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4

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I. Introduction

'Islam in Europe' is a notion that is as easily used as it is convoluted. One element, 'Islam', has been evaluated from a security as well as theological perspective, and in political as well as sociological terms. The other element, 'Europe', is geographically undefined and can stand for a cultural identity as well as human rights values. Usually, however, the discussion on the relation between 'Islam' and 'Europe' focuses on a comparison of Islamic and European values. This kind of argumentation is faulty for two reasons. First, the intention of this debate is to assess the values held by Muslims in Europe but concentrates on the values of Islam itself because it is presumed that the values of European Muslims are identical with the values of Islam. However, believers and their beliefs are not necessarily the same. For example, Islam, like other faiths, shows a weak theological and historical track record on issues like gender equality or democracy, but its believers may very well uphold these values.[1] The comparison of values would therefore benefit more from the question 'what values do the believers have?', than 'what are the values of Islam?'. The discussion, in other words, should be about Muslims in Europe themselves rather than Islam.

The second reason why the comparison of Islamic and European values is often nonsensical is because European values are presumed to be clear, while they mostly are not. Usually, European values are equated with human rights, but what do these rights have to do with social matters like the shaking of hands or the clothes that people wear? Still, these are the issues causing enormous controversies that are played out in discussions on European values. In such instances, European values seemingly are not human rights themselves but values to be protected by those human rights. What, then, are these values? That is the subject of this chapter. As a

[1] For instance, in recent decades a discourse of 'Islamic feminism' has developed in the Muslim world, see, eg, M Badran, 'Between Secular and Islamic Feminism/s: Reflections on the Middle East and Beyond' (2005) 1 *Journal of Middle East Women's Studies* 6; Z Mir-Hosseini, 'Muslim Women's Quest for Equality: Between Islamic Law and Feminism' (2006) 32 *Critical Inquiry* 629.

tool of analysis for this question, I have proposed to view the notion of European values as consisting of two kinds: political-legal values and religious-cultural values.[2] Political-legal values stand for values that are the outcomes of political and legal deliberations. These values are fundamental freedoms (religion, expression, political action, etc) and notions like democracy, solidarity, and tolerance. These values are enshrined in constitutions, codes and treaties, and although still subject to continuous debate, their conceptual existence seems carved in granite.

Religious-cultural values relate to the customs and sense of identity of any given society. These are not legalised or otherwise registered because they are assumed to be shared by everyone. They constitute a subcurrent in the social fabric that can be loosely described as 'the way we do things around here'. The vagueness and inconspicuousness of religious-cultural values should not be underestimated: at times they can carry more weight than political-legal values.

Granted, the distinction between these two sets of values may seem arbitrary. Lawyers and political scientists will be the first to point at the ways political-legal values are influenced by religious and cultural values,[3] just like notions of multiculturalism have found their way into legal debates[4] and long-standing cultural traditions of state–religion relations have found their way into national legislation and political mores. But the purpose of this distinction between the two sets of values is not as a tool of accuracy, but as a tool of analysis.

This chapter will discuss five typical issues of conflict in this debate on European and Islamic values. It will be demonstrated that the confrontations between these two sets of values are mostly conflicts within the domain of European religious-cultural values and much less within the domain of political-legal values. When analysing these cases, it will become apparent how religious-cultural values interact with, or even override, political-legal values.

II. European and Islamic values: Five Cases

A. The Case of Secularism

The first issue of conflict between Islamic and European values is that of secularism, also known as the separation of religion and state, and sometimes as the

[2] MS Berger, 'Understanding Sharia in the West' (2018) 6 *Journal of Law, Religion and State* 236, 256–59.

[3] For religious values see, eg, HJ Berman, *Law and Revolution II: The Impact of Protestant Reformations on the Western Legal Tradition* (Cambridge, Harvard University Press, 2003); D Flatto and B Porat (eds), *Law as Religion, Religion as Law* (Cambridge, Cambridge University Press, 2022). For cultural values see, eg, R Provost (ed), *Cultures in the Domains of Law* (Cambridge, Cambridge University Press, 2017); AC Saguy and S Forrest, 'Culture and Law: Beyond a Paradigm of Cause and Effect' (2008) 619 *The Annals of the American Academy of Political and Social Science* 149.

