Oxford University Press, pp 183.

<sup>141</sup> At the time of writing there were reports that al-Muhajiroun had dissolved.

<sup>142</sup> The Hizb al-Tahrir and al-Muhajiroun differ about where that state should be located, for the former the Islamic state is likely to appear in a current Muslim majority country, whereas for the latter, it could be anywhere and Muslims, even in Europe, should work towards establishing an Islamic state.



movements. Of course there are some others who defy categorisation. The Jihadi movements mainly arose out of the prisons in Egypt during the 60s and 70s when there was a crack-down on Islamists activities and the use of physical and psychological torture was employed to break to ranks of groups such as the Muslim Brotherhood. A trend appeared which labelled such state led aggression by other Muslims and supporters of the state (police, army etc.) as *kufir* (and then by extension the person committing such acts became a *kafir* (infidel)), furthermore, it was seen that the best way to defeat this aggression was to violently overthrow the rulers who were not implementing the law of Islam in any case. Once such views took root, a radical and extreme reaction was refluxed which called for an armed struggle to establish Islamic law. The Jihadi movements have been criticized by many Muslim scholars, especially other Wahabi scholars who often took on pro-Government stances and preached against revolutionary tendencies.

The Hizb al-Tahrir was established by a Palestinian Judge, Taqi al-Din an-Nabhani in 1953 and since its inception has called for a restoration of the Islamic polity based on the model of the *Khilafa*. It considers that Islam has a precisely laid out systems of politics, governance, economics, etc. and that there is no need to borrow or to learn from western models like democracy. The party does not advocate using violence to establish political authority as its believes that the *hijrah* of the Prophet and the subsequent establishment of Madinah as a city state, was in fact a bloodless coup. It has always been a radical and highly vocal group and very overtly political in its message. The Party has always remained quite small in its following and influence and has been often mocked and criticized by other Muslim groups for its controversial stance on issues.

Among such groups the reasons for opposition of the West range from the thesis that values such as democracy constitutes a form of polytheism (*shirk*) (by interfering with God's authority to rule), as God, not the consensus of people, is the ultimate source of legalisation and sovereignty (*hakimiyah*) rests with God, to critiques that tap into the debate between traditionalism and modernity and highlight that Islam has its own paradigms for social construction based on consultation (*shura*) and does not need to

borrow from a Western philosophical model, that to borrow concepts such as Human Rights or democracy from the West would be to buy into the philosophy of modernism and secularism. The Hizb al-Tahrir and the Jihadis call for a complete abstention from engagement with secular or non-Islamic political systems, even voting. In the 1990's, the charismatic leader of the UK branch of the Hizb al-Tahrir, Omar Bakri Mohammed, broke away and formed al-Muhajiroun. This group has had a closer alliance with Jihadi voices such as Abu Hamza al-Masri, and believes that Britain should become an Islamic state. Although we have looked at some particularly UK based examples, such voices are indicative of the broader collection of rejectionist voices across Europe, for example followers of the Armed Islamic Group (GIA) in France. In all such cases one can notice that the phenomenon is not particular to Europe, but is symptomatic of a broader trend present in the Muslim world. We have also stressed previously that such groups are actually very small in size and often have little support among European Muslims – though they may be more vocal during a tense political climate such as the 'war on terror'.

### **The European Apologetic Voices**

Part of the Islamic argumentation on Human Rights being developed by Muslims in Europe is apologetic and in reaction to arguments put forward by non-Muslims in a public (and increasingly hostile) discourse on Islam. "John"'s provocative questioning of Islamonline.net, one of the most popular websites of Western Muslims, is a paradigmatic example of the power relations underlying Human Rights debates in Islam<sup>143</sup>. Sending his question in the section for fatwa requests, the petitioner identified as John - in all likelihood a non-Muslim – wants to know the Islamic position on Human Rights. In the answer, the Islamonline team invoke the concept of human rights as many as five times, as in "Prophet Muhammad, peace and blessings be upon him, was the main enforcer of human rights".

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<sup>143</sup> See

<http://www.islamonline.net/fatwa/english/FatwaDisplay.asp?hFatwaID=81396>><http://www.islamonline.net/fatwa/english/FatwaDisplay.asp?hFatwaID=81396> (April 2004).

An author often cited by European Muslims in the discussions on Islam and Human Rights is the aforementioned Mawdudi, whose relevant book, *Human Rights in Islam*, has been published by the Islamic Foundation in Leicester. In this text Maududi argues the case for his stance that Islam and Human Rights are compatible, indeed, he emphasises that long before the Magna Carta, Islam had established such notions:

It is very loudly and vociferously claimed that the world got the concept of basic human rights from the Magna Carta of Britain; though the Magna Carta itself came into existence six hundred years after the advent of Islam. But the truth of the matter is that until the seventeenth century no one even knew that the Magna Carta contained the principles of Trial by Jury; Habeas Corpus, and the Control of Parliament on the Right of Taxation.<sup>144</sup>

Maududi, who was engrossed in the post-colonial context of the Indian sub-continent, also criticises the Western approach to HR for not having enough power to actually implement HR principles and describes that the UN can talk about HR, but not do much beyond this. In general Maududi is quite dismissive of the Western practise of Human Rights, while being fully embracive of Human Rights *per se*. For him and most others who argue this position there is little need for a dialogical approach as the Islamic texts contain the solutions and are capable of implementing true HR principles.

The Islamic Human Rights Commission (IHRC)<sup>145</sup>, set up in London in 1997, is a research and advocacy organisation which self-purportedly campaigns for the defence of the oppressed regardless of their religious affiliation, according to the Qur'anic injunction. In practice however, the Commission focuses mainly on "Muslim" issues such as Palestine, Iraq, and Islamophobia in Europe<sup>146</sup>. Despite not a formal goal of the organisation, the Islamic Human Rights Commission has also been involved in the articulation of a discourse on Islam and Human Rights. In 2003 the IHRC co-organised a

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<sup>144</sup> Abul A'la Maududi, *Human Rights in Islam*, Leicester, Islamic Foundation, 1980.

<sup>145</sup> [www.ihrc.org](http://www.ihrc.org). The current director, Massoud Shadjareh, used to work with the Muslim Parliament.

<sup>146</sup> See for example the latest issue of the IHRC Newsletter, dated October 2003, at <http://server792.dnslive.net/~ihrc/file/IHRC-Oct-2003-www.pdf>.

one-day conference on “Islamic and Western Perceptions of Human Rights” in London. Two of its representative, Arzu Merali, delivered a paper entitled “To Liberate or not to Liberate? Universalism, Islam and Human Rights”<sup>147</sup>, in which he outlines his vision on the issue. For Merali, the lack of representation of the different cultures and creeds among the drafters of the Universal Declaration of Human Rights makes the document strongly biased and Eurocentric. Merali also sees the West as highly selective and inconsistent in its application of human rights. He argues that Western human rights discourses are at “the vanguard of globalization and capitalism”, seeing it as an “imperialistic” rather than “universal” project. Merali furthermore criticizes the transformation of human rights into a “secular religion”, where human rights activism replaces “pious action and moral rigour”. Merali argues that the fundamental difference between “Islamic rights” and “Human Rights” lies in the former’s divine nature. He opposes to Western liberalism the Islamic balance between the individual and society. Another writer for the Islamic Human Rights Commission, the Barrister Osama Daneshyar, has looked at the concepts of fair and free trial, privacy and free expression in Islamic *Shari‘a* law and the ECHR<sup>148</sup>. Daneshyar attributes the lack of human rights in the Arab world to its governments’ failure to uphold the constitutional guarantees enshrined in *Shari‘a* law in favour of secularist policies which lack popular support.

The American-led war in Iraq, conducted in the name of “freedom” and “human rights”, has complicated matters further. The abuse of prisoners of war in Iraqi prisons has led some Muslims to question the universality of human rights<sup>149</sup>. Interestingly, it has also pushed some influential opinion-leaders, such as the website ISLAMONLINE, to explicitly encourage Muslims to “get active with Human Rights organisations”<sup>150</sup>. ISLAMONLINE is based in Doha, Qatar, and has been set up to disseminate the “middle-ground” Islamic ideology of the exiled Egyptian scholar Yusuf Qaradawi, who acts as the website’s stamp of authenticity. It targets both Muslim and non-Muslim viewers. Typically, the website defines its goals as the following:

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<sup>147</sup> Available online at [www.ihrc.org](http://www.ihrc.org).

<sup>148</sup> Osama Daneshyar, « Fundamental Human Rights in Islamic Sharia Law », available at [www.ihrc.org](http://www.ihrc.org).

<sup>149</sup> See for example “POWs Abuse: Are Human Rights Truly Universal?” – Live Dialogue with South African Muslim activist Ahmed Motala at [Islamonline.net](http://Islamonline.net), 11 May 2004.

<sup>150</sup> [http://www.islamonline.net/English/In\\_Depth/AgainstAbuse/2004/Article/article05.shtml](http://www.islamonline.net/English/In_Depth/AgainstAbuse/2004/Article/article05.shtml)

To work for the good of humanity, as Islam teaches us. To work to uplift the Islamic nation specifically and humanity in general. To support the principles of freedom, justice, democracy, and human rights. To reinforce values and morals on the individual, family, and community levels. To expand the circle of introducing Islam; present its wholeness and the way its system and laws complement each other; to affirm its balance, fairness and applicability in all places and times; and present tolerance and the humanity of its laws. To strengthen the ties of unity and affiliation between the members of the Islamic community and support informational and cultural exchange. To expand awareness of important events in the Arab, Islamic and larger worlds. To build confidence and a spirit of hope among Muslims<sup>151</sup>.