[4] eg, MC Foblets and AD Renteln (eds), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (London, Bloomsbury Publishing, 2009); I Ruggiu, *Culture and the Judiciary: The Anthropologist Judge* (Milton Park, Taylor & Francis, 2020).

separation of church and state.[5] It is commonly assumed that this notion is fundamental to Europe but unknown to Islam. Both assumptions contain inaccuracies and ambiguities.

Let us start with Europe, where the separation of religion and state is commonly considered a clearly defined value, but, in reality, there is no uniform notion of what that value entails.[6] For instance, some countries, like the United Kingdom and Sweden, have established state churches. Other countries, like the Netherlands and Germany, only maintain state religious neutrality while countries such as France actively enforce the absence of religion in public spaces belonging to the state. Further, countries like Belgium and Bosnia recognise certain religious communities and pay the salaries of their clergy and maintenance fees of their houses of worship, while other countries make those fundings entirely the responsibility of the religious communities themselves.

We find the same ambiguities in Islam. Islam has little conceptualisation of the notion of 'the state', let alone the ways in which that state relates to religion.[7] This is not just typical of Islam, but of most religions. Christians may refer to the principle 'render to Caesar the things that are Caesar's, and to God the things that are God's',[8] but the Catholic Church has historically shown little affinity with that instruction. Throughout history, most states have deemed it necessary to align themselves with a religion, but not necessarily with that religion's teachings. So, also, has history witnessed various forms of involvement of the clergy with the state. In the case of Islam, for example, the Islamic clergy has a long tradition of maintaining independence from the state.[9] In other words, it is of little use to scrutinise the theological teachings of a religion to determine its relation to the state; one also needs to look at the actions of the state as well as of the believers of a religion and how those believers have aligned their religion with their state citizenship. In the case of Islam, we see, for instance, that most Muslim majority states during the 1950s and 1960s had little affinity with religion and tried to keep the clergy at bay, while from the 1980s onwards the relation between clergy and state has become more intimate in many of those same states.[10]

If we turn our attention to Islam in Europe and look at the believers rather than their beliefs, the following observation can be made: it appears that most Muslims

[5] These are two different but overlapping notions. For the purpose of this chapter, 'religion and state' is intended to mean the state's relation to both religion as such, and to religious institutions.

[6] The following examples are taken from G Robbers (ed), *State and Church in the European Union* (Baden-Baden, Nomos, 2005) and S Ferrari and S Pastorelli, 'Religion in the European Public Spaces: A Legal Overview' in S Ferrari (ed), *Religion in Public Spaces: A European Perspective* (Milton Park, Routledge, 2012).

[7] W Halaq, *The Impossible State* (New York, Columbia University Press, 2014).

[8] *St Mark's Gospel*, 12:17.

[9] See, eg, IM Lapidus, 'The Separation of State and Religion in the Development of Early Islamic Society' (1975) 6 *International Journal of Middle East Studies* 363; KS Vikør, *Between God and the Sultan: A History of Islamic Law* (Oxford, Oxford University Press, 2006) 185.

[10] The literature on this phenomenon of 'political Islam' is extensive. Two outstanding studies are N Ayyubi, *Political Islam* (Milton Park, Routledge, 1993) and P Mandaville, *Global Political Islam* (Milton Park, Routledge, 2007).

in Europe embrace the notion of 'separation of religion and state'.[11] The reason for this is that such separation guarantees a degree of freedom of religion, which is exactly what Muslims in Europe aspire to have. The separation of religion and state is clearly interpreted by these Muslims as a political-legal value. But if this is the case, why is the European Muslims' relation with religion and state so often questioned?

It seems that we are dealing with a mix-up between the notions of secularism and secularisation. Where the former stands for ways of separating relations between state and religion,[12] the latter stands for individuals' self-separation between themselves and their religion.[13] In Europe, more than in other parts of the world, religiosity has been diminishing rapidly.[14] In this process, the disappearance or, at best, privatisation of religion has become the dominant norm in Europe.[15] This is not a political-legal norm, however, but a religious-cultural one: the privatisation or absence of religion is not dictated by law but is what a majority population lives by. However, the two phenomena of separating relations between state and religion, on the one hand, and the self-separation between persons and their religion, on the other, have come to mean approximately the same thing: secularisation has become equated with secularism.[16] In doing so, the 'state', as referred to in the separation of state and religion, is not only meant to be the government, but also society. Consequently, the fact that most Muslims in Europe favour separation of state and religion (secularism) but many of them ostentatiously show their religiousness through action and dress is understood by both non-religious and not-so-religious Europeans to be contrary to the secularisation that has become the standard norm of 'how we do things here'.

The processes of secularism and secularisation have evolved, in some circles of society, into the notion of 'Judaeo-Christian civilisation'. For instance, at the finalising stage of the 'constitution' of the European Union in 2004, it was suggested

[11] European Union Agency for Fundamental Rights, 'Second European Union Minorities and Discrimination Survey (EU-MIDIS II): Muslims – Selected findings' (EFRA, 2017); Gallup, 'Special Report: Muslims in Europe' (Gallup, 2007).

[12] See N Hashemi, 'The Multiple Histories of Secularism: Muslim Societies in Comparison' (2010) 36 *Philosophy & Social Criticism* 326.

[13] P Berger, 'Secularization and de-secularization' in L Woodhead (ed), *Religions in the Modern World: Traditions and Transformations* (Milton Park, Routledge, 2002) 336. It must be noted that the 'secularisation theory', which is hotly debated in academic circles, deals with the causes of secularisation, not the phenomenon of secularisation itself.

[14] PEW, 'Being Christian in Western Europe' (PEW Research Centre, 2018); S Bullivent, 'Europe's Young Adults and Religion Findings from the European Social Survey' (2014–16) (Benedict XVI Centre for Religion and Society, 2018).

[15] J Casanova, *Public Religions in the Modern World* (Chicago, University of Chicago Press, 1994). It must be emphasised that this norm no longer appears to reflect reality anymore since religiousness in Europe is said to be re-emerging. See eg, C Calhoun, M Juergensmeyer and J van Antwerpen (eds), *Rethinking secularism* (Oxford, Oxford University Press, 2011).

[16] According to Charles Taylor, this development is the result of what he terms the 'Age of Mobilization'. See C Taylor, *A Secular Age* (Cambridge, Harvard University Press, 2007) 423–72.

that this term should be inserted into the preamble, but at the last moment it was decided against.[17] An interesting aspect of this concept of Judaeo-Christian civilisation is that it is devoid of religiousness: it has become an identity marker of Europeanness, with references to culture and history rather than religious doctrine.[18] The concept of Judaeo-Christian civilisation can be considered a continuation of the 'grand narrative' of Christian civilisation that was dominant in the nineteenth and early twentieth century.[19] And just like that grand narrative, the narrative of a Judaeo-Christian civilisation distinguishes between 'us' and 'them', not on the basis of political-legal values, but on cultural-religious values.[20]

B. The Case of the Headscarf

During the 1990s, the headscarf took centre stage in the debates about Islam in Europe. One reason was because it was the main visible manifestation of Islamic religiousness which was considered by many Europeans to be against secularism as well as secularisation. But the headscarf symbolised more than mere religiousness, as is illustrated by two prominent rulings by the European Court of Human Rights (ECtHR) which later served as leading precedents for numerous cases in national courts. Both cases concerned the question of whether a ban on the headscarf constituted a violation of the freedom of religion. In the first case, a teacher at a primary school was fired after she started wearing the headscarf.[21] In the second, a student at a state university was not allowed entry because of her headscarf.[22]

In both cases the Court ruled that the ban was justified because the headscarf was considered harmful to third parties as well as to general values. It is enlightening to quote the relevant arguments of the Court in these two cases (the italics are mine):

> [I]t cannot be denied outright that the wearing of a headscarf might have some kind of *proselytising effect*, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of *gender equality*. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of *tolerance*, *respect for others* and, above all,

[17] The Treaty establishing a Constitution for Europe was signed in 2004 ([2004] OJ C310/1); M Heyward, 'What Constitutes Europe?: Religion, Law and Ideology in the Draft Constitution for the European Union' (2005) *Hanse Law Review*; I Bărbulescu and G Andreescu, 'References to God and the Christian Tradition in the Treaty Establishing a Constitution for Europe: An Examination of the Background (2009) 24 *Journal for the Study of Religions and Ideologies* 207.