### **The European Conciliatory Voices**

There have been some more or less successful attempts to reconcile between Islam and Human Rights discourses among Muslims in Europe. The transnational European Council for Fatwa and Research, founded in 1997 in London at the initiative of the Federation of Islamic Organisations in Europe (FIOE), is a case in hand<sup>152</sup>. Composed of over thirty traditional Islamic scholars (*ulama*) and led by Yusuf Qaradawi, the ECFR has shown some willingness to incorporate European social norms into their consultative rulings (*fatwas*). If collectively the members persist in considering apostasy in an Islamic state as a crime “similar to modern-day treason”<sup>153</sup>, individually a number of member scholars hold notably different positions. The ECFR has endeavoured to bridge the gap between Human Rights ideals and Islamic legal discourses in a number of issues, in particularly regarding the status of women:

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<sup>151</sup> <http://www.islamonline.net/english/aboutus.shtml>.

<sup>152</sup> See Caeiro, Alexandre (2005), “Islamic Normativity in the West: A Case Study of the European Council for Fatwa and Research” in van Bruinessen, M and Allievi, S: *Producing Islamic Knowledge: Transmission and Dissemination in Western Europe*. Routledge, forthcoming.

<sup>153</sup> ECFR (n.d.), *First Collection of Fatwas*, Islamic Inc, Cairo, p. 38.

- Man and woman are, according to the ECFR, "partners in critical social duties and obligations"<sup>154</sup>. The famous Qur'anic verse (4:34) on the divine preference (*qiwama*) of man in relation to woman is interpreted by the ECFR as meaning "'Allah has given each preference over the other" and not that Allah gave preference to men over women"<sup>155</sup>.
- The ECFR states that "the Muslim wife is under no obligation to serve her husband himself, unless she did so as a charity from her good self"<sup>156</sup>.
- It declares that "the husband has no right to force his wife to place her income in a joint pot or account"<sup>157</sup>.
- It argues that "it is unlawful for a Muslim husband to prevent his wife from visiting her Christian parents"<sup>158</sup>.

These issues, while undoubtedly very down to earth, are not consensual: in the fatwa literature circulating in the spaces of the Muslim Diaspora: there are opposite answers that legitimate the oppressed status of women in Islam. One case in point is the imam of Venissieux who was expelled by the French Minister of Interior in April 2004 because he had had spoken in support of polygamy and the stoning of adultery women (The administrative court of Lyon, however, eventually stayed the expulsion, on the grounds that it had no basis in fact but rather on "general statements resting on subjective opinions).

Interestingly, Muslim groups in Europe have also started to champion Human Rights. The European Council for Fatwa and Research invoked the Human Rights declarations in a recent statement of its position on the *hijab* controversy in France, urging restraint to the French government intent on banning the Muslim headscarf in public schools from September 2004 onwards<sup>159</sup>.

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<sup>154</sup> *First Collection*, op cit., p. 77.

<sup>155</sup> Resolution 6/4, *Equality between the husband and wife in a marital relationship*, 4<sup>th</sup> session, Dublin 1999.

<sup>156</sup> *First Collection*, op cit., p.73.

<sup>157</sup> *Idem*, p. 81.

<sup>158</sup> *Idem*, p. 89.

<sup>159</sup> For a French translation of this statement, see [www.uoif-online.com](http://www.uoif-online.com).

There are other intellectual voices present in magazines, think tanks such as the *Forum citoyens de culture musulmane* in France or the London-based *Islam 21 Project*, as well as a number of Muslim associations actively participating in these discussions. The Lyon-based Saïda Kada, president of *Femmes françaises et musulmanes engagées*, implicitly assumes the primacy of HR in her activities<sup>160</sup>. A similar stance is taken by *Les amis de la Médina*, an association formed around the Muslim publication of the same name headed by Hakim El Ghissassi. El Ghissassi has explicitly criticized imams in France for failing to take into consideration, in their interpretation of the Qur'an, "the developments brought about in the field of Human Rights, in particular equality and liberty of conscience, as well as the new forms of organization of society and family" induced by "secularization and the differentiation of the political and the religious in the context of the primacy of positive law"<sup>161</sup>. A member of the Conseil français du culte musulman, anthropologist Dounia Bouzar, has also written a number of books destined to French youth, purportedly to prove that "Islam and Human Rights are not contradictory, on the contrary"<sup>162</sup>.

In their drive towards State recognition, Muslim organisations in Europe have often been urged to reconcile Islam and human rights discourses as a precondition to their participation in the process of institutionalisation of the Islamic religion. In France, the Minister of the Interior Jean-Pierre Chevènement asked Muslim participants in the consultative body (*Istichara*) to sign a declaration on the rights and duties of the Muslim worship entitled "Principes et fondements juridiques régissant les rapports entre pouvoirs publics et le culte musulman de France". The document, unanimously adopted in January 2000 by all Muslim players implicated in the institutionalisation of Islam in France, explicitly seeks guarantees on the compatibility between Islamic norms and human rights standards, invoking various human rights declarations and postulating an unconditional acceptance of the freedoms of religion and thought as well as of gender equality.

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<sup>160</sup> Saïda Kada, *Le voile islamique: un droit ou un devoir?* Paper delivered at the conference "Droits de l'Homme et la femme musulmane", Geneva, 2 April 2004.

<sup>161</sup> See El Ghissassi, "Pourquoi ces imams nous agressent?", 3 May 2004, in [www.sezame.info](http://www.sezame.info).

<sup>162</sup> Dounia Bouzar, *Etre musulman aujourd'hui*, De La Martinière Jeunesse, Paris, p. 11.

Already in 1995, the *Charte du culte musulman en France*, authored by Dalil Boubakeur (recteur of the Grande Mosquée de Paris, with links to Algeria) and solemnly presented to the Ministry of the Interior in January, “suggests a structuration according to the spirit and letter of Islam...in perfect compatibility with the democratic rules which informed the genesis of the Republican laws and the concepts of human rights”<sup>163</sup>. Likewise in Germany, the drafters of the Islamic Charta have explicitly argued that “there is no contradiction between the divine rights of the individual, anchored in the Quran, and the core right as embodied in Western human rights declarations. None of these declarations however enter into the specific details of how to harmonize Islamic norms with human rights standards on freedom of religion, gender-equality, etc.

The International Forum for Islamic Dialogue (IFID) is a global networking for Muslim intellectuals and activists. It is present in the cyberspace through its website [www.islam21.net](http://www.islam21.net), and it can be considered an example of a liberal approach to Islam and Human Rights issues. Founded in 1994 and currently headed by Najah Kadhim, a lecturer in microelectronics in the UK, the IFID is a locus for the production of an Islamic discourse on human rights. Based in London, it is hailed by some as a voice representative of British Muslim intellectuals. Its mission is “to establish a humane, democratic, Islamic thought by maintaining and developing a dynamic dialogue”. Its ethos is distinctively modernist. Mohamed Arkoun, the celebrated Franco-Algerian thinker, has written for the website. One of the most regular contributors is Parvez Manzoor, one of the Muslim personalities that we have referred to (see below). Manzoor has posted a number of contributions at [www.islam21.net](http://www.islam21.net), including his famous paper entitled *Islam and Human Rights: A Modernist Guide*. Since 9/11, the main focus of the organization has switched from the articulation of a modern Islam to addressing violence committed in its name. The IFID also aims at addressing the Muslim youth through the publication of the quarterly *Islam 21 Youth*.

Women’s issues are important for the Islam 21 project and a number of authors have sought to address gender questions. Moqtedar Khan argues that “American and European

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<sup>163</sup> Boubakeur, Dalil (1995), *Charte du culte musulman en France*, Editions du Rocher, Monaco, p. 87.



Muslims must help initiate an awakening among Muslims to the overwhelming domination of men in Islamic legal studies. There is no doubt in my mind that when men alone interpret the Quran and Hadith and Islamic juristic traditions, they do it from a masculine perspective. It is important that we produce more and more women scholars of Islam who can eventually understand and advance their own understanding of Islamic sources”<sup>164</sup>. A female writer, Dr Juman Kubba, has attempted to correct common understandings of polygamy in Islamic Law:

“The prevalent notion that Islam allows a man to have four wives is misleading as follows: Islam did not introduce polygamy. Polygamy was practiced before Islam. Islam corrected the practice and modified it to make it less harmful to society while maintaining some of its benefits. In fact Islam required the well being of the women involved as a condition for the legitimacy of such multiple marriage as is mentioned in the Quran. This is by no means a defense to men who abuse this practice for the most part nor is it an encouragement of this practice as in this day and age it seems rather awkward and nearly impossible to do due the complexity and high cost of modern life. Polygamy was not considered awkward thousands of years ago but for us in today's world it is unacceptable by most Muslim women and it is outlawed in many parts of the world. Moreover, some Muslim countries as well as individual scholars have introduced measures that a woman can protect herself from polygamy at the time the marriage contract is performed even in the Muslim countries where it is legal. Thus the ill effects of this practice are acknowledged even by Muslims”<sup>165</sup>.

The conference organised by the Islamic European Conference and the World Islamic Call Society at the United Nations in Geneva on 2<sup>nd</sup> April 2004, entitled *Droits de l'Homme et la femme musulmane*, was instructive of the discourses on Islam and human rights being developed in Europe. Many speakers, both male and female, criticised the

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<sup>164</sup> <http://www.islam21.net/pages/keyissues/key2-11.htm>.

<sup>165</sup> <http://www.islam21.net/pages/keyissues/key2-12.htm>

male bias of religious interpretation and the patriarchal nature of Muslim societies, pointing to the lack of “proper” Islamic knowledge as a major problem. The acceptance of the individualistic ethos that is, according to our hypothesis, shaping Muslim views of *Shari‘a*, came across in the question of the Muslim headscarf: there seems to be a widespread acceptance by Muslims of the necessity of individual choice regarding the wearing of the *hijab*. The Norwegian convert Lena Larsen strongly argued for taking Human Rights as “traffic rules” – religious affiliation should not, according to her, be an issue at all: like traffic regulations, Human Rights are a necessary tool for peace and living together, and no religion is intrinsically opposed to it. Mohamed Al Midani (Syria – France) presented a paper entitled “La compatibilité du droit musulman avec la Déclaration universelle des droits de l’homme de 1948”. Drawing on the three original reservations of the Saudi delegation to the Declaration (Art. 13 on the freedom of circulation – non-Muslims are not allowed to penetrate into the Hijaz; Art. 16 on marriage regardless of religion – Muslim women cannot marry non-Muslim men); Art. 18 on changing religion – apostasy is considered a crime), Midani mobilised resources from different schools of *fiqh* (Muslim law) as well as modern arguments on freedom of religion to solve the existing difficulties. According to him, the Shafi‘ite and Hanafite schools of legal thought were not as vehemently opposed to the presence of non-Muslims in the region as the Hanbalite. He also introduced a distinction between the (modern) private act of conversion and its public and threatening display (of the old times). He did not however tackle the difficulties raised by article 16.

Not all positions articulated during the conference were embracive or conciliatory though: Al Sayed Al Shahed (Egypt - Austria) argued that since HR declarations lacked any reference to “duties” and placed the “individual” above the “community”, they could not be acceptable in Islam. A number of speakers pointed out a perceived contradiction between Western theoretical support for Human Rights and its historical record (abroad and also, since 9/11, at home) and emphasised that Western societies remain highly patriarchal (wage differentials; marital violence; low female political representation). Some argued that the “dignity” of women in Islam is more important than “equality” and others expressed concern that human rights could be a “Western agenda”. There was

some discussion on the prohibition of Muslim women to marry non-Muslims, which involved some quick quotations and counter quotations of Qur'anic verses. Fawzia Ashmawi argued that this ruling is not truly Islamic and should not be applicable today (ie, Muslim women should be allowed to marry non-Muslims); others vocally disagreed. Lena Larsen suggested that in any case the Islamic orthodoxy, which is opposed to such marriages, is not in breach of Human Rights, since it is only when a State imposes sanctions against inter-marriage that it becomes a violation of Human Rights. Many agreed that Muslims in Europe had to go beyond the level of official normative discourse ("it's *haram*", forbidden) and face the reality (where such marriages have become commonplace). The emerging timid debate on the legitimacy of mixed marriages for Muslim women seems to be a European (or Western) specificity.

It is also noteworthy that some of the major voices in the debate on Islam and Human Rights in Europe are transnational Muslim intellectuals from outside Europe speaking to multiple audiences (both Muslim and non-Muslim). The 2004 Nobel Prize winner Shirin Ebadi from Iran is just one example of the impact of Muslims abroad in European debates about Islam and modernity. Another example is Jamal al Banna, the brother of Hassan al Banna, the Egyptian founder of the Muslim Brotherhood. Born in 1920, Jamal al Banna is a prolific writer who distinguishes himself from the majority of Islamic scholars in Egypt by his modernist positions. Well-known in Europe among Arabic-speakers, Jamal al Banna has been for a number of years one of the few mainstream Muslim scholars to argue that the Muslim headscarf, or *hijab*, is not an Islamic obligation. Undoubtedly (at least partially) because of his opinions on this question, Jamal al Banna was invited to Paris to give a talk at a conference held in the National Assembly on May 12<sup>th</sup>, 2004. During his visit he also gave a number of lectures for Muslim publics in the capital and in Marseilles on topics such as "Freedom of Belief in Islam" and "Towards an Islamic Enlightenment". Among his recent publications (in Arabic) are *The Methodology of Islam in the affirmation of Human Rights* (1999), *Diversity in a Muslim Society* (2001) and *The Hijab* (2003). Most of the conciliatory voices come actually from American Muslims who are engaged in a rethinking of the

Islamic Tradition such as Abdulahhi An-Naim, Amina Wadud or Khaled Abou El Fadl<sup>166</sup>.

### **Interviews and Literature Review**

We selected a small number of Muslim intellectuals, scholars and activists based in Europe for the interviews and literature survey for this project. These individuals were chosen on the basis of their involvement, in different ways and at different levels, with the HR discourse as their geographical distribution. A brief introduction to the individuals follows below, which is in turn followed by an analytical framework and the analysis of the findings. A sample of the Questionnaire used has been included in the Appendix.

**Abdulwahhab El-Affendi** is a Senior Research Fellow and Coordinator of the Project on Democracy in the Muslim World at the Centre for the Study of Democracy, University of Westminster, London. His works include: *Rethinking Islam and Modernity: Essays in Honour of Fathi Osman*, the Islamic Foundation, Leicester, 2001. He is a regular contributor to the Islam21 website and dialogue forums.

**Rachid Ghannouchi** is a scholar of both Islamic and western disciplines originally from Tunisia. He is leader of the Nahda movement and is also a member of the European Council for Fatwa and Research (ECFR). His publications include, *Al-Hurriyyat Al-'Ammah fid-Dawla Al-Islamiyya (1993) (Arabic: General Freedoms in the Islamic State)*. Of the different scholars we looked at in this project, Ghannouchi is the foremost in terms of combining traditional Islamic scholarship with the Western disciplines of learning, being both a senior 'Alim and a philosophy teacher at the same time. Ghannouchi's thought have undergone many transitions over the years; he began his activist life with the Jama'at Tabligh, was later inspired by the Muslim Brotherhood and then individual thinkers such as Malik Bennabi. Inspired by what he experienced of women's active

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<sup>166</sup> For a description of the American Muslim thinking on this topic, see Cesari, Jocelyne (2004), *L'islam a l'epreuve de l'Occident*, Paris: La Decouverte.

involvement in political and social life in The Sudan, Ghannouchi was instrumental in encouraging a legitimate Islamic space for the public participation of women in the Arab world at a time when this was seen as highly controversial. His commitment to the democratic process including pluralism and the sharing and alternation of power, and that the democratic process should exclude no-one not even communists shows that Ghannouchi's grasp of democracy and civil society was far beyond other Islamist leaders of his time.

**Murad Hofmann**, now retired, is a Lawyer by education and worked for 33 years in German Foreign Service, during which time he served as Ambassador to Algeria and Morocco. He regularly speaks to Muslim and non-Muslim audiences on Islam in the contemporary world. He has written a number of titles on Islam including, "Human Rights and Islam"<sup>167</sup>. Murad Hofmann probably sits somewhere between the embracive and conciliatory approaches and while he emphasises the dignity of man, also feels that "there only is a linguistic stumbling block between human rights and Islam: the misconception that man was the very seat of the rights he enjoys instead of being the privileged recipient of God given rights"<sup>168</sup>. And also that "Islam is a complementary human rights system coming quite close to the Western one"<sup>169</sup>.

**Maleiha Malik** has been lecturer in Law at the School of Law, King's College, London, since 1993. Her research interests include Tort, Discrimination Law and Jurisprudence. She regularly publishes on minority rights and racially aggravated crime. *Faith and Law*, Hart Publications, 2000, features among her recent publications.

**Parvez Manzoor** is a linguist and cultural critic. He resides in Sweden and speaks and writes extensively on Islam and modernity. He is consulting editor to the *Muslim World Book Review* and most of his writings can be found on his website: [www.pmanzoor.info](http://www.pmanzoor.info).

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<sup>167</sup> *Encounters*, 5:2, 1999, pp.221-33

<sup>168</sup> Interview with Murad Hofmann, June 2004.

<sup>169</sup> *Ibid.*

**Tareq Oubrou** is of Moroccan origin, he came to France at the age of 19 in order to pursue his academic studies in natural sciences. Soon after his arrival he started officiating as imam, in Nantes, Limoges, Pau and now Bordeaux. He coined the term “chari’a de minorité” in a famous article published in *Islam de France*<sup>170</sup>. More recently, he co-authored a lively debate with a secular Muslim intellectual, Leila Babès, on freedom, women and Islam<sup>171</sup>. Tareq Oubrou illustrates the model of the self-taught imam, trained in natural sciences (biology), who combines mastery of classical Islamic sciences with a strong grasp of French history and sociology. In France he is one of the few Muslim thinkers engaging with the Texts and explicitly trying to fulfill a double-legality: shariatic and French/European. Influenced by the discipline of Western hermeneutics, Oubrou’s interpretation of the Islamic texts is based on the principle that a text is “not a place of arrival but one of departure”.

**Tariq Ramadan** is a prominent scholar and activist based in Switzerland. Ramadan was recently rejected a visa to enter the US and teach in Notre Dame University, but prior to this used to teach philosophy and Islamic studies at the Colleges of Geneva and University of Fribourg, Switzerland. He is author of a number of books including, *Western Muslims and the Future of Islam*, Oxford, 2004. Tariq Ramadan is probably the best known of our selection of scholars and has recently made a controversial call for a moratorium on some of the traditional Islamic punishments and has asked for the scholars to consider three questions: What is in the texts? How does the contemporary context affect how we read the texts? Is the policy implementable? While modernist interpreters of *Shari’a* have been known for their dismissal of such traditions, this is a radical step for scholar coming from the ‘centre’, and therefore marks him out to be a very interest personality to study in this context. *Time Magazine* described him as the Muslim Martin Luther.

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<sup>170</sup> Oubrou, T. (1998), « Introduction théorique à la chari’a de minorité », in *Islam de France*, N° 2, 1998.

<sup>171</sup> Babès, L. and Oubrou, T. (2002), *Loi d’Allah, loi des hommes – liberté, égalité et femmes en islam*. Paris, Albin Michel.

## Framework for Analysis

Most of the Muslim intellectuals and scholars surveyed here illustrate a conciliatory approach to HR. For the sake of the analysis and in order to categorise the different approaches, we feel that the conciliatory voice contains three distinct dimensions:

- 1) The acknowledgement of some form of tension between the existing Islamic tradition and historical application of *Shari'a* and the western conception of HR.
- 2) The recognition of the European context and thus implicitly values such as pluralism, secularism and democracy.
- 3) The acknowledgement and commitment to work on reconciliation between the Islamic tradition and the Western conception of HR which involves a critical-reflective approach to the Islamic tradition and emphasise the need for *ijtihad*<sup>172</sup> which is located in a European context in order to bring HR discourse and Islamic practice closer.