[18] E Nathan and A Topolski, *Is there a Judaeo-Christian Tradition*? (Berlin, De Gruyter, 2016).

[19] MA Perkins, *Christendom and European Identity, The Legacy of a Grand Narrative Since 1789* (Berlin, De Gruyter, 2004).

[20] See also G Marranci, 'Multiculturalism, Islam and the clash of civilisations theory: rethinking Islamophobia' (2004) 5 *Culture and Religion* 105.

[21] *Dahlab v Switzerland*, App no 42393/98 (ECtHR, 15 February 2011).

[22] *Leyla Shahin v Turkey*, App no 44774/98 (ECtHR, 10 November 2005).

> *equality and non-discrimination* that all teachers in a democratic society must convey to their pupils.[23]
>
> [I]t is the principle of *secularism*, …, which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of *pluralism, respect for the rights of others* and, in particular, *equality before the law of men and women* are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it *contrary to such values to allow religious attire*, including, as in the present case, the Islamic headscarf, to be worn.[24]

Perhaps the most noticeable feature of these rulings is the assumptions made by the Court about how the headscarf relates to European values. In *Dahlab*, the wearing of the headscarf is, without any explanation, associated with intolerance and disrespect for others. In *Sahin*, the headscarf is considered contrary to secularism, which the Court (without explanation and with a surprising breadth of interpretation) associates with pluralism, respect for the rights of others, and gender equality. The Court received criticism in academic circles for this reasoning,[25] but these rulings set a course of jurisprudence that would greatly impact future debates on the headscarf.

Another striking feature of this jurisprudence is that it seemed to only apply to the headscarf. The Court did rule differently in two similar cases regarding the Christian symbol of the crucifix. In the first case, where a British Airways air hostess protested against her employer's demand to remove her necklace with a crucifix, the Court ruled in favour of the air hostess noting that 'a discreet cross could not have detracted much from her corporate appearance and there was no evidence that allowing the wearing of religious dress on previous occasions had detracted from British Airway's brand or corporate image.'[26] No arguments such as the 'risk of proselytisation' or violation of 'secularism' were used.

In the other case, where parents in Italy protested against a state school brandishing crucifixes in the classroom, the Court ruled in favour of Italy's argument that this was a custom 'resulting of Italy's historical development, a fact which gave it not only a religious connotation but also an identity-linked one.'[27] Not only did the Court agree with the notion that the crucifix was part of Italy's national identity, but it also approved of Italy's argument that the crucifix, 'beyond its religious meaning, … symbolised the principles and values which formed the foundation of democracy and western civilisation, and that its presence in classrooms was

[23] *Dahlab* (n 21).

[24] *Leyla Shahin* (n 22).

[25] See eg, C Evans, 'The "Islamic scarf" in the European Court of Human Rights' (2006) 7 *Melbourne Journal of International Law*; M Adrian, 'The principled slope: religious freedom and the European Court of Human Rights' (2017) 45 *Religion, State & Society* 174.

[26] *Eweida and Others v the United Kingdom*, App nos 48420/10, 59842/10, 51671/10 and 36516/10) (ECHR, 15 January 2013).

[27] *Lautsi and Others v Italy*, App No 30814/06 (ECHR, 18 March 2011) at 67.

justifiable on that account.'[28] And while the Court considered the headscarf to constitute a form of religious indoctrination, it emphatically dismissed that argument in the case of the crucifix in the school and chose not to discuss it in the case of the crucifix worn by the air hostess.[29]

C. The Case of the Burqa

While it would seem consistent to discuss the ban on the full-face veil (or burqa) together with the headscarf, there is an important difference from an analytical perspective: while the impediments to the headscarf were issued by a court of law, burqa bans were promulgated by national legislatures. In the latter case, parliaments hold a considerable political say in the matter. The first three European countries to introduce a burqa ban were Belgium, the Netherlands and France. In all three instances there is a similar pattern: the national State Councils strongly advised against such a ban based on legal arguments and the bans were passed by a parliament with distinctly cultural and religious motives.