## Analysis:

### Acknowledging the Tension between HR and Islamic Tradition

While Affendi accepts that theoretically it is a good exercise to think of an approach that equalises chances for people, he views attempts at universalising the HR discourse with some degree of scepticism as “no abstract human being exists, there is no human being who approaches the universe without ideas, values, culture, etc.”<sup>173</sup> He further adds concern that such universalisation can be a hegemonic process or that double standards can be involved. “When the American constitution was promulgated it was declared that all men are created equal, but the constitution and law at that time did accept slavery.

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<sup>172</sup> A reason based interpretation and contextualisation of the Islamic texts to modern situations.

<sup>173</sup> *ibid*

‘Men’ here meant whites not blacks.”<sup>174</sup> Having said this, he also acknowledges that the logic of the US constitution meant that the view of ‘man’ would eventually become broader. Affendi readily admits that as the current context stands, there are tensions between HR and Islamic tradition, listing points such as sexuality, apostasy, women’s rights, and corporal punishments. However, Hofmann is critical of some Western views of HR among Muslim nations “as if human rights, as a matter of course, were protected in the Occident and, as a matter of course, violated in the Orient.”<sup>175</sup> He stresses that “people must realize that human rights violations happening here and there in the Muslim world – for example, police brutality and torture, politically motivated rape, fraudulent elections, administrative corruption, etc. – are neither Islamically motivated nor legitimized by Islam. On the contrary, it is mostly active Muslims who are imprisoned in some countries the latter Muslim by name only.”<sup>176</sup> In doing so he is defensive of the Islamic tradition, that “Islam for 1,400 years already has helped to protect what is to be protected by the core of human rights...”<sup>177</sup>

He is also keen to show that where there are some tension points between HR and Islamic tradition, they can usually be overcome by contemporary *ijtihad*. “*La ikraha fi d-Din* (there is no compulsion in religion) should not only be respected between Muslims and non-Muslims but, so much more so, between Muslim brothers and sisters. In connection with apostasy, former Muslims were persecuted only if they also committed high treason in the sense of...actively working against Islam or even fighting on the other side. Capital punishment for high treason, especially during war, is known worldwide.”<sup>178</sup> He also mentions another point of debate as being the notions of *dhimmi* (protected minority) and citizenship. “However, nowadays, such *dhimmi* consider themselves discriminated against as long as they are not granted full citizenship. Well, to do so should not pose a problem for those Muslim States which in every other respect organized themselves on non-Islamic, national lines, provided that the *dhimmi* accept the responsibilities attached to citizenship, including military drafting. Crucial is the realization that the Qur’anic

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<sup>174</sup> *ibid*

<sup>175</sup> *ibid.*

<sup>176</sup> *ibid.*

<sup>177</sup> *ibid.*

<sup>178</sup> *ibid.*



status of *dhimmi* constitutes the minimum of protection to be accorded, not the maximum that may be granted.”<sup>179</sup> In terms of debates around the status of women Hofmann adopts a progressive reading of a classical stance saying, “And *ar-rijal qawwamuna ‘ala an-nisa*<sup>180</sup> (usually translated as: ‘men are the protectors and maintainers of women’) is, today, understood only to say: ‘Men shall take full care of women’ – a far cry from earlier interpretations (which indicated a degree of superiority of men). Men are no longer seen standing above women but protectively *in front* of them, in consideration of men’s normally greater physical and financial potential.”<sup>181</sup>

In his book *al-Hurriyat al-‘Ammah fid-Dawlah al-Islamiyah* (Public Freedoms in the Islamic State), Ghannouchi is critical of the concept of freedom in the West, recognising that the struggle for liberty has “the lack of guarantees that see the equitable and universal implementation of these rights...it is true that an individual has the right to think, speak or travel the way he wishes, but how can he accomplish all of this if culture, wealth and power are monopolized by a limited group of citizens...”<sup>182</sup> This was referred to by Ghannouchi as ‘negative freedom’. He explained that such freedom is subject to influence which can be subtle and disguised, so that a person may not even be aware of it. For example the influence of the market in manipulating the minds and choice of the public. He further sought to establish that not only is there no contradiction between Islam and freedom and Islam and HR, but *Aqidah* (Islamic creed) provides the foundation for both concepts. Ghannouchi, along with other prominent Islamic thinkers believes that at one level freedom is not something that man is born with, but rather something he seeks to obtain in life, through revelation. Freedom is thus, something acquired through struggle and sacrifice in the way of God.

Malik, like Affendi lists some problematic areas such as sexual orientation, freedom of thought, gender equality, and also points out that “perhaps some interpretations of Islamic values find a great deal of compatibility between women’s rights in Islam and concepts of

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<sup>179</sup> *ibid.*

<sup>180</sup> Qur’an 4:34

<sup>181</sup> *ibid.*

<sup>182</sup> Tamimi, Azzam, *Rachid Ghannouchi: A Democrat Within Islamism*, OUP, 2001. p. 73.

freedom and autonomy, but modern conditions suggest that there is a conflict and certainly the actual treatment of women in the Muslim world, suggests that its an area that requires more work.”<sup>183</sup>

Parvez Manzoor represents perhaps the most critical of the conciliatory voices surveyed here. His criticism are based primarily on the philosophical underpinnings of both the HR debate and the Islamic tradition and he often expresses misgivings for the lack of though that Muslims have employed in so readily taking on board notions such as ‘the state’. “The notions of state and citizen, which underpin the modern discourse of Human Rights, are problematic in that they both are conspicuously absent in the classical civilization of Islam. Despite the intimate connection that has always existed between the Islamic doctrine and the exercise of political power, Muslim tradition never developed any concept of the state - a territorial entity which is 'sovereign' within its boundaries and whose authority is binding both on the ruler and the ruled.”<sup>184</sup> While this may seem like quite a bold and sweeping critique, of contemporary Muslim thought, one cannot deny its importance if held to be true. Manzoor further comments, “Without resolving the question of the nature and constitution of Muslim public order today, it is futile to participate in the HR discourse and make any worthwhile contribution.”<sup>185</sup> He is very critical of the Islamist position and the pursuit of the state, “Much confusion was also spread by uninformed and unsuspecting ideologues who coined blatantly self-contradictory neologisms like 'The Islamic State' and made them part of the indigenous discourse. Believing that 'state' is simply a modern euphemism for political order, they were led to equate faith with coercion, and ended up by conferring legitimacy to totalitarian structures they called Islamic!”<sup>186</sup>

When one looks at Manzoor views on the HR discourse, at first its seems that the Islam and HR discourse are irreconcilable, “in actual fact, neither the civil liberties of the citizen nor the sacred dignity of the believer have been accorded any respect beyond the

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<sup>183</sup> ibid

<sup>184</sup> <http://www.islam21.net/pages/keyissues/key4-6.htm>

<sup>185</sup> ibid.

<sup>186</sup> ibid.

perfunctory lip service, a sad state of affairs which makes the culture of human rights a veritable oddity in the Muslim world.”<sup>187</sup> Furthermore Manzoor emphasises the cultural and historical specificity of the HR discourse, “The ruling idea of the modern state, and that of HR, it needs reminding, arose out of the European experience that had been conditioned by the institutionalisation of the spiritual and the temporal as the realms of the pope and the prince. The ideology and morality of the HR is therefore intelligible and meaningful only within this dualistic framework. The state as a secular institution rose in response to confessional wars which plagued European polities during the seventeenth century. With time, even the believers came to prefer the non-confessional state to the supremacy of the rival church that made religious affiliation a benchmark of political loyalty.”<sup>188</sup>

In light of the specificity of HR discourse, he seems to be highly critical of the attempts at universalising it. “To claim universality for a manifestly contingent and expedient charter of HR, then, is either to lack all philosophical sophistication or to possess exceptional political guile. For the theory of universal human rights can only be reconciled with the notion of historical development, if history has already come to an end and civil morality has reached its finality in the ethos of the modern civilisation.”<sup>189</sup> He is also critical of the final outcome of the application of HR principles, “The current Charter of HR does not contain any viable solution to the problem of global injustice; it does not constitute a blue-print for a Just World-Order.”<sup>190</sup> And that “further, the Charter of HR does not say anything about the 'rights of humanity' or 'rights of nature' because such a discourse would be subversive of the whole ethos of industrial and post-industrial society.”<sup>191</sup>

Tareq Oubrou’s approach also shows that there are tensions points between the HR discourse and *Shari’a*. Unlike some feminist Muslim writers, Oubrou does not accept the proposition that polygamy was forbidden by the Qur’an. Instead, polygamy is what Oubrou calls an “anthropological constant” and Western societies are “hypocritical” in

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<sup>187</sup> *ibid.*

<sup>188</sup> *ibid.*

<sup>189</sup> *ibid.*

<sup>190</sup> *ibid.*

<sup>191</sup> *ibid.*

their refusal to consider it. However, the recognition of polygamy in Islam also corresponds to human societies “under certain demographic and sociological situations”, and Oubrou does not exclude the possibility of modern states in the Muslim world to legislate against it.

Tariq Ramadan, is keen to point out that there are potential tensions due to the philosophical and cultural origins of HR discourse, “Born and thought in the West by intellectuals who were battling against oppressive forces - themselves justified in the name of the absolute - the philosophy of human rights is marked, in its essence, by such an origin. Before being a universal tool, it indicates a moment of the history of the liberation of reason vis-à-vis dogma, and of the assertion of the individual and his autonomy against the oppression of a power and a religion which denied him. Thus, historically speaking, the process is of the order of a reaction. It was an attempt to assert oneself and liberate oneself from imposed duties that rights based solely on rationality were codified and declared. Whatever our desire to defend the rights of human beings, we find ourselves with the obligation to acknowledge that the dynamic which gave rise to these texts contains three basic characteristics. By its own history, it determines the primacy of rational norm. It bases itself on a defence of human autonomy. Lastly, it is the realisation of the rejection of any absolute.”<sup>192</sup>

Ramadan is also very critical of the reality of the HR and its implementation, “We have been told lies, so many lies, and the lies continue. Humanitarian arguments are weighed with the interests which they defend and the dead are valued according to the interest which justifies them. The worst enemy of human rights and the worst insult to the 1948 Declaration is not caused by Islamic, Indian or other differences, rather the worst enemy is indeed this variable utilisation of the most beautiful texts for the most sombre of interests. The worst insult lies indeed in this unconditional support for the most bloody and repressive dictatorial regimes ever to exist.”<sup>193</sup> Hence for Ramadan the tension between Islam and HR discourse is far overshadowed by the lack of application of HR

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<sup>192</sup> <http://max211.free.fr/articles/anglais/articles-human-right.htm>

<sup>193</sup> *ibid.*

principles in real events in the world. This he believes could endanger the HR project. “How can it be imagined that the inhabitants of the South, whether Muslim or not, still believe in the grandeur of human rights? How is it still to be hoped that they trust those who do not hesitate to ward off the most cupid of their interests by means of the most beautiful discourse of humanist intentions. It would be just as insane to ask the homeless, unemployed and those excluded from society to believe the sincere respect that their politicians have towards them. The problem of human rights today, like the problem of the rights acknowledged by Islam but which are violated every day, is that it still belongs to the domain of theory and intention while everything is allowed in practice.”<sup>194</sup> For Ramadan the criticism is not just levelled at Western nations, but Muslim nations and all others who regularly flout their own values.

### **Recognising the European Context**

Affendi defines HR as “a contextual discourse which tries to deal with fundamental issues of morality and the good life and how human being should behave towards each other.”<sup>195</sup> He is also keen to emphasise this discourse has emerged in the European context, hence it is ‘contextual’, but while saying this admits that the issues that the HR discourse deals with have a universal aspect to them, “human conduct, morality, public authority are relevant for any community and they are raised in different ways but the present discourse has attempted to become universal...whether it has achieved that is another question.”<sup>196</sup> He also feels that when Muslims scholars began to look at the HR discourse in the 19<sup>th</sup> century they tried to identify Islamic correlations with the terms and concepts that HR represents. For example ‘justice’ was found to be a close corollary of ‘liberty’. He mentions that the HR discourse was used by the vulnerable and that it was instrumental in the dismantling of colonialism. He also feels that “it should be used by all people who need to gain their rights and this is the real meaning of universalising HR discourse,”<sup>197</sup> including within this category European Muslims who face discrimination

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<sup>194</sup> *ibid.*

<sup>195</sup> Interview with Abdelwahab El-Affendi, July 2004.

<sup>196</sup> *ibid*

<sup>197</sup> *ibid*

and prejudice. Affendi thus asks, “Given this background, Muslims (or any other community for that matter) did not have any prima facie grounds for being hostile to human rights. Quite the reverse, in fact, since the disadvantaged stood to benefit from the universal applicability of principles of equality and non-discrimination, at least in theory. Why, then, did some Muslim countries express reservations over the basic human rights document, and why do many Muslims continue to oppose some human rights provisions even today, and in increasing numbers and vociferousness?”<sup>198</sup>

However probing this cultural transference and compatibility further Affendi is critical of how people in the West seem to “believe that freedom means you have to do what we do”<sup>199</sup>. He sees this as a misunderstanding of what freedom entails and not a necessary incompatibility in the HR and Islamic discourses. Likewise, Affendi is critical of how Muslims have understood the concept of freedom, “The problems stem from the fact that we don’t fully comprehend that you cannot be truly religious unless you are free. Some people think that because religion is sacred and divine, this means that there is only one way of doing it and that people could be forced into things...and that why the current conception of Islamic government seems to be based on the idea that people need to be forced by an authority in order to be religious. But if someone is forced, to go through the motions, he cannot be religious – he is a hypocrite, or something else”<sup>200</sup>.

Unlike some of the other scholars whose views have been studied in this project, Hofmann does categorically take on the universality of HR discourse. “However, no one can rationally deny that classical, core Human Rights are indeed universal and not culturally conditioned. All human beings, no matter where, should be protected from murder, torture, or imprisonment without fair trial; all of them should enjoy freedom of conscience and thought, freedom of religion, and be free to leave their countries.”<sup>201</sup>

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<sup>198</sup> Abdelwahab El-Affendi, “Reviving Controversy: Islamic Revivalism and Modern Human Rights”, *Encounters*, 6:2, 2000. p. 8.

<sup>199</sup> *ibid*

<sup>200</sup> *ibid*

<sup>201</sup> *ibid.*

Malik brings a English legal perspective to the HR debate among Muslims and feels that the HR discourse “doesn’t have any absolute or essential meaning, but what it does usually capture is a commitment to certain other, more fundamental, values such as freedom, autonomy and dignity for individuals.”<sup>202</sup> For Malik, even though the HR discourse originates from a Western intellectual tradition, she emphasises the values that lie behind the HR discourse and feels that in this light the supposed tensions between HR and Islamic traditions are overstated, “these fundamental values that I’m talking about that underpin the term HR, such as freedom or autonomy are in fact compatible with Islamic values...And I think that on deeper examination many people will be surprised that there is a great deal of correlation between Islamic values and values such as freedom and autonomy.”<sup>203</sup> Malik is concerned of the perception among some Muslims “that they are uniquely subject to criticism because of their faith does make them more defensive and possibly less willing to adapt and engage than they might be if they were more confident.”<sup>204</sup> However she also sees that European Muslims have taken up the HR discourse in trying to improve their situation, mentioning two specific examples, “the reaction to anti-terrorism legislation where the claim is that these violate fundamental rule of law principles and secondly discrimination.”<sup>205</sup> She feels that this situation can vary across Europe and that although the ECHR and the new EU constitution show that there is a European dimension to this, there are, however, important national differences in the HR culture, e.g. France and UK.

Despite Manzoor’s very critical stance and the potential tensions that he raises, there is also a pragmatic strand his thought: “Whatever the philosophical discomforts of the universal theory of HR...Indeed, it has captured Muslim imagination and stirred Islamic conscience as well. Modern Muslim scholars, who have examined the concept of *Haqq* (Right) in Islamic law, have come to the conclusion that despite the fact that traditional jurists never articulated a precise definition, Islamic law not only was cognisant of *haqq* but it even developed other more comprehensive and precise concepts such as *hukm*

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<sup>202</sup> Interview with Maleiha Malik, July 2004

<sup>203</sup> *ibid*

<sup>204</sup> *ibid*

<sup>205</sup> *ibid*

(moral values) which subsumed the former.”<sup>206</sup> Thus Manzoor is able to find a connection with classical *fiqh*, and, as other scholars we have looked at in this project, asserts that Islam has not only perceived the notion of duties, but also a rights based approach is very much part of the Muslim tradition. Manzoor also acknowledges the reality of the world today and the need to protect citizens from state hegemony, “Every Muslim community today is part of the global state-system and ostensibly exercises 'sovereignty' within the borders of a parochial and territorial entity. Muslim states are also signatories to the United Nations' 'Charter of the Fundamental and Universal Human Rights' and as such morally and legally bound to honour and implement its provisions. Moreover, with few exceptions, contemporary Muslim rule is alien, arbitrary and predatory. Hence, it must not be allowed to use 'Islam', or the medieval formulations of Muslim jurists, as the legitimising argument for its oppression and denial of the fundamental rights of their citizenry. Cynicism against HR is also cynicism against Islam. Despite our - theoretical and metaphysical - reservations against the secular-humanist ethos of HR, we must, Muslims qua citizens, promote the cause of HR; for the theoretical resolution may come later, and not to be beneficiaries of a humane political culture would be infinitely more grievous.”<sup>207</sup>

Oubrou is deeply conscious of the European Context. Since the Qur'an itself took into consideration the contexts of its revelation. This seems to mean that the interpretation of the sacred Text is both subjective and evolving. Oubrou does not see the need to postulate the equivalence (or otherwise) of Islam and (French) Republican values or human rights discourses, since the latter are cultural products and, as such, likely to change further over time. In this respect, Oubrou opposes the methodology of modernist thinkers who project over the Islamic texts certain pre-defined concepts (in particular, Western ideas of “justice” and “equality”) that have been *exogenously* constructed. Oubrou believes this methodology falls under the same trap of those who “essentialize” Islam. Oubrou refers approvingly to the example of the early 20<sup>th</sup> century Moroccan scholar and activist Allal Al-Fasi who campaigned for the state abolition of polygamy in his country. In France,

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<sup>206</sup> *ibid.*

<sup>207</sup> *ibid.*



however, polygamy is effectively and *Islamically* forbidden, since Muslims are required to comply with national laws. This approach seems to be exemplary of Oubrou's "charia de la minorité".

For Ramadan the origins of HR are distinctly western, but that does not render them automatically incompatible with Islam and neither does this show that valuable progress has not been made. "The Declaration of 1948 is a point of reference from which we can derive today basic, general principles which go along the lines of respect for human dignity. The same can be said about all philosophical developments since Locke which have allowed Western societies to be more tolerant. The facts are there, it is not possible to deny them. These societies, nurtured by their reference to human rights, have concern for the respect of human beings, their equality and liberty. The lacunae are important, everyone knows it, but the progress is undeniable."<sup>208</sup> In a number of publications, such as *To be a European Muslim*, Ramadan talks of how the European context can sometimes be closer to the spirit of the *Shari'a* than the Muslim countries. Ramadan is dismissive of the ancient debates around *dar al-harb* (abode of war) and *dar al-Islam* (abode of peace) that create in his view a 'binary vision' of the world. Instead he looks to the Muslim presence in Europe with great hope and feels that the pursuit of justice (the overall aim of the *Shari'a*) can be a genuine and rewarding exercise, especially due to the freedoms that Muslims enjoy in Europe.