In these three countries, the State Councils act as the legal conscience of the state by closely reviewing each draft law before it is passed back into the legislative process. In Belgium, it was decided by Parliament not to submit the draft law to the State Council, while both the Dutch and French State Councils had the same arguments against such a ban.[30] The first argument was that considerations of security were not adequate to justify a burqa ban because there was already sufficient legislation in place to achieve that particular goal. The second argument was that individual citizens enjoy 'personal autonomy', that is the fundamental right to decide for oneself how to live one's life. The State Councils argued that since there was no evidence that the burqa was forced upon the few women who were wearing it, there was no justification in banning the burqa.

These political-legal arguments were overruled by the ample religious-cultural arguments put forward by the parliaments:[31] the burqa was considered a violation of human dignity, gender equality, women's empowerment and 'Western values'.

[28] ibid.

[29] *Lautsi* (n 27) at 73–74.

[30] (France) Conseil d'Etat, 'Etude relative aux possibilités juridiques d'interdiction du port du voile intégral' (25 March 2010); (Netherlands) Raad van State, zaaknummer W03.07.0219/II, 21 September 2007.

[31] (France) 'Proposition de loi visant à fixer le champ des interdictions de dissimuler son visage liées aux exigences des services publics, à la prévention des atteintes à l'ordre public' (no 2544, 20 May 2010); (Belgium) 'Propositions de Loi, visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage, interdisant de porter dans les lieux et espaces publics des tenues vestimentaires marquant le visage, sur l'exercice de la liberté d'aller et venir sur la voie publique' (DOC 53 0219/004, 18 April 2011); (Netherlands) 'Voorstel van de leden Wilders en Fritsma tot wijziging van het Wetboek van Strafrecht in verband met een verbod op het dragen van gezichtsbedekkende sluier's of nikaabs op een openbare plaats (verbod op de gezichtsbedekkende sluier)' (Kamerstukken II 2006/07, 31 108, nr 1-3).

The burqa was further said to be contrary to Islam itself and to pose an impediment to integration. Keeping in mind that legislation of the prohibiting kind is commonly subject to strict scrutiny of a political-legal nature, it is significant that most arguments seemed to respond to the gut feeling 'that is not how we do things around here!'.

The Dutch burqa ban stumbled over a change of government and was eventually promulgated in a lighter version in 2020. The Belgian and French burqa bans became effective in July 2011, and were later followed by similar bans in Denmark, Norway, Austria, Germany, Spain, Italy, Bulgaria, Kosovo and Bosnia-Hercegovina. So far, only the French burqa ban has been challenged before the ECtHR.[32] The Court meticulously went through all France's arguments supporting its burqa ban. The argument of public safety was rejected as an insufficient justification because, just like the French and Dutch State Councils' argument against the ban, the Court considered this goal sufficiently covered by legislation already in place. France's other legal argument was protection of rights and freedoms of third parties and was described by France as 'respect for a minimum number of values that apply in an open democratic society'. France argued that three values were relevant here: gender equality, human dignity and 'living together' (*vivre ensemble*). The Court rejected the first two values as justifiable reasons for a burqa ban arguing that there is no indication that the Muslim women concerned 'seek to express a form of contempt against those they encounter or otherwise to offend against the dignity of others'.[33] However, the Court accepted the value of 'living together' as a ground for the burqa ban. It shared France's view that 'the face plays an important role in social interaction' and that it is understandable that persons in public spaces do not wish to be confronted with 'practices or behaviour' that hinder such social interaction. After all, this social interaction, according to the Court, is 'by established consensus an inseparable part of social life' in France.[34]

The burqa ban is an intriguing example of the way political-legal and religious-cultural values interact. The burqa is a practice that unquestionably does not suit the majority culture of European societies. But, at the same time, European political-legal values demand a high degree of toleration for deviant behaviour. In this case, however, the legislature took the contrary stance, and prescribed by law what is or is not religiously and culturally appropriate.