### **Commitment to Reconciling HR with Islam**

Affendi is critical of the Muslim state-led responses to the UDHR and describes them as working against the spirit of HR in order to protect and hide away abuse of such principles. But he feels that Muslim have the potential to make a contribution to the HR discourse, "a constructive discourse will start from the gains in freedoms which the HR discourse has achieved for humanity and add to these gains. I think the contribution that Muslims can bring is a new meaning of freedom as the current discourse assumes certain behaviour in respect of being free. If we evolve a discourse that takes on board the gains

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<sup>208</sup> *ibid.*

in freedom and HR and then increases them by making them more meaningful for a larger section of humanity and more in line with values of other people than that would be a contribution.”<sup>209</sup> And while he stresses that Islam should not be made to fit into another paradigm *a priori*, he is definitely of the conciliatory school emphasising the need for compromise and the use of what he calls “comprehensive principle – e.g. reciprocity”<sup>210</sup>. He gives an example of this: “When the early discussions about freedom of religion were held, the Muslims were very advanced in freedom of religion – people of other faith could practice their religion under Islam, but often not vice versa... Nowadays other communities are more advanced and are more tolerant than Muslims are. Muslims could say that given this reality we should have a moral obligation to grant others the freedom that we also enjoy as minorities.”<sup>211</sup>

Hofmann is also very critical of the Muslim initiatives on HR so far, which in his view “were less than helpful because they only nourished the suspicion that the Muslims wanted to blur the issue, and also highlighted areas of dissent. The Muslims in doing so presented themselves as unwilling late-comers, and that was downright counter-productive.”<sup>212</sup> For Hofmann the debate surrounding HR is a fundamental one as he stresses that “Muslims find themselves on the defensive in three crucial respects: democracy, human rights in general, and the rights of women in particular. It is no exaggeration to state that the future of Islam in the Occident to a large extent depends on the answers given in these three fields.”<sup>213</sup>

In tangible terms, some Muslim scholars (those of the rejectionist trend) have commented that democracy and the rule of law are incompatible with Islam as ‘God is the sole Sovereign’. Ghannouchi views such ideas as the misunderstanding of both democracy and Islam. He admits that liberal democracy may not suit Muslim society, but postulates that the mechanism of democracy can be used to develop a democratic tradition that is applicable to Muslims. Ghannouchi emphasises that the sovereignty of God cannot mean

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<sup>209</sup> *op cit*, interview with Abdelwahab El-Affendi.

<sup>210</sup> *ibid*

<sup>211</sup> *ibid*

<sup>212</sup> Murad Hofmann, “Human Rights and Islam”, *Encounters*, 5:2, 1999.

<sup>213</sup> *Ibid*.

that God comes to earth to rule. On the contrary, the sovereignty of God implies the rule of God's law, i.e. 'the rule of law', a cornerstone of modern democratic states and the Human Rights discourse. For him, the idea of submitting oneself to the sovereignty of God is actually a liberating one; to remove the possibility of despotism, the totalitarian rule of another human being. Using such inventive and creative readings into traditional Islamic thought, Ghannouchi has been able to remain firmly within the Islamic tradition and at the same time argue the case for Muslims to take notions of HR, freedom, liberty, democracy, civil society and citizenship very seriously.

Likewise Malik feels that while there may be contentions between HR and Islam on a state or global level, in everyday life people in Europe are able to separate their "private sentiments and how they operate in the public sphere because they don't live in Muslim countries. Muslims who live as minorities have a different set of issue that need to be resolved and they can't expect their religious values to be represented publicly"<sup>214</sup>. This type of negotiation is not just acquired on a personal level, but even legal and political institutions are also dealing with them all the time, e.g. family law in courts. Malik feels this is a healthy process and calls for a "genuine engagement with the Muslim community that is wide and not just with a few representatives. And also the Muslim community needs to have more debates about such matters."<sup>215</sup> Malik believes that Islamic declarations and such documents can help to promote the debate on HR, but is quite critical of the bad record of HR practice in some Muslim countries. In terms of looking to the future, Malik is confident and conciliatory in her approach, referring to the work of Hashim Kamali, who, "in his work on Islamic law is challenging the existing stereotype that Islamic law and Islamic political theory didn't have within them any ideas of individual rights"<sup>216</sup>. While Malik feels that there is a need for awareness of cultural specificity but she also sees a limit to this. "I think it's possible for us to agree on minimum standards, I think people would be surprised at how much agreement can be reached on what the basic requirements are re: treatment of an individual."<sup>217</sup>

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<sup>214</sup> *ibid*

<sup>215</sup> *ibid*

<sup>216</sup> *ibid*

<sup>217</sup> *ibid*

Manzoor is also conciliatory, “The HR idea, it is my conviction, does not present Muslim thought with any insurmountable moral challenge. Islam has the moral and intellectual resources to meet all the demands of HR conscience.”<sup>218</sup> But he does feel that Muslims have the potential to, “enrich the discourse of HR from this Qur'anic vantage-point, which is more congenial to the collective notion of Humanity Rights rather than the incumbent one that places individual liberty at the centre...”<sup>219</sup> Likewise he feels that if the HR paradigm is to be a universal success then it also has to learn, “To ensure the universality of the HR idea, we would need a conception of a universal *Gemeinschaft* of man, and not merely a global *Gesellschaft* of warring states.”<sup>220</sup> And warns that the, “HR debate must not become a sermon to the already converted but must provide a forum for the moral conscience of humanity. Not only religions but also states and state-systems, not only the traditional civilisation of Islam but also the modern Leviathan of secularism, must be arraigned before the court of universal moral conscience.”<sup>221</sup>

On the question of apostasy, sanctioned according to the dominant interpretation of Islamic law by the death penalty, Oubrou recognizes its problematic nature. He has discussed the Islamic sources for this penalty in his *Loi d'Allah, loi des hommes*<sup>222</sup>. In Oubrou's reading of the biographies of Prophet Muhammad and his Companions, there is no indication whatsoever of the killing of apostates, on the contrary. Oubrou identifies a hadith collected by Bukhari and attributed to the Prophet Muhammad declaring that “whoever changes his religion, kill him”. Oubrou reviews the evidence for this narration and finds that its authenticity is not established. Concerning a second hadith, which is similar to the first but adds as a further condition that “the apostate breaks free from his community”, Oubrou equates this to the modern-day “troubles to public order and physical threats against the state”. He quotes the Hanafite opinion that women apostates are not to put to death as further proof of the military threat posed by apostasy in the early days of Islam. In conclusion, Tareq Oubrou considers that the death penalty for the

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<sup>218</sup> *ibid.*

<sup>219</sup> *ibid.*

<sup>220</sup> *ibid.*

<sup>221</sup> *ibid.*

<sup>222</sup> *Ibid*, pp. 42-63.

apostate is “not legally and unambiguously founded”, although the act in itself remains “Qur’anicly condemned”. Moreover, Oubrou remarks on the irony of France, the self-proclaimed “patrie des droits de l’homme”, legislating for banning the individual right to wear the Muslim headscarf in public schools.

Ramadan emphasises that a dialogue between HR and Islam is necessary and that even though the origins and sources may be different there can be conciliation between the two, “Human rights exist in Islam, but they are, nevertheless, part of a holistic vision which orientate their scope. The differences are substantial but they must not lead us to conclude the impossibility of dialogue between the two civilisations. On the contrary, if the source is different, it is nonetheless possible to find in Islam, (as indeed in the texts of Jewish and Christian traditions), orientations and fundamental principles of rights stemming from obligations which agree with those emanating from the text of 1948.”<sup>223</sup> The method for this is elucidated further that “by referring to the Qur'an and the Sunna, by considering the work of *ijtihad* of the *ulama* and by developing and pursuing reflection in this sense, one realises that one can subtract from the centre of Islamic legislation, from the *Shari‘a*, elements relating to rights. Respect of the latter is primal in comparison to any application of punishments (*‘uqubat*). These include the right to life, freedom, equality, non-discrimination, justice, asylum, and the right to liberty of conscience, etc.”<sup>224</sup> Thus Ramadan stresses the presence of the rights based approach within the Islamic tradition, but also links this with the notions of dignity and obligation, “In fact, if the universality of human rights - as stated in the version of the 1948 Declaration - causes a problem for Muslims, this does not mean that Islam rejects or refutes any thought relating to human rights if understood as the protection of human dignity. On the contrary, all the juridical thought of Islam revolves, so much in the objective of its obligations as in that of its rights, around the respect and inviolability of the person, whether man, woman or child.”<sup>225</sup> Ramadan is hopeful for the future and urges a dialogical approach, “If there really exists a pluralism, and if there is a sincere will to engage in the co-existence of civilisations and cultures, then this must proceed

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<sup>223</sup> *ibid.*

<sup>224</sup> *ibid.*

<sup>225</sup> *ibid.*

from here. Imposing one's norms on others will inevitably mean conflicts. But to call each religion and culture to develop from within spaces of protection for the dignity of woman, man and child is, in our view, the choice of the future.”<sup>226</sup>

### **Synthesis of the chapter**

A tension is emerging among Muslims' approach to Human Rights. One replicating the global doctrine of Wahabism is clearly rejectionist. . It is defensive and considers Human Rights as an alien concept that is basically hostile to the Islamic Tradition. It is not particularly European; however it can attract some margins of European young Muslims. The discourses produced by European Muslims on Human Rights tend to be either embracive in their vast majority or conciliatory.

The dominant attitude is embracive i.e. embraces Human Rights as an exclusive achievement of the Islamic culture. In the Muslim world such an apologetic approach is materialized in the multiple attempts to redefine Human Rights in an exclusively Islamic framework. Since the 1980s, some international Islamic statements such as the Universal Islamic Declaration of Human Rights (1981), reflect this conservative position. But in Europe, the emphasis is not on the production of political documents but on the presenting Fundamental Rights as an intrinsic part of the Islamic Tradition. In the post 9/11 context, the stress is on tolerance, justice and equality between genders. At the other end of the intellectual spectrum, liberal interpretations can be found as well. They acknowledge the tension between and Human Rights precepts and call for a cross-cultural dialogue. What is at stake is a self-critical re-evaluation of the Islamic tradition *and* its underlying principles<sup>227</sup>.