D. The Case of Sharia

In 2003, the ECtHR stated in *Refah v Turkey* that 'Sharia clearly deviates from the values of the [European] Convention [on Human Rights].'[35] This statement has

[32] See *SAS v Frankrijk*, App no 43835/11 (EHRM, 1 July 2014).
[33] ibid at 120.
[34] ibid at 121.
[35] *Refah v Turkey*, App nos 41340/98, 41342/98, 41343/98 and 41344/98 (EHRM, 13 February 2003).

since then often been quoted in political and legal debates. It was referred to in a motion submitted (but not followed up) in the European Parliament in 2019[36] and again in a resolution passed in the Parliamentary Assembly of the Council of Europe.[37]

However, from a legal perspective, it was strange that the Court did not define what it meant by 'Sharia', and the Court has been criticised for that.[38] This lack of explanation is not only surprising, but has also created confusion. It is surprising because a key characteristic of legal language is the intention to create clarity of terminology. In court rulings, especially in higher courts, matters of law are spelled out and interpreted down to the most minute detail. In *Refah*, however, not only did the Court introduce a term that is alien to European legal vocabulary, but it also failed to clarify what it meant by it. That was careless, because 'Sharia' is not a code or book of law, but rather an umbrella term with a myriad of meanings, ranging from the harsh and intolerant control of people (like the Taliban or ISIL) to a scholarly method of extracting rules from sacred texts containing rules concerning crime and punishment as well as instructions for prayer, fasting and burying the dead.[39]

In *Refah*, members of a political party had made remarks about Islam and Sharia that were perceived as a threat to national security. While these members did not specify what they meant exactly with their desire for 'Sharia', their remarks were truly frightening. One Refah MP said in a 1996 television interview that 'Sharia was the solution for the country' while another Refah MP said in 1997 that 'if someone attacks me, I will strike back. I will fight to the end to introduce Sharia.' Another Refah member said, 'the system has to change. We have waited, and we will wait a little longer … And let the Muslims keep alive the anger, revenge, and hatred they feel in their hearts.' Other members also spoke of 'jihad' and the possibility of using violence to seize power.[40]

Surely, these remarks can be considered sufficiently threatening to justify a ban of the party. The Turkish state thought so, and the Court considered that decision justified. But the Court continued, uninvited and unprompted by the lawyer's

[36] European Parliament, Motion for a European Parliament resolution on political Islam in the European Union (B-9-2019-0227, 9 December 2019): 'C. whereas the objective of these associations and groups is the application of Sharia law, namely a legal system which is incompatible with the founding principles of the EU, in particular with the principles of human dignity, freedom, democracy, equality and human rights.'

[37] Parliamentary Assembly of the Council of Europe, Resolution 2253 (2019), Sharia, the Cairo Declaration and the European Convention on Human Rights: '5. The Assembly is also greatly concerned about the fact that Sharia law – including provisions which are in clear contradiction with the Convention – is applied, either officially or unofficially, in several Council of Europe member States, or parts thereof.'

[38] eg, K Boyle, 'Human Rights, Religion and Democracy: The Refah Party Case' (2004) 1 *Essex Human Rights Review*; D Schilling, 'European Islamophobia and Turkey – Refah Partisi (The Welfare Party) v. Turkey' (2004) 26 *Loyola of Los Angeles International & Comparative Law Review*.

[39] See, eg, W Hallaq, *Sharia* (Cambridge, Cambridge University Press, 2012) and KS Vikør, *Between God and the Sultan* (London, C Hurst & Co Publishers, 2005).

[40] *Refah* (n 35) at 31–40.

submissions, to pass judgment on the notion of 'Sharia' itself. In doing so it created confusion about Islam in Europe. All the rules of Islam, ranging from the manner of burial or prayer to contracts and homicide, are called 'Sharia'. While some extremist Muslims have given intolerant and violent interpretations to some of these rules, most devout Muslims live in accordance with the rules that pertain to religious rituals. It was probably not the intention of the Court to consider those rules as violations of the Convention, but this was effectively what the Court did in denouncing 'Sharia' in its entirety as contrary to European values, essentially denouncing all the rules of Islam and therefore, Islam itself.