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<sup>226</sup> *ibid.*

<sup>227</sup> See An-Na'im, Abdullahi (1990). *Toward an Islamic Reformation, Civil Liberties, Human Rights, and International Law*, Syracuse: Syracuse University Press.  
Al-Ashmawwy, Muhammad (1989), *L'islamisme contre l'islam*, Paris: La Decouverte,  
Mahmasani, Subhi, "Adaptation of Islamic Jurisprudence to Modern Special needs" in John J. Donohue and John L. Esposito (eds) (1982), *Islam in Transition: Muslim Perspectives*, Oxford: Oxford University Press, pp 183.

## CONCLUSION AND RECOMMENDATIONS

- 1) The inclusion of Turkey within the European Union could have a positive effect on the definition of European public culture. More precisely the European Union has the potential to shape the public discourse on Islam by influencing the narrative of the different member states which tend to oppose Islam and core national values. For example, the request made in May 2004 by Italian and Polish governments to introduce a reference to Christianity in the European constitution shed light on this anxiety of some European regimes toward Islam. In the same vein, during the debate in the French Parliament on the accession of Turkey on October 14, 2004, the French Prime Minister Jean-Pierre Raffarin, said that neither Turkey nor the EU was ready for Turkish membership now, though he said Turkey's desire for admission was legitimate. In these circumstances, the EU could have a decisive political role in communicating a different message about Islam and Muslims and including them in the definition of the future European public culture.
  
- 2) There is need for promotion of Europe-wide discussion and dialogue between non-Muslim and Muslim citizens, interlocutors, and leaders (especially among younger people so that there is an investment in the next generation) with respect to the notion of HR and similarities and differences with various strands of Islamic thought. The EU could help to facilitate such discussions by making funds available to NGOs and emphasising the need for such discussion.
  
- 3) Specifically, Muslim individuals, groups and organizations need empowerment with respect to HR education. Currently the debates around HR tend to be either among academics and scholars or community activists. There is a need to take the HR discourse to the level of ordinary citizens and promote wider and deeper education on this issue.

- 4) There is a need to promote much further research and study on the subject of HR and Islam to address the apparent gaps and to see how rapprochement can be achieved. Our research, as well as other works, have identified key scholars and thinkers who are involved in the HR discourse and are attempting to form a bridge between the Islamic tradition and the contemporary HR discourse. In order to facilitate this process it is necessary to look more deeply at issues such as the notion of freedom and liberty in Islamic thought, and also to address the tensions that other faith groups such as Christians and Jews may have towards parts of the HR discourse, e.g. sexual orientation, and how such tensions are dealt with.
- 5) While respecting the limits of subsidiarity, there is an urgent need to tackle the anomalies and perceptions of HR shortcomings within members states as have been pointed out in numerous reports by the European Unions Monitoring Centre on Racism and Xenophobia (EUMC)<sup>228</sup>, the Open Society Institute (OSI)<sup>229</sup> while looking at the EU accession process, the European Commission Against Racism and Intolerance (ECRI)<sup>230</sup>, the Framework Convention for the Protection of National Minorities (FCNM), the European Network Against Racism (ENAR) and the United Nations.
- 6) Due to the number of different bodies that deal with discrimination (which is understandable and a positive factor) there should be a more joined-up or co-ordinated approach to tackling the issue of discrimination at the European level. It would probably be most appropriate if the DG Justice and Home Affairs takes lead on this.

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<sup>228</sup> See for example the EUMC report by Nielsen and Allen, *Islamophobia in the EU Following 11 September 2001*, EUMC, 2002.

<sup>229</sup> See for example: *Monitoring the EU Accession Process: Minority Protection, Volume II - case studies in Selected member States (France, Germany, Italy, Spain United Kingdom)*, OSI, 2002.

<sup>230</sup> The ENAR ([www.enar-eu.org](http://www.enar-eu.org)), ECRI & FCNM ([www.coe.int](http://www.coe.int)), release regular reports which can be found on their websites. Some of these reports are addressed to members states and they urge the member states to monitor their own performance on discrimination issues.



- 7) In addition to a change in the narrative on Islam, the narrative on HR could be made to be more inclusive and plural, without abandoning the fundamental values that lie behind the HR discourse. For example on a linguistic level, in addition to talking of HR, there could be direct reference to such values as liberty, freedom of thought and equality of peoples.
  
- 8) There could be and should be greater involvement and consultation of Muslim organizations and representatives at a European policy level. Just as there are now mechanisms for communication at a national level, it is likely that Muslim institutions would be favourable to a positive partnership with the EU to enhance discussion at a European level.

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## APPENDIX I: QUESTIONNAIRE

1. What does the term 'Human Rights' (HR) mean to you?
2. How compatible do you think HR is with Islamic values?  
If there are different attitudes how would you describe them?  
Is there an Islamic consensus of views on HR?
3. How are these incompatibilities dealt with?
4. In your view, who are the main scholars/academics in this field, in Europe? In the world?
5. Are there any important reference texts from within the Islamic tradition?
6. Can you cite examples of incompatibility between HR and Islam?  
e.g. How is it possible to conciliate the principle of equality between human beings and the gender distinction in the Islamic tradition?  
Or between freedom of belief and the rulings on apostasy?
7. Do you think that Muslims in Europe are facing a particular situation regarding HR? Why?
8. Do you think its possible to live as a 'good' Muslim in secular Europe without violating basic HR? Why?
9. Do you think that HR impacts on Muslim identity? If so, how?
10. What contributions do you think Muslims can make to the discourse on HR?
11. What is your view of Muslim initiatives on HR? (e.g. OIC declaration on HR)
12. Do you know of any good practice cases of Islamic activism on the basis of HR?

## APPENDIX II: SAMPLE OF INTERVIEW TRANSCRIPTIONS

### 1. Abdulwahab El-Affendi (University of Westminster, London) – July 2004

What is Human Rights?

HR is a contextual discourse which tries to deal with fundamental issues of morality and the good life and how human being should behave towards each other. How collective public authority should be conducted. Contextual means it has emerged in the European context. It tries to answer Q's which have been raised in this context. The same issues are universal in a sense – human conduct, morality, public authority are relevant for any community and they are raised in different ways but the present discourse has attempted to become universal...whether it has achieved that is another question.

Does the cultural context render it incompatible?

It am not saying compatible or incompatible, it's a matter of context. E.g. nowadays people speak about freedom and liberty – but if someone is free it doesn't mean you have to do the same things. The mistake in the west can be that if you believe that freedom means you have to do "what we do"...so if you have a democracy, then you have to do the same as us...that's not incompatibility but a misunderstanding of freedom itself, which means to do what *we* think is right!

From the beginning Muslims who looked at the European experience did find a universal aspect to it and understood the universal aspect – Abduh, Tahtawi, etc. e.g the latter said what the west means by liberty, we mean by justice. In Islam the question of justice was a very fundamental one...fairness and justice are important. But there are issues in how we understand these concepts – I personally feel that some Muslims have problems with understanding them. The problems stem from the fact that we don't fully comprehend that you cannot be truly religious unless you are free. Some people think that because

religion is sacred and divine, this means that there is only one way of doing it and that people could be forced into things...and that why the current conception of Islamic government seems to be based on the idea that people need to be forced by an authority in order to be religious. But if someone is forced, to go through the motions, he cannot be religious – he is a hypocrite, or something else! This is where we have the problem – unless people come to terms with the moral question and responsibility. Yes there are differences between what we think is right between the Islamic way of life and western liberalism – now, every Muslim has to understand this and do for themselves. E.g. in the question of *hijab* – it's up to the lady herself...its only religious if done freely. But some westerners have a problem with this. They understand that if she is free she should behave like them.

Universalism has a problem of abstraction – no abstract human being exists, there is no human being who approaches the universe without ideas, values, culture, etc. But theoretically of course it is a good exercise to think of an approach that equalises chances for people. But it could be hegemonic – if you are speaking of a universal discourse but are practising something else, e.g. when the American constitution was promulgated it was declared that all men are created equal, but the constitution and law at that time did accept slavery. 'Men' here meant whites not blacks. But the logic of the constitution would mean ultimately broadening this. So they have progressed.

The main problem with Muslim thinking on HR is that the west started from a certain cultural perspective and tried to expand to a universal outlook, Muslims haven't come to terms with this yet. How do we develop a comprehensive way of thinking starting from the Muslim perspective and going forward? Because there are certain principles in Islam that contradict HR, but these are also contradictions within the system of values of Islam – e.g. when Islam says that there is no coercion in faith, and then at the same time there is a call to punish those who abandon their faith. Or when people speak of justice and equality of human beings but then you have applications which seem to contradict this. We need to do two things: 1) we have a set of values by which Muslims are happy to live – which might not accord to some other perceptions of freedom or liberty...e.g. people

accept what the Qur'an says about inheritance or marriage – if Muslims are happy with such rules and want to live by them – there is nothing wrong with that even from a HR perspective. It becomes a problem when Muslims live with others. 2) Although we talk a lot about the Madinah constitution as a precedent we have not fully comprehended the importance of that agreement that there was a way that was developed for Muslims to deal with others who live with them, and that was according to the same way in which we deal now and that is: compromise. We have to take this principle in issues which do not infringe our own rights and develop imaginative ways of compromise.

Names of scholars:

Qardawi for example, Khurshid Ahmed, Abdullahi an-Naiem, Tariq Ramadan, the Islamic Council of Europe in the past, Mohammed Arkoun...a wide spectrum. The discourse is evolving and in Europe and UK it is being discussed in places like Oxford Centre and the University of Westminster (centre for the study of democracy and civil society).

Classical sources?