What seemed to have happened here in this case is that the judges were guided more by their perceptions of Sharia than by their legal professionalism. European perceptions of Islam in general, and Sharia in particular, are notoriously negative. Some of that negative association may be justified, but much of it is the result of centuries-old perceptions embedded in the European collective memory.[41]

E. The Case of Sharia Courts

Related to the issue of Sharia is the situation regarding the so-called Sharia 'courts' or 'councils'. Here an uncritical use of terminology has created confusion about what is actually happening.

Let us first clarify the terminology used here. A 'court' is the term for a judicial institution whose rulings are recognised by the state and that can be enforced by state authorities. In most instances, these courts apply state law, but that is not always the case. In some instances, the state recognises court rulings based on laws other than state law. This used to be the case with Catholic personal status law in countries like Italy and Spain, and Greek Orthodox personal status law in Greece. Nowadays, the only surviving non-state law recognised by a European state is Islamic personal status law in the Greek province of Western Thrace:[42] specialised courts apply Islamic personal status law to Muslims who opt for it and these institutions can be considered the only 'Sharia courts' in Europe.

While no other religious courts exist in Europe, there are plenty of religious tribunals or councils. Most of them used to be state-recognised courts that lost that authority and now only function for believers who want to make use of them. Hence, there are still many Catholic, Jewish, Orthodox Christian and various Protestant tribunals in Europe, each with their own judges, procedures and

[41] MS Berger, *A Short History of Islam in Europe* (Leiden, Leiden University Press, 2004); D Norman, *Islam and the West: The Making of an Image* (Edinburgh, Edinburgh University Press, 1960); JV Tolan, *Saracens: Islam in the Medieval European Imagination* (New York, Columbia University Press, 2002).

[42] MS Berger, *The Last Shari'a Court in Europe* (The Hague, Eleven Publishers, 2021); Y Sezgin, 'Muslim Family Laws in Israel and Greece: Can Non-Muslim Courts Bring About Legal Change in Shari'a?' (2018) 25 *Islamic Law & Society* 235.

laws.[43] This is where Sharia councils come in; they are tribunals set up by learned people who act as arbiters in cases of marriage and divorce, to which they apply rules of Islam. At the time of this writing, these councils only exist in the United Kingdom,[44] and they have been extensively studied and vehemently criticised.[45] That criticism mostly centres around the argument that the assumption of voluntary use of these councils by the Muslim communities is not correct because they are mostly used by women who feel it is their only option to get out of unwanted Islamic marriages.[46] This criticism is not specific to Islamic councils because it applies to most religious tribunals (in particular to Jewish councils where the husband's refusal to use his exclusive right of divorce can cause his wife to remain trapped in her marriage).[47]

From a political-legal perspective, the religious tribunals (including Sharia councils) have the right to exist, partly as a matter of freedom of religion, but also as a matter of personal autonomy so that people can regulate their lives in accordance with their own wishes and convictions regardless of how strange or objectionable that may seem to others. From a religious-cultural perspective, one could argue that Christian and Jewish courts and councils have always existed and can therefore be considered part of the Judaeo-Christian cultural heritage. That begs the question why it causes such indignation when Muslims want to do the same. A likely answer is that secularised Europeans have little, if any, knowledge of the other religious tribunals that have existed for so long in their societies.

III. Conclusion

The examples discussed above, when seen through the prism of political-legal and religious-cultural values, provide us with several insights regarding Islam in Europe. First, there appears to be a distinct bias against Islam. This is evident in the argumentations used in the rulings of the European Court of Human Rights

[43] MJ Broyde, *Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the Wes*t (Oxford, Oxford University Press, 2017); N Doe, 'The Legal Position of Religious Organizations' in N Doe, *Law and Religion in Europe: A Comparative Introduction* (Oxford, Oxford University Press, 2011).