I have a basic problem...we already have a discourse on HR which is trying to claim universality...hence the issue is already pre-judged. So when Muslims look at their sources with this HR discourse in mind, they are bound to find principles like “no coercion in faith”, questions about basic freedoms, “all are created equal”, “there should be no discrimination on basis of colour”, etc. But as people are approaching the text with an established framework in mind, we haven't established a truly Islamic perspective. A real Islamic perspective should have started from its own premises to develop this vision. But we cannot go back in history and start again. I think the solution is look at Islam in its entirety and not just to look at parts of it. E.g. in inheritance there may be difference between how much a male and female inherit, but there are greater financial responsibilities on men so overall the picture balances out.

Other contradictions:

Sexuality, freedom of religion – apostasy, women’s right, corporal punishments, etc.

Reconcilable or is the gulf too wide?

I do not believe in artificially attempting to fit Islamic teachings to HR *a priori*. I think a discourse should evolve within the Muslims community about how Islam could be re-interpreted and understood in the realm of the present situation. We could find ways in compromises for example, or in comprehensive principle – e.g. reciprocity. When the early discussions about freedom of religion were held, the Muslims were very advanced in freedom of religion – people of other faith could practice their religion under Islam, but often not vice versa - e.g. Spain etc.. Nowadays other communities are more advanced and are more tolerant than Muslims are. Muslims could say that given this reality we should have a moral obligation to grant others the freedom that we also enjoy as minorities.

European context? Secular environment...

Some perceive a problem that they may find difficulty in imparting their values to their children in societies where there is greater consumer pressure to conform, etc. Also provisions for prayers etc; there is discrimination, but such issues do not amount to a serious problem, rather they are challenges that Muslims must meet. And we can also see that many of the younger generation are more observant than their elders.

Identity Construction

Muslim identity is only now evolving in a European context. Discrimination is pushing people closer together and new identities are being forged. This needs some intellectual leadership, otherwise we can see the dangers of some of the separatist tendencies like Hizb al-Tahrir etc. So people need to feel comfortable about their European and Muslim

identities. Many people have been more free to practice their values in the West and scholars like Fazlur Rahman had to migrate from Pakistan.

OIC declaration on HR? Muslim contribution to HR?

I think they are more anti-HR than HR based! They have been developed to protect systems which are based on abuse of HR. I don't see these as a contribution, this is going back on the gains of HR....a constructive discourse will start from the gains in freedoms which the HR discourse has achieved for humanity and add to these gains. I think the contribution that Muslims can bring is a new meaning of freedom as the current discourse assumes certain behaviour in respect of being free. If we evolve a discourse that takes on board the gains in freedom and HR and then increases them by making them more meaningful for a larger section of humanity and more in line with values of other people then that would be a contribution.

Muslim use of HR in Europe? Will this lead to mere victimhood?

Historically HR has been used by the colonised to free themselves. Also by the Blacks in US, the victims of apartheid, Palestinians, etc. There is nothing wrong for Muslims in Europe to use it. It should be used by all people who need to gain their rights and this is the real meaning of universalising HR discourse and it should be used to broaden and widen HR.

## **2. Maleiha Malik (Kings College, London) – July 2004**

Defining the term itself what do you think it means, what would you say about it?

I think the term human rights itself doesn't have any absolute or essential meaning, but what it does usually capture is a commitment to certain other, more fundamental, values such as freedom, autonomy and dignity for individuals.

There has been a lot of debate about human rights and Islam, do you think the two are compatible?

I think that the conflict has been overstated and sometimes the conflict has been overstated for convenient and strategic or political reasons, because of conflict between perhaps countries that are seen to have a deeper commitment to human rights, such as democracies and more authoritarian countries in the Middle East. But I think if one examines the issue of whether or not these fundamental values that I'm talking about that underpin the term HR, such as freedom or autonomy are in fact compatible with Islamic values, I think the conflict is less than if you pitched the debate in terms of a conflict between HR and Islamic values. And I think that on deeper examination many people will be surprised that there is a great deal of correlation between Islamic values and values such as freedom and autonomy.

From your own research can you think of any problems that do exist?

One of these candidates that comes to mind is obviously issues related to women, where I think that, although perhaps some interpretations of Islamic values find a great deal of compatibility between women's rights in Islam and concepts of freedom and autonomy, but modern conditions suggest that there is a conflict and certainly the actual treatment of women in the Muslim world, suggests that its an area that requires more work.

Are there differences in the ways in which Muslims speak about HR?

I think there is a broad spectrum, there is a lot of controversy about whether or not the term has an essential meaning and that very many people are quite sceptical about the use of the term HR at all, whereas others feel deeply committed to the ideology of HR and having associated a deep meaning with it.

Other areas of difficulty?



Freedom of expression is an important area and it is worthwhile to recognise that there are difficulties in terms of interpreting certain aspects of traditional Islamic doctrine in a way that is compatible with western notions of freedom of expression. Another one – within equality there is the issue of gender and also sexual orientation, where not only Islam but also other traditional religions come into conflict with modern commitments to equality on the grounds of sexual orientation. Islam is not unique to that effect.

Other religions have dealt with such issues largely by secularisation, this seems to be a problem for Muslims?

It may be a problem for Muslim countries, but I think people in Europe do it all the time. They have to do this - to have some sort of distinction between private sentiments and how they operate in the public sphere because they don't live in Muslim countries. Muslims who live as minorities have a different set of issue that need to be resolved and they can't expect their religious values to be represented publicly...and people in Muslim countries often don't have the freedoms that Muslims in Europe have.

Where differences are present between HR and Islam – how to negotiate?

This debate occurs all the time and people negotiate these things in their private lives, even legal and political institutions are dealing with them all the time, e.g. family law in courts. It's healthy to continue to discuss these issues. There is a need to ensure that there is a genuine engagement with the Muslim community that is wide and not just with a few representatives. And also the Muslim community needs to have more debates about such matters. The debates need to continue and both sides can probably do more.

Cultural bias in the way HR discourse is constructed?

I think there are political reasons and political uses of the term human rights. I think that human rights in the way that we understand it in the West does draw upon a long-

standing liberal tradition and the enlightenment so I think there is a cultural bias in the sense that it originates from what is very much a Western intellectual tradition.

Does that then cause a problem for those who wish to look at compatibility between HR and Islam?

I think as I said the clashes are less than one would imagine where the problem that arises is that certain assumptions or a certain language is used that take on a western paradigm, but there are similar concepts within the Islamic intellectual tradition that are indigenous to that tradition – so there is no reason that something like freedom or autonomy should be a monopoly of the western tradition, it is possible to examine traditional sources within Islam and come close to analogous concepts.

Key thinkers / ideologues?

From the western perspective HR research is conducted from a host of disciplines, from example within law there are a number of human rights lawyers that are well known, depending on whether one is talking of domestic, European or international human rights. Within the Islamic tradition one notable name that comes to mind is Professor Hashim Kamali, who in his work on Islamic law is challenging the existing stereotype that Islamic law and Islamic political theory didn't have within them any ideas of individual rights – that they were formed on the idea of duty. Kamali's work suggests that it is possible to go back to the traditional sources of Islamic law and to classify them in a way that shows the notions of individual freedom and individual rights are important within Islamic legal theory so his current publications include works on individual freedom.

Classical Muslim sources that may have dealt with this?

Not really my area, but texts such as Ghazali's legal theory or if we examine other traditional discussions the theme of individual autonomy and choice is present. I think it is important to go back to that as a starting point

Do you think HR in a broad sense (incorporating discrimination, etc) can shape the Muslim communities in Europe.

I think the perception among some Muslims that they are uniquely subject to criticism because of their faith does make them more defensive and possibly less willing to adapt and engage than they might be if they were more confident. That's unfortunate. I think the discourse about necessary conflict between HR and Islam is unfortunate because it also re-enforces unfair stereotypes about Islam being medieval and not concerned with what is good for individuals which, I feel, is not true.

The way that citizenship is based nowadays, HR and civil liberties are taken for granted and the perception that Muslims can't fit into this because of their faith is a huge barrier. I think Muslims as a minority can ask for some accommodation but will not be able to affect the framework fundamentally.

Can others add anything to the HR discourse?

Rather than talk about HR it's more interesting to talk about more fundamental concepts like freedom, autonomy and dignity. And on those lines I don't see any reason why the western intellectual tradition would be the only one that promotes these values. I think there would be a great advantage to see what other cultural or religious traditions have to say.

Muslim nations and HR, e.g. OIC declaration, cultural specificity, etc?

I think because most those countries are not democracies and may have bad records of HR standards the reservations carry less weight and people are less persuaded. If an authoritarian government with an appalling HR record raises objections it is very different from a country with a good record of HR raising a specific objection and saying that it has a different interpretation. There is a legitimate need for awareness of cultural

specificity but there is a limit to this. I think it's possible for us to agree on minimum standards, I think people would be surprised at how much agreement can be reached on what the basic requirements are re: treatment of an individual. At the very least Muslim countries could use their own teachings vis-à-vis treatment of women etc.

OIC statement and others can be useful for promoting the debate, even in terms of rhetoric as eventually the citizens can hold the government to the standards they have set. As I've said HR isn't really an essentialist notion and if we can get the results by using other terms and this can deliver freedom and dignity for individuals then this could be worthwhile. HR is used to represent more fundamental values, it's unlikely we'll drop the term HR to address those issues directly, but that would allow us to have a more clear debate about what we are after.

Muslim in Europe using/adopting HR discourse?

Two examples come to mind, firstly the reaction to current anti-terrorism legislation where the claim is that these violate fundamental rule of law principles and secondly discrimination. So Muslims have definitely taken up HR discourse, especially with respect to equality. Largely this would be a genuine adoption of HR principles, though sometimes this is a pragmatic usage, for example when people have demanded rights based on equality of treatment but have not seemed willing to grant the same sorts of rights to others, for example on grounds of gender and sexual orientation.

Is there a single European notion of HR?

I think the ECHR and the developments on the EU, with the new constitution, etc. shows that there is a European dimension to this. But there are important national differences in the HR culture, e.g. France and UK.