[44] D Torrance, 'Sharia law courts in the UK, House of Commons Library' (Number CDP-2019-0102, 2019).

[45] eg, S Bano, 'An Exploratory Study of Shariah Councils in England with respect to Family Law' (Reading, 2012); J Brechin, 'A Study of the Use of Sharia Law in Religious Arbitration in the United Kingdom and the Concerns that this Raises for Human Rights' (2013) 15 *Ecclesiastical Law Journal* 293; A Shachar, *Multicultural Jurisdictions: cultural differences and women's rights* (Cambridge, Cambridge University Press, 2011). See also ch 8 of this volume.

[46] eg, M. Siddiqui et al, 'The Independent Review into the Application of Sharia Law in England and Wales' (UK Parliament, 2018).

[47] MJ Broyde, *Marriage, Divorce, and the Abandoned Wife in Jewish Law: A Conceptual Understanding of the* Agunah *Problems in America* (KTAV Publishing House Inc, 2001); J Wexler, 'Gotta Get a Get: Maryland and Florida Should Adopt Get Statutes' (2009) 17 *Journal of Law and Policy*.

regarding the Sharia and the use of religious symbols, as well as the justification used by several European legislatures in banning the burqa. Calling the wearing of the headscarf an act of intolerance without providing an explanation of what exactly constitutes this intolerance implies that the judges were guided by preconceived notions rather than by legal rationalism. A similar attitude can be detected in the legal discussions regarding Sharia and the burqa. There, subconscious notions of Islam ingrained in the European religious-cultural memory appear to have overridden the political-legal standards Europeans had set for themselves.

This bias leads us to a second observation: the use of double standards. Christian symbols like crucifixes are given a different evaluation than headscarves, just as Sharia tribunals are judged much more harshly than religious tribunals of other faiths. It is evident that the mechanism of 'us versus them' is active here, whereby the 'us' stands for Europeans belonging to an imaginary Judaeo-Christian civilisation, while the 'them' denotes Muslims of alien origin. This is confirmed by various discrimination monitors and surveys conducted in the past few decades.

These two mechanisms lead to the third observation that there is a development in Europe wherein religious-cultural values are given precedent over political-legal values when it comes to issues of Islam. This happens in two ways. One way is to interpret political-legal values in religious-cultural terms, as happened when the crucifix was described as a marker of Italy's national identity and a symbol of democracy, or when the headscarf was called a symbol of intolerance contrary to gender equality. The other way is to legalise religious-cultural values, meaning that the values in question are transferred from the religious-cultural domain to the political-legal domain. This was done by the legal ban of the burqa and by the attempt to include 'Judaeo-Christian values' in the European constitution.

The question is whether this is a bad thing. Why not give preference to the religious-cultural values cherished by the majority? The problem is that some of the fundamental political-legal values are put in place precisely to prevent that: the rights of minorities should not be overruled by those of the majority. One of these political-legal values – toleration – demands that the majority must endure actions and behaviour they might consider absurd or even unacceptable. According to certain Judaeo-Christian rules and practices, women have an inferior status to men, but what if it is their own choice to live in accordance to those rules? The burqa may be offensive to some, but is this not also the case with facial tattoos or certain extravagant modes of dress? The ECtHR deemed it one of the foundations of the European democratic order that all opinions must be permitted, even if they 'shock, offend, and disturb'.[48] In the case of certain modes of Muslim dress or behaviour, which some find shocking, offensive and disturbing, should people not display a similar tolerance?

If, on the other hand, such behaviour can indeed be considered intolerant, we face Karl Popper's tolerance paradox: by tolerating the intolerant, we risk losing

[48] *Handyside v UK*, App no 5493/72 (ECHR, 7 December 1976).

the very institutions that stand for an open and tolerant society.[49] To prevent that from happening, one must fight the intolerant with intolerance, but in doing so, also risk dismantling the foundations of today's Europe. Toleration, therefore, is the key to the balancing act between political-legal and religious-cultural values. But that key demands a keen scrutiny in defining what is meant by political-legal values, and why.

[49] K Popper, *The Open Society and its Enemies* (first edn 1945, Abingdon, Taylor & Francis, 2011